THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 401/2003

In the matter between:

MICHAEL WEARE Appellant

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and

THE COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICE Respondent

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Coram : SCOTT, FARLAM, MTHIYANE, CLOETE JJA *et* ERASMUS AJA

Date of hearing : 13 SEPTEMBER 2004

Date of delivery : 29 SEPTEMBER 2004

Summary: Overpayment of VAT – refundable in terms of s 44(2)(a) of Act 89 of 1991, not in terms of s 44(1) – overpayment in terms of prevailing practice.

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] The appellant carries on business as a bookmaker. The business is an 'enterprise' as defined in s 1 of the Value-Added Tax Act 89 of 1991 ('the Act') and the appellant is a registered vendor in terms of s 23 of the Act. During the period September 1991 (when the Act came into operation) until the tax period for the period June to July 1996 the appellant overpaid a total of R1 432 038,83 in value-added tax ('tax'). After deducting the tax payable for the latter tax period he claimed a refund of R1 417 018,99. The appellant contended both in the Natal Income Tax Special Court and in this court that he was entitled to a refund in terms of s 44(1) read with s 16(3) and s 16(5) of the Act. The respondent, on the other hand, contended that a refund was payable in terms of s 44(2)(a). Whether the refund is to be made in terms of s 44(1) or s 44(2)(a) is the first of the two main issues requiring determination in this appeal. If the refund is to be made in terms of s 44(1), the appellant (and other bookmakers who overpaid in similar circumstances) would be entitled to recover the amount overpaid during a period of five years preceding the claim, which in the present case would cover the full amount of the overpayment. If in terms of 44(2)(a), the appellant's claim would be

subject to the further proviso that the refund would be limited to the overpayment made during the preceding six months 'if the Commissioner is satisfied that such payment was made in accordance with a practice generally prevailing at the said date', ie the date of payment. This proviso is contained in s 44(3) to which s 44(2)(a) is subject. (I shall refer in greater detail to these provisions later in this judgment.) The respondent ruled that the payments in question were made in accordance with a practice generally prevailing and accordingly limited the amount repayable to the appellant to R336 259,93. The existence or otherwise of the practice is the second issue requiring determination. The appellant appealed unsuccessfully to the Special Court. The present appeal is with the leave of that court granted in terms of s 86A(5) of the Income Tax Act 58 of 1962, read with s 34 of the Act.

[2] In the ordinary course of the appellant's business he entered into betting transactions with punters, each of whom paid him a sum of money against an undertaking by him to pay a specified multiple of the amount so paid depending upon the outcome of a future event, typically the result of a horse race. In the event of a punter's wager proving successful the appellant paid out winnings to that punter. When the circumstances were such that the appellant deemed it necessary to limit his risk exposure in relation

to the bets he had received, he himself would place 'cover' or 'take-back' bets with other bookmakers who would similarly be registered vendors in terms of the Act. When these proved to be winning bets the appellant, of course, would receive 'take-back' winnings from the other book makers. It is these 'take-back' winnings which gave rise to the dispute which is the subject of this appeal.

[3] In order to better understand the contentions of the parties it is necessary to say something of the scheme of the Act and to refer in some detail to certain of its provisions which are relevant to bookmakers and have a bearing on the issues in question.

[4] Section 7(1)(a) levies tax 'on the supply by any vendor of goods or services supplied by him . . . in the course or furtherance of any enterprise carried on by him . . .' . Section 7(2) provides that, except as otherwise provided in the Act, the tax payable in terms of s 7(1)(a) is to be paid by the vendor referred to in that subsection. The Act embodies a self-assessment system of taxation. A vendor is required to calculate the tax payable by him in respect of each tax period during which he has carried on his enterprise. Broadly speaking, this involves the calculation of both his 'output tax' and his 'input tax' and deducting the latter from the

former. The result is the tax he has to pay. Output tax, 'in relation to any vendor', is defined in s 1 as meaning -

'the tax charged under section 7(1)(a) in respect of the supply of goods and services by that vendor.'

