THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Service (Case no 728/2022) [2023] ZASCA 144 (8 November 2023)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing, with costs including the costs of two counsel, an appeal against a decision of the Gauteng Division of the High Court of South Africa, Pretoria (the high court), dismissing an application for declaratory relief pertaining to s 11(1)*(f)* of the Value Added Tax Act 89 of 1991 (the VAT Act).

The appellant, Lueven Metals (Proprietary) Limited, claimed refunds in the total sum of R 51 million from the respondent, the Commissioner for the South African Revenue Service (SARS). After conducting a VAT and Income Tax Audit, SARS concluded that the appellant's gold had previously been subjected to a manufacturing process. SARS took the view that s 11(1)*(f)* of the VAT Act prohibited the supply at a zero-rate to the South African Reserve Bank (SARB), the South African Mint Company (Pty) Ltd (Mintco) or any Bank registered under the Banks Act, of gold that has undergone any manufacturing process other than the refining thereof or production of such bars. SARS accordingly expressed an intention to re-classify the zero-rated sales as standard-rated sales with VAT of 15% in terms of s 7(1)*(a)*, read with s 11(1) and s 64 of the VAT Act. SARS also intimated that it was considering imposing an understatement penalty and raising interest on the appellant's outstanding VAT liability.

The appellant instituted legal proceedings against SARS before the high court for a declaratory order. The application, however, failed before the high court and was dismissed with costs. Leave to appeal to this Court was nonetheless granted by the high court.

Before the Supreme Court of Appeal (SCA), Counsel were required to address whether absent a directive in terms of s 105 of the Tax Administration Act (TAA), the high court could enter into and pronounce on the merits of the application for declaratory relief. The argument advanced by both counsel was that as there was neither an 'assessment' nor a 'decision as described in s 104' and as the nature of the relief sought was a declaration of rights, the default rule that a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA, did not find application.

The majority of the SCA (the majority judgment), however, expressed the view that the legislative scheme was designed to ensure that the objection and appeal process and the resolution of tax disputes by means of alternative dispute resolution and then the tax board or the tax court be exhausted, before the high court could be approached. It also contemplated that in the ordinary course the tax court would deal with the dispute, by way of a trial, as the court of first instance before the high court could be approached. Nowhere was that clearer than from the language, context, history and purpose of s 105, which made it plain that a tax payer may only dispute an assessment by the objection and appeal procedure under the TAA, unless a high court directs otherwise. The majority judgment further held that prior to the amendment of s 105, the taxpayer could elect to take an assessment on review to the high court instead of following the prescribed procedure. That was no longer the case. The amendment was meant to make it clear that the default rule was that a taxpayer had to follow the prescribed procedure,

unless a high court directed otherwise. The majority judgment further held that a declaratory order was not appropriate if there were other specific statutory remedies available. In responding to the letter of audit findings, the appellant seemed to have simply gone through the motions and did not thereafter, afford SARS the opportunity to reconsider or alter the proposed assessments. Having responded to SARS' notice of assessment with fairly detailed representations, the appellant then pre-empted a reconsideration by or reply from SARS by giving notice and launching the application for declaratory relief. That the appellant genuinely sought to engage with SARS seemed doubtful; because the giving of notice without allowing a reasonable time for a reply, and meaningful engagement, were mutually incompatible. In simply ignoring the emphasis placed by the TAA on alternative dispute resolution and in disregarding the need to exhaust its internal remedies, the high court became the appellant's first port of call. The danger with such an approach was that high courts could potentially be flooded with like matters. There was little to commend an approach by a taxpayer to the high court, without awaiting a response from SARS, including perhaps one that may well be favourable. As a result, the majority judgment held that an application for declaratory relief was not appropriate in this matter. The nature of the dispute more properly lent itself to resolution by use of the special machinery of the TAA set up for that purpose. Thus, although the high court incorrectly entertained an application for declaratory relief, the majority judgment found that it was correct in dismissing it.

In the minority judgment, the view was expressed that in the circumstances of the matter the seeking of declaratory relief was appropriate. However, because of the factual disputes the granting of such relief was not.

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