REPORTABLE
CASE NO: 500/2001

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

ANIL SINGH **APPELLANT**

and

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

CORAM: OLIVIER, CONRADIE, CLOETE JJA, JONES and HEHER AJJA

DATE OF HEARING: 20 FEBRUARY 2003

DELIVERY DATE: 31 MARCH 2003

Summary: VAT Act 89 of 1991: the Commissioner must give notice to the taxpayer where he has made an assessment in terms of s 30(1) before he can recover the assessed amount in terms of s 40(2).

JUDGMENT

CLOETE JA and HEHER AJA

CLOETE JA and HEHER AJA:

[1] This is an appeal with leave of the Judge *a quo* (Galgut AJP) against his judgment which is reported at 2002 (3) SA 94 (D).

[2] The appellant sought an order setting aside a judgment obtained against him by the respondent in terms of s 40(2)(a) of the Value-Added Tax Act 89 of 1991 on 18 July 2001 in the sum of R2 366 730,63. The taking of judgment was preceded by the making of assessments in terms of s 31(1) of the Act on the previous day. The appellant was not given notice of the respondent's intention to apply for judgment. That was not his complaint (nor could it have been, in the light of what was said in *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC) at para [49][1]). Instead, the essence of his case was that notice of the assessments had not been given to him before the statement contemplated by s 40(2)(a) was filed (which was common cause) and that the proceedings under the section were consequently void. The learned Judge dismissed the submission and, subject to certain alterations to the quantum of the judgment caused by the inclusion of an unfounded claim for additional tax, the application as well.

[3] Before this Court the same argument was advanced, supplemented, in the alternative, by reliance on a contention that the failure to give notice of the assessments before invoking the s 40(2)(a) procedure breached the appellant's right to fair administrative action which received statutory expression in s 3 of

1 The scheme of the Act was analysed and explained in detail by Kriegler J in paras [11] to [24].

the Promotion of Administrative Justice Act 3 of 2000 promulgated on 30 November 2000.

[4] Since counsel for the respondent relied upon the judgment of the Court *a quo* we shall begin by summarising the reasoning which led to a conclusion favourable to his client-

VAT that is calculable and payable by the taxpayer in terms of s 28(1) of the Act (as was the position in the case) becomes due and payable on or before the specified date in each tax period. The result is that when an assessment is made by the Commissioner in terms of s 31(1) the amount assessed has already fallen due and become payable. Written notice of the assessment to the taxpayer is provided for in s 31(4). That notice serves the purpose of fixing the time for objection to and appeal against the assessment. The lodging of such an objection has no effect on the taxpayer's obligation to pay VAT or the Commissioner's right to recover it. Section 40 provides the means for summary recovery of VAT, penalty, interest and additional tax which have become due or payable. In proceedings under s 40(2) the correctness of the assessment, on which the certified statement that the Commissioner files is based, may not be questioned (s 40(5)). Notification to the taxpayer of the assessment serves no purpose in the context of s 40(2)(a) and is not a prerequisite to filing of the statement.

[5] The Act contains no express requirement that notice of the assessment must be given to the taxpayer before the Commissioner files the statement

which has the effect of a civil judgment in terms of s 40(2)(a). The question is whether such notice is a necessary implication.

[6] The reasoning of Galgut AJP depends, it seems to us, on three propositions. The first is that any amount assessed by the Commissioner under s 31 has already become due and payable by reason of the provisions of s 28(1). The second is that, because an assessment merely quantifies a liability that is already due and payable, the taxpayer, whose duty it is to assess his own liability, need not be told that the Commissioner has undertaken the task and fixed an amount which the taxpayer should have reflected in his return made under s 28(1). The third is that the sole recourse of the taxpayer who disputes his liability to pay the amount of the assessment is to adopt the procedure of objection and appeal; accordingly notice to him of the assessment prior to an application for judgment in terms of s 40(2)(a) is a pointless exercise. As we shall attempt to show, none of these fundamental propositions is justified.

