IN THE TAX COURT OF SOUTH AFRICA,
(HELD AT BLOEMFONTEIN)

Case No.: VAT 1999

In the matter between: -

FREE STATE DEVELOPMENT CORPORATION Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT BY: C. J. MUSI, JP

HEARD ON: 22 JULY 2021

DELIVERED ON: 19 AUGUST 2021

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[1] This is an opposed interlocutory application wherein the Free State Development Corporation (appellant) seeks an order in the following terms:

> 'Leave is granted to the appellant to withdraw its statement of grounds of appeal and to file a new amended statement of grounds of appeal within 20 days of the granting of this order;
> Leave is granted to the respondent to file a reply within 20 days of receipt of the appellant's new statement of grounds of appeal; ...'

[2] The facts of this matter are not in dispute. The appellant is the official economic development agency for the Free State Province and a 'designated entity' that received money from the Department of Trade and Industry (DTI).

[3] On 5 March 2014, the DTI and the appellant entered into an agreement in terms of which the DTI would fund the appellant to form a special economic zone in the Free State. It paid the appellant R4 500 000.00 for the 2013/2014 financial year.

[4] On 15 December 2015, they entered into a second agreement (The Special Economic Zone Funding Agreement) in terms of which the appellant received a total of R244 347 122.34, in tranches, from the DTI for the implementation of a special economic zone at Maluti-a-Phofung.

[5] The appellant declared the amount so received as zero rated supplies on its VAT 201 returns. The South African Revenue Service (respondent) was of the view that the supplies were not zero rated but supplies that are subject to the standard VAT rate.

[6] A value-added tax (VAT) audit was conducted by the respondent on the appellant's tax affairs for the periods 07/2012, 02/2015, 10/2015, 12/2015, 7/2016, 02/2017 and 06/2017.

[7] The respondent found that the appellant had understated output VAT for the periods mentioned in the preceding paragraph. The respondent raised additional assessments in respect of the appellant's tax affairs in terms of section 92 of the Tax Administration Act (TAA)[1] to correct the amount of VAT payable. The total assessment amount for the entire periods was R39 107 317,42, which was paid to the respondent.

[8] The appellant objected to the assessments. The matter was referred for alternative dispute resolution but the parties could not resolve it. The appellant lodged an appeal to this Court.

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[1] Section 92 of the Tax Administration Act, 28 of 2011 provides as follows:

'If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the *fiscus*, SARS must make an additional assessment to correct the prejudice.'

[9] The appellant's objection was premised on the transactions being zero rated. The respondent insisted that the transactions were subject to the standard VAT rate because they were supplies or deemed supplies.

[10] The respondent filed its statement of grounds of assessment in terms of Tax Court Rule (TCR) 31(2),[2] based on the ground that the money received was an actual or deemed supply to a designated entity. The appellant filed its statement of grounds of appeal in terms of TCR 32(2)[3] in the form of an affidavit. Its case in the statement of grounds of appeal was that the money received from the DTI should be zero rated. The respondent filed its reply to the appellant's statement of grounds of appeal in terms of TCR 33.[4]

[11] After receiving legal advice, the appellant sought to amend its statement of grounds of appeal to challenge the respondent's assertion that the money received was a supply or deemed supply. It desires to show that the transactions were neither supplies nor deemed supplies.

[12] The respondent opposes the application on the basis that the proposed amendment seeks to introduce grounds of appeal which constitute new grounds of objection against a part of the assessments not objected to. It argued that the TCRs do not make provision for an amendment that introduces

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[2] The Rule provides:

'The statement of the grounds of opposing the appeal must set out a clear and concise statement of-

(a) the consolidated grounds of the disputed assessment;
(b) which of the facts or the legal grounds in the notice of appeal under rule 10 are admitted and which of those facts or legal grounds are opposed; and
(c) the material facts and legal grounds upon which SARS relies in opposing the appeal.'

[3] TCR 32(2) states:

'The statement must set out clearly and concisely-

(a) the grounds upon which the appellant appeals;
(b) which of the facts or the legal grounds in the statement under rule 31 are admitted and which of those facts or legal grounds are opposed; and
(c) the material facts and the legal grounds upon which the appellant relies for the appeal and opposing the facts or legal grounds in the statement under rule 31.'

