THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 135/2021

In the matter between:

PURVEYORS SOUTH AFRICA
MINE SERVICES (PTY) LTD **APPELLANT**

and

COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICES **RESPONDENT**

Neutral Citation:	*Purveyors South Africa Mine Services (Pty) Ltd v Commissioner for the South African Revenue Services* (135/2021) [2021] ZASCA 170 (7 December 2021)
Coram:	PETSE AP, MATHOPO, SCHIPPERS, MOKGOHLOA JJA and MOLEFE AJA
Heard:	16 November 2021
Delivered:	This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The

date and time for hand-down is deemed to be 15h00 on 7 December 2021.

Summary: Voluntary disclosure – whether taxpayer met the requirements of section 227 of the Tax Administration Act 28 of 2011 – Commissioner for the South African Revenue Services had knowledge of information subsequently disclosed and prompted taxpayer to comply – disclosure not voluntary – requirements of section 227 not satisfied – appeal dismissed.

ORDER

On appeal from: The Tax Court of South Africa, Pretoria (Fabricius J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of the two counsel.

JUDGMENT

Mathopo JA (Petse AP, Schippers, Mokgohloa JJA and Molefe AJA concurring):

[1] This is an appeal from the decision of the Tax Court of South Africa, Pretoria (the Tax Court) upholding the rejection by the respondent, the Commissioner for the South African Revenue Services (SARS), of the Voluntary Disclosure Relief Application (the application) submitted by the appellant, Purveyors South Africa Mine Services (Pty) Ltd (Purveyors), under s 227 of the Tax Administration Act 28 of 2011 (TAA). Purveyors disputes the decision of SARS to reject the application. On the other hand, SARS submits that its decision is in accordance with the provision of s 227.

[2] Section 227, which is headed 'Requirement for valid voluntary disclosure', provides:

'The requirements for a valid voluntary disclosure are that the disclosure must –

(a) be voluntary;

(b) involve a 'default' which has not occurred within five years of the disclosure of a similar 'default' by the applicant or a person referred to in section 226(3);

(c) be full and complete in all material respects;

(d) involve a behaviour referred to in column 2 of the understatement penalty percentage table in section 223;

(e) not result in a refund due by SARS; and

(f) be made in the prescribed form and manner.'

[3] The facts are uncomplicated and common cause between the parties. On 12 January 2015, Purveyors entered into a dry lease agreement with Freeport Minerals Corporation, a company incorporated and tax resident in the United States of America (Freeport), in respect of an Embraer 135 LR Aircraft registered in the United States of America. The dry lease agreement allowed Purveyors to operate air charter services for the benefit of Tenke Fungurume Mining SARL (Tenke), a non-resident company that owns and operates a mine located in the Democratic Republic of Congo (the DRC). At the date of conclusion of the dry lease agreement, Freeport held 100% of the ordinary shares in Purveyors and 80% of the shares in Tenke. The remaining 20% of the issued share capital of Tenke was and is still held by La Gécaminés Des Carriérés Et Des Mines S A.

[4] Purveyors entered into an aircraft management agreement with Air Katanga, a company incorporated in the DRC, to provide air charter services for the benefit of Tenke. Based on the aircraft management agreement, Air Katanga serves as manager of the aircraft and is engaged in the business of managing, operating and maintaining the aircraft.

[5] On 19 January 2015, Purveyors commenced with the provision of air charter services to Tenke under a usage agreement. The aircraft transports employees, sub-contractors, suppliers, and business guests from Johannesburg to Lubumbashi and Kinshasa in the DRC generally three times a week, namely on Mondays, Wednesdays and Fridays. Tenke pays a fee in United States dollars to Purveyors per flight hour in exchange for operating the aircraft on a monthly basis subject to an annual reconciliation of costs as per the terms of the usage agreement. Whilst the aircraft is not in use, it is kept at a leased hangar at O R Tambo International Airport. The hangar is owned by Fireblade Aviation, a company incorporated in the Republic of South Africa.

[6] On 16 November 2016, Purveyors ceased to be a wholly owned subsidiary of Freeport by way of a disposal of its entire issued share capital by Freeport to CMOC DRC Limited, which is a company incorporated and tax registered in Hong Kong.

