

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A33/2008

In the appeal between:

J J GRUNDLINGH

Appellant

and

THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE

Respondent

CORAM:

EBRAHIM, J, *et* JORDAAN, J *et*
CLAASEN, AJ

JUDGMENT:

CLAASEN, AJ

HEARD ON:

24 AUGUST 2009

DELIVERED ON:

17 SEPTEMBER 2009

- [1] The appellant resides permanently in the Republic of South Africa. The appellant is an attorney, admitted to practise as such in both South Africa and the Kingdom of Lesotho. The appellant is a partner of the firm Webbers in Bloemfontein, South Africa. The appellant is also a partner in a separate Lesotho partnership known as Webber Newdigate. Webber Newdigate is a partnership of attorneys registered in the Deeds Office in Lesotho and

only conducts business in Lesotho. Webber Newdigate's fixed place of business and office is in Lesotho where it renders professional services. The professional services are rendered by partners, some of whom are residents of the Republic of South Africa and others of Lesotho.

[2] The appellant shares in the profits of Webber Newdigate. The appellant's share of Webber Newdigate's profits in the 2002 and 2003 years of assessment were taxed by the Lesotho fiscal authorities. The respondent included these profits in appellant's taxable income for the relevant years of assessment, but credited the appellant with the amounts of tax paid to the Lesotho Revenue Authorities.

[3] The issue on appeal is whether the appellant's share of the profits of Webber Newdigate is taxable only in Lesotho or whether it is taxable in Lesotho as well as in South Africa. The appellant contends that his share of the profits of Webber Newdigate is taxable only in Lesotho in the light of the provisions of Article 7(1) of the agreement between the government of the Republic of South Africa and the government of the Kingdom of Lesotho for the avoidance of

double taxation and the prevention of fiscal evasion with respect to taxes on income. (DTA)

This agreement appeared in the Government Notice No. 607 of the Government Gazette 17948 of 22nd April 1997.

[4] The respondent contends that on the correct interpretation of the article 7(1) of the DTA, respondent was entitled to tax the appellant on his share of profits of Webber Newdigate. Alternatively the respondent contends that he was entitled to tax the appellant in terms of article 14 of the DTA. The respondent was, however, obliged to deduct the taxes paid by the appellant in Lesotho from the taxes due according to his South African fiscal law in terms of article 22(2) of the DTA.

[5] The disputed assessment was first referred to the tax board, which ruled in favour of the appellant. As the commissioner was dissatisfied with the decision of the board, the appeal was referred to the Tax Court of South Africa held at Bloemfontein, to be heard *de novo* in terms of section 83A(4) of the Income Tax Act, nr 58 of 1962. The

tax court found in favour of the respondent and the appellant appealed to the full bench. Van der Merwe, J found that the provisions of article 7(1) of the DTA can only apply if Webber Newdigate is liable for tax in Lesotho. The relevant ground of appeal is that the court erred in not finding that Webber Newdigate is an enterprise of Lesotho for the purposes of article 7(1) of the DTA in the light of the fact that the court accepted Webber Newdigate carries on its business in Lesotho by appellant and other Lesotho residents.

- [6] The DTA was published in the Government Gazette as aforesaid and enacted in terms of section 108(2) of the Income Tax Act, nr. 58 of 1962. Article 7(1) of the DTA provides,

“The profits of an enterprise of a Contracting State, shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.”

[7] Article 3(1)(f) reads:

“the terms ‘enterprise of a Contracting State’ and ‘enterprise of the other Contracting State’ mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State.”

[8] Article 3(1)(d) of the DTA defines a “company” as a body corporate or any entity which is treated as a company or body corporate for tax purposes. It is clear from what follows, that Webber Newdigate is not treated as a body corporate for tax purposes.

[9] Article 3(1)(i) of the DTA defines the term “person” to include an individual, a company and any other body of persons which is treated as an entity for tax purposes. As will be seen the individual partners are entities for tax purposes but not the partnership Webber Newdigate.

[10] Appellant's case is therefore dependent on whether Webber Newdigate is liable to tax in Lesotho. This proposition is unacceptable for the following reasons:

10.1 It is common cause that since 1 January 2001 there was a change in the South African tax regime. It changed from a source-based to a residence-based taxation. A South African resident is taxed on all income received by or accrued to such resident, irrespective of the source of income or where the income was earned. That meant that all income, including foreign income, can now be included in the income of a South African resident, unless such income falls within one of the exclusions reflected in the DTA. The appellant asserts that article 7(1) of the DTA provides such an exclusion.

