



**IN THE HIGH COURT OF ESWATINI**  
**JUDGMENT**

**HELD AT MBABANE**  
**927/2017**

**CASE NO.**

In the matter between:

**SWAZILAND LOTTERY TRUST (PTY) LTD**

**APPLICANT**

and

**SWAZILAND REVENUE AUTHORITY**  
**RESPONDENT**

Neutral Citation: *Swaziland Lottery Trust (Pty) Ltd and Swaziland Revenue Authority (9279/2017) [2021] SZHC 171 (28 September 2021)*

Coram : **Q.M. MABUZA - PRINCIPAL JUDGE**

Heard : 24 April 2021

Delivered : 28 September 2021

**SUMMARY**

*The Applicant who is a holder of a public lottery licence seeks declaratory relief that it is exempted from paying income tax as it pays levies to the Gaming Board. These two payments amount to double taxation. The applicant also seeks a refund of moneys that it has paid as income tax. The Applicant further seeks to review and set aside a decision made by the Respondent on the 23 March 2017.*

---

## JUDGMENT

---

### **MABUZA - PJ**

[1] The Applicant herein seeks an order in the following terms:

- (a) Declaring that the Applicant is exempted from paying income tax in terms of Section 20 of the Lotteries Act No. 40 of 1963, derived from its public lottery activities.
- (b) Reviewing and setting aside the decision of the Commissioner General made on the 23<sup>rd</sup> March 2017.
- (c) An order directing the Respondent to refund the Applicant the sum of E4, 822, 433.66 paid by the Applicant to the Respondent during the period 31 March 2014 to 14 February 2017.
- (d) Costs of suit in the event that the Respondent opposes this application.
- (e) Further and/or alternative relief.

[2] The application is opposed by the Respondent.

## **The Parties**

[3] The Applicant is Swaziland Lottery Trust (Pty) Ltd, a Company duly registered and incorporated in accordance with the Company Laws of the Kingdom of Swaziland with its principal place of business at King Mswati III Avenue East, 10<sup>th</sup> Street, Matsapha Industrial Site, District of Manzini.

The Applicant is the holder of a public lottery license issued in terms of Section 13 of the Lotteries Act No. 40 of 1963. A copy of the public lottery license is attached marked "GC 1"

[4] The Respondent is the Swaziland Revenue Authority, a Company duly incorporated in accordance with the Company Law of the Kingdom of Swaziland with its principal place of business at SRA Building Mbabane, District of Hhohho.

## **The Applicant's case**

[5] The Applicant is a company whose sole business is the lottery business. As indicated above, it is a holder of a Public Lottery licence issued in terms of Section 13 of the Lotteries Act No. 40 of 1963.

The lottery business is regulated by The Lotteries Act No. 40 of 1963 and the Casino Act No. 56 of 1963.

[6] The Applicant operates a lottery business around the Country and has lotto shops in Mbabane, Manzini, Siphofaneni, Nhlanguano, Simunye, Matata and Siteki. The Applicant does not conduct any other business except for the lottery business.

The Applicant started operating its lottery business in 1995 and has been in operation since then.

[7] The Applicant says that it has since 1995 paid taxation to the gaming board by way of levies as stipulated in the Lotteries Act. Since the start of its business in 1995, the Applicant was making losses and was not subjected to taxation by the Respondent. The Applicant was nonetheless paying levies in respect of income derived from its lottery business.

[8] In 2013, the Applicant made its first profit and the Respondent taxed the Applicant in respect of the income derived from its lottery business. Since then the Applicant has been taxed and paid income tax to the Respondent. The Applicant has been paying Income Tax in respect of the income it derives from lottery activities. The Applicant has during the period 2013 to 2017 paid a total sum of E4 822 433.66 as income tax. The Respondent has received the payments aforesaid as income tax. It is this amount that is the subject of prayer (c).