[7] CMOC DRC Limited is affiliated with a sister company named CMOC Mining USA Limited (CMOC USA). CMOC USA is a company incorporated and tax resident in the United States. The initial dry lease agreement was subsequently assumed by CMOC USA and a new dry lease agreement (the agreement) was concluded. All other agreements, including the usage agreement and the aircraft management remain in effect between Purveyors and Tenke and other service providers.

[8] On 30 January 2017, Purveyors requested, via e-mail, a meeting with SARS 'to regularize the VAT that was supposed to be paid over.' In the e-mail, Purveyors informed SARS that: 'We have just received a VAT technical opinion from PwC that we were supposed to pay the VAT over to SARS upon the import of the aircraft'. On the 1 February 2017, SARS responded in an e-mail from Mr Johannes Du Preez in which he indicated that the aircraft was subject to penalty implications. He also requested to see documentation in terms of s 101 of the Customs and Excise Act 91 of 1964.

[9] On 2 February 2017, Mr Kgotso Thakgudi of Purveyors acknowledged receipt of Mr Du Preez's email and indicated that he would revert as soon as possible with the requested information. On 29 March 2017, Mr Du Preez wrote to Purveyors explaining the reasons why VAT and penalties were payable. Mr Du Preez further indicated that Purveyors needed to appoint a clearing agent to assist it with an import permit to regularise its continued default. Purveyors responded on the same day, indicating that it understood from Mr Du Preez's e-mail and from their telephone discussion that VAT output and custom duties were applicable, as well as fines and penalties.

[10] Mr Du Preez responded in an e-mail dated 30 March 2017, in which he sought to clear any misunderstanding and indicated that there existed no waiver of potential penalties, and that if the tax to SARS was late, Purveyors would be liable to pay penalties and interest.

[11] On 16 May 2017, Mr Du Preez wrote a further e-mail to Purveyors indicating that it had to address the matter as he had allowed Purveyors sufficient time to

regularise its tax affairs. Purveyors responded and indicated that it was still awaiting a response from its head office. Purveyors approached its auditors, Price Waters Coopers (PwC), for an opinion as to whether it was liable to pay import VAT. PwC agreed with SARS that Purveyors was obliged to pay import VAT as well as penalties and interest. This was against the backdrop of PwC's earlier opinion, given in January 2017, advising Purveyors to honour its tax obligation in relation to its historical tax liability.

[12] Purveyors took no further steps to regularise its liability for VAT and penalties until 4 April 2018 when it applied for voluntary disclosure relief in terms of s 226 of the TAA. This was approximately a year after the last letter from Purveyors to SARS. Relying on s 227, SARS rejected the application on the grounds that it was not voluntary; and did not contain the facts of which SARS was unaware as those facts had already been disclosed to it prior to the voluntary disclosure application.

[13] The Tax Court agreed with SARS and dismissed Purveyors' case. It found, *inter alia*, that the application was not voluntary as there was an element of compulsion on the part of Purveyors when it submitted the application. This further appeal by Purveyors is with the leave of the Tax Court.

[14] The primary issue in this appeal is whether SARS was correct in rejecting Purveyors' voluntary disclosure application for non-compliance with s 227, more specifically on the ground that it was not made voluntarily. The issue therefore resolves itself into this: does the exchange or discussions between the representatives of SARS and the officials of Purveyors have any material bearing on the application? Purveyors contends that the prior information disclosed to SARS in the process of ascertaining its tax liability is irrelevant and should not preclude it from making a valid voluntary disclosure application. Purveyors' case is that the exchanges have no formal or binding effect on the views expressed by the taxpayer. Essentially, it argues that the application must not be considered at the historical point but crucially at the time when the application is made. In other words, prior knowledge disclosed by the taxpayer is no bar to a valid voluntary disclosure application and does not affect the validity and voluntariness of the application.

[15] As regards the interpretation of the word 'disclosure' in the section, Purveyors contends that there is no requirement that disclosure ought to be new or something of which SARS had not been previously aware. To shore up its argument it aligned itself with the writings of S P Van Zyl & T R Carney, who opined that '. . . "disclosure" is neither restricted in its denotation nor does its context in the TAA limit its meaning to "new" or "secret" information explicitly. To argue this would be precarious in the least.'[1] More about this later.