[7] We shall deal first with the acceptance by the Court *a quo* that any amount which the Commissioner assesses has already become due and payable, without the need of any preceding action by him. (This was also found to be the effect of the statute by Erasmus J in *Traco Marketing (Pty) Ltd and Another v Minister of Finance and Others* [1996] 2 All SA 467 (SECLD) at 471 d - i.)

[8] There are two fallacies in the first proposition: that an amount other than the amount returned by the taxpayer has fallen due under s 28 and that the amount assessed by the Commissioner is to be equated with the amount payable

by the taxpayer under that section. In *Traco Marketing*, *loc cit*, the learned Judge said,

'The Commissioner makes an assessment only when a vendor or importer fails to fulfil his obligations.'

In so far as that dictum also implies that the assessment amounts to a correction of the taxpayer's return, it requires qualification since, at least in relation to the grounds for assessment set out in s 31(1)(b) and (c), and, bearing in mind the power which he has under s 31(3) to 'estimate the amount upon which the tax is payable', the Commissioner merely forms an opinion which may subsequently be shown to have been wrong.

[9] Section 40 provides (to the extent relevant):

'(1) Any amount of any tax, additional tax, penalty or interest payable in terms of this Act shall, when it becomes due or is payable, be a debt due to the State and shall be recoverable by the Commissioner in the manner hereinafter provided.

(2)(a) If any person fails to pay any tax, additional tax, penalty or interest payable in terms of this Act, when it becomes due or is payable by him, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were, a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement.

. . . .

(5) It shall not be competent for any person in proceedings in connection with any statement filed in terms of subsection (2)(a) to question the correctness of any assessment upon which

such statement is based, notwithstanding that objection and appeal may have been lodged against such assessment.'

The section is a recovery provision and nothing more. It does not empower the Commissioner to determine whether an amount is payable (or due). The jurisdictional element is that the tax must be payable before the Commissioner can invoke the procedure for which the section provides. When that element exists the Commissioner can rely on ss (5) and recover an amount which he certifies as (already) due or payable, despite the fact that an objection has been lodged or an appeal may be pending.

[10] In the context of the Act an amount is due when the correctness of the amount has been ascertained either because it is reflected as due in the taxpayer's return or because the circumstances set out in s 32(5) have become applicable (in both of which cases it is both due and payable) or, if there is a dispute, after the procedures relating to objection and appeal have been exhausted (in which case the amount so ascertained was due and payable with the return).

[11] An amount may be due but not yet payable, eg additional tax (see the judgment of the Court *a quo* at 100 G - 101 C). Conversely, an amount which is payable may not be due. This may be the case with an assessed amount[2] prior to the final determination of a dispute: to the extent that the assessment is finally found to be correct, that amount was due (and payable) when the return

2 In *Metcash supra* Kriegler J noted (at fn 62) that the debt arising from the obligation to pay assessed VAT becomes due by operation of the Act upon assessment. The learned Justice was not specifically directing his attention to the distinction between what is due and what is payable and the remark was obiter.

was rendered; to the extent that the assessment was not correct, that assessment was not due at any time, but it was payable in terms of s 31(1), which provides that where in the circumstances contemplated in the section, the Commissioner has made an assessment of the tax payable by the person liable for the payment of such amount of tax, 'the amount of tax so assessed shall be paid by the person concerned to the Commissioner.' An example will illustrate this. Suppose the taxpayer renders a return for 100. The Commissioner assesses his liability at 200. In the fullness of time, the amount is finally determined at 125. 125 was therefore due and payable when the return was rendered. The balance of 75 was not due; but it was nevertheless payable in terms of s 31(1) because of the assessment. We do not think that the obligation to pay which s 31(1) creates can be interpreted other than as an immediate obligation. If the Commissioner's right is to demand payment forthwith then such remedies as are provided for non-payment should logically be interpreted in a manner which allows for exaction of the amount on default. Section 40(2)(a) provides such a remedy and the word 'payable' where it appears in that section must accordingly be construed as an existing obligation rather than a future or contingent one. Section 40(5) which precludes the challenge to an assessment in such proceedings also justifies the conclusion that the right to exact the amount reflected in the assessment flows from the assessment itself and not some subsequent event. It should be noted that s 36, which requires payment of tax pending any appeal, recognises that an obligation to pay and the right to recover already exist; it does not create such obligations.

