

PRESERVATION ORDERS

Judgment was recently handed down in the High Court (Western Cape Division) in the matter of Commissioner for the South African Revenue Service v Tradex (Pty) Ltd and others (9 September 2014, case no 12949/2013, as yet unreported).

The taxpayers in this matter were Louise Wiggett (Wiggett), Tradex (Pty) Ltd (Tradex) and Business Wise Accounting and Management Services CC (BWA).

Wiggett controlled Tradex and BWA. Wiggett owned an immovable property as well as an undivided share in another immovable property.

Tradex supplied technology solutions and consulting services in respect of international trade. It had no immovable property.

BWA had an agreement in place with Tradex for the supply of furniture, equipment, office accommodation and operational support service. BWA owned two immovable properties.

Wiggett, Tradex and WBA had failed to submit various returns and it was expected that they would have tax liabilities once determined and assessed. Tradex had an established tax liability of about R4 million besides any undetermined liabilities.

The taxpayers had a history of interactions with the South African Revenue Service (SARS) in respect of regularising their tax affairs: Tradex previously applied under the small business tax amnesty in 2007 as well as filed voluntary disclosure programme applications in October 2011. Wiggett met with SARS in September 2012 and in December 2012 presented SARS with an action plan. In January 2013 SARS referred Wiggett and Tradex for investigation. Meetings were held and correspondence exchanged between Wiggett and SARS between January and May 2013. Wiggett submitted a payment plan to SARS and appointed auditors to investigate the records of Tradex and BWA.

However, in August 2013 SARS, on an *ex parte* basis, applied for and was granted a provisional preservation order in terms of s163(4) of the Tax Administration Act, No 28 of 2011 (TAA) against the taxpayers. A curator *bonis* was also appointed. A rule *nisi* was ordered and the taxpayers were called upon to show cause, on a specified return date, why the preservation order should not be made final.

The return date was postponed by agreement several times as the taxpayers wanted to get their tax affairs in order. The taxpayers' records had to be reconstructed and auditing only commenced in October 2013. The process was delayed and Wiggett appointed a tax practitioner and new auditors in March/April 2014. Several amounts had also been paid to SARS by April 2014. Subsequently SARS also conducted a field audit in May 2014 on the taxpayers. By June 2014 the taxpayers had submitted their outstanding returns.

However, it appears that SARS became dissatisfied with the progress and wanted the provisional order confirmed. The parties filed opposing and replying affidavits and the matter came to be heard before Rogers J in August 2014.

The taxpayers argued that their returns were up to date (by the time of the hearing) and repeated a previous offer of security in the form of caveats in respect of dealing with the various immovable properties as well as a cession *in securitatem debiti* of Tradex's book debts. The taxpayers argued that their expected remaining tax liability was only about R7 million, and that the security offered exceeded such liability. For these reasons the taxpayers submitted that a final preservation order would be unnecessary.

SARS argued that, in terms of the audit that it was conducting (which was at an advanced stage) the taxpayers' actual tax liability far exceeded R7 million. Also, the value of the security offered was less than the taxpayers claimed.

The preservation order that SARS sought the court to confirm included that:

- the taxpayers not dissipate their assets;
- caveats be registered against the immovable properties;
- a curator *bonis* be appointed and the taxpayers' assets vest in the curator;
- the curator be empowered to take control of the assets and realise them to settle taxes;

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- the taxpayers deliver all records to the curator, act according to his instructions, and subject themselves to interviews; and
- a senior counsel be appointed as mediator to resolve any disputes.

Section 163 of the TAA was amended in 2014 with retrospective effect from 1 October 2012. However, the court held that the matter should be dealt with on the wording of s163 prior to amendment, despite the retrospectivity of the amendment, because the initial *ex parte* application was granted before the amendment was introduced.

The court made the following comments in respect of preservation orders in terms of s163 of the TAA:

- tax does not have to be due and payable at the time the order is made;
- the preservation order must be “required to secure the collection of tax” and this would be the case if the preservation order would provide a “substantial advantage” in the collection of tax;
- the main focus of a preservation order is to prevent the dissipation of assets;
- SARS must show that there is a “material risk that a taxpayer will dissipate its assets”;
- it is not relevant whether the taxpayer *bona fide* believes that no tax is owed;
- preservation orders are not as a matter of course available to SARS – there must be a material risk that assets will be diminished, because in such circumstances a substantial advantage would be conferred should the order be granted;
- one must have regard to the terms of the order sought, and not to whether a preservation order is required in the abstract; and
- a court must decide, on the papers, whether on a balance of probability the relevant jurisdictional facts are present, and to exercise its discretion.

