



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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

2022-09-20

DATE

SIGNATURE

Appeal Court Case Number: A86/2021

Tax Court Case Number: IT24852

In the matter between:

PUMA ENERGY PROCUREMENT SOUTH AFRICA

(PTY) LTD

Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN

REVENUE SERVICERespondent

JUDGMENT

POTTERILL JIntroduction

- [1] The Appellant, Puma Energy Procurement South Africa Proprietary Limited [Puma] is a licenced and limited risk distributor of fuel for purposes of s64F of the Customs and Excise Act No 91 of 1964 [the CEA]. For the tax period of 2011 to 2015 Puma sourced and purchased fuel from South African refineries for resale to customers outside South African borders. Excepting for the purchase price, Puma was also required to pay an amount representing excise duties and levies. In terms of the CEA an exporter of fuel, like Puma, when complying with the conditions of the CEA, is entitled to a refund of these excise duties or levies paid.
- [2] Puma claimed such refund for the 2015 income tax year assessment, but the Respondent [SARS] rejected the claim for the refund citing prescription as the reason for the rejection; it was claimed outside of the two-year period allowed in terms of 76B of the CEA.

- [3] Puma resorted to reflecting the rejected claim for the levies and duties as a deduction for a loss in its 2015 income tax return in terms of s11(a) of the Income Tax Act 58 of 1962 [the Tax Act]. Pursuant to an income tax audit of Puma's 2015 income tax year of assessment, SARS disallowed the deduction of the loss claimed in the amount of R38 831 547.40 and levied understatement penalties at the rate of 10 % on the basis that there existed a substantial understatement.
- [4] Puma lodged an appeal to the Tax Court. SARS submitted that Puma sought to circumvent the prescription of the custom refunds by claiming the prescribed claims in the income tax return.
- [5] On the day of the hearing SARS proceeded to argue a point *in limine* that the claims in terms of the CEA had prescribed and if the point *in limine* was upheld it would end the matter there. Puma objected to this approach and submitted that no preliminary points were pleaded in SARS' s rule 31 or 33 statements. However, the court entertained the point *in limine* on prescription only defining the issue as whether "... a prescribed claim for refunds under the Customs and Excise Act may be revived by simply lodging a claim for deduction in terms of section 11(a)."
- [6] The court went a step further and not only decided the point *in limine* but also, without affording address on the issue confirmed

the additional assessment of 2015. SARS in argument conceded that paragraph 19 of the order of the Tax Court must be set aside.

The legislative framework

[7] Section 10(1) of the Prescription Act 68 of 1969 [the Prescription Act] provides:

“10. Extinction of debts by prescription

(1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.”

S11 of the Tax Act provides:

“11. General deductions allowed in determination of taxable income

For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived -

(a) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature ...”

Was the court correct in upholding the point *in limine* that prescription was applicable to the claim for a deduction of losses in terms of s 11(a) of the Tax Act?

- [8] On behalf of SARS it was argued that because the claim for the levies and duties were claimed late, the prescription attached thereto in terms of the CEA automatically extended as prescription to the Tax Act and barred Puma from claiming it because the debt was extinguished.
- [9] Puma argued that the Prescription Act is not applicable to s11 of the Tax Act. The crux of their argument was that the term “*debt*” in the Prescription Act had to be characterised in terms of the nature of the cause of action. Extinctive prescription could not find application because Puma did not claim payment of a debt from SARS.
- [10] The Court found that s10 of the Prescription Act was applicable and the “*preliminary point of prescription raised by the respondent is upheld and the appeal is dismissed.*” The court *a quo* did not give reasons as to how it came to this finding, bar making general remarks pertaining to prescription.
- [11] SARS did raise prescription in the statements on the merits as a bar to a “*revival*” of the claim for duties and levies, but not as required in the statements as a preliminary point and the court *a quo* should not have entertained this point. But, leaving that aside,

the Prescription Act is not applicable to a loss claimed as a deduction. The word “*debt*” in the Prescription Act does not include every obligation to do something or refrain from doing something, apart from payment or delivery.¹ A taxpayer invoking s11 of the Tax Act is not claiming a debt and it can never constitute a “debt” for prescription in terms of the Prescription Act. A taxpayer can invoke s11 of the Tax Act rightly or wrongly, i.e. does it constitute a loss entitling Puma to a deduction or not, but the taxpayer is not, by doing so, claiming a debt from SARS.

[12] In *Eskom v Bojanala Platinum District Municipality and Another* 2005 (4) SA 31 (SCA) at par [9] the court found as follows:

“It does not necessarily follow, however, that a taxpayer’s claim for a refund of RSC levies improperly assessed, and therefore not due, also constitutes taxation. The respondent’s councils had no power to levy or collect more by way of tax than was due to them in terms of Act 109 of 1985 and the regulations made thereunder. Such payments, even if believed to be due at the time, were thus not taxes but something else. Equally, the ‘debt’ underlying the claim for a refund would not be a tax debt imposed or levied under any law.”

Thus a claim for a refund is not a tax debt imposed or levied under any law. Puma did not claim payment or delivery from SARS of prescribed excise duties, but claimed a loss as a deduction in assessing its taxable income.

¹ *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) para [93]

[13] The court *a quo* worked from the incorrect premise as background to determine the point *in limine* and for clarity I repeat the issue as defined by the court:

“... a prescribed claim for refunds under the Customs and Excise Act may be revived by simply lodging a claim for deduction in terms of section 11(a).”

The cause of action of Puma is not a claim, but a deduction. It is not a revival of a claim for refunds under the CEA. Seeking incurred losses from Puma’s 2015 tax assessment can never constitute a debt in terms of the Prescription Act.

[14] SARS’ argument that there is revival of a claim is simply bad in law, as a result of the late filing of the claim a loss in fact occurred and the Tax Court must determine whether in terms of s11 of the Tax Act it qualifies as a loss for deduction. The argument that the point *in limine* must be upheld otherwise a nullity will be enforced is rejected. The loss exists, it is not a nullity, whether it is claimable as a deduction is to be determined.

[15] In as far as the court *a quo* may have made findings pertaining to the merits in the reasons when coming to a finding on the preliminary point, such findings are set aside and the Tax Court is to entertain the merits afresh.

Costs

[16] SARS only in argument at the hearing conceded that the court *a quo* erred to make a ruling on the understatement penalties. A court hearing and ruling on a preliminary point, but granting an order on the merits, despite it not being argued before it, is irregular and must be set aside. On that basis counsel for Puma argued that SARS should pay the costs of this appeal as the concession should have been made earlier.

[17] I am satisfied that the costs should follow the result.

[18] I accordingly propose the following order:

[18.1] The appeal is upheld with costs:

[18.2] The order of the court *a quo* is set aside and replaced with the following:

“The respondent’s point in limine based on prescription is dismissed with costs”

[18.3] The matter is referred back to the Tax Court for adjudication of the Appellant’s appeal.

S. POTTERILL
JUDGE OF THE HIGH COURT

I agree

L.M. MOLOPA
JUDGE OF THE HIGH COURT

I agree

T.P. BOKAKO
ACTING JUDGE OF THE HIGH COURT

CASE NO: A86/2021

HEARD ON: 3 August 2022

FOR THE APPELLANT: ADV. P.A. SWANEPOEL SC

INSTRUCTED BY: Cliffe Dekker Hofmeyr Inc c/o Friedland Hart Solomon &
Nicolson

FOR THE RESPONDENT: ADV. O. MOKGATLE

MS. T. SENATLA

INSTRUCTED BY: Registrar of Tax Court and SARS

DATE OF JUDGMENT: 20 September 2022