[12] The Court *a quo* assumed that the return of a taxpayer who is assessed will be incorrect and that the amount of the assessment will reflect what was always due. As the example we have given illustrates, that is not necessarily so. In the absence of a notice of assessment an amount which is not due cannot be payable. No such notice had been given in this case. It follows that it was not open to the Commissioner to utilize the procedures of s 40.

[13] The second of the propositions referred to in paragraph [6] above suffers from the same fallacious approach set out in the previous paragraph of this judgment. In addition it has shortcomings of its own.

[14] The Act predicates the bringing into existence of an assessment prior to the lodging of the statement under s 40(2)(a). That is apparent from s 40(5). The phrase used in the last-mentioned subsection is 'any assessment upon which such statement is based' not any assessment upon which it may be based. The reason is obvious. If the position were otherwise, the Commissioner could obtain a civil judgment with all the consequences that that entails, including the possibility of sequestration in terms of s 40(2)(c), without informing the taxpayer how he arrives at the amount of such assessment.

[15] Albeit that an assessment may be 'a mental act in the nature of a decision' *per* Schreiner JA in *Irvin and Johnson (SA) Ltd v Commissioner for Inland Revenue* 1946 AD 483 at 494, counsel's submission that it is sufficient for the assessment to exist purely in the Commissioner's head cannot be correct; the law is not generally concerned with thoughts but with their outward manifestations and, in the context of s 40(1), the tax cannot be regarded as

having become recoverable through judicial intervention until the taxpayer has been informed of the assessment, a subject to which we shall return.

[16] Section 31(4) requires the Commissioner to give written notice of the assessment to the taxpayer concerned. There can thus be no suggestion that, as between the two parties, any secrecy attaches to a completed assessment.

[17] The primary purpose of giving notice of the assessment is not objection and appeal but payment by the taxpayer. As we have already pointed out, section 31 provides that, in the circumstances identified in ss (1)(a)-(e), the Commissioner may make an assessment of the amount of tax payable 'and the amount of tax so assessed shall be paid by the person concerned to the Commissioner'. In *Metcash* at para [60] Kriegler J pointed out that

'Ensuring prompt payment by vendors of amounts assessed to be due by them is clearly an important public purpose . . . Requiring them to pay on assessment prior to disputing their liability is an essential part of the scheme.'

The hypothetical (or assumed) knowledge by the taxpayer of the correct amount of his liability at the date for rendering his return is, no doubt, a convenient fiction for the determination of a date of liability and payment, but the reality is that no taxpayer (*bona fide* or dishonest) who is kept in ignorance of the fact of an assessment and its content can be expected to reconsider his liability and pay what he owes.

[18] A judgment is an appropriate remedy for the refusal or neglect of a debtor to pay his creditor when he knows full well that he owes money. It is inapposite to the situation where the alleged debtor neither knows that he has a creditor nor

the amount that is said to be owing by him. A VAT vendor may fall anywhere within the spectrum of the two possibilities. It is true that section 40(2) creates a summary procedure which enables the Commissioner to file for judgment and proceed to execution. No court process initiates the claim, no service on the debtor is required and there is no scope for opposition or a hearing (*Metcash* at para [49]). All this notwithstanding, it would be extraordinary if the legislature had intended to authorise the taking of a judgment in respect of an indebtedness of which the taxpayer had only deemed knowledge, given the role of payment in the scheme, the substantial departure from the common law which such an authorisation would bring about and the seriousness of the potential consequences to the taxpayer, and then manifested that intention simply by its silence on the matter of service of the assessment before an application for judgment can be lodged.

