



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Case No: 65/2014

In the appeal between:

**DIESEL ELECTRIC SWAZILAND (PTY) LTD**

**APPELLANT**

**VS**

**SWAZILAND REVENUE AUTHORITY**

**RESPONDENT**

Neutral citation: *Diesel Electric Swaziland (Pty) Ltd vs Swaziland Revenue Authority (66/2014) [2014] SZSC 26 (29<sup>th</sup> July 2015)*

**CORAM:** **M.C.B. MAPHALALA, ACJ**  
**M.D. MAMBA, AJA**  
**M.J. DLAMINI, AJA**

Heard : 15<sup>th</sup> July 2015  
Delivered : 29<sup>th</sup> July 2015

**Summary**

Income tax – appellant sought an interdict restraining the respondent from levying, demanding and/or making Estimated Assessments - appellant failing to provide documents for tax assessment – respondent invoking section 39 of the Income Tax Order culminating in the Estimated Assessment – appellant lodging an objection which is considered and disallowed – on appeal held that no objection was pending before the respondent and that appellant had an alternative remedy to appeal respondent’s decision – appeal accordingly dismissed with costs.

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**JUDGMENT**

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**M.C.B. MAPHALALA, ACJ**

- [1] The appellant lodged an application on a certificate of urgency seeking an interdict restraining the respondent from levying, demanding and/or making an Estimated Assessment for the tax period 2009, 2010, 2011 and 2012 respectively.
- [2] It is common cause that the appellant is a taxpayer within the meaning of section 2 of the Income Tax Order No. 22 of 1975 as amended. On the 25<sup>th</sup> August 2011 the respondent conducted an inspection of the appellant's financial records for the 2008 financial year, and, it found that an additional tax of E35 316-00 (thirty five thousand three hundred and sixteen emalangeni) was payable; and, the appellant duly paid the outstanding tax as required.
- [3] In October 2013 the respondent conducted another inspection of the appellant's financial records for the period 2009, 2010, 2011 and 2012 for tax purposes. However, it became apparent that the appellant had failed to provide all the required financial records as required by section 35 of the Income Tax Order No. 22 of 1975. The Order provides the following:

**“35. (1) For the purpose of obtaining full information in respect of any income of any taxpayer, the Commissioner may require any person to produce for examination by the Commissioner or by any person appointed by him for such purpose at such time and place as may be**

**appointed by the Commissioner any deeds, plans, instruments, books, accounts, trade lists, stock lists, or documents that may be deemed necessary for the purpose of this order, and, if any such deeds, plans, instruments, books, account, lists or documents are not in English or siSwati, the Commissioner may by notice, in writing, require the taxpayer at the taxpayer's expense to produce at such time and place as may be appointed a translation in English or siSwati prepared and certified by a sworn translator or a person other than a sworn translator approved by the Commissioner. (Amended A.11/1985)**

**(2) The Commissioner may, by written notice require any person entitled to or in receipt of income (whether on his own behalf or a public officer of a company or an agent or trustee of any person), or any person whom the Commissioner may deem able to furnish information to attend at a time and place to be named by the Commissioner for the purpose of being examined on oath respecting the income of any person or any transactions or matter affecting the income of any person or any transactions or matter affecting them or any of them or any part thereof.**

**(3) The Commissioner shall allow any person reasonable expenses necessarily incurred by such person in attending at the place named by the Commissioner in subsection (2).**

**(4) Any officer engaged in carrying out the provisions of this order who has in relation to the affairs of a particular person been authorised thereto by the Commissioner in writing or by telegram, may for the purposes of this order-**

**(a) Without previous notice, at any time during the day, enter any premises whatsoever, and on such premises search for any moneys, books, records, accounts or documents;**

**(b) in carrying out any such search, open or cause to be removed and opened, any article in which he suspects that any moneys, books, records, accounts or documents is contained;**

**(c) Seize any such book, record, account or document as in his opinion may afford evidence which may be material in assessing the liability of any person for any tax;**

**(d) Retain any such books, records, accounts or documents for as long as it may be required for any assessing or for any criminal or other proceedings under this order.**

**(5) Any person exercising any power under subsection (4) shall on demand produce the written authority furnished to him by the Commissioner.**