[16] SARS argues that the application did not comply with the requirements of s 227 of the TAA because, on a proper construction of s 227, Purveyors did not disclose information or facts of which SARS was unaware. It submits that the application was not voluntary as Purveyors was prompted by SARS. In essence, the application was brought because Purveyors was warned that it will be liable for penalties and interest arising from its failure to have paid the relevant tax.

[17] SARS further contends that the Customs Officials had already gained knowledge of the default and had advised Purveyors on 1 February 2017 that the aircraft should be declared in South Africa and VAT paid thereon. The argument advanced is that Purveyors was prompted by the actions of SARS to submit the application.

[18] What is implicated in this appeal is a proper interpretation of s 227 of the TAA. The first and perhaps the most important question to consider is the approach to be adopted by this Court in construing the section. There are *dicta* in many judgments which are open to the construction that, construing tax legislation should be regarded as a respectable contest between the fiscus and the taxpayer concerned. At the same time, careful consideration should be given to the language of the section to ascertain its purpose and avoid a superficial assessment of the facts. One must read the words used in the section in their context, with regard to the apparent purpose of

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[1] S P Van Zyl & T R Carney 'Just How Voluntary Is "Voluntary" for Purposes of a Voluntary Disclosure Application in Terms of Section 226 of the Tax Administration Act 28 of 2011 – Purveyors South Africa Mine Services (Pty) Ltd v Commissioner: South African Revenue Service (61689/2020) [2020] ZAGPPHC 404 (25 Aug 2020)'2021 *THRHR* 84 at 95-110.

the section. In interpreting the section, I borrow largely from *Commissioner for South African Revenue Services v United Manganese of Kalahari (Pty) Ltd*, where this Court stated:

'It is unnecessary to rehearse the established approach to the interpretation of statutes set out in *Endumeni* and approved by the Constitutional Court in *Big Five Duty Free*. It is an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. The approach is as applicable to taxing statutes as to any other statute. The inevitable point of departure is the language used in the provision under consideration.'[2]

We should bear in mind that there is no particular mystic about tax law; ordinary legal principles and terms are involved.[3]

[19] The starting point to notice about the section is that it relates to 'voluntary disclosure'. Each of these words is of wide and general import. Cardinal among words to which meaning ought to be given is 'voluntary'. According to the Shorter Oxford English Dictionary on Historical Principles, the word 'voluntary' means: 'performed or done of one's own free will, impulse or choice; not constrained, prompted, or suggested by another'.[4] An equally important word to attribute meaning is the word 'disclosure' which appears twice in the section. Disclosure means 'to open up to the knowledge of others, to reveal'.[5] In his article titled 'Tax Amnesties in Africa: An analysis of the voluntary disclosure Programme in Uganda', Solomon Rukundo stated the following:

'"Voluntary disclosure occurs when a taxpayer, unprompted and of their own volition, comes forward to disclose their tax liabilities, misstatements or omissions in their tax declarations in order to return to a fully compliant status with respect to legal obligations"'. The taxpayer must not have been prompted by any compliance action by URA such as: initiation of a tax investigation, request for tax information, tax advisory letter, tax health check/review, notice of audit, tax query, or compliance visit by URA officers (URA 2020c). Voluntariness of a

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[2] *Commissioner for South African Revenue Services v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA); 82 SATC 444 para 8.

[3] *Secretary for Inland Revenue v Kirsch* [1978] 3 All SA 308 (T); 1978 (3) SA 93 (T) para 94D.

[4] The Shorter Oxford English Dictionary on Historical Principles (1) 3 ed 1973.

[5] Ibid volume 2.

disclosure is a key policy objective of the programme. If disclosures made by taxpayers prompted by compliance actions were to be accepted, there would be no incentive for taxpayers to correct past deficiencies until it was clear that they are going to be held accountable. The requirement of voluntariness is in line with the model tax amnesty described earlier.'[6]

The words 'voluntary' and 'disclosure' in the section require that the voluntary disclosure application must measure up fully to the requirements of the section. This appears from the textual interpretation of the section. These requirements apply with equal force in South Africa. It is clear that the onus rests on the taxpayer to establish, on a balance of probabilities, that it has fully met the requirements of the section.