[19] What is set out in paragraphs [14] to [18] above provides, in our view, sufficient reason to regard notification of the assessment to the taxpayer as a necessity contemplated by the legislature.

[20] As to the third proposition on which the reasoning of the Court *a quo* is founded, *Metcash* (at paras [53], [54], [56] and [71]) makes it plain that objection and appeal is not the sole recourse of the taxpayer who wishes to dispute his liability. Moreover the judgment contains clear indications that a taxpayer who is subject to a s 31 assessment is possessed of remedies which can be exercised before judgment is applied for (see para [66]: a wide field of defences is available to a debtor who wishes to pre-empt the entry of judgment).

In the absence of service of process or notice of set down of the application for judgment, the potential trigger for the exercise of those remedies can only be the assessment. All this, it seems to us, is entirely logical: if the vendor has available a range of defences, why should he only receive their benefit after judgment has been taken against him? Looked at from a different angle, what can be the prejudice to the Commissioner in allowing the taxpayer insight into the assessment before he moves for judgment?

[21] Counsel for the Commissioner submitted from the bar that there is a strong likelihood that a taxpayer against whom s 31 is invoked will be untrustworthy (see *Metcash* at para [22]) and that the giving of notice of the Commissioner's intentions may well provoke concealment of assets and even cause the taxpayer to decamp before the Commissioner can take judgment and execute on it. Assuming the validity of this apprehension, if the Commissioner has a well-founded belief that such conduct will result from service of the assessment he has his remedies at common law, or he may (if so advised) avoid the consequence by allowing only a short period of time after service of the assessment before applying for judgment, bearing in mind that fairness of administrative procedure depends on the circumstances of each case: s 3(2)(a) of the Promotion of Administrative Justice Act.

[22] We therefore agree with counsel for the appellant that, in a case such as the present, non-payment of an assessed amount is a jurisdictional fact upon which the exercise of powers under s 40(2)(a) depends. It is a necessary corollary that the taxpayer should have been given notice of the assessment

before he can regarded as one who is in default of payment for the purpose of taking judgment against him. Notice of the assessment to the taxpayer before the statement contemplated in s 40(2)(a) is filed is necessary to give effect to the objects of the Act. To exclude notice would be to deprive the taxpayer of rights at common law which are not excluded by the Act. We conclude that the learned Judge in the Court below was wrong in finding the Commissioner was entitled to implement the procedures of s 40(2)(a) before notice of the assessment had been given.

[23] Certain submissions were addressed to us on the strength of s 3 of the Promotion of Administrative Justice Act. The contention was that fair administrative procedures necessitated notice of assessment prior to judgment. Counsel for the Commissioner conceded that failure to serve constituted a breach of the appellant's fundamental rights. He sought to justify the breach by the general submissions to which we have referred in paragraph [21]. He was not able to point to any circumstance applicable to the appellant's case which provided such justification.

[24] The reliance on the breach of a constitutional right was raised by the appellant for the first time in his counsel's heads of argument on appeal. Although counsel for the respondent raised no objection, the situation is clearly unsatisfactory. As emphasised in *Prince v President, Cape Law Society and Others* 2001(2) SA 388 (CC) at para [22], in relation to a challenge to the constitutionality of a provision in a statute, it is not sufficient for a party to raise such a matter only in heads of argument without laying a proper foundation for

it in the papers or pleadings. That applies equally to a complaint of breach of a fundamental right which the other party is entitled to justify by evidence as well as argument. In the circumstances we find it unnecessary to enter further into this question as it is clear that the appellant must succeed on his main submission.

[25] It would likewise be superfluous to address the other findings of the Court *a quo* which were the subject of attack by the appellant. The right of the Commissioner to take judgment even before the expiry of the period within which objection may be made in terms of s 31(5) will, if objection is duly lodged against the assessment, certainly result in some degree of prejudice to the taxpayer. The taxpayer is confined to the, perhaps illusory, consolation of an eventual adjustment in his favour in terms of s 36(1) and repayment of or compensation for that which was wrongly taken from him. Naturally, if the Commissioner purports to take steps beyond those which the Act authorises, as he has done in this case, the remedies available to the taxpayer may be more extensive.