10.2 The Income Tax Act, nr. 9 of 1993 of the Kingdom of Lesotho reads as follows:

“Principle of taxation for partnerships

75(1) The partners rather than the partnership are taxed, but the partnership is required to file a partnership return of income.

Taxation of partners

- 77(1) The gross income of the resident partner includes the partners' distributive share of partnership income.
- (2) The gross income of a non-resident partner includes the partners' distributive share of the Lesotho/source of partnership income.
- (3) A resident partner is allowed a deduction for the partners' distributive share of partnership loss.
- (4) A non-resident partner is allowed a deduction for the partners' distributive share of partnership loss but only to the extent that the activity given rise to the loss would have given rise to Lesotho/source income if a loss had not been incurred.
- (5) Income, expenses, or losses derived or incurred by a partnership retain their character as to geographic source and type of income, expense or loss in the hands of the partners.
- (6) A partners' distributive share of partnership income or loss is equal to the partners' percentage interest in the partnership.
- (7) A partners' distributive share of partnership loss is allowed only to the extent of the adjusted cost base of the partner's interest in the partnership at the end of the year of assessment in which the

loss occurred, and any excess of such loss over such basis may be carried forward.

10.3 The Income Tax Act 58 of 1962 and the Income Tax Order of the Kingdom of Lesotho nr 9 of 1993 does not recognise a partnership as a separate legal taxable entity. Partnerships are taxed on the same basis as partnerships in South Africa. A partnership, as such, is therefore not liable to any tax in its own right.

10.4 The appellant, as a partner of Webber Newdigate, is liable for tax and not the partnership. It was common cause where partners receive equal shares of the partnership profits, that these partners are individually taxed and may be taxed on different scales

10.5 It is common cause that a partnership is not a person or legal entity both in South Africa and in the Kingdom of Lesotho. It is also clear that Webber Newdigate is not treated as a body corporate for tax purposes and, as aforesaid, the individual partners are tax entities, liable to pay taxes and not the partnership Webber Newdigate.

10.6 Article 22 of the DTA eliminates double taxation as follows:

“Double taxation shall be eliminated as follows-

...

2. In South Africa, taxes paid by South African residents in respect of income taxable in Lesotho, in accordance with the provisions of this Agreement, shall be deducted from the taxes due according to the South African fiscal law. Such deduction shall not, however, exceed that part of the income tax, as computed before the deduction is given, which is attributable to the income which may be taxed in Lesotho.”

10.7 Section 24H of the Income Tax Act, nr. 58 of 1962 provides as follows:

“(2) Where any trade or business is carried on in partnership, each member of such partnership shall, notwithstanding the fact that he may be a limited partner, be deemed for purposes of this Act to be carrying on such trade or business.

...

(5)(a) Where any income has in common been received by or accrued to the members of

any partnership, a portion (determined in accordance with any agreement between such members as to the ratio in which the profits or losses of the partnership are to be shared) of such income shall, notwithstanding anything to the contrary contained in any law or relevant agreement of partnership, be deemed to have been received by or to have accrued to each such member individually on the date upon which such income was received by or accrued to them in common.”

10.8 The appellant are therefore deemed to carry on the business of Webber Newdigate from the viewpoint of the respondent. Any portion of the profits received is deemed to be generated by the appellant. Webber Newdigate is not an enterprise, liable to pay tax, in Lesotho and article 7(1) of the DTA is not applicable.

[11] Because of the finding in regard to article 7(1) of the DTA it is unnecessary to deal with respondent’s contention regarding article 14.

[12] For these reasons the appeal dismissed is and the assessments confirmed.

J. Y. CLAASEN, AJ

I concur.

S. EBRAHIM, J

I concur.

A. F. JORDAAN, J

On behalf of the appellant: Adv. P. J. Loubser
 Instructed by:
 Webbers
 BLOEMFONTEIN

On behalf of the respondent: Adv. P. J. J. Marais SC
 With C Louw
 Instructed by:
 The State Attorney
 BLOEMFONTEIN

/em