**(6) The person to whose affairs any book, record, account or document seized under subsection (4) relates, shall be entitled to examine and make extracts therefrom during office hours under such supervision as the Commissioner may determine.”**

[4] The respondent is required by law to issue an annual public notice to taxpayers advising them to furnish returns for tax assessment within a specified period of time; and, taxpayers are obliged to furnish the said returns in the prescribed forms.<sup>1</sup>

[5] Every person who carries on trade in the country or any income generating activity is required by law to keep the original financial records at the place of business. This is to enable the respondent to ascertain the taxable income

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<sup>1</sup> Sections 33 and 37 of the Income Tax Order No. 22 of 1975.

derived as well as the allowable deductions.<sup>2</sup> Similarly, any person whether or not he is liable for tax is obliged to furnish such information as required by the respondent upon notice.<sup>3</sup>

[6] Similarly, the respondent is legally enjoined to demand an inspection of financial records from any taxpayer with a view to determine and ascertain taxable income as well as allowable deductions, if any.<sup>4</sup>

[7] Pursuant to the failure by the appellant to furnish the respondent with the required financial records for the period 2009 – 2012, the respondent proceeded to invoke section 39 (1) of the Income Tax Order No. 22 of 1975. This section provides the following:

**“39. (1) In every case in which any taxpayer makes default in furnishing any return or information, or if the Commissioner is not satisfied with the return or information furnished by any taxpayer, the Commissioner may make an assessment in such sum as the Commissioner’s judgment ought to be charged in accordance with this Order, and thereupon shall give notice thereof to the taxpayer to be charged, and such taxpayer shall be liable to pay the tax upon such sum.**

**(2) Any such assessment shall be subject to objection and appeal as provided in this Order.”**

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<sup>2</sup> Section 35bis (1) of the Income Tax Order No. 22 of 1975.

<sup>3</sup> Section 38 of the Income Tax Order No. 22 of 1975.

<sup>4</sup> Section 36 of the Income Tax Order No. 22 of 1975.

[8] It is apparent from the evidence and in particular Annexure “SRA2” dated 20<sup>th</sup> August 2013, that the respondent acting in accordance with section 36 of the Income Tax Order No. 22 of 1975, informed the appellant that it would be conducting an audit on the 11<sup>th</sup> September 2013, at the appellant’s premises for the period 1<sup>st</sup> July 2008 up to 30<sup>th</sup> June 2012. The correspondence further disclosed that the audit was pursuant to an audit done in 2011 for the tax year 2008. However, the audit could not be conducted as scheduled pursuant to a request made by the appellant’s accountant Roy Thomas who was allegedly having a medical check-up in a hospital in Cape Town. Mr. Thomas requested in terms of Annexure “SRA3”, to have the audit postponed to 9<sup>th</sup> October 2013. The request for postponement of the audit was accordingly granted.

[9] Notwithstanding the indulgence given by the respondent, the appellant failed to furnish the required information. The respondent expressed its disappointment that the documents furnished by the appellant were not even a third of what had been requested; this was done in a correspondence addressed to the appellant and dated 6<sup>th</sup> November 2013. A meeting was further suggested between the parties with a view to resolve the matter. The meeting was not forthcoming and, by correspondence dated 18<sup>th</sup> November 2013, the respondent informed the appellant that it would be conducting the audit later that day.

[10] The respondent accordingly levied estimated assessments for the period 2009 and 2010 respectively as it is evidenced by Annexures “SRA10” and

“SRA11”. The Estimated Assessments were done on the 4<sup>th</sup> April 2014. However, actual assessments were done for the period 2011 and 2012 based on the documents provided by the appellant; and, this is apparent from the Notices of Assessment at pages 25 and 38 of the record of proceedings.