[26] In the result we concur in the order made by Olivier JA.

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T D CLOETE
JUDGE OF APPEAL

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J A HEHER
ACTING JUDGE OF APPEAL

CONRADIE JA)Concur
JONES AJA)

OLIVIER JA

[1] In this appeal, we are unanimous as far as the order to be made is concerned. That order is the one at the end of this judgment. There are, however, differences in the reasoning leading up to that conclusion. In what follows, I set out my thoughts on the subject.

The factual background

[2] In August 2001 the appellant approached the Durban and Coast Local Division on notice of motion for an order setting aside, alternatively rescinding, a judgment granted by that court on 18 July 2001 against the appellant and in favour of the respondent for payment of the sum of R1 032 961,43

[3] The judgment resulted from the filing by the respondent of a statement in terms of s 40(2)(a) of the Value-Added Tax Act, 89 of 1991 ("the Act").

[4] It is common cause that the judgment under consideration was obtained in the course of the day of 18 July 2001. Only afterwards, at approximately 17:00, were certain VAT assessment notices (form VAT 217P), relating to periods from 1996 to September 2002, served upon the appellant.

[5] The sole complaint raised in the application by the appellant, who at all relevant times had been a registered Value Added Tax vendor, was that the respondent was required to give him notice of an assessment prior to seeking a judgment in terms of s 40 of the Act.

[6] The application, which was opposed by the respondent was heard and in the main dismissed by Galgut J, who also granted leave to the appellant to appeal against the dismissal to this Court.

[7] Neither in the court below, nor in argument in this Court, was the procedural basis of the application for rescission of the default judgment, obtained by the respondent, raised or debated. Such basis could only have been the rescission provisions of rule 42(1)(a) of the Uniform Rules of Court or the common law remedy of *restitutio in integrum*. Absent objection by the respondent to the procedural correctness of the application and argument on this point, I will say no more on this aspect.

The legal background

[8] The question then is whether the statutory 'judgment' obtained by the respondent in the High Court by virtue of the provisions of s 40(2) of the Act, can be set aside because the appellant had not, prior to such judgment having been obtained by the respondent, been given notice of the assessment envisaged by s 31 of the Act.

[9] The Act is not at all clear and the answer to the question posed above is not obvious. What is required as a first step is an overview of the procedure that must be taken by the respondent before the application for judgment in terms of s 40(2)(a). I summarise the provisions as follows.

[10] Every registered vendor must, at a certain date, furnish the respondent with a return, containing information as to the output and input tax pertaining to the preceding tax period, calculate the amount of the tax payable to the respondent or the amount of any refund due to the vendor (sec 28), and pay to the respondent the amount which, *ex facie* the said return, is payable.

[11] If the respondent is satisfied with the vendor's return, and payment, that is the end of the matter.

[12] However, in certain circumstances, the respondent may make an assessment of the amount of tax payable by the vendor and the amount of tax so assessed shall be paid by the person concerned to the respondent (sec 31(1)). The circumstances which may lead to such an assessment being made are set out in s 31(1), which reads as follows:

> '31. **Assessments**. (1) Where

(a) any person fails to furnish any return as required by section 28, 29 or 30 or fails to furnish any declaration as required by section 13 (4) or 14; or

(b) the Commissioner is not satisfied with any return or declaration which any person is required to furnish under a section referred to in paragraph (a); or

(c) the Commissioner has reason to believe that any person has become liable for the payment of any amount of tax but has not paid such amount; or

(d) any person, not being a vendor, supplies goods or services and represents that tax is charged on that supply; or

(e) any vendor supplies goods or services and such supply is not a taxable supply or such supply is a taxable supply in respect of which tax is chargeable at a rate of zero per cent, and in either case that vendor represents that tax is charged on such supply at a rate in excess of zero per cent,

the Commissioner may make an assessment of the amount of tax payable by the person liable for the payment of such amount of tax, and the amount of tax so assessed shall be paid by the person concerned to the Commissioner.'