SARS argued that the taxpayers’ previous non-compliance in respect of not submitting their returns, as well as the disarray in which their records were, were grounds for the court to grant a final preservation order. However, the court noted that “[a] person may be disorganised and late in regard to its tax administration without there being any appreciable danger that its assets will be diminished by the time tax comes to be collected.”

SARS also argued that the fact that Wiggett caused Tradex to reinvest all its cash back into its business rather than using it to pay tax is an indication of dissipation. The court however dismissed this argument and noted that such reinvestment actually caused the business to become even more valuable. The facts, on the papers, showed that Tradex was doing well from an operational point of view.

The court could also not find, on the papers, that Tradex was better off or more valuable since the curator *bonis* was provisionally appointed. SARS also did not allege that Wiggett was causing Tradex to dissipate its assets and there was no evidence that Wiggett or BWA had attempted to dissipate their immovable properties.

SARS had known for some years that the taxpayers had not rendered their required returns and there had been many communications and meetings between SARS and the taxpayers before SARS brought the application. The papers did not mention that anything had happened in the meantime giving reason for SARS to believe that the taxpayers’ assets would be dissipated unless a preservation order was granted. The court specifically noted that it appeared that SARS was only pursuing a preservation order to put pressure on the taxpayers, and that that was not the purpose of s163 of the TAA.

The court also made the following observations:

- It appeared that Wiggett and BWA would not have substantial tax liabilities.
- The order that SARS sought did not distinguish between the taxpayers.
- Interdicting Tradex from dealing with their assets in a manner that would cause a decrease in the value of its assets could shut the company down if it meant that it could not use its cash to pay for business expenditure. That would only be required if the sale of the business assets would be better for SARS than continued operation, and there was no basis for such a view. Such a blanket order would in any event be too vague. There were no facts showing that Tradex was dealing with its assets in such a manner that decreased their value.
- Tradex would not be in a worse position if the a curator was not appointed and there would be no substantial advantage to SARS – a curator only assists in discovering and preserving assets and does not investigate potential tax liabilities.
- An interdict against disposal or encumbrance of Wiggett’s and BWA’s properties would be sufficient if there were indeed a material risk of dissipation and the appointment of a curator would be superfluous. SARS should have just asked the taxpayers to give undertakings and to register caveats in respect of their properties, as it seemed likely that they would have agreed. In fact, the taxpayers had made several open tenders to SARS in respect of providing security in respect of the properties, and Wiggett offered a suretyship in respect of Tradex’s tax liabilities. BWA also tendered that the proceeds in respect of any sale of its property be placed in trust for purposes of paying any tax owed by Wiggett, Tradex or BWA.

A preservation order was thus not required to secure the collection of tax, and the court could therefore not confirm the provisional order as sought.

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In conclusion, the court made the following general comments:

- The court commented that an application for a preservation order in terms of s163 of the TAA could only be brought on an *ex parte* basis, without notice to the taxpayer, if there are sufficient reasons for justifying that notice not be given to the taxpayer.
- The provisional order does not have to contain all the orders that SARS wishes to include in the final order. For example, the appointment of a curator in the provisional order is often not reasonably required in the interim period pending the return date, and it should be kept in mind that the appointment of a curator is an intrusion into the rights of a taxpayer. In the present case a curator was provisionally appointed without notice to the taxpayers. There was no justification for such an appointment in the interim. Pending the return date when the taxpayer will be heard, a provisional order must only contain what is reasonably required to secure SARS's position.

- The orders sought must be tailored to the circumstances of each case.
- Section 163 of the TAA is not a collection mechanism. There are other specific collection mechanisms available to SARS in the TAA. It is not appropriate to grant an order giving a curator the power to sell assets in order to pay tax liabilities that are not yet ascertained or are disputed. The order should rather require a curator to approach a court at a later stage for the granting of authority to sell assets to satisfy tax debts.

Heinrich Louw

SARS MUST CHOOSE ITS REMEDIES

The decision of Rogers J, in *Commissioner for the South African Revenue Service v Tradex (Pty) Ltd and others* (9 September 2014, case no 12949/2013, as yet unreported) has raised a number of issues pertaining to the circumstances under which the South African Revenue Service (SARS) is entitled to obtain a preservation order against a taxpayer in terms of s163 of the Tax Administration Act, No 28 of 2011 (TAA). Ultimately it was found that SARS was not entitled to a preservation order as it was not 'required' to secure the collection of the taxes that could have become due in that instance.

