IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG: PRETORIA DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
22-10-2009 DS. Webster.
DATE SIGNATURE

CASE NO.: 21343/2008
DATE: 22/10/09

In the matter between

FIRST SOUTH AFRICAN HOLDINGS (PTY) LTD
APPLICANT

And

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE
RESPONDENT

JUDGMENT

WEBSTER J

1. The question in issue in this application is whether the Respondent is restricted or constrained by section 79A(2)(a) of the Income Tax Act No. 58 of 1962 ("the Act"), as amended, from issuing a reduced assessment to the Applicant's income tax in respect of its 2007 year of assessment.

2. Section 79A of the Act reads as follows:

"(1) The Commissioner may, notwithstanding the fact that no objection has been lodged or appeal noted in terms of the provisions of Part III of Chapter III of this Act, reduce an assessment-

(a) to rectify any processing error made in issuing that assessment; or

(b) where it is proved to the satisfaction of the Commissioner that in issuing that assessment any amount which-

(i) was taken into account by the Commissioner in determining the taxpayer's liability for tax, should not have been taken into account; or

(ii) should have been taken into account in determining the taxpayer's liability for tax, was not taken into account by the Commissioner:

Provided that such assessment, wherein the amount was so taken into account or not taken into account, as contemplated in subparagraph (i) or (ii), as the case may be, was issued by the Commissioner based on information provided in the taxpayer's return for the current or any previous year of assessment.

(2) The Commissioner shall not reduce an assessment under subsection (1)-

(a) after the expiration of three years from the date of that assessment; or

(b) if the amount was assessed in terms of an assessment accepted by the taxpayer and which was made in accordance with the practice

generally prevailing at the date of that assessment.."

3. It is common cause between the parties that in the 2002 financial year returns the applicant, in accounting for foreign exchange gains and losses in terms of section 241 of the Act, it had included in its taxable income in 2002 "the full unrealised foreign exchange gain" in respect of a loan instead of 10% of that nett gain in terms of section 241(7) of the Act. The effect of this, so says the applicant, is that its taxable income had been inflated by R14 676 954 attracting the tax payable in the amount of R4.2 million.

4. It is further common cause that the applicant in the same returns for the 2002 financial year returns claimed an "assessed loss" of R34 978 418 for the 2001 financial year. The effect of this and what is set out in paragraph 2 *supra* was that the applicant's assessment reflected an assessed tax loss and nothing payable by way of tax for 2002. This appears in the applicant's income tax assessment dated 17 July, 2003.

4.1 On 12 April, 2006 the respondent, relying on the provisions of section 79A(2)(a) of the Act, revisited the 2002 assessment and disallowed the applicant's accumulated tax loss from the 2001 year of assessment. The effect of this revised assessment reflected an amount of R6 681 010.57 payable by the applicant.

4.2 The applicant avers further that together with the above revised assessment the respondent issued further revised assessments for income tax in respect of the 2003 and 2004 tax years as well as assessments in respect of Secondary Tax on Companies (the latter are not relevant to the issues herein). The applicant objected to the revised income tax assessment for the 2002 tax year.

4.3 On 17 July, 2006 the respondent disallowed these objections. On 25 August, 2006 the applicant appealed against the respondent's decision.

4.4 The dispute was then referred to alternative dispute resolution (ADR) in terms of section 83 and 107A of the Act.

4.5 The parties reached an agreement on the issues in terms of which the applicant withdrew its objections and appeal.

5.1 On 25 July 2007 the applicant submitted a request to the respondent for the issue of a reduced assessment based on the error set out in paragraph 2 of this judgment.

5.2 The respondent's view was that the appeal regarding income tax was confined and related exclusively to the "...loss...[and]...does not relate to a wrong calculation of an amount that has been received by or accrued to the taxpayer in the 2002 year of assessment".