Section 31(1) of the Act was the basis on which the respondent made the assessment now under discussion. The point is that the amount reflected in the assessment becomes 'payable', subject to what is said hereunder.

[13] The next step is that the respondent, in terms of sec 31(4)

> ' . . . shall give the person concerned a written notice of such assessment, stating the amount upon which tax is payable, the amount of tax payable, the amount of any additional tax payable in terms of section 60 and the tax period (if any) in relation to which the assessment is made.'

[14] The notice of assessment must include notice to the person concerned that any objection to such assessment shall be lodged or sent so as to reach the Commissioner within 30 days after the date of such notice (s 31(5)).

[15] This brings me to the steps to be taken by a vendor who is dissatisfied with an assessment. He or she may lodge an objection thereto with the respondent within 30 days after the date on which notice of the assessment was given (s 32). The respondent must consider the objection and if it is disallowed, give notice thereof to the vendor. Such decision (or amended assessment) shall, in terms of s 32(5), and subject to the right of appeal mentioned hereunder, ' . . . be final and conclusive'.

[16] An appeal against a decision by the respondent to disallow an objection, or against an amended assessment, lies to the special court for hearing income tax appeals. Notice of such an appeal must be given to the vendor within 30 days (s 33). In the circumstances set out in s 33A the appeal shall be heard by the Board established by s 83A(2) of the Income Tax Act.

A further appeal against a decision of the special court exists in terms of s 34.

[17] Section 36 then introduces a principle that has been described as 'pay now, argue later'. The section provides that the obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under the Act, shall not, unless the respondent so directs, be suspended by any appeal or pending the decision of a court of law. If the vendor's appeal is upheld or conceded, the respondent is obliged to make a due adjustment (s 36).

[18] The principle 'pay now, argue later' also underlies the provisions of s 40. It provides that any amount of tax, additional tax, penalty or interest payable in terms of the Act shall, '. . . when it becomes due or is payable' be a debt due to the State and shall be recoverable by the respondent (s 40(1)). Section 40(2)(a) sets out how the respondent may then proceed. It reads as follows:

> '(2)(a) If any person fails to pay any tax, additional tax, penalty or interest payable in terms of this Act, when it becomes due or is payable by him, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were, a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement.'

[19] All these steps the taking of judgment against the vendor and proceedings for sequestration or liquidation may thus take place while an appeal is pending. To exacerbate this draconic procedure, s 40(5) provides:

> '(5) It shall not be competent for any person in proceedings in connection with any statement filed in terms of subsection (2)(a) to question the correctness of any assessment upon which such statement is based, notwithstanding that objection and appeal may have been lodged against such assessment.'

[20] Must the vendor receive notice of the assessment before judgment is taken against him by virtue of s 40(2)(a) of the Act?

The Act gives no clear answer. Section 40(2)(a) requires the respondent to file with the clerk or registrar of the court concerned, in order to obtain judgment, ' . . . a statement certified by him as correct and setting forth the amount thereof so due or payable . . . '. But the Act does not explain the link between the assessment and the statement; nor does it require notification of the statement to the vendor before judgment is obtained. In the result, the requirement that a statement be filed, does not provide an answer to the question posed.

[21] Another way of approaching the problem, is to ask: what does the Act (in secs 40(1) and 40(2)(a)) mean when it requires, as a precondition for the

respondent obtaining judgment, that the amount of any tax, additional tax, penalty or interest shall be recoverable by the procedure allowed in sec 40(2)(a) ' . . . when it becomes due or is payable'?

To circumscribe the problem more narrowly : if the VAT ' . . . becomes due or is payable' even if no notice is given to the VAT-debtor of an assessment, such assessment is not a prerequisite for the obtaining of judgment. *Ergo*, prior notification of the assessment is only necessary, for the purposes of s 40(2)(a) if its effect is that the debt ' . . . becomes due . . ' or is rendered 'payable'.