- [9] The Respondent has insisted that the Applicant continue paying income tax for income derived from lottery activities. The Applicant also pays levies to government in respect of the same income derived from lottery activities. The levies are paid in terms of the Lotteries Act.
- [10] During January 2016, the Applicant advised the Respondent that it was exempt from paying income tax by operation of The Lotteries Act No. 40 of 1963 (“The Act”) and requested the Respondent to apply such exemption.
- [11] The parties exchanged correspondence, culminating in the Respondent’s decision, communicated in a letter on 23 March 2017 wherein the Respondent declined to apply the exemption for which provision is envisaged in terms of the Act.
- [12] The basis for this decision by the Respondent was that *“The [Income Tax] Order being the sole legislation regulating taxation of income that is sourced in Swaziland is the only instrument with authority to grant tax exemptions...”* and that *“...unless an exemption is granted in terms of the Order it is not legitimate.”* The Respondent went on to

*state, "The [Lotteries] Act shall not, of its own accord, exempt any tax obligations imposed by the order"*

[13] It is this decision that Applicant seeks to review and have set aside in terms of prayer (b).

[14] The Applicant, thereafter, made the application that is before this Honourable Court for declaratory relief, the review and setting aside of the Respondent's decision of 23 March 2017, the refund of money erroneously paid under the guise of income tax.

### **The Respondent's case**

[15] The response by the Respondent is that the levies allegedly paid by the Applicant are provided for in the Lotteries Act because such levies are not paid to the Respondent as they do not amount to tax. The Respondent further denies that the Applicant is subjected to double taxation and avers that there is no prejudice suffered by the Applicant.

[16] It is the Respondent's argument that he is mandated by the Income Tax Order of 1975 to collect Income Tax. This Act is therefore the only piece of legislation which governs all issues relating to the payment or

collection of Income Tax. This is evidenced in the heading of the Order and the purpose which the legislation is to serve which states that:

***“A King’s Order-in-Council to consolidate the law relating to the taxation of income.”***

[17] It is the Respondent’s view that the Income Tax Order takes precedence over any other legislation dealing with income tax incomes in the country.

[18] The Respondent further states that the purpose of the Income Tax Order of 1975 is to consolidate all laws relating to the taxation of income and as such takes precedence over or it is superseded all other legislation on taxation of incomes.

[19] That the Income Tax Order specifies income to be exempt from tax and income generated from lotteries is not specified therein as being exempt and as such this renders the income generated by Applicant not exempt from paying income tax.

[20] That it is further worth mentioning that the Applicant does not list the activities it carries out from which it generates its income. And that

this is because it is possible that the activities conducted by the Applicant through which it generates its income may not necessarily be those covered by the Lotteries Act. The Applicant is therefore called upon to disclose the nature of the activities from which its income is derived.

[21] That the levy paid to the Gaming Board cannot be equated to tax as the Respondent does not know how the levy is computed and why it is paid, and what it is used for once paid or received by the Gaming Board, which entity does not collect any tax as this is the exclusive preserve of the Respondent.

[22] The Respondent's insistence on the Applicant paying Income Tax is premised on the fact that the Income Tax Order does not exempt the Applicant from paying income Tax.

[23] The Respondent is of the view that since the Applicant is not specifically mentioned or since its income has not been specifically exempted from income tax in terms of the Income Tax Order, which is the only legislation dealing with taxation of incomes, then the



exemption granted by the Lotteries Act cannot supersede the Income Tax Order.

**Reviewing and setting aside the decision of the Commissioner General dated 23 March 2017**

[24] The Commissioner General's response is that he applied his mind to the request by the Applicant, and his decision not to grant the request was justifiable as he had mentioned in preceding paragraphs that since the Income Tax Order of 1975 does not exempt the Applicant from paying tax then the Respondent cannot then decide to exempt the Applicant because it does not have such powers. And he had hoped that the Minister could exercise the powers conferred upon him (Minister) to resolve the impasse by giving his guidance which was not forthcoming.

[25] He deposed that the two legislations were in conflict in a way, and the Respondent's position is that since the Income Tax Order is the law which was specifically enacted to consolidate all laws dealing with the taxation of incomes, then any other law which provides to the contrary to what the Order stipulates, that other law will not be applied or enforced. The Income Tax Order supersedes any other laws when dealing with the taxation of income in Swaziland.

[26] It was denied that the Commissioner General when he took the decision adhered to a fixed principle or that he took into account irrelevant considerations and ignored relevant ones. And that the decision he took was premised on the Income Tax Order of 1975 which does not grant an exemption to the Applicant.