The fact that SARS was unsuccessful with the preservation order, does not imply that it does not have a wide array of remedies available to it in the case of a delinquent taxpayer in terms of the provisions of the TAA. Rogers J was at pains to point out in a number of instances that SARS could have used a number of other remedies to obtain the relevant documents and/or information from the taxpayer. Equally, he could have raised assessments against the taxpayer on an estimated basis as well. The confusion came in on the basis that SARS primarily relied upon the lack of information to obtain the preservation order as opposed to making use of one of its other remedies as envisaged in the TAA.

Amongst others, Rogers J indicated at paragraph 55:

"While I can understand SARS' frustration, that is not the purpose of the preservation application. There are other statutory mechanisms available to SARS to deal with taxpayers who fail to provide information, to render returns or to make payment of tax (see, in particular, the information-gathering provisions of Chapter 5 of the TAA, SARS' power to issue estimated and so-called jeopardy assessments in terms of Chapter 8, the tax-recovery provisions of Chapter 11, the administrative non-compliance penalties which can be imposed in terms of Chapter 15 and the criminal offences created by Chapter 17)."

Insofar as the information-gathering powers of SARS are concerned:

- SARS is entitled in terms of s45 of the TAA to carry out an inspection at premises where a SARS official has reasonable belief that a trade or enterprise is being carried on;
- s46 provides for SARS to request relevant material from a taxpayer;
- a SARS official is entitled in terms of s48 to require a person to provide the relevant material that the official may require to audit or criminally investigate in connection with the administration of a tax Act in relation to such person or any other person. In other words, it can also obtain the information from an auditor to the extent that a taxpayer may fail to provide same; and
- importantly, s50 onwards provides for the establishment of an enquiry. A person may not refuse to answer a question during an enquiry on the grounds that it may incriminate such person. In addition, the enquiry is not suspended by civil or criminal proceedings.

To the extent that SARS is not able to obtain the relevant information, it can also apply for a warrant to enter premises in circumstances where an application is made on an *ex parte* basis to a Judge.

To the extent that SARS is not able to obtain the information, Chapter 8 of the TAA provides that SARS can not only issue

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jeopardy assessments, but also estimated assessments. A jeopardy assessment can be made in advance of the date upon which a return is normally due if SARS is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy. An estimated assessment may be made if the taxpayer fails to submit a return as required or submits a return or information that is incorrect or inadequate.

Once an assessment has been issued, a number of other doors open up for SARS. A preservation order is applicable in circumstances where the amount of tax has not yet been ascertained. Once an assessment has been issued, however, the so-called 'pay now, argue later' principle applies. Section 164 of the TAA provides that the obligation to pay tax is not otherwise suspended by an objection or appeal. However, if an application has been made to suspend a payment for tax, SARS cannot institute collection proceedings for a period of ten business days after notice of the SARS' decision.

At paragraph 74 of the judgment, Rogers J indicated:

“Once tax has been assessed or is otherwise due and payable, the pay-now-fight-later regime applies unless a senior SARS official otherwise directs (s164). SARS may, if the taxpayer fails to pay on due date, obtain civil judgment in terms of s172 of the TAA. SARS is not required to give notice of the application for civil judgment if the giving of such notice would prejudice the collection of tax (s172(3)). SARS may thereupon levy execution in the ordinary way against assets belonging to the taxpayer. SARS can also institute sequestration or liquidation proceedings (s177-178) and is in certain circumstances accorded rights of recovery against third parties (ss179-184).”

It is important to appreciate that SARS can even obtain judgment pursuant to an estimated or jeopardy assessment without giving notice of the application for civil judgment if the giving of the notice would prejudice the collection of tax. Lastly, SARS can also obtain security for the payment of tax from the taxpayer in terms of s161 of the TAA. One of the instances where such security can be obtained is if the taxpayer has frequently failed to pay amounts of tax due or has frequently failed to carry out any other obligations imposed under a tax Act. Importantly, in the case of a taxpayer which is not a natural person, SARS can also require the members, shareholders or trustees who control or who are involved in the management of the taxpayer to enter into a contract of suretyship in respect of the liability for tax which may arise from time to time.

One can expect that the judgment of Rogers J in the *Tradex* case is not the end of this saga, but probably only the beginning. Given the other remedies that are available to SARS, one can expect a number of other steps to be taken by SARS in order to obtain information and/or ultimately to issue assessments. The moment an assessment is issued, the collection of the tax allegedly due becomes easier and security can be obtained for the payment of the taxes.

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