Does notification of the assessment serve these purposes?

[22] In the court *a quo* the learned judge came to the conclusion that prior notification of the assessment was not necessary because the VAT assessed ' . . . will in all cases already have become overdue by the date on which the Commissioner makes the assessment. The same applies to the penalty and interest on unpaid VAT, because on an interpretation of sec 39(1)(a) such a penalty, in the sum of 10% of the unpaid VAT, and such interest, are automatically payable, and as such they are payable from the date upon which the VAT had become payable.' The underlying philosophy of the judgment follows what Kriegler J said in *Metcash Trading Ltd v Commissioner, South African Revenue Services and Another* 2001 (1) SA 1109 (CC) at 1122 C that ' . . . VAT is payable on each and every sale; the VAT percentage, the details for its calculation and the timetable for periodic payment are statutorily

predetermined, and it is left to the vendor to ensure that the correct periodic balance is calculated, appropriated and paid over in respect of each tax period.'

[23] This philosophy was echoed by Erasmus J in *Traco Marketing (Pty) Ltd and another v Minister of Finance and others* [1996] 2 All SA 467 (SE). In that case, the assessment was served on the vendor earlier the same day that the certified statement was filed with the registrar of the court. It was argued on behalf of the vendor that it could never have been the intention of the legislature that a judgment and subsequent execution could be taken against the taxpayer by an assessment that is neither final nor conclusive *ie* pending the final outcome of objections and appeals (see 470 f-h). The learned judge held that by virtue of the provisions of s 38(1) of the Act, which requires that the tax payable under the Act shall be paid in full within the time allowed by the specified periods in which the returns must be filed (secs 13(4), 14, 38 or 29), it is a feature of the Act. ' . . . that the tax becomes due and payable without any preceding action by the Commissioner.' (at 471 d)

The learned judge proceeded (at 471 i):

> 'It appears that the provision relates to tax payable but unpaid at the time of the assessment. The assessment therefore does not create the obligation to pay the tax. That obligation arises from the operation of s 38(1), read with the other relevant provisions of the Act. Section 40(2)(a) provides for the speedy and effective recovery of tax which has become due or is payable *before* assessment. Within the scheme of the Act, the right to object to an

assessment does not affect and therefore cannot suspend the pre-existing obligation to pay the tax. Nothing in the Act provides or indicates otherwise.'

[24] If the underlying philosophy and the interpretation given to the Act in *Metcash*, *Traco* and the court *a quo* cannot be shown to be wrong, it must follow that the giving of a notice of the assessment by the respondent to the VAT debtor is irrelevant because it does not render the debt due or payable, it having become due or payable before such assessment.

The correctness of the said philosophy and interpretation thus requires close scrutiny.

[25] The ordinary meaning of 'due' is that ' . . . there must be a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately.' (per Galgut AJA in *The Master v I L Back and Co Ltd and Others* 1983 (1) SA 986 (A) at 1004 G; see also *Western Bank Ltd v S J J van Vuuren Transport (Pty) Ltd and Others* 1980 (2) SA 348 (T) at 351; *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909; *Whatmore v Murray* 1908 TS 969 per Innes CJ at 970; *Banque Paribas v The Fund Comprising Proceeds of Sale of the MV Emerald Transporter* 1985 (2) SA 448 (D and C) at 463 C - E; *Commisioner for Inland Revenue v People's Stores Walvis Bay (Pty) Ltd* 1990 (2) SA 353 (A) at 366 G per Hefer JA).