[27] It is the Respondent's argument that since the Income Tax Order does not exempt the Applicant from paying Income Tax, then any other law inconsistent with the Income Tax Order will not be implemented to the extent of the inconsistency with the Order. The Lotteries Act is not consistent with the Income Tax Order and the Respondent is therefore not bound to follow it.

### **Declaratory Relief**

[28] The Respondent's response is that the declaratory order being sought cannot be granted because the Lotteries Act is subservient to the Income Tax Order in as far as it deals with the taxation of income and since the Applicant is not exempted under the Income Tax Order.

## **Refund by the Respondent**

[29] The Respondent admits that the sum of E4 822.433-66 (Emalangeni Four Million Eight Hundred and Twenty Two Thousand Four Hundred and Thirty Three Sixty Six Cents) was paid by the Applicant. The Respondent further states that since the actual activities from which the income was generated are not known, the Respondent cannot admit that the income was generated from activities conducted in terms of the Lotteries Act, except to speculate that since the Applicant has a licence to conduct the business of a public lottery, then as a matter of fact, the activities that generated the income are those provided for under the Lotteries Act.

[30] In conclusion the Respondent re-iterates that the Applicant is not exempt from paying income tax as per the Income Tax Order of 1975 and has not made out a case for the grant of the relief sought.

[31] In its Replying Affidavit the Applicant maintained its position in support of the application *inter alia*:

- (a) That Section 20 of the Lotteries Act exempts it from paying Income Tax notwithstanding any law stating otherwise;

- (b) That the Applicant is required to pay tax to the Respondent yet it pays levies to the Government. This amounts to double taxation.

### **The Applicant's arguments**

[32] The Applicant's arguments are that:

1. Section 20 of The Lotteries Act provides that:-  
  
*"Notwithstanding any law imposing taxation, the licensee is hereby exempted from all taxes in respect of income that he may at any time derive from the public lotteries."*
2. This provision is peremptory, requiring first, that a person be licensed under the Act, and second, that the income in question is been derived from the business of operating a public lottery.
3. Upon meeting the aforesaid two requirements, the duly licensed lottery operator ought to be exempted from all taxes in respect of that income.
4. The Legislator, for the avoidance of doubt, provided that this exemption **shall** operate *"notwithstanding any law imposing taxation"*.
5. Neither the Act nor Section 20 have been repealed by any subsequent legislation and so it must be taken to be in force up the present date.

6. If the legislature had a specific intention, it would be reflected in the clear and unambiguous words of the text.
7. The ordinary meaning of the words used in Section 20 of the Act is clear.
8. No elaborate interpretation is warranted where the meaning of a statute is clear and to engage in any interpretative exercise could only be seeking means to subvert the manifest intention of the legislator in drafting Section 20 of the Act in such simple language.
9. It is not for the Respondent, given the plain meaning of the legislative provision and the context in which it was enacted, to seek to disregard the exemption for which provision is made in Section 20 of the Act.

[33] The Income Tax Order of 1975 and Sector-Specific Regulation:

1. The Respondent's case is seemingly premised on the contention that the Income Tax Order of 1975 ("the Order") is "*the only piece of legislation which governs all issues relating to the payment or collection of income tax*".
2. To support this contention, the Respondent relies on the title of the Order, which reads:-

*“A King’s Order-In-Council to consolidate the law relating to the taxation of income King’s Order-In-council to make provision for the taxation of income.”*

3. The Respondent seizes upon the word “consolidate” to reach the conclusion that all income tax must of necessity then flow through the portal of the Order.
4. This is misplaced since the wording of the order is capable of further understanding, being that provision is made for the taxation of income in general.
5. Such merger of the laws relating to income tax as may be understood to come from “*consolidation*” does not exclude the possibility of provision being made for alternative paths to the taxation of income by other legislation in exceptional circumstances.
6. such exceptional circumstances as may occasion an alternative approach to the taxation of income are provided for by the Act and they are present in the matter at hand in that the Applicant is duly licensed under the Act and the income which the Respondent seeks to tax is derived from the business of a public lottery.