[4] TCR 33 reads as follows:

'(1) SARS may after delivery of the statement of grounds of appeal under rule 32 deliver a reply to the statement within -

(a) 15 days after the appellant has discovered the required documents, where the appellant was requested to make discovery under rule 36(2); or
(b) 20 days after delivery of the statement under rule 32.

(2) The reply to the statement of grounds of appeal must set out a clear and concise reply to any new grounds, material facts or applicable law set out in the statement.'

a new ground of objection. Additionally, that this Court does not have jurisdiction to adjudicate upon such new ground.

[13] The issue to be decided in this matter is whether the appellant has made out a proper case for the relief sought.

[14] TCR 35 provides for amendments. It states:

> '(1) The parties may agree that a statement under rule 31, 32 or 33 be amended.
> (2) If the other party does not agree to the amendment, the party who requires an amendment may apply to the tax Court under Part F for an order under rule 52.'

[15] TCR 52(7) states that a party seeking an amendment may apply for an appropriate order including an order for a postponement of the hearing.

[16] In its TCR 31(2) statement the respondent stated the following:

> '22. Section 7(1)(a) of the VAT Act provides.
> "*7. Imposition of value-added tax*
> *(1) Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax –*
> (a) *on the supply by any vendor of goods or services supplied by him on or after the commencement date in the furtherance of any enterprise carried on by him, calculated at the rate of 15% (14% prior to 1 April 2018) on the value of the supply concerned or the importation, as the case may be.*"
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> 23. Section 1 of the VAT Act defines 'supply' as including "*performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of 'supply' shall be construed accordingly*".
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> 24. The appellant is liable for payment of standard rate VAT in terms of the abovementioned agreement(s) read with the provisions of Section 7 as result of the fact that the agreement(s) provides for a standard rated transaction for the actual supply of goods or services for consideration.

25. In the alternative to the content of paragraph 24, where a transaction does not qualify as a supply as defined in section 7(1) of the VAT Act, such transaction may qualify as a deemed supply in terms of section 8 of said Act, and more specifically section 8(5).

26. Section 8(5) of the VAT Act provides:

> "*(5) For the purposes of this Act a designated entity shall be deemed to supply services to any public authority or municipality to the extent of any payment made by the public authority or municipality concerned to or on behalf of that designated entity in the course or furtherance of an enterprise carried on by that designated entity.*"

27. The payments received by the Appellant from the DTI qualifies as a deemed supply in terms of section 8(5) and standard rate VAT is thus payable on such payments.

28. Section 8(5A) of the VAT Act provides for supplies or deemed supplies that may attract a zero rating in terms of the provisions of section 11 of the VAT Act and provides as follows:

> "*For the purposes of section 11(2)(t), a vendor (excluding a designated entity) shall be deemed to supply services to any public authority, municipality or constitutional institution listed in Schedule 1 to the Public Finance Management Act, 1999 (Act 1 of 1999), to the extent of any grant paid to or on behalf of that vendor in the course or furtherance of an enterprise carried on by that vendor.*"'

[17] In its TCR 32(2) statement the appellant sets out the background to the agreements stating that it was merely a conduit which the DTI used in order to realise is objective of developing the special economic zone. It concluded as follows:

> 'Therefore, it is indisputable that the payment made by the DTI (as a public authority) to the FDC was an unrequited amount where the FDC was not expected to perform any functions except for monitoring the implementation of the project and the fact that all proceeds were to be expended for the development of the SEZ's and not on the FDC should be sufficient for such a transaction to be zero rated. In actual fact, the payment is not linked to an actual supply of goods or services.'
> (My underlining.)

[18] Although this Court is called a Tax Appeal Court, it is a Court of revision and not a Court of appeal in the ordinary sense.[5] The proceedings in this Court is a re-hearing of the dispute based on the administrative process (objection) and the judicial process (pleadings in terms of TCR 31, 32 and 33). This is so because a taxpayer may not appeal on a ground that constitutes a new objection against a part or amount of the disputed assessment not objected to under TCR 7.[6] The taxpayer may not include in its statement of grounds of appeal a ground that constitutes a new grant of objection against a part or amount of the disputed assessment not objected to under TCR 7.[7]

[19] In terms of TCR 34 the issues in an appeal will be those contained in the statement of the grounds of assessment and opposing the appeal read with the statement of the grounds of appeal and, if any, the reply to the grounds of appeal. Although the pleadings delineate the issues, they are subject to the objection.