Input tax, 'in relation to a vendor' is defined as meaning -

'(a) tax charged under section 7 and payable in terms of that section by –

(i) a supplier on the supply of goods or services made by that supplier to the vendor; or . . .

where the goods or services concerned are acquired by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies or, where the goods or services are acquired by the vendor partly for such purpose, to the extent (as determined in accordance with the provisions of section 17) that the goods or services concerned are acquired by the vendor for such purpose'.

[5] But for the deeming provision in s 8(13), a betting transaction would not attract tax under the Act. This is because a betting transaction would not constitute a 'supply of goods or services' within the meaning of s 7(1)(a) as transactions sounding only in money are expressly excluded from the definition of 'goods' and 'services' in s1 of the Act. However, s 8(13) provides:

'For the purposes of this Act, where any person bets an amount on the outcome of a race or on any other event or occurrence, the person with whom the bet is placed shall be deemed to supply a service to such first-mentioned person'.

In terms of s 10(17) the consideration in money for the service deemed by s 8(13) to be supplied shall in turn 'be deemed to be the amount that is received in respect of the bet'. In the result, the appellant is deemed to supply a service to punters who place bets with him and the appellant's output tax – for which he is accountable to the respondent – is calculated on the amounts of the bets so received.

[6] Section 16(3) provides that the tax payable by a vendor is to be calculated by deducting from the sum of the vendor's output tax the amounts of input tax for which provision is made in the section. In the case of a bookmaker, what may be deducted is, first, the input tax calculated on bets laid with other bookmakers, ie take-back bets. This is deductible by virtue of s 16(3)(a)(i) which permits the deduction of input tax 'in respect of supplies of goods and services . . . made to the vendor during that tax period'. The second deduction that may be made is the input tax calculated on the winnings paid to successful punters. This is in terms of s 16(3)(d) which provides for the deduction of 'an amount equal to the tax fraction of any amount paid by the supplier of the services contemplated in section 8(13) as a prize or winnings to the recipient of such services'.

[7] In 1996, subsequent to the period relevant to the present proceedings, the Act was amended by the insertion of s 8(13A) by s 20 of Act 46 of 1996. The effect of the new section was to deem the tax fraction of the winnings received by a bookmaker on take-back bets placed by him with other bookmakers to be output tax for the service rendered by him to the other bookmakers. Prior to the amendment there was, therefore, no provision in the Act requiring take-back winnings to be included in the calculation of the bookmaker's output tax and hence the tax payable by him. The tax he was obliged to pay was the difference between, on the one hand, the amount of his output tax calculated on the bets he received from punters and, on the other, the input tax calculated on the winnings paid by him to punters and on take-back bets placed by him with other bookmakers.

[8] The absence in the Act of a provision such as that contained in the inserted s 8(13A) appears to have been a *hiatus* overlooked by the Commissioner and bookmakers alike. Indeed, it appears to have been common cause that, given the scheme of the Act, one would ordinarily expect such winnings to be taken into account in the calculation of output tax just as the payment of winnings to punters is taken into account in the calculation of a bookmaker's input tax. Take-back winnings were, however, dealt with in the

Guide for Vendors VAT 404 which was issued in 1991 and reissued in 1995. Paragraph 7.3.9.2 of both editions provides:

'. . . Where a bookmaker wins a covering bet he will be required to account for output tax on the amount received as winnings (including the original stake). In order to calculate this amount the tax fraction is applied to the actual amount received from the other bookmaker or the totalizator.'

[9] The overpayment of tax by the appellant during the period in question occurred as a result of the appellant (in common with other bookmakers) including in his calculation of the tax payable by him the take-back winnings he had received from other bookmakers. In doing so he adopted a so-called 'netting off' method which differed from the method contemplated in both the Act and the Guide. On the assumption that take-back winnings were required to be taken into account in calculating the tax payable, the method contemplated in the Act and the Guide would be the following:

(i) Output tax would be calculated on the total amount of the bets placed by punters with the bookmaker plus the total amount of the take-back winnings received by the bookmaker.