7. The business of public lotteries is, in other words, subject to sector specific regulation in regard to the licensing of market participants and their taxation.
8. It does not take anything away from the consolidation of income tax laws by the Order that a sector of the economy may have been carved out from the operation of the general income tax law.
9. The position is, in such a case, simply that a sector-specific tax regime is posited in the place of the general approach mandated by the Order.
10. As demonstrated by the payment of the levy, alternative arrangements are in place for a tax on the income from public lotteries to be paid to the government.
11. The Respondent requires specific exemption in the text of the Order, as it argues repeatedly in its Answering Affidavit, further to its argument that the Order supersedes all other laws when dealing with income tax in Swaziland.
12. The Respondent is, in adopting this position, not guided by the law which provides for exemption of revenue earned by a person in the position of the Applicant.

13. It is, moreover, worth noting that the levy which a person in the position of the Applicant pays to the government is calculated as a percentage of its gross income from the business of conducting a public lottery. Income tax, on the other hand, is calculated as a percentage of net income.
14. The tax burden on a person in the position of the Applicant, in light of the imposition of the levy of gross income, may actually exceed the tax burden which would be imposed under the income tax regime.
15. Doubtless, the granting of the exemption in terms of Section 20 of the Act was informed by this understanding that the licensed operator of a public lottery would be obliged to hand over a portion of its gross revenue to the government.

[34] Revenue Authority Act:-

1. If one refers to the legislation that creates the Respondent, the Revenue Authority Act No.1 of 2008, there is therein specific mention of the Lotteries Act.
2. The schedule to the Revenue Authority Act is headed, "Revenue laws to be administered by the Swaziland Revenue Authority."



3. Guidance for the adjudication of this matter is found from the Founding Statute of the Respondent.
4. The Revenue Authority Act provides, in Section 4 (2) (a) that the Respondent shall:

*“administer and give effect to the laws or the specified provisions of the laws set out in the Schedule..”*

and further, in Section 4 (2) (i):

*“subject to the laws set out in the Schedule, perform such other functions relating to revenue as the Minister may direct.”*

5. The Act is listed in the schedule to the Revenue Authority Act.
6. The Respondent is therefore enjoined to give effect to the provisions of the Act.
7. The Respondent is constrained by the laws contained in the schedule to its own founding legislation, as the wording of Section 4 (2) (i) indicates, it shall perform its functions *“subject to the laws set out in the schedule”*.
8. The Respondent may not opt out of its obligation to act within the boundaries of the Lotteries Act as is made clear by Section 4 (2) (i) of the Revenue Authority Act.

## **Summation of the grounds of review**

[35] In summation of grounds of review the Applicant argues that:

1. The Respondent's decision is so unreasonable so as to warrant the inference that he failed to apply his mind to the relevant issues before him.
2. The Commissioner General of the Respondent, in the first place, misconceived the powers conferred upon him in that he disregarded an act of parliament that is in force.
3. It is not open to the Commissioner General to question the legitimacy of any legislative provision for any reason, including that which he considers to be in conflict with the Order, which is the reason proffered for his decision.
4. In the case where there is a conflict between the two pieces of legislation, if indeed there is a conflict, it ought to be put to the Courts of law to decide on how such conflict should be resolved.
5. The Respondent is not competent in law to decide such conflict by imposing an order of precedence of the laws which are equally in force in the Kingdom.
6. The Respondent appears to have paid scant attention to the fact that the Applicant pays a levy to the same government on whose behalf the Respondent collects revenue, which levy is calculated

as a percentage of gross revenue from the business of a public lottery.

7. Aside from the fact that the levy, calculated thus, could well be in excess of what income tax could be levied (as the latter is based on net income), the Respondent appears to have disregarded the effect of imposing income tax on top of the levy – which is that the Applicant and other persons in its position would pay what amounts to tax on their income twice. This surely is untenable and would be what the legislature sought to avoid by including the exemption provision in the Act.
8. Further, the Respondent's position is that of an administrator who adheres to a fixed principle in complete disregard of the particular circumstances of a case that is presented before him.
9. Given the existence of sector-specific regulation on taxes alongside the imposition of a levy on gross revenue in lieu of income tax, the Commissioner General ought to have understood the rationale behind the exemption of the Applicant from all other taxes and applied the same.
10. The conclusion that the Respondent's position is untenable in law is unavoidable and its decision must be reviewed and set aside for the foregoing reason.

