LESOTHO

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CIV/A/13/2019

In the matter between:

LESOTHO FLOUR MILLS LIMITED **APPELLANT**

And

LESOTHO REVENUE AUTHORITY **1ST RESPONDENT**

COMMISSIONER-GENERAL: LRA **2ND RESPONDENT**

CORAM: S.P. SAKOANE CJ

HEARD: 31 MAY 2022

DELIVERED: 18 OCTOBER 2022

Neutral citation: Lesotho Flour Mills Ltd v. Lesotho Revenue Authority Ltd and another [2022] LSHC 263 Civ (18 October 2022)

SUMMARY

Tax – Assessments raised on fringe benefits – Appeal against dismissal of objection – Income Tax Act No.9 of 1993.

ANNOTATIONS:

CITED CASES:

SOUTH AFRICA

Africa Cash and Carry (Pty) Ltd v. Commissioner for the South African Revenue Service [2020] 1 SA 1 (SCA)

Commissioner for the South African Revenue Services v. Pretoria East Motors (Pty) Lt [2014] 3 A11 SA 266 (SCA)

Metcash Trading Ltd v. CSARS 2001 (1) SA 1109 (CC)

STATUTES:

Income Tax Act No.9 of 1993

Revenue Appeals Tribunal Act No.2 of 2005

JUDGMENT

I. INTRODUCTION

[1] This is an appeal and cross-appeal against the judgment of the Revenue Appeals Tribunal in which it partly upheld the assessment by the Commissioner General of the Lesotho Revenue Authority impugning tax on fringe benefits together with additional tax pursuant to the provisions of the **Income Tax Act No.9 of 1993**.

Live issues

[2] When the appeal was called, counsel for both sides informed the Court that only three issues remained live for determination, namely taxation of airtime, taxation of staff sales and additional tax.

Findings

[3] The Revenue Appeals Tribunal made the following findings:

3.1.1 Taxation of airtime

There is no evidence that airtime of 1,500.00 per month loaded to senior managers cellphones was not utilized for discharging the business of the appellant. Thus, there was no reason to treat it

differently from office landlines used by the senior managers as a taxable fringe benefit.

3.1.2 The M250.00 per month allowance loaded on the cellphones of their spouses was not utilized for the benefit of the business of the appellants and was, according to section 31 of the Act, a gift to be regarded as part of employment income. The appellant was then duty-bound to withhold tax on it in terms of section 156 of the Act. Failure to withhold tax made the appellant personally liable for its payment to the Commissioner-General.

3.2 Taxation of staff sales

The staff sales benefit is not a debt waiver fringe benefit. It is a gift that forms part of the income of an employee which the employer has the duty to withhold tax. Failure to do so makes the employer liable for its payment to the Commissioner-General. The appellant was, therefore, liable for staff sales tax as assessed by the Lesotho Revenue Authority.

3.3 Additional tax

There is no reason to interfere with the decision to impose additional tax on the outstanding taxes.

Grounds of appeal

[4] The appellant's grounds of appeal are as follows:

> "**That the Revenue Appeals Tribunal erred and/or misdirected itself by:**
>
> 1 Finding that the Appellant must pay withholding tax on the "airtime benefit" provided to the cellphones of the spouses of three senior managers of Appellant, amounting to M250 per month, in terms of sections 156 and 165 of the Act when this was neither the basis upon which the Commissioner assessed the Appellant nor the subject of the Appeal against Fringe Benefits tax imposed by the Commissioner in terms of sections 116 to 127 of the Act, nor the Order requested by Appellant in its Grounds of Appeal.
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> 2 Finding that the Appellant must pay withholding tax on the "staff sales" provided to Appellant's employees in the amount of M724 888, in terms of sections 156 and 165 of the Act, when this was neither the basis upon which the Commissioner assessed the Appellant nor the subject of the Appeal against Fringe Benefits tax imposed by the Commissioner in terms of sections 116 to 126 of The Act, nor the order requested by Appellant in its Grounds of Appeal.
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> 3 Finding that the additional tax was payable on the basis that the Appellant did not genuinely believe that its reason for its failure to remit the withholding tax had merits as there was no evidence to support this finding nor was there any assessment for the payment of withholding the tax on gifts made to employees in place.
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> 4 Not upholding the Appellant's appeal against fringe benefits tax, imposed on the Appellant for airtime provided to the spouses of senior management after the Revenue Appeals Tribunal confirmed that the airtime provided did not constitute "utilities expenditure" in terms of the Income Tax Act, 1993.
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> 5 Not upholding the Appellant's appeal against fringe benefits tax, imposed on the Appellant for vouchers provided to employees after the Revenue Appeals Tribunal confirmed that the vouchers so provided did not constitute a debt waiver fringe benefit in terms of the Income Tax Act, 1993.
>
> 6 Affirming the Respondents' Assessment for the reasons not relied upon in the assessment, alternatively; beyond the issues before the Revenue Appeals Tribunal as defined in the statement of the grounds of appeal read with the opposing statement."

