THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Commissioner for the South African Revenue Service v Medtronic International Trading S.A.R.L (Case no 456/2021) [2023] ZASCA 20 (03 March 2023)

Today the Supreme Court of Appeal (SCA) dismissed an appeal from the Gauteng Division of the High Court, Pretoria. This appeal concerned itself with whether certain provisions of the Tax Administration Act 28 of 2011 (TAA) precluded remission of interest levied on late payment of value added tax (VAT), as provided for in the Value Added Tax Act 89 of 1991 (VAT Act).

The respondent, Medtronic International (Metronic), was defrauded by a former employee of millions of rands through embezzlement of its funds. For a number of years, the employee presented fraudulent VAT returns to SARS and sought reimbursements thereon. Once the matter was discovered, Medtronic applied to SARS' Voluntary Disclosure Programme (VDP) and disclosed their default to SARS, as well as the reasons therefor. During March 2018, Medtronic requested SARS to waive the interest payable as a result of its default of payment of VAT, taking into account the circumstances in which the loss had occurred. In response, SARS informed Medtronic that it was not empowered to waive interest under the VDP and advised Medtronic that it could either pay the post-relief amount in full or withdraw from the VDP programme and follow the normal course in remedying its default. Medtronic decided to proceed under the VDP and entered into a written agreement with SARS. Medtronic fully complied with the terms of the VDP agreement and paid the post-relief amount in full, including the interest that resulted from the default.

On 12 October 2018, Metronic requested SARS to remit interests levied on the capital tax representing the amount of default, basing the request on s 39(7) of the VAT Act in conjunction with SARS' Interpretation Note 61. At the time, s 39(7) was subject to be repealed in terms of s 272 of the TAA, when the amendment of the act eventually came into effect. Bearing the impending repeal in mind, SARS considered the request

invalid and informed Metronic that it ought rather to submit a notice of objection. Metronic objected to this suggestion on the basis that the VDP agreement explicitly stated that objections to an assessment or determination issued or made by SARS were impermissible in terms of s 232(2) of the TAA. Medtronic then requested SARS to withdraw the refusal to consider its earlier application for remittance, in terms of s 9(1) of the TAA. This request too was refused by SARS.

This appeal essentially raised two issues to be determined, namely whether Chapter 16, Part B and ss 225-233 of the TAA prohibited the remission of interest under s 39(7) of the VAT Act once a VDP agreement had been implemented, and whether, irrespective of the VDP agreement, SARS' bore the statutory duty to consider and adjudicate a taxpayer's request for remission of interest. The SCA considered the matter on a narrow basis by determining whether SARS lawfully could have refused to even consider the request for remission and to, thereafter, take a decision in respect thereof. This entailed an administrative decision, and Medtronic relied on the Promotion of Administrative Justice Act 30 of 2000 in this regard.

The SCA found that SARS steadfastly refused to even entertain Medtronic's application and, as a result, did not consider and determine the application on its merits. The lawfulness of such a course of action can be determined with reference to s 33 of the Constitution of the Republic of South Africa, which guaranteed lawful, reasonable and procedurally fair administrative action. The Court found that the Commissioner's refusal undermined a fundamental right enshrined in the Bill of Rights and concluded that SARS bore a statutory duty buttressed by the Constitution to, at the very least, give consideration to the request and then make a decision based on the merits of the matter. SARS' refusal was therefore unjustified and eligible to be reviewed under ss 6 and 8 of PAJA.

In the result, the SCA dismissed the appeal with costs.

The minority judgment (Goosen AJA, with Makgoka JA concurring) found that the conclusion of a voluntary disclosure agreement, concluded in terms of s 229 of the Tax Administration Act, precludes the subsequent consideration of remission of interest in terms of s 39 (7) of the VAT Act or s 187 (6) of the TAA. The minority reasoned that the conclusion of the agreement establishes the liability for the payment of the agreed tax debt. Upon the ordinary principles of the law of contract, a party is bound to the terms of the bargain it has struck. A party to an agreement may only resile therefrom upon recognised and established grounds. None were alleged or established.

The minority expressed the view that upon a proper interpretation of the TAA, in particular Part B of Chapter 16 which deals with voluntary disclosure relief, an application for remission of interest is not expressly excluded. It left open the question

whether remission of interest may be considered simultaneously with consideration of voluntary disclosure relief. No definitive finding to this effect was made since, on the facts, Medtronic International had elected not to proceed with such application prior to the conclusion of the voluntary disclosure agreement.

The minority would therefore have upheld the appeal, with costs.

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