## **Refund of Income Tax paid by the Applicant**

[36] The refund of what has been paid by the Applicant to the Respondent under the guise of income tax is a necessary conclusion if this Honourable Court finds in favour of the Applicant.

[37] This follows because such income tax will have been paid under the erroneous belief that the Applicant was bound to pay income tax to the Respondent as if there were no exception as provided by Section 20 of the Act.

[38] The Respondent would have been, in this regard, unjustly enriched by the Applicant's payment of what purported to be income tax.

[39] The Applicant, for its part, sought to obey the authority of the Respondent, even where such authority was misdirected, and it paid the income tax demanded of it.

[40] In the interests of justice, the Applicant ought not to be penalized for obeying authority while it engaged with the Respondent and, ultimately, sought the guidance of the Courts.

[41] Reference is made to the provisions of the Order, in Section 64 (1) (b), where it provides:-

*“Any amount paid by any person in terms of the provisions of this Order shall be refundable to the extent that such amount exceeds ... the amount properly chargeable under this Order”*

[42] If this Honourable Court finds that Section 20 of the Act should have been applied to the revenues of the Applicant from its conduct of a public lottery, then Section 64 (1) (b) of the Order would also find application as such amounts that the Applicant has paid as income tax would be in excess of the amount properly chargeable under the Order.

**In conclusion the Applicant argues that:-**

[43] There is, in light of the foregoing, no conflict between the Lotteries Act and the Income Tax Order.

[44] The Order makes general provision for taxation of income but that does not exclude the possibility of sector-specific regulation imposing a separate tax regime for persons conducting business in a specific sector.

[45] The Order does not call for the elimination of sector-specific approach to the taxation of persons such as is imposed by the Act.

[46] That the sector-specific approach provides for an exemption from income tax, imposing in its stead a levy that is akin to income tax does not give the Respondent license to disregard, as it contends, that sector-specific tax regime.

[47] The text of the Act is clear and unambiguous in its granting of the exemption from taxes for persons operating in the public lottery sector of the economy.

[48] Indeed, special provision is made for such persons in the imposition of a levy on their gross revenue in lieu of income taxes. The Respondent may not opt out of its statutory obligations in this regard.

[49] The Respondent's duty to administer the income tax encompasses the specific reference to the Act, and consequently, its exemption provision.

[50] There are valid grounds for the review of the Respondent's decision and, following that, for the awarding of a refund to the Applicant of such amounts as may have been paid to the Respondent under the erroneous understanding of the legal position which is advanced by the Respondent.

[51] The relief sought in the Notice of Motion.

### **The Respondent's Arguments**

[52] It is the Respondent's argument that the imposition of Income Tax is provided for under the Income Tax Order of 1975.

[53] That the Applicant's business is not listed under Section 12 of the Income Tax Order as that which is exempted from the normal tax;

[54] That the Income Tax Order of 1975, being the newer or later statute, impliedly repealed Section 20 of the Lotteries Act No. 40 of 1963;

[55] That the Applicant is therefore liable to be levied with, and to pay income tax.

[56] The general principle or presumption, where there are two separate statutory enactments dealing with the same subject matter, and the newer or later statute does not explicitly provide for the repeal of the provision in the older statute, is that the new or later statutory provision or enactment had repealed the older statutory provision by implication. See: 1. **Stephen Zuke v Swaziland Environment Authority and 2 Others - High Court Case No. 500/2017.** 2. **Khumalo v Director General of Co-operation and Development and Others 1991 (1) SA 158 (A).**

[57] There is also the issue of the difference between a statute with general application and a statute with special application, which comes into play in this case. The Lotteries Act is a special Act, whereas the Income Tax Order is a general Act.

[58] The Lotteries Act specifically deals with taxation of income derived from the business activities of a public lottery licence holder. On the other hand the Income Tax Order deals, in general, with the taxation of income from all kinds or types of business activities.



[59] It is submitted that general principle or presumption that a later or newer statute impliedly repeals the older statute finds application in this case. This is because the legislature, when enacting the Income Tax Order of 1975 was aware that it had previously enacted the Lotteries Act No. 40 of 1953, which statute, under Section 20, exempted public lottery licence holders from paying income tax.

[60] Notwithstanding this knowledge, the later Act specifically provided for businesses which are exempted from paying income tax. A Lottery Licence Holder was not included under those businesses which are exempted.