[11] In response to the audit reports compiled by the respondent, the appellant by letter dated 13<sup>th</sup> February 2014, sought more information from the respondent for purposes of commenting on the audit reports. The letter reads in part:

**“RE: AUDIT REPORTS FOR DIESEL ELECTRIC (PTY) LTD**

**We acknowledge receipt of your audit reports for the tax year 2009 up to 2012.**

**However, in order to enable us to comment on each of your findings, we kindly request the following particulars:**

- 1) The year that was used in the calculations of the net profit for the additional taxes for 2009 and 2010.**
- 2) The figures that were used by the SRA to calculate and thereafter conclude that Diesel Electric (Pty) Ltd had under-declared its purchases for 2011 by E4 385 301.00 (four million three hundred and eighty five thousand three hundred and one emalangeni).**
- 3) The figures that led SRA to arrive at the conclusion that Diesel Electric (Pty) Ltd had under-declared its sales and purchases for the 2012 tax year by E6 904 326.00 (six million nine hundred and four thousand three hundred and twenty six emalangeni) and E326 480.00 (three hundred and twenty six thousand four hundred and eighty emalangeni) respectively.**

**We are not convinced that the above figures are founded on the company's documents that were availed by your team in October 2013....”**

[12] The respondent in turn provided the appellant with the required information in a letter dated 18<sup>th</sup> February, 2014 marked as Annexure “SRA13”. Pursuant thereto the appellant lodged an objection against the audit reports for the tax years 2009 up to 2012 contending that the additional taxes levied on the company were incorrect and not based on the documents provided to the respondent in October 2013. The objection is marked as Annexure “SRA14”.

The respondent by letter dated 7<sup>th</sup> March 2014 dealt extensively with the objection lodged by the appellant. The letter states in part the following:

**“RE: OBJECTION TO 2009, 2010, 2011 AND 2012 AUDIT REPORTS – DIESEL ELECTRIC- 100 106 442**

- 1. Reference is made to your letter dated 17<sup>th</sup> February 2014, on the abovementioned subject matter.**
- 2. A taxpayer who is not satisfied with the Commissioner's decision or notice of assessment may object, and such objection should specify, in detail, the grounds upon which it is made, as provided by section 52 (1) and (2) of the income tax order 1975, as amended.**
- 3. This provision states that every objection should have detailed grounds on which it has been raised. In your objection correspondence you merely stated that, “amounts on which the additional taxes are based are incorrect.” This statement is vague because, you did not specify exactly which amounts are these and why you claim they are incorrect, as required by the order.**



4. **Section 53 of the order further provides that the onus of proof that there were incorrect figures lies with you. There was no attachment of any document providing that our auditors did not take into consideration certain information that was presented to them by you during the audit.**
5. **We have however considered your request to allow you some time to collate the documentation in support of your objection and the commission gives you seven days from the date of this letter to submit all the documents in support of your objection. After the lapse of this time your objection will be summarily disallowed for lack of valid grounds if no information is still forthcoming from yourselves.**
6. **Note that any information requested by SRA officers in the execution of their duties must be availed in the manner and time prescribed. Further be advised that the lodgement of an objection does not suspend payment of the taxes due. The debt that is owing to the commission is due and payable, as provided by section 61 (1) of the income tax order.”**

[13] We take cognisance of the request made by the appellant to the respondent to be given time to collate the documentation in support of its objection; and, in return the respondent gave the appellant seven working days to submit all the documentations in support of the objection. The appellant was further informed that after the lapse of the extended period, the objection would summarily be disallowed. It is not disputed that the appellant failed to submit the requisite documentation within the extended period, and, accordingly, the objection was disallowed.

[14] Accordingly, the respondent contends that the subsequent objection lodged by the appellant’s attorneys on the 17<sup>th</sup> March, 2014 had been overtaken by events in light of the previous correspondence between the parties. It is common

cause that the appellant's attorneys by letter dated 17<sup>th</sup> March 2014 lodged an objection to the audit reports and further sought a period of ninety days to enable the appellant to collate its documentation and substantiate its objection. By letter dated 31<sup>st</sup> March 2014 the respondent informed the appellant that in terms of section 51 of the Income Tax Act, the respondent only communicates with taxpayers directly and not with their lawyers; hence, they would ignore the correspondence from the attorneys.

The respondent in their letter further rejected the request for extension of time by ninety days on the basis that the appellant's objection was disallowed on the 18<sup>th</sup> March 2014; hence, the audit reports became final, and, that there was no pending objection. The respondent's letter is marked Annexure "SRA16". The respondent further contended that the only remedy available to the appellant was lodging an appeal to the Commissioner in terms of section 54 of the Income Tax Order.