[20] The language used in the section clearly indicates the legislature's intention to arm the Commissioner with extensive powers to prevent taxpayers from disclosures which are neither voluntary nor complete in all material respects. The fact that the section provides that the disclosure application must be made in the prescribed form or manner rather than obtaining *ad hoc* advice from SARS is a clear indication that the mischief sought to be prevented is one where a taxpayer discloses information to SARS and later on makes a voluntary disclosure application. The purpose of the application is designed to ensure that errant taxpayers who are not compliant must come clean, out of their own volition and without any prompting, to make amends in respect of their defaults by informing SARS. No purpose would be served if the TAA enables errant taxpayers to obtain informal advice and when it does not suit them, to then apply for voluntary disclosure relief. Whether a voluntary disclosure has been prompted by a compliance action is a question of fact to be determined by examining the circumstances in which it was made.

[21] Applied to the present case, the facts show that from the outset – and well before the submission of its VDP application – Purveyors knew that it was liable for the import VAT on the aircraft and penalties, which were not going to be waived. That much is plain from the e-mail sent on 29 March 2017 by its Office Manager, Ms Amina Mumba, to Mr Du Preez. She said:

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[6] S Rukundo 'Tax Amnesties in Africa: An analysis of the voluntary disclosure Programme in Uganda' (2020) *International Centre for Tax and Administration; African Tax Administration Paper 21* at 25.

'We understand from your mail and our telephonic discussion that a VAT output is applicable and customs duties are applicable as well. However the VAT input is claimable back. Fines and penalties are applicable, however, based on the fact that the company might have been misinformed at the inception of the operation of the aircraft, you are willing to advance that as mitigating circumstances in order to waive the applicable fines and penalties.
Furthermore, if we follow the process outlined below we will be in compliance with all the laws and regulations and you (SARS) will award a document of compliance.'

[22] This e-mail makes three things clear. First, the VDP application by Purveyors was prompted by compliance action on the part of SARS which was aware of the default following interactions between Mr Du Preez and Purveyors' representatives. Second, Purveyors itself appreciated that it was liable for fines and penalties which had to be paid before it would be tax-compliant. Third, the VDP application was not motivated by any desire to come clean, but rather to avoid the payment of fines and penalties. This is underscored both by the absence of any evidence that Purveyors had been contemplating a VDP application; and its failure to follow the process referred to in Ms Mumba's e-mail. Simply put, Purveyors' application was not voluntary.

[23] The contention by Purveyors that it had been advised by an official of SARS (Mr Tsebe) that no import VAT was payable cannot assist it. In his affidavit Mr Tsebe confirmed that he had not been provided with any documentation relating to the relevant transaction, and it was a general inquiry. But what is clear from the evidence is that the Purveyors did not act on the advice of Mr Tsebe: the inference is inescapable that it had indeed charged the import VAT. In January 2017 Mr Thakgudi, its senior accountant, advised SARS that PwC had advised Purveyors that it was 'supposed to pay the VAT over to SARS'. What is more, Purveyors failed to produce any invoice relating to the lease of the aircraft to show that VAT had not been charged. And confronted by Mr Du Preez about its tax default, Purveyors did not protest that it had not received any import VAT on the aircraft.

[24] The disclosure of Purveyors to SARS was not in the context of a voluntary disclosure relief application. It is unconscionable to treat a disclosure by a taxpayer to SARS any different. This especially so where SARS had warned the taxpayer

about the implications of its tax obligation. Purveyors wants us to disregard the discussions and interactions it had with SARS' officials.

[25] It is difficult to understand on what conceivable basis a taxpayer can obtain a voluntary disclosure relief in circumstances where SARS had prior knowledge of the default, regardless of the source of such prior knowledge, and had in addition, warned the taxpayer of the consequences of its default. To grant relief in these circumstances would be at odds with the purposes of the Voluntary Disclosure Programme – to enhance voluntary compliance with the tax system by enabling errant taxpayers to disclose defaults of which SARS is unaware, and to ensure the best use of SARS' resources.