[61] The principle or rule of interpretation that says that the express mention of one thing excludes the other is applicable, as such, the exclusion of public lotteries businesses from the list of those business which are exempted means that this business is not exempted and it has to pay income tax under the Income Tax Order.

[62] In the case of **Stephen Zuke** (*Supra*), the full bench of the High Court stated as follows:

*[39] In determining which legislative provision prevails over the other, it has been held that the recently enacted provision supersedes and prevails, particularly when the earlier provision is contained in an enactment that is of general nature and is inconsistent with the later provision that is contained in an enactment of a special nature.”*

[63] The difference between a general Act and a special Act also leads to the conclusion that even though the Income Tax Order of 1975 (the later Act) is an Act of general application, and the older Act - the Lotteries Act of 1963, is a specific enactment dealing with taxation of businesses conducting public lotteries, the later Act specifically provides that its purpose is “**....to consolidate the law relating to the taxation of incomes.**” This simply means that the Income Tax Order was enacted to regulate the taxation of incomes, as the only legislation to deal with the taxation of incomes from the date of its promulgation. The English definition of “**consolidate**” as stated in the Oxford Advanced Learners Dictionary is: - “**to unite or combine things into one**”.

[64] It is submitted that the legislature, when enacting the Income Tax Order, was aware that there are several different pieces of legislation

which dealt with the taxation of incomes and now it wanted to merge or “combine” all such provisions under one piece of legislation, that is why the preamble to the Income Tax Order specifically says that its purpose is to consolidate the law relating to the taxation of incomes.

[65] In the **Khumalo** Case (*Supra*), the Court there stated that, at page 164 paragraph 4: -

*“...We are bound ....to apply a rule of construction which has been repeatedly laid down is firmly established. It is that wherever Parliament in an earlier statute had directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the legislature had before provided for individually, unless an intention to do so is specifically declared.”*

[66] There is an exception to the general presumption stated above. The exception is found or captured in the last sentence of the above quotation, which says **“... unless an intention to do so is specifically declared.”**

[67] The Court in the Khumalo case mentioned above, goes on to state that:

-

*“The true import of the exception therefore appears to be that, in the absence of an express repeal, there is a presumption that a later general enactment was not intended to effect a repeal of a conflicting earlier and special enactment. This presumption falls away, however, if there are clear indications that the legislature nonetheless intended to repeal the earlier enactment. This is the case when it is evidence that the later enactment was meant to cover without exception, the whole field or subject to which relates.”*

[68] The above quote is applicable to the present case. The later legislation, as specifically stated in its preamble, was to consolidate the law relating to the taxation of incomes. This statement is evidence that the legislature, by enacting the Income Tax Order, wanted or intended that all issues relating to the taxation of incomes should, from the date of the enactment of the Order, be dealt with under this Order. The Income Tax Order therefore supersedes the Lotteries Act when it comes to taxation of incomes. This therefore means that since the business activities of the Applicant have not been exempted from

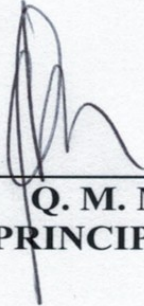
paying income tax under the Income Tax Order, the Applicant has to pay income tax. The declaratory Order sought by the Applicant cannot therefore be granted by this Honourable Court.

### **By the Court**

[69] The arguments by both parties are very compelling. However, I must agree with the Respondent: -

- (a) The levies payable to the Gaming Board are not income tax as stipulated by the Income Tax Order. Income tax is payable to the Eswatini Revenue Authority. No evidence has been placed before this Court as to the ultimate destination of the lottery levies after they reach the Gaming Board. They clearly do not end up with the Revenue Authority otherwise the Respondent would have made an admission to that effect. Prayer (a) fails.
- (b) It follows therefore that the decision made by the Respondent stands. There will be no order reviewing it and setting it aside. Prayer (b) fails.
- (c) There will be no refund order of moneys already paid to the Respondent as income tax. Prayer (c) fails.
- (d) The application fails and is hereby dismissed with costs.

Crim. Ca



---

**Q. M. MABUZA**  
**PRINCIPAL JUDGE**

For the Applicant: **Mr. M. Khumalo**

For the Respondents: **Mr. N. Manzini**