- [15] In the present matter, the appellant seeks an interdict restraining the respondent from levying, demanding and/or making an Estimate Assessment for the tax years 2009, 2010, 2011 and 2012. It is apparent from the evidence that the Estimate Assessment for the period of 2009 and 2010 were done on the 4<sup>th</sup> April 2014 together with the actual assessment for the period 2011 and 2012; hence, at the time when this application was lodged by the appellant on the 29<sup>th</sup> April 2014, the respondent had already levied the assessment and further issued the audit reports; to that extent the application was both misconceived and

overtaken by events. Furthermore, the appellant had been given sufficient time to provide the necessary information since August 2013 for purposes of the assessment but it failed to do so. In addition the objection lodged by the appellant was considered and the appellant given an extended period to collate the documentation; however, it failed to do so, and the objection was subsequently disallowed on the 15<sup>th</sup> March 2014 after the lapse of the extended period.

[16] Section 52 of the Income Tax Order 22 of 1975 deals with objections and provide the following:

**“52. (1) Any objection to any assessment made under this order shall be made within twenty-one days after the date of the assessment notice or within such further time as the Commission may for good cause allow in the prescribed manner and under the prescribed terms by any taxpayer who is aggrieved by any assessment in which he is interested.**

**(2) Every objection shall be in writing and shall specify in detail the grounds upon which such objection is made. Provided that the taxpayer, for the purpose of the objections, shall be entitled to rely on any evidence whether oral or documentary, other than the evidence produced by him during the course of the assessment except in the following circumstances-**

**(a) where the Commissioner has refused to admit evidence which ought to have been admitted;**

**(b) where the taxpayer was prevented by sufficient cause from producing the evidence which he was called upon to produce; and**

**(c) Where the assessment was made without giving sufficient opportunity to the taxpayer to adduce evidence relevant to any ground of objection.**

**(Amended A.6/1994)**

**(3) On receipt of a notice of objection to an assessment, the Commissioner may reduce or alter the assessment or may disallow the objection and shall send the taxpayer the notice of such alteration, reduction or disallowance and shall record in the assessment register any alteration or reduction made in the assessment.**

**(4) If no objection is made to any assessment or if an objection has been allowed or withdrawn, such assessment or altered or reduced assessment, as the case may be, shall, subject to the right of appeal provided in this part and subject to section 41 (1), be final and conclusive.”**

[17] In the circumstances the appellant is not entitled to the interdict sought as it has failed to establish a clear right to the remedy in terms of section 53 of the Income Tax Order. Furthermore, the appellant has an alternative remedy of appealing to the Commissioner in terms of section 54 of the Income Tax Order.

The sections aforesaid provide the following:

**“53. The burden of proof that any amount is exempt from or not liable to any tax chargeable under this Order or is subject to any deduction or set-off, shall be upon the person claiming such exemption, non-liability,**

**deduction or set-off, and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.**

**54. (1) Any taxpayer who is dissatisfied with any decision of the Commissioner as notified in the notice of alteration or reduction of an assessment or disallowance of an objection may appeal therefrom to the court:**

**Provided that no such notice of appeal shall be of any force and effect, unless it is lodged with the Commissioner within the period prescribed in subsection (2).**

**(2) Notice of such appeal shall be in writing and shall be lodged with the Commissioner within twenty-one days after the date of any notice of alternation, reduction or disallowance referred to in section 52 (3), or within such further time as the Commissioner or the court may for good cause allow.**

**(3) On the hearing of any such appeal the taxpayer shall be limited to the grounds stated in his notice of objection.**

**(4) If the assessment has been altered or reduced, the assessment so altered or reduced shall be deemed to be the assessment against which the appeal is made.”**

[18] In the circumstances the court *a quo* did not misdirect itself in dismissing the application, and, the respondent complied with all the procedural requirements of the Income Tax Order.

[19] Accordingly, the following order is made:

- (1) The appeal is dismissed with costs.
- (2) The judgment of the court *a quo* is hereby confirmed.

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M.C.B. MAPHALALA  
ACTING CHIEF JUSTICE \_\_\_\_\_

I agree

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M.D. MAMBA  
ACTING JUSTICE OF APPEAL

I agree

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M.J. DLAMINI  
ACTING JUSTICE OF APPEAL

For Appellant

Attorney M.M. Thwala

For Respondent

Attorney M.S. Manzini

**DELIVERED IN OPEN COURT ON 29 JULY 2015**