[26] I endorse the opinion that the application must comply with the provisions of the section in all material respects. Moreover, the taxpayer must take SARS into their confidence and voluntarily make a proper and frank disclosure which is neither prompted nor made as a result of any fear or compulsion. SARS must undoubtedly not be aware of the default. The architecture of the section is such that it is designed, by the use of wide and comprehensive language, to dispel any doubt as to what is required of a taxpayer. The section is not a penalty section. If it were, there would be justification for construing its provisions strictly. On the contrary, any valid voluntary disclosure will redound to the benefit of the taxpayer in terms of s 229 of the TAA.[7]

[27] In short, the legislature has endeavoured to make it extremely easy for the taxpayer to comply with the requirements of the Voluntary Disclosure Programme by

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[7] Section 229 of the TAA reads as follows:

'Despite the provisions of a tax Act, SARS must, pursuant to the making of a valid voluntary disclosure by the applicant and the conclusion of the voluntary disclosure agreement under section 230 –

(a) not pursue criminal prosecution for a tax offence arising from the 'default';

(b) grant the relief in respect of any understatement penalty to the extent referred to in column 5 or 6 of the understatement penalty percentage table in section 223; and

(c) grant 100 per cent relief in respect of an administrative non-compliance penalty that was or may be imposed under Chapter 15 or a penalty imposed under a tax Act, excluding a penalty imposed under that Chapter or in terms of a tax Act for the late submission of a return.'

enabling taxpayers to comply with their tax obligations, by making a full and complete voluntary disclosure in the prescribed form and manner, instead of avoiding or postponing payment of taxes. A sensible interpretation of the voluntary disclosure provisions, their context and purpose show that the drafters of the provisions clearly had in mind that a taxpayer who elects to inform SARS of its default runs the risk that any subsequent disclosure might not be treated as being voluntary.

[28] There is, in my view, considerable force in the contention by counsel for SARS, that on a proper interpretation of s 227 of the TAA, there is no room for Purveyors' submission that the section must be construed as excluding any prior knowledge on the part of SARS. The purpose of the application is to incentivise taxpayers to make a clean break so that SARS can give them immunity. This can only happen if there is a full and proper disclosure, of which SARS was unaware and which disclosure was not prompted by SARS. This is a conclusion which arises by necessary implication from the terms of the provisions as a whole. Clearly it is not the intention of the legislature to reward involuntary conduct with exemptions conferred by the section.

[29] I am of the opinion that upon a true analysis of the facts of the present case, Purveyors' application does not pass the test. The application was not voluntarily made. Purveyors, in its application, did not disclose information of which SARS was unaware. The submission that the application should be treated as if no exchanges, approaches or contact was made with SARS representative is without merit. To construe 227 in the way for which Purveyors contended would defeat the purpose of the section and produce an anomalous result. Such an interpretation would produce the result that a taxpayer who has not complied with his tax obligations would ask SARS for an opinion, disclose his transgressions and, upon receipt of that opinion, thereafter apply for a relief under ss 226 and 227. This is the very mischief which the legislature sought to avoid.

[30] In conclusion, the contention by Purveyors that the decision by SARS falls to be reviewed and set aside because notice of an audit or criminal investigation as contemplated in s 226(2) of the TAA had not been given, is misconceived. It is not

the case of SARS that Purveyors has been subjected to an audit or criminal investigation. The application was rejected on the basis of non-compliance with s 227 and not s 226(2). Its VDP application was prompted by compliance action by officials of SARS and the advice it received from its auditors, PwC. In the light of the aforegoing, it is clear that in order to escape payment of penalties and interest, Purveyors submitted the VDP application. I agree with the Tax Court that the application by Purveyors was not voluntary and did not meet the requirements of s 227 because SARS knew of its default and warned that it would be liable for VAT plus penalties and interest. Nothing new was disclosed in the application. That said, the appeal must fail.

[31] In the result, the appeal is dismissed with costs, including the costs of the two counsel.

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R S Mathopo

Judge of Appeal

APPEARANCES

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