

FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

DATE OF JUDGMENT: 29 JULY 2010

CASE NO.: 1434/2010

5 *In the matter between:*

GRAIN SA

Applicant

and

COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE

10 SERVICES

Respondent

15

GOEDGENOEG / APPROVED
DATE/DATUM 02/09/2010 HANTEKREUNINGSIGATURE

JUDGMENT

JORDAAN, J : In this matter the applicant approaches the Court for declaratory orders declaring certain decisions taken by the respondent, the Commissioner of Inland Revenue, as wrong and declaring that certain payments received by the applicant from the Maize Trust are indeed donations and not consideration as defined in the Value Added Tax Act, 89 of 1991.

25 Firstly/

Firstly, the respondent contends that it is not appropriate for this Court to make such an order at this stage since there are various reasons why the respondent should not be curtailed in his duties to exercise his, what was called,
5 "unfettered discretion" in terms of the said Act when performing his duties.

It was also in the heads of argument argued that if the applicant's income is later on found by the respondent as subject to payment of value added tax, that will amount to an
10 assessment which would be subject to objection and appeal and should be dealt with in terms of the procedure envisaged for that purpose in terms of this Act and the Income Tax Act by the Tax Court as such.

It is common cause that what happened here is that the
15 respondent made a ruling in terms of Section 41 of the Act, more specifically Section 41(b) of the Act regarding the said payments.

The provisions regarding objections and appeals contained in the Act is contained in Sections 32 – 37 thereof
20 and such a ruling does not form part of any of the sections referred to in those sections as being subject to objection and appeal. The Act therefore does not provide for objection and appeal against rulings like this.

The respondent, represented by Mr Van Vuuren,
25 maintained /

maintained that it would be prejudicial to the, as previously stated, "unfettered discretion" of the respondent if declaratory orders are made at this stage since the respondent has to see to the exercise of his duties in terms of the Act and will be
5 curtailed in that regard if an order is granted at this stage.

A similar matter and similar arguments have been dealt with in the matter of *Shell's Annandale Farm (Pty) Ltd v Commissioner, South African Revenue Services* reported in 2000 (3) SA 564 CPD and I refer to specifically page 571
10 thereof although the issue is dealt with from page 568H – 571J. Dealing with that the learned judge said the following;

"When a court has to determine whether it should exercise its discretion in favour of a declaratory order considerations of public policy come into play. In matters
15 like the present it is a weighty consideration that the Commissioner for Inland Revenue is placed in an invidious position where taxpayers attempt to short-circuit the procedural provisions of the Act. As Van Dijkhorst J said:

20 'There is a danger that the courts may be flooded with cases where entrepreneurs seek certainty about their tax liability before embarking on new ventures or schemes. The Commissioner would be in an invidious position if he is forced to defend every tentative opinion he expresses
25 in /

in a court of law.' (At 124D).

5 This is not such a case. It concerns a dispute as to whether the proceeds of an expropriation are subject to VAT. The dispute is a real one and applicant has not approached this court to obtain a certainty before embarking on 'new ventures or schemes'. Respondent initiated the dispute with a series of threatening correspondence. Furthermore a dispute of law, namely whether the proceeds of an expropriation attract VAT is not dissimilar in principle from a dispute as to
10 whether the proceeds of a publishing department of a university constitute receipts and accruals of an educational institution of a public character. In the circumstances thus I find that a disputed liability for
15 VAT as in the instant case is an appropriate subject for a declaratory order."

20 This applies to the present matter as well. It was also argued on behalf of the respondent that this Court should not decide the matter because all the facts pertaining to the matter were not thrashed out to the bone as would have been possible in a trial matter. I disagree with this. At the meeting held between the relevant parties the respondent had all the opportunity to get the core of all the facts relevant to his decision and if he was of the
25 opinion/

opinion that those facts were insufficient he should not have made a ruling, but have insisted on obtaining those facts before making a ruling. I am therefore unpersuaded that this Court should not make a
5 declaratory order if justified by the facts.

The background to the matter is that the Maize Trust is one of so-called agricultural industry trusts that were created. The objectives of the Maize Trust is to provide funding to the benefit of the maize industry, in particular market and
10 production related research, acquisition and dissemination of market information and access to markets in respect of South African maize by providing infrastructure thereof, training and assistance in areas where the need exists.

For that purpose applications for funding are invited by
15 the Trust from time to time. The applicant, for several years, applied for such funding and received funding from the Trust. The applicant is an association not for gain. It runs various projects in the interest of the maize industry utilising the funds received from the Trust. These projects can be categorised as
20 follows, namely:

- (1) acquisition and dissemination of information to schools regarding the school industry;
- (2) providing market and production research information to the maize industry and producers;
- 25 (3)/

(3) providing market infrastructure, training and assistance in rural areas which is called a so-called "Farmers Development Program", which latter program is solely funded by the Trust.

