

INTERPRETATION OF FISCAL LEGISLATION

The judgment of the Supreme Court of Appeal in *Commissioner SARS v Bosch (394/2013) [2014] ZASCA 171 (19 November 2014)* (*Bosch case*) dealing with the fiscal consequences of a deferred delivery transaction is not only important in the context of the meaning of simulation, but also with reference to the way in which legislation should be interpreted. In the *Bosch case* the question arose as to the meaning of s8A of the Income Tax Act, No 58 of 1962, which read that there was to be included in a taxpayer's income an amount of any gain made by him by the exercise, cession or release during a year of assessment of any right to acquire a marketable security.

The issue in dispute was whether the right to acquire shares arose when the taxpayer exercised the option to acquire shares or only when the time for payment and delivery of the shares arrived. It was indicated that, as a starting point, the words of the section must be considered in the light of their context, the apparent purpose of the provision and any relevant background material. It was indicated that there may be 'rare' cases where the words in the statute are only capable of bearing a single meaning. However, outside those type of scenarios it was indicated that it is 'pointless' to refer to a statutory provision having a plain meaning. It was indicated that one meaning may strike the reader as syntactically and grammatically more plausible than another. However, as soon as more than one possible meaning is available, the determination of the proper meaning depends as much on context, purpose and background as on dictionary definitions or even 'excessive peering' at the language to be interpreted without sufficient attention to the historical contextual scene.

In the context, reference was made to a right to acquire a marketable security. It did not refer to the acquisition of a marketable security. It was indicated that, if an offer is made to sell a marketable security, in circumstances where the offer is not linked to keep the offer open for a defined period, the offeree has a right to acquire the marketable security for so long as the offer remains open for acceptance.

Apart from the fact that the fiscal legislation was amended subsequently in order to address the apparent anomaly, the court specifically referred to the explanatory memorandum that accompanied the amending legislation that indicated that the previous wording "fail to fully capture all the appreciation associated with the marketable security as ordinary income".

The court also indicated that, in the case of a marginal question of statutory interpretation, "evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation". It was indicated that the conduct of SARS that administered the legislation provides evidence of how reasonable persons in their position would understand and construe the legislation. It is thus a valuable pointer to the correct interpretation of the legislation. Given the fact that the South African Revenue Service (SARS) interpreted the legislation in a specific manner (contrary to the argument that was presented in the *Bosch case*, the court thus accepted the interpretation contended for by the taxpayer.

The *Bosch case* is clear authority for the fact that one should not adopt a literal interpretation to legislation as the so-called plain meaning approach is not helpful. The moment more than one meaning is possible, one should look at all the surrounding circumstances, including:

- subsequent legislation and the reason for the subsequent legislation; and
- the way in which SARS has interpreted the legislation previously.

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NO EVIDENCE JUSTIFYING PENALTY

Judgment was handed down in the Tax Court on 18 November 2014 in the case of *AB (Pty) Ltd v The Commissioner for the South African Revenue Service* (case number 1132, as yet unreported).

In this matter the South African Revenue Service (SARS) audited and assessed a vendor in respect of Value-added Tax (VAT). It appeared that the vendor could not adequately explain, nor provide supporting documentation, in respect of discrepancies between its VAT declarations for the relevant periods, and the VAT control account in its books.

The vendor objected against the assessments, but the objection was only partially allowed. The revised assessments, following the partial allowance, were in respect of overstating input VAT, additional tax at 200% in terms of s60 of the VAT Act, No 89 of 1991 (VAT Act) (as it read at the time), a 10% late payment penalty in terms of s39 of the VAT Act, and interest.

The vendor appealed against the decision of SARS to not allow the objection in full. However, the vendor subsequently conceded that the capital amount of the tax was due, and proceeded with the appeal only in respect of the additional tax, late payment penalty, and interest.

In support of its appeal, the vendor submitted to SARS that it had never been its intention to evade tax, that it was under the impression that its auditor was correctly dealing with its tax affairs (not having any tax or accounting experience themselves), and requested that SARS be lenient and waive the penalties and interest.

In respect of the 200% additional tax, the parties agreed that SARS had the duty to begin and that the onus was on SARS to prove that the imposition of the additional tax was correct.

SARS called one of its auditors as a witness, which recommended to an internal committee that the additional tax be imposed. However, the decision to impose the additional tax was ultimately made by a more senior committee, and little reliance could thus be placed on the witness.

The court noted that SARS did not place any evidence before the court as to how and why the senior committee arrived at its decision, and there was thus no evidence that would enable the court to assess the correctness of the decision. The court also noted that SARS, at the outset of the hearing, advised the court that it no longer sought to impose 200% additional tax, but only 100% additional tax. This implied that SARS conceded that the decision of the committee was incorrect.

The court took the approach that a court is allowed to re-hear the entire matter where the correctness of a discretionary decision (which is subject to objection and appeal) is contested.

On such a rehearing, SARS has to lead evidence afresh to show how the percentage of additional tax was arrived at, and that it was correct, but no such evidence was presented. SARS did thus not discharge the onus which it had accepted.

The court accordingly set aside the imposition of the additional tax, and directed that "the additional tax be remitted to nil". The court did not deal with the late payment penalty and the interest.

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