[20] This Court must ensure that the hearing before it is fair. It is not bound by SARS's opinion or assessment.

> 'What is important is that the methodology used and the assumptions on the strength of which the estimated estimates were made should remain the same, otherwise the conclusions reached by the tax court might not be procedurally fair. The tax court must place itself in the shoes of the functionary to determine whether the methodology followed and assumptions on which the estimated assessments are based, are reasonable and produce a reasonable result.
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> [53] Being a court of revision does not mean that a tax court is free of restrictions. It too must observe an administratively fair process. That will entail inter alia that the dispute must be resolved on the issues raised by the parties and the enquiry confined to the facts placed before the court. In this regard the pleadings are important and the parties will be kept to their pleadings, where any departure from the pleadings would cause prejudice or prevent a full enquiry. But, within those limits tax court has a wide discretion, for the pleadings are made for the court and not the court for the pleadings.

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[5] Africa Cash and Carry (Pty) Ltd v The Commissioner for the South African Revenue Service 2020 (2) SA 19 (SCA) at para 52.
[6] See TCR 10(3).
[7] TCR 32(3). TCR 7 regulates the manner and form of an objection against an assessment by a taxpayer.

> Where a party has had every facility to place all the fact before the tax court and the investigation into all the circumstances has been thorough, then there is no justification to interfere simply because the pleadings had not been as explicit as they might have been.'[8]

[21] The Court has a discretion to grant or refuse an application for an amendment. The discretion should be exercised judicially. The Court must always be mindful of the fact that granting an amendment might prejudice the other party. The applicant must therefore establish that the other party will not be prejudiced by the amendment.[9] In **Trans-Drakensberg Bank Ltd**[10] it was pointed out that:

> 'Having already made his case in his pleadings, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue, he cannot be allowed to harness opponent by an amendment which has no foundation. He cannot place on record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleadings acceptable, or deliberately refrain until a late stage from bringing forward his amendment with the purpose of catching his opponent unawares, or obtaining a tactical advantage or of avoiding a special order a to costs.'[11]

[22] Similar considerations apply in Tax Court cases. However, in Tax Court cases the Court may not grant an amendment which will have the effect of introducing a new ground of objection against a part or amount of the disputed assessment not objected to under TCR 7. This is to ensure that the taxpayer puts all his or her cards on the table at the administrative stage and that matters are effectively dealt with at that stage. The parties should generally not be allowed to proffer one objection during the administrative stage and another during the adjudicative stage.

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[8] Ibid at paras 52 and 53.
[9] Cross v Ferreira 1950 (3) SA 443 (C) at 447. GMF Kontrakteurs (Edms) Bpk v Pretoria City Council 1978 (2) SA 219 (T) at 222H.
[10] Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another 1967 (3) SA 632 (D).
[11] Ibid at 641A-B.

[23] This does not mean that the Court would automatically refuse such applications. The Court should look at the pleadings, including the new ground sought to be introduced, in order to discern whether the ground was not foreshadowed in the objection. there would be prejudice to the respondent.

[24] If an issue has been foreshadowed in the pleadings but was not explicitly pleaded and there would be no real prejudice to the respondent such an amendment should be granted, depending on the explanation given as to why the case was not pleaded in that manner in the first place and the explanation for the delay, if any, in bringing the application. The general position under the previous Act, which stated that the appellant in the Tax Court is limited to the grounds contained in his or her notice of objection was set out in **Matla Coal**, where it was said:[12]

> 'It is naturally important that the provisions of sec 83(7)(b) be adhered to, for otherwise the Commissioner maybe prejudiced by an appellant shifting the grounds of his objection to the assessment in issue. At the same time, I do not think that in interpreting and applying sec 83(7)(b) the court should be unduly technical or rigid in its approach. It should look at the substance of the objection and the issue as to whether it covers the point which the appellant wishes to advance on appeal must be adjudged on the particular facts of the case'[13]

[25] The appellant's terse and ineloquent explanation for seeking the amendment is as follows. It was advised, based on the contracts between it and the DTI, that the transactions were zero rated for VAT purposes. In following the advice, it completed the VAT 201 self-assessment and indicated that the transactions were zero rated. The respondent was of the view that the transactions were subject to the standard VAT rate. Its objection and pleadings were drafted in accordance with the advice received.