- 5 The other programs are partially funded by the Trust and also by funds of the applicant itself. The funds obtained from the Trust must be used as set out in the application for funding and are paid out in three stages. The results and reconciliations of the program must be provided to the Trust.
- 10 Funds not utilised for such purpose must be paid back to the Trust.

In 2008 the applicant sought a VAT ruling from the respondent to the effect that funds so received from the Trust are donations as defined in the Act and thus exempt from the
15 payment of value added tax. The respondent initially ruled that such payments were not donations but consideration for supplies and that the applicant was therefore obliged to account for output tax on such payments received.

At a later meeting, and after representations were made
20 to the respondent, the parties discussed the matter again and it led eventually to the first ruling being withdrawn and a new ruling made by the respondent. In terms of the latter ruling all monies received from the Trust for the various programs are regarded as donations with the exception of money received

25 for/

for the Farmers Development Program which is regarded as consideration and in respect of which the applicant must issue tax invoices for services rendered to the involved farmers for such supplies and not invoices to the Maize Trust.

5 The applicant now approaches the Court for declaratory orders as aforesaid to the effect that money so received for the Farmers Development Program are donations and not subject to value added tax.

In terms of the Act "consideration" is defined as follows:

10 "In relation to the supply of goods or services to any person, includes any payment made or to be made (including any deposit on any returnable container and tax), whether in money or otherwise, or any act or
15 forbearance; whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods or services, whether by that person or by any other person, but does not include any payment made by any person as a donation to any association not for
20 gain."

20 The rest of the definition is irrelevant.

"Donation" is defined as:

"...means a payment whether in money or otherwise voluntarily made to any association not for gain for the carrying on or the carrying out of the purposes of that
25 association/

association and in respect of which no identifiable direct
valuable benefit arises or may arise in the form of a
supply of goods or services to the person making that
payment or in the form of a supply of goods or services
5 to any other person who is a connected person in relation
to the person making the payments, but does not include
any payment made by a public authority or a
municipality."

It is common cause and conceded on behalf of the
10 respondent that the emerging farmers that gain by the said
program are not connected persons to the Maize Trust.
Nothing more has to be said about this.

The only crucial question here is whether the payments
made by the Trust to the applicants constitute donations or
15 not. It was argued on behalf of the applicant that the
definition broken down to its different essentials point to only
one result and that is that the payments received are
donations. It is common cause that payments are made in
money, are made voluntarily by the Trust and on the accepted
20 facts there is no dispute as to the fact that it is made
voluntarily. Applications are asked for and it can be refused or
granted. There is nothing in the facts before the Court that
points to any other conclusion as that such payments are made
voluntarily and can be refused by the Trust if they feel like it.
25 The/

The mere fact that such payments have been made for quite a few years by the Trust to the applicant does not alter this. It is not in dispute that the applicant is an association not for gain as required by the definition and that the payments
5 are made for the carrying on or the carrying out of the purposes of the applicant's association.

There is no indication that a payment is made by a public authority or municipality since nowhere does it appear that the Trust is such a body.

10 The last requirement, in respect of which no identifiable direct valuable benefit arises or may arise to the Trust or a connected person is also discussed in the heads on behalf of the applicant and was argued on behalf of the applicant. I already pointed out that it was conceded that the farmers were
15 not connected persons to the Trust and also that the Trust itself receives no gain from the payments made. No identifiable valuable benefit has been pointed out by the respondent.

What is more, in the definition of "consideration" it
20 specifically excludes payments made as donations to an association not for gain. That implies that if services or goods are supplied for which payment is received, once such payment consists of a donation, it is not considered as consideration in terms of the definition.

25 The/

The respondents argue in essence that the simple realities are that the applicant makes supplies to emerging farmers. It does so because of funding received from the Maize Trust, it therefore obtains consideration for the supplies
5 and is therefore subject to value added tax. That argument, to my mind is a simplification of the matter and disregards the definition of "consideration" as contained in the Act.

The ruling made by the respondents as such also rules that invoices should be issued to the emerging farmers and not
10 to the Maize Trust. That creates the impression that the respondent is of opinion that the payments, although done by the Trust, are made on behalf of the farmers and therefore are to be regarded as consideration given by the farmers as such. There is no factual basis for such an inference. No farmer
15 applies for funding. Their identities are totally unknown to the Trust and there is no indication that the Trust in any way is entitled to a refund from the farmers. Mr Van Vuuren, on behalf of the respondents, could not explain that part of the ruling.

20 I have no doubt that the payments made to the applicants by the Trust are donations as defined in the Act. There is in essence no differentiation between the funds paid for the other projects and the Farmers Development Program. The mere fact that the receivers of the supplies in the latter program can
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be identified does not alter the essence of the matter.

In the result I am of opinion that the order should be granted and prayers 1 – 3 are therefore GRANTED.

COURT ADJOURNS