(ii) Input tax would be calculated on the total amount of the winnings paid to punters by the bookmaker plus the

total amount of the take-back bets placed by the bookmaker.

(iii) The tax payable would be the result of the calculation referred to in (i) less the result of the calculation referred to in (ii).

The method adopted by the appellant was the following:

(i) In calculating his output tax he took the total amount of bets received (subject to output tax), deducted from this figure the total amount of the take-back bets he had placed with other bookmakers (subject to input tax) and calculated his output tax on the difference.

(ii) In calculating his input tax he took the total amount of winnings he had paid to punters (subject to input tax), deducted from this amount the total amount of take-back winnings he had received from other bookmakers (assumed to be subject to output tax) and calculated his input tax on the difference.

(iii) He paid tax on the result of the calculation referred to in (i) less the result of the calculation referred to in (ii).

Regardless of whether one or the other method is employed, the result, of course, is the same. The appellant testified that the sole reason for adopting the method he did, was that the forms he had

to complete for his provincial betting taxes required him to furnish information in this manner and it was convenient simply to take the information from these forms when completing his VAT return.

[10] Counsel for the appellant submitted, however, that because of the fortuitous adoption by the appellant of the 'netting off' method of calculation, the refund to which he was entitled was a refund in terms of s 44(1) and not s 44(2)(a). It was fortuitous, he said, because had the tax payable been calculated in the manner contemplated by the Act, the overpayment would have been refundable in terms of s 44(2)(a) and not s 44(1).

[11] In order to appreciate the argument advanced by counsel it is necessary to quote certain provisions of the Act. The first is the first proviso to s 16(3). At the relevant time it read:

'Provided that where any vendor is entitled under the preceding provisions of this subsection to deduct any amount in respect of any tax period from the said sum, the vendor may deduct that amount from the amount of output tax attributable to any later tax period to the extent that it has not previously been deducted by the vendor under this subsection.'

In passing it is necessary to observe that the reference to what may be deducted 'under the preceding provisions' is a reference to the input tax that may be deducted, while the 'said sum' is a

reference to the sum of the vendor's output tax. The next provision relied upon is s 16(5). The relevant part reads:

'If, in relation to any tax period of any vendor, the aggregate of the amounts that may be deducted under subsection (3) from the sum referred to in that subsection . . . exceeds the said sum, the amount of the excess shall, subject to the provisions of this Act, be refundable to the vendor by the Commissioner as provided for in section 44(1).'

Section 44(1), in turn, read at the time:

'Any amount of tax which is refundable to any vendor in terms of s 16(5) in respect of any tax period shall, to the extent that such amount has not been set off against unpaid tax in terms of subsection (6) of this section, be refunded to the vendor by the Commissioner: Provided that –

(i) The Commissioner shall not make a refund under this subsection unless the claim for the refund is made within five years after the end of the said tax period; or

(ii) Where the amount would be so refunded to the vendor is determined to be R10 or less, the amount so determined shall not be refunded in respect of the said tax period but shall be carried forward to the next succeeding tax period of the vendor and be accounted for as provided for in section 16(5)'

[12] Counsel's contention, shortly stated, is as follows. Because the 'netting off' method of calculation, as set out above, was adopted by the appellant during the periods in question, 'take-back winnings' were deducted from the amount of winnings paid to

punters (subject to input tax) to arrive at the appellant's input tax. In the result, so the argument went, there was an under deduction of input tax. Accordingly, the amount of input tax not deducted from output tax in respect of previous tax periods could be deducted in a later tax period in terms of the first proviso to s 16(3). This, it was argued, is what the appellant did for the tax period in respect of June to July 1996, resulting in an excess of input tax over output tax for that tax period. That excess, so the argument went, was an excess within the meaning of s 16(5) and was accordingly refundable in terms of s 44(1).