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[12] Matla Coal Ltd v Commissioner for Inland Revenue [1986] ZASCA 120 (Case number 22/85 delivered on 30 September 1986. HR Computek (Pty) Ltd v Commissioner for the South African Revenue Services (830/2012) [2012] ZASCA 178 (29 November 2012) at paras 11 and 12.

[13] Ibid at page 25.

[26] It is only when it engaged a second counsel (Senior Counsel) after its initial counsel's mandate was terminated, that it was advised that both it and the respondent asked the wrong legal question in the assessments. They both asked whether the supplies were zero rated or subject to the standard VAT rate. The appellant was advised by its current counsel that the true question to ask is 'whether the transactions between the appellant and the DTI were in fact and law supplies or deemed supplies'. If it is determined that the transactions amounted to supplies or deemed supplies, then the standard VAT rate would apply. If on the other hand it is determined that the transactions did not amount to supplies or deemed supplies then those transactions would not be subject to any VAT, at all.

[27] The respondent mounted several objections against the proposed amendment. It submitted that the proposed amendment seeks to introduce grounds of appeal which constitute new grounds of objection against a part of the assessment not objected to. Technically, this is correct. However, if one has a look at the pleadings it becomes clear that the issue sought to be introduced has been foreshadowed by the parties. In the appellant's statement of grounds of appeal, it *inter alia* stated 'the payment is not linked to an actual supply of goods and services'. The respondent also dealt with the issue whether the transactions under consideration amounted to a supply or alternatively a deemed supply.

[28] Although this ground was not explicitly pleaded, the issue was contemplated by both parties. Courts should not be inflexibly bound by and be slaves to procedural formalism to the extent that justice is compromised.[14]

[29] The respondent argued that the appellant cannot - at trial stage (appeal stage) - invoke the notion that the VAT 201 returns were submitted in error. On the facts of this case they could not have made the assertion at any other stage. They only found out at appeal stage that they submitted VAT 201 returns erroneously because the transactions were not, according to it, subject to VAT

[14] See Simmons, N.O. v Gilbert Hamer & Co Ltd 1963 (1) SA 897 (N) at 906.

because they were not supplies or deemed supplies. As soon as it found that out, it brought the amendment application.

[30] The respondent pointed out that sections 25(5)[15] or 93(1)(d)[16] should have been be invoked in order to correct an error. Those processes are administrative and no longer available to the appellant. That ship has sailed and the only other way that the error can be addressed is by having the point of law contended by the appellant argued and determined by this Court.

[31] The respondent argued that it is legally untenable for the appellant to introduce the ground of error at this stage because this Court does not have the requisite jurisdiction to adjudicate such a ground. It must be remembered that the ground sought to be introduced is a ground based on a point of law. The appellant does not seek to introduce any other evidence that was not before the respondent. It proposes to argue the ground based on the same evidential material that was before both parties at all relevant times, save for the withdrawal of the VAT 201 returns and the admissions.

[32] In **Paddock Motors**[17] it was trenchantly stated that it:

> '...would create an intolerable position if a court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part, ...If e.g. the parties were to overlook a question of law arising from the fact as agreed upon, a question fundamental to the issues they have discerned and stated, the court could hardly be bound to ignore the fundamental problem and only decide the secondary independent issues actually mentioned in the special case. This would be a fruitless exercise, divorced from reality, and may lead to a wrong decision.'[18]

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[15] Section 25(5), Act 28 of 2011 reads:
'SARS may, prior to the issue of an original assessment by SARS, request a person to submit an amended return to correct an undisputed error in a return.'

[16] Section 93(1)(d), Act 28 of 2011 reads:
'SARS is satisfied that there is an error in the assessment as a result of an undisputed error by— (i) SARS; or (ii) the taxpayer in a return.'

[17] Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A).

[18] Ibid at pages 23 and 24.

[33] When a point of law, which could settle the dispute, arises it is for the Court to determine the point of law and not the parties. It has been said that:

> 'where a plaintiff alleges in a pleading that a particular law governs the case, whereas that law may not, an admission by a defendant that the law referred to governs the case does not make it so. What the law is has always been a matter for the court to determine, and it is well established that mistakes about the law which the parties make are not binding on a court.'[19]

[34] This Court therefore has jurisdiction to determine the point of law.

[35] The respondent submitted that the appellant is bound by its declarations. It argued that because the appellant indicated that the supplies or deemed supplies were zero rated, it must prove that. The appellant may not, so the argument went, now, argue that there was no supply or deemed supply because it certified that its declarations are complete and correct and it is bound thereby.