Grounds of cross-appeal

[5] The respondents cross-appeal on the following grounds:

> "The Revenue Appeals Tribunal erred and misdirected itself in the following respects:
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> **Ground 1**:
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> 1. In finding that the provision of vouchers by the Appellant to its employees aimed at enabling them to obtain Appellant's products for

their own use from the Appellant's stores or designed retailers, did not constitute a debt waiver fringe benefit whereas it in fact did.

Alternative to ground 1:
1.1 In finding that the Appellant must pay withholding tax on the "staff sales" provided to Appellant's employees in terms of section 156 and 165 of the Income Tax Act No.9 of 1993 (Act) on grounds that the provision of vouchers by the Appellant to its employees amounted to a gift as contemplated in section 31 of the Act as opposed to an indirect payment as contemplated in section 67 (1) of the Act.

Ground 2:
2. In finding that the Appellant must pay withholding tax on the "airtime benefit" provided to the cell phones of the spouses of three senior managers of Appellant in terms of section 156 and 165 of the Income Tax Act No.9 of 1993 (Act) on grounds that it amounted to a gift as contemplated in section 31 of the Act as opposed to an indirect payment as contemplated in section 67 (1) of the Act."

Powers of the Revenue Appeals Tribunal

[6] Although referred to as an appeal tribunal, the Tribunal is a court of revision and not a court of appeal in the ordinary sense. Appeal proceedings in terms of a statutory mechanism are specially created for reconsideration of the Commissioner's administrative decisions which are liable to appropriate correction by the Tribunal. The legislature intended that there could be a re-hearing of the whole matter by the Tribunal which can even substitute its own decision for that of the Commissioner if justified on the evidence. Accordingly, the Tribunal rehears the issues and decides afresh whether an assessment is reasonable. The Tribunal re-evaluates the facts and circumstances of the subject matter on which the assessment is based with reference to the methodology followed and

assumptions on which the estimated assessment is served. The Tribunal has power to alter amounts in the estimated assessments to amounts supported by the evidence before it[1].

II. MERITS

The law

[7] As the fate of both the appeal and cross-appeal depends on the interpretation of certain provisions of the **Income Tax Act, 1993**, it is appropriate to first interpret those provisions before discussing the factual issues raised in the grounds of appeal and cross-appeal.

Fringe benefits

[8] The term fringe benefit is compendiously defined in section 115 to mean "a car allowance, housing, utilities, domestic assistance, meal or excessive superannuation contributions".

[9] Utilities expenditure is defined to mean "any expenditure for fuel, power, water, sewerage or telephone in respect of the employee's place of residence."

[1] Metcash Trading Ltd v. CSARS 2001 (1) SA 1109 (CC); Africa Cash and Carry (Pty) Ltd v. Commissioner for the South African Revenue Service [2020]1 SA 1 (SCA)

[10] Fringe benefit tax is imposed on every employer who has a fringe benefit taxable amount. The rate of payable tax is 40%[2].

[11] Fringe benefits that are exempted from tax[3] are the following:

11.1 A meal or refreshment provided in a canteen, cafeteria, or dining room operated by or behalf the employer solely for the benefit of employees and which is available to all non-casual employees on equal terms[4].

11.2 A medical fringe benefit available to all non-casual employees on equal terms[5].

11.3 A fringe benefit relating to exempt employment[6].

11.4 A fringe benefit of a value so small as to make accounting for it unreasonable or administratively impracticable[7].

[12] The details of each of fringe benefit is provided for in sections 119 to 127. For purposes of this appeal and cross-appeal, focus in on taxation of airtime, staff sales and imposing of additional tax as these three are the only live issues in the appeal and cross-appeal.