[13] In my view the argument is unsound. The first proviso to s 16(3) makes provision for the deduction from output tax in a later tax period of an amount in respect of input tax not previously deducted from output tax. But in the present case all amounts in respect of input tax which were deductible from output tax were taken into account in the calculation of the tax payable in respect of each tax period. What the appellant did was not to omit an amount subject to input tax but to include in each calculation his take-back winnings as an amount subject to output tax. Input tax was not understated; output tax was overstated. It was this that increased the tax payable and resulted in the overpayment. This is so because regardless of the method of calculation used, in

substance the take-back winnings were treated as being subject to output tax. Whether these were deducted from an amount subject to input tax or added to an amount subject to output tax their nature remained the same. That could not change simply because one or other method of calculation was used when both methods result in the same tax figure. It follows that in my judgment the appellant's reliance on the proviso in s 16(3) and hence the provisions of s 16(5) is misplaced. It follows too that the refund to which the appellant is entitled is not one in terms of s 44(1).

[14] This brings me to s 44(2). It reads:

'Subject to the provisions of subsection (3), where –

(a) any amount of tax, additional tax, penalty or interest paid by any person in terms of this Act to the Commissioner was in excess of the amount of tax, additional tax, penalty or interest, as the case may be, that should properly have been charged under this Act; or

(b) any amount refunded to a vendor in terms of subsection (1) was less than the amount properly refundable under that subsection,

the Commissioner shall, on application by the person concerned, refund the amount of tax, additional tax, penalty or interest paid in excess or the amount by which the amount refunded was less than the amount properly refundable, as the case may be.'

It was not in dispute that if the overpayment was not refundable under s 44(1), it would be refundable under s 44(2)(a). But the latter section is 'subject to the provisions of subsection (3)'. I have previously referred to the six-month limitation contained in s 44(3) but for the sake of completeness I quote s 44(3)(a), as it read prior to its amendment in 1997.

'The Commissioner shall not make a refund under subsection (2), unless –

(a) the claim for the refund of such excess amount of tax, additional tax, penalty or interest is made within five years after the date upon which payment of the amount claimed to be refundable was made: Provided that if the Commissioner is satisfied that such payment was made in accordance with the practice generally prevailing at the said date, no refund shall be made unless the claim for the refund is made within six months after that date . . . . '

[15] The question that arises is whether the overpayment was made in accordance with a practice generally prevailing. Mr Peter Franck, who holds the position of Director: Value Added Tax Policy and Legislation in the South African Revenue Service, testified that until the point was taken in the course of 1996 it was accepted by all in the revenue service that bookmakers' winnings on take-back bets were subject to output tax. This, he said, was not only consistent with the scheme of the Act but was reflected in both

editions of the VAT Guide 404. He said that once the *lacuna* in the Act was discovered, steps were immediately taken to have the Act amended to rectify the situation. In the meantime, on making inquiries, it transpired that nearly every bookmaker in the country was seeking a refund. The inference arising from this evidence is that prior to the discovery of the *lacuna* in the Act, there existed a general practice of including take-back winnings as an amount subject to output tax in the calculation of the tax payable by bookmakers. In terms of s 37 of the Act the onus was upon the appellant to show that the overpayment of tax made by him was not in accordance with the practice generally prevailing. Mr Peter Maxwell, a partner at Deloitte and Touche, who testified on behalf of the appellant, suggested that there may have been some bookmakers for whom he did not act who had not accounted for take-back winnings. This somewhat vague suggestion was clearly insufficient to discharge the burden of proof on the appellant. Counsel also sought to make something of the fact that the method adopted by the bookmakers differed from that contemplated in the Guide. But whether the one or other method was employed is of little consequence; the result was the same. The point is that the prevailing practice was for bookmakers to

include in the calculation of their tax the take-back winnings they received as being subject to output tax.

(16) The appeal is accordingly dismissed with costs, including the costs occasioned by the employment of two counsel.

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D G SCOTT
JUDGE OF APPEAL

CONCUR:

FARLAM JA
MTHIYANE JA
CLOETE JA
ERASMUS AJA