[36] The appellant conceded that its characterization of the transactions was wrong because it made an error of law. The amendment is aimed at correcting that situation. To keep the appellant bound by its declarations on the VAT 201 return when it is clear that it made a mistake based on its wrong interpretation of the law would be totally unfair and unjust.

[37] The respondent contended that the proposed amendment will render the TCR 32 statement excipiable. This is true only with regard to those assessments that predate the signing of the contracts. This, on the facts of this case, only affects the 07/2012 assessment. Each assessment is a claim by the respondent that the taxpayer owes it a particular amount for a particular period. Since the 07/2012 assessment falls outside of the period that is governed by the contract, it may be subject to an exception. That however does not makes all the other objections to the assessment subject to an

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[19] Potters Mill Investments 14 (Pty) (Ltd) v Abe Swersky & Associates and Another 2016 (5) SA 202 (WCC) at para 11.

exception. It is still open to the taxpayer to concede the tax liability for the period 07/2012. This in my view is not a good ground for refusing the proposed amendment.

[38] The respondent submitted that the applicant does not make out a proper case for the withdrawal of its admissions. As I have already stated the papers of the appellant in support of the withdrawal of the admissions and the amendment are terse and ineloquently drafted. That, however, is not sufficient reason to non-suit the appellant. It is clear from a constructed affidavit by the appellant that the admissions were erroneously made because it received bad legal advice.

[39] The fact that a taxpayer has acted on bad legal advice will not always be a sufficient reason for an amendment. Where, however, the taxpayer has made out a clear case that it intends raising a triable issue of law subsequently discovered then the bad legal advice should be seen in a different light. The triable issue and the terse explanation supplement each other. What the appellant's case lacks in detail is supplemented by its demonstrable triable case.

[40] The appellant incisively demonstrated that the relevant provisions of the VAT Act may be interpreted in its favor. It set out in detail the different sections of the VAT Act in order to show that it and the respondent misinterpreted the law on this issue.

[41] In essence the appellant wants to withdraw an admission that the law applicable to the transaction is different to what it admitted in the administrative and judicial processes. In **Potters Mill** it was held that:

> 'It is evident in my view that an admission by a defendant that the applicable law is what the plaintiff alleges it to be falls to be treated somewhat differently to the admission of a fact which is necessary for a plaintiff to prove. If a fact is admitted by the defendant,

> the plaintiff need not prove it. Questions of proof do not arise when it comes to the law. The relevant case law should be read, in my opinion, with this in mind.'[20]

[42] The basic principle of tax law is underscored by section 143(1) of the TAA which states that it is the duty of SARS 'to assess and collect tax according to the laws enacted by Parliament and not to forgo a tax which is properly chargeable and payable'.

[43] This basic principle would be undermined if the amendment is not granted. The respondent would be allowed to assess and collect approximately R39 million contrary to the law.

[44] I am convinced that the application to withdraw admissions and the application for amendment were *bona fide* and without delay. There is no prejudice to the respondent. The proposed amendment would raise a crucial point of law. This will ensure that justice is done in that the real issue between the parties will be determined. The respondent does not dispute that the amendment would raise a triable issue. The determination of that point would settle all the disputes between the parties. That is so because the appellant concedes that should the Court find that the transactions between it and the DTI were indeed supplies or deemed supplies then it has no leg to stand on.

[45] The appellant indicated, in its notice of motion, that it seeks a costs order against the respondent if it opposes the application on unreasonable grounds. The respondent did not oppose the application on unreasonable grounds.

[46] I accordingly make the following order:

46.1 Leave is granted to the appellant to withdraw the admissions made in its statement of grounds of appeal and to file an amended statement of grounds of appeal within 20 days of this order.

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[20] Potters Mill *supra* at para 13.

46.2 Leave is granted to the respondent to file a reply to the amended statement of grounds of appeal within 20 days of receipt of the appellant's amended statement of grounds of appeal.

46.3 No order as to costs is made.

C.J. MUSI, JP

Appearances:

For the Appellants:	Adv. P.J.J. Zietsman SC With Adv M.B. Mojaki Instructed by Rampai Attorneys Bloemfontein
For the Respondents:	Adv. N. Snellenburg SC With Adv D.R. Thompson Instructed by State Attorney Bloemfontein