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[2] Section 116
[3] Section 118
[4] Section 123 (3)
[5] Section 124 (3)
[6] Section 118 (b)
[7] Section 118 (c)

Onus of proof

[13] In terms of section 14 (1), "The burden of proving that an assessment is excessive is on the taxpayer". This appeal must, therefore, be approached on the footing that the onus burdens the appellant to show, on a preponderance of probability, that the assessments of the respondents are wrong. But as said by Ponnan JA in **Commissioner for the South African Revenue Services v. Pretoria East Motors Pty Ltd**[8]:

> "[6] .... That, however, is not to suggest that SARS was free to simply adopt a supine attitude. It was bound before the appeal to set out the grounds of the disputed assessments and the taxpayer was obliged to respond with the grounds of appeal and these delineate the disputes between the parties.
>
> .....
>
> [11] .... The raising of an additional assessment must be based on proper grounds for believing that, in the case of VAT, there has been an under declaration of supplies and hence of output tax, or an unjustified deduction of input tax. In the case of income tax it must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified. It is only in this way that SARS can engage the taxpayer in an administratively fair manner, as it is obliged to do. It is also the only basis upon which it can, as it must, provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment is wrong.
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> .....
>
> [14 Whilst there are disputes in tax appeals, such as the entertainment expenditure in the present appeal, where the production of invoices or vouchers is called for if the taxpayer is to discharge the onus of proof resting on it, that is not always the case. Everything will depend upon the nature of the dispute between the parties as defined by the grounds of assessment and the grounds of appeal. Where, for example, the SARS auditor has based an assessment upon the taxpayer's accounts and records, but has misconstrued them, then it is sufficient for the taxpayer to explain the nature of the misconception, point out the

[8] [2014] 3 A11 SA 266 (SCA)

> flaws in the analysis and explain how those records and accounts should be properly understood. That can be done by a witness such as Dr Gouws who, as a qualified chartered accountant, is capable of giving such an explanation after a full and proper consideration of the accounts. If there are underlying facts in support of that explanation that SARS wishes to place in dispute, then it should indicate clearly what those facts are so that the taxpayer is alerted to the need to call direct evidence on those matters. Any other approach would make litigation in the Tax Court unmanageable, as the taxpayer would be left in the dark as to the level of detail required of it in the presentation of its case. It must be stressed that SARS is under an obligation throughout the assessment process leading up to the appeal and the appeal itself to indicate clearly what matters and which documents are in dispute so that the taxpayer knows what is needed to present its case."

The Appeal

First ground: Taxation of airtime

[14] Airtime is a utility expenditure and a fringe benefit that is taxable if its value is not so small as to be exempted from tax under section 118 (c). In its written heads of argument, the appellant contends that the Tribunal found that the airtime for the benefit of senior management does not constitute a fringe benefit as defined in the Act. And having so found it should have reduced the assessment to nil and also reduced the additional tax imposed to nil. The Tribunal failed to do so and instead issued a different assessment for income tax in an unspecified amount leaving untouched the additional tax calculated on the airtime fringe benefit. Thus, so went the argument, the Tribunal acted beyond issues before it to the prejudice of the appellant.

[15] The appellant's contention has no merit. The Tribunal made a determination that the airtime benefit provided to three senior managers is a utilities expenditure and where it is used for the benefit of the employee and not that of the employer, it attracts tax. On the evidence, the appellant had entered into a contract with a service provider in terms of which the senior managers' cellphones were loaded with M1,500.00 airtime per month. Nothing showed that they did not utilize it for discharging the business of the appellant. For this reason, the Tribunal held that the M1,500.00 airtime is not taxable fringe benefit.

[16] During oral argument, Counsel for the appellant submitted that it was common cause that the airtime was for mobile phones and not telephones fixed at the senior managers' residences. The Commissioner-General imposed tax on the basis that airtime for mobile phones is a taxable utilities expenditure in terms of sections 121 (1) read with section 115 of the Act.

[17] The question that arises is whether the cellphones are used in respect of the senior managers' place of residence or for the discharge of the employer's business during or after working hours or both. The answer provided by the Tribunal is that there is no evidence to suggest that the airtime loaded on the cellphones was not utilized for discharging the business of the appellant and, therefore, found no reason to treat the use of the airtime

differently from use of office landlines. Hence the finding that the airtime is not a taxable fringe benefit. It follows from this finding that the respondents' assessment that the airtime of M1,500.00 allocated to the three senior managers' cellphones is taxable was rejected by the Tribunal.

[18] The respondents take issue with this finding. They contend that it was not disputed by the appellant that there was an element of private use of the cellphones and such private use did occur at the senior managers' residences. In the circumstances, the airtime became utilities fringe benefit as defined in section 121 and was rightly taxed.