6. The applicant states that its "...objection to the revised assessment..." dated 31 August, 2007 was written after "...having consulted new advisors..." ("Annexure F" to the founding affidavit) This accords with the respondent's view set out in the preceding paragraph. Various issues have been raised in the papers by both the applicant and the respondent. In the light of the conclusion to which I have come and further because of very pressing time constraints in this division I shall not canvass all the issues raised by the parties in the papers and in argument. I acknowledge the time and effort by both silk in the preparation and presentation of their intensive and extensive arguments. Those required, under normal circumstances, an evaluation of those arguments. No

effrontery to both counsel is intended. On the contrary, listening to them was not only illustrative but a pleasure that was appreciated.

7. It was argued that the assessment issued on 30 June, 2006 "...effectively incorporates the original assessment and together they constitute the assessment which is the subject of the taxpayer's request in terms of section 79A(1)(b) of the Act and consequently "...the assessment in question was not issued more than three years ago and that the restriction in section 79A(2)(a) is not applicable".

8. I agree with both counsel that section 79A is a purely administrative provision, the primary purpose of which is to accord both the taxpayer and SARS the opportunity to rectify errors, be they the processing of data, a miscalculation or an omission on the part of both the taxpayer and SARS. Its existence in the Statute book is not novel but a restatement of the principles of transparency, openness and fairness that are enshrined in the Constitution. A taxpayer who has made an error in the tax returns is afforded the opportunity to rectify such error so that the income tax payable is the correct amount.

9. The redress in section 79A is not open-ended and valid in perpetuity: it has a time limit of three (3) years. This period is nor surprising nor a thumb-such in my view. The legislature, aware of the law as it is assumed to be, must have intended to bring the rights of both the taxpayers and SARS in the correction of errors within the same period as the period of prescription.

10. I have some misgivings about the applicant's submission. In the first place it is inconsistent with the clear meaning of section 79A. Its fundamental intention is to enable a party that has made an

error to have such error remedied within three (3) years of the making of such error. That to my mind is the ordinary meaning of the words in the section. Secondly, the submission postulates a situation where errors that were made more than three (3) years in the past may be brought up under section 79A as long as the tax year in issue has been the subject of proceedings under the section within any three (3) years of the last "assessment". This clearly offends the principle of finality: proceedings have to come to an end at some time or other. If the applicant's argument is correct finality would be elusive and illusive for as long as an "assessment" has been made "in the last three (3) years".

11. The notion of fairness and equity is not compromised by the time limit of three years.

12. The observations made above are consistent with the fundamental rule of interpretation that words must be given their ordinary or plain meaning of language unless such meaning leads to "...injustice or incongruity or absurdity...".

13. The chronology of the issues, as set out above, indicates clearly that the respondent invoked the provisions of section 79A within three (3) years of the assessment it had made on 17 July, 2003. The item was the "2001 loss" reflected in the 2002 tax return which had been accepted by the respondent.

14. The pertinent question is whether the applicant could "piggy-back" on the respondent's reliance on section 79A and raise the error it had made in its 2002 tax return by arguing that the respondent's assessment of 30 June, 2006 entitled it to do so as set out in paragraph 7 of this judgment.

15. It is my considered view that a party that wishes to rely on the provisions of section 79A must specifically invoke its reliance on the section within three (3) years. In this regard I am mindful of the fact that in considering the respondent's right to disallow the loss of 2001 the effect constituted "that assessment" that entitled the applicant to raise its own error outside the period of three (3) years as it has clearly attempted to do in this case. That, in my view, is clearly impermissible and the respondent was correct in refusing to accede to the applicant's request.

16. Having arrived at the above conclusion it is not necessary to canvass the other issues raised in the papers.

17. **The application is dismissed with costs, such costs to cover the fees of two counsel.**

G. Webster

G. WEBSTER
JUDGE IN THE HIGH COURT

Date of Hearing	:	5 December 2008
Counsel for the Applicant	:	Adv MJD Wallis SC
Counsel for the Respondent	:	Adv Dennis Fine SC Adv A Lapan