[19] The problem with the respondents' contention is that it has no evidential support for the suggested occurrence of private use of cellphones and its duration. There is, therefore, no basis for the contention that there are clear circumstances that the airtime was utilized for the benefit of the senior managers and not for the business of the appellant. I have no reason to disturb the finding of the Tribunal that the airtime loaded on the cellphones of senior managers is not a taxable utilities fringe benefit under section 121.

[20] Apropos taxation of airtime allowances for spouses, the Tribunal characterised them as gifts according to section 31 read with the

Explanatory Memorandum. The appellant, so held the Tribunal, was legally bound to withhold tax on them but it failed to do so and thus became liable to pay tax as a withholding agent in terms of section 165.

[21] Section 31 falls under Part IV of Chapter II of the Act dealing with income tax. Division III thereof provides for exemptions from income tax. A gift is defined as "the value of property acquired by gift, bequest, devise, or inheritance" and is exempted from income tax. But income tax from property so acquired is not exempted from income tax. Relevant to the issue under discussion is sub-section (3) which provides that an amount transferred by the employer to or for the benefit of an employee is treated as employment income.

[22] This means that such an amount is a benefit the employer provides to the employee and becomes part of the latter's income which is taxable. The Tribunal was therefore, correct in characterizing M250.00 airtime as gifts to the employees' spouses. However, it fell into error when it determined that the gift should be regarded as employment income because there is no employment relationship between the appellant and the spouses of its employees as to give rise to receipt of income on the part of their spouses. Nothing in the Explanatory Memorandum is to the contrary. Thus, section 31 does not apply to the M250.00 airtime provided to the spouses.

Second ground: Taxation of staff sales by way of vouchers

[23] The Tribunal found that the issuance of vouchers to employees to purchase some groceries does not constitute a debt waiver fringe benefit under section 126. Sub-section (1) defines a debt waiver benefit as:

> "A benefit provided by an employer to an employee consisting of the waiver of an obligation of the employee to pay or repay an amount owing to the employer or to any other person is a debt waiver fringe benefit."

[24] The Tribunal then held that the Appellant's employees did not owe any debt to it or a third party to be redeemed by the vouchers. Accordingly, there was no debt waiver fringe benefit to talk about. The appellant was liable for payment of tax on the staff sales as a withholding agent. The respondents were right in their assessment for liability for failure to withhold and pay the tax.

[25] The appellant contends that although the Tribunal is correct in its finding that the staff sales benefit is not a debt waiver fringe benefit, it failed to give effect to this finding by not setting aside the assessment in terms of section 10 of the **Revenue Appeals Tribunal Act No.2 of 2005** which reads as follows:

> "**Powers of the Tribunal**
> 10. In deciding an appeal, the Tribunal may make an order-
> (a) affirming, reducing, increasing or varying the assessment, decision, ruling, determination or direction of the Commissioner General under appeal, as the case may be; or

> (b) remitting the assessment, decision, ruling, determination or direction under appeal for reconsideration by the Commissioner General in accordance with the directions or recommendations of the Tribunal; or
> (c) in the case of an appeal against the amount of an additional tax imposed by the Commissioner General, affirming, reducing, or increasing the amount of the additional tax so imposed, subject to the maximum amount chargeable in terms of any law in question as set out in the Schedule."

[26] I do not agree with the reasoning that the provision of purchase vouchers does not constitute a debt waiver fringe benefit. The appellant's human resources director testified that the vouchers were given as a benefit. Their purpose was to serve as a credit facility for the benefit of employees. Therefore, liability for payment of purchased goods fell on the appellant who did not even seek reimbursement from the employees. Therefore, the appellant was liable to pay tax in the value of amounts in the vouchers for the waived payment.

Third ground: Additional tax

[27] The Tribunal found no reason to interfere with the imposition of additional tax on the outstanding taxes on M250.00 airtime and the staff sales. It will be recalled that the basis of liability to pay these outstanding taxes is failure by the appellant as a withholding agent according to section 165. Additional tax is imposable under section 196 which reads:

"**Additional Tax in Relation to Tax Withheld Under Part VII**

196. (1) A withholding agent liable under section 165 for failing to withhold tax is liable for additional tax at the specified rate on the amount of tax not withheld calculated from the due date for payment of such tax.

(2) A withholding agent who fails to comply with section 166 is liable for additional tax at the specified rate on the amount of tax which that person has failed to pay to the Commissioner calculated from the due date for payment of such tax.

(3) Additional tax recoverable under subsection (1) or (2) is borne personally by the person on whom it is levied, and no part thereof is recoverable from the payee, or credited against an assessment of tax."

[28] The Tribunal found as an indisputable fact that the 1st respondent had already made a reduction of 75% on the final assessment of the additional tax. The appellant contends that the additional tax is not attracted in respect of non-taxable fringe benefit. I failed to follow this argument because the liability of the appellant arises from its failure to withhold tax in relation to taxable fringe benefits.

[29] It is not a case of failure by an individual taxpayer to pay tax due in terms of section 194. The Act draws a clear distinction between liability for failure to pay qua taxpayer on the one hand, and liability for failure to withhold tax as an agent under section 196 on the other hand. Additional tax is imposable under both sections.

Cross Appeal

Ground 1: Provision of vouchers

[30] The cross-appellants contend that the Tribunal erred in holding that the provision of vouchers for staff sales did not constitute a debt waiver whereas in fact it did. In the alternative, they contend that the Tribunal erred in finding that the provision of vouchers to employees by the appellant amounted to a gift and not an indirect payment contemplated in section 67 (1).

[31] A debt waiver fringe benefit, as earlier pointed out, is defined in section 126 (1) as a benefit provided by an employer to an employee consisting of a waiver of payment or repayment of an amount owed to the employer or a third party. The Tribunal found that neither the employer nor the employees owed any debt in respect of the purchase or acquisition of goods by vouchers provided by the appellant. Thus, the vouchers did not constitute a debt waiver fringe benefit and the appellant was liable for failure to withhold and pay tax.

[32] The Explanatory Memorandum provides that "reference to the waiver of employee debts to third parties is intended to cover a situation where the employer discharges the employee's obligation to a third party with no

obligation for employee to reimburse the employer". A witness called by the appellant testified at the trial that employees were given vouchers as part of their allowances or benefits. The vouchers were attached to their pay-slips at the end of each month. The vouchers allowed employees to purchase products at stores designated by the appellant.

[33] It is the cross-appellants' contention that the vouchers are a credit guarantee to the designated stores that the employer takes responsibility for payment of the goods purchased by the employee. The vouchers were used to pay in lieu of cash and this constituted a discharge of the employees' obligation to pay by the employer without any reimbursement from the employees. I find merit in this contention.

[34] Because the vouchers were attached to the employees' pay-slips, the cross-appellants are right also in contending that they amounted to taxable indirect payments to the employees which the appellant was legally bound to deduct in terms of section 67 and pay in terms of section 165 (1).

[35] The Tribunal was, therefore, wrong to characterize the payment vouchers as a gift and not a debt waiver fringe benefit.

Ground 2: Airtime benefit to spouses taxable as an indirect payment under section 67 (1) and not as a gift under section 31

[36] During oral argument, Counsel for the cross-appellants submitted that airtime benefit was a taxable fringe benefit of both senior managers and their spouses and not gifts. The Tribunal found the airtime benefit constitutes a utilities expenditure and then proceeded to draw a distinction between airtime for senior managers and airtime for their spouses.

[37] As regards airtime for senior managers, the Tribunal determined it as a utilities expenditure which can only attract tax when used for the personal benefit of the senior managers and not for the business of the appellant. It would only become a non-taxable utilities expenditure if used as a telephone at the residences of the senior managers. As regards airtime for spouses, the Tribunal determined it as gifts in terms of section 31 which form part of employment income.

[38] I have already held that the Tribunal was correct in its determination in respect of airtime for senior managers but wrong in its determination of airtime for spouses. Indeed, a gift to an employee qualifies as part of employment income and is, therefore, taxable. But there is no provision in the Act regulating taxation of gifts by the employer to third parties except where that gift is itself income or is a payment that directly or indirectly

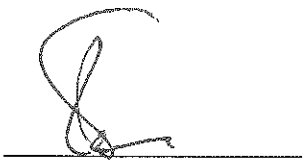
benefits a third party. There is no doubt that as third parties, the spouses benefited from the airtime. The appellant was then obligated to deduct tax in terms of section 67 and not section 31.

[39] In the result, the following order is made:

1. The appeal is upheld in part.

2. The cross-appeal succeeds.

3. The appellant to pay costs of the cross-appellants.



S.P. SAKOANE
CHIEF JUSTICE

For the Appellant: R.A. Suhr

For the Respondents: L. Mahao