[26] The word 'payable' can have at least two different meanings, viz ' . . . (a) that which is due or must be paid, or (b) that which may be paid or may have to be paid. . . . . The sense of (a) is a present liability due and payable . . . . (b) . . . . a future or contingent liability.' (per Trollip JA in *Marine and Trade Insurance Co Ltd v Katz NO* 1979 (4) SA 961 (A) at 975 D - F; followed by Hefer JA in *Administrateur, Tranvsvaal v J D van Niekerk en Genote BK* 1995 (2) SA 241 (A) at 245 B - C). Depending on the context of the statute involved, the word payable may refer to ' . . . what is eventually due, or what there is a liability to pay' (per Searle J in *Stafford v Registrar of Deeds* 1913 CPD 379 at 384 *in fin*)'; '. . . . "payable at a future time", or "in respect of which there is liability to pay".' (per Searle J in *Stafford v Registrar of Deeds*, *supra*, at 385 *in fin*. (Approved of by Trollip JA in *Marine and Trade Insurance Co Ltd v Katz NO supra*, at 975D-G; and by Melunsky J in *Schenk v Schenk* 1993 (2) SA 346 (ED) at 350 A - 51C).

[27] The Act does not couple the word due and payable, in s 40, with and. They are distinguished by or. It follows that a separate meaning must be given to the two terms. From what has been stated above, 'due' must be given, in s 40 of the Act, the meaning of ' . . . a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor'. 'Payable' in order to distinguish it from 'due' must be given the meaning of a ' . . . future or contingent liability'.

[28] I must now apply these conclusions to the provisions of the Act. When does the obligation to pay VAT become 'due or payable'?

[29] Section 16(1) of the Act obliges the vendor to calculate, in the manner set out in that section, the tax 'payable' by the vendor, and s 28(1) requires the vendor to furnish the respondent with a return '. . . and pay the tax payable' to the respondent. It is clear that the word 'payable' in these two provisions cannot mean anything more than a future or contingent liability to pay an amount as later finally assessed by the respondent. Thus: the amount reflected in the return must be paid immediately because it is, in the sense described above, 'due'; however, there may be a future or contingent liability to pay more than that reflected in the return depending on the final decisions of the respondent or a court. Such contingent liability is not 'due', because it is not yet liquidated by a court or by agreement; nor is it payable because it is uncertain whether the vendor is liable for the future payment of any amount.

[30] However, the contingent liability for the correct amount payable in terms of the Act, becomes 'owing', in the sense described above, not only when the assessment is made and notice thereof is given to the vendor, but somewhat later by virtue of the provisions of s 32(5) and read with s36.

[31] Section 32(5) deals with the situation where no objection is lodged to the respondent's assessment, or where the objection has been disallowed or withdrawn or the assessment has been altered or reduced. In these cases, the assessment becomes ' . . . final and conclusive'. This means, at least, that the amount assessed now becomes due.

[32] Two deductions from the provisions of s 32 of the Act seem to me to be incontrovertible, viz: (a) that the whole procedure of objection is predicated on the vendor having been notified of the assessment otherwise the objection procedures cannot ever be implemented and the assessed amount cannot become due; and (b) that where the provisions of the section have been complied with and the objection properly dealt with the assessment becomes final and conclusive, and the amount thus arrived at becomes due, in the sense used above, *ie* there is now a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor; the debt is now one in respect of which the debtor is under an obligation to pay immediately (see the authorities quoted in par [25] above). It now becomes clear why the legislator in secs 40(1) and 40(2)(a) of the Act used the words ' . . . becomes due'. The liquidated amount for which the vendor is finally and conclusively liable, becomes due by virtue of the completion of the objection procedures of s 32.

[33] For present purposes, however, it must be stressed that the section 32 objection procedure is predicated upon the vendor having received notice of the assessment, as is required by s 31(4) which notice, furthermore, must give the vendor notice of his right to lodge an objection (s 31(6)).

[34] The following conclusions seem to me to be warranted:

[34.1] If the respondent is not satisfied with the return furnished by the vendor, *ie* in the circumstances set forth in s 31(1) of the Act, he may make an assessment.

[34.2] The respondent must give the debtor notice of such assessment s 31(4) including notice of the right of objection, which right may be exercised within a period of 30 days after such notification (s 31(5)).

[34.3] It follows that if the respondent has not made an assessment and given notice thereof to the vendor he cannot obtain judgment in terms of s 40(2)(a) of the Act, because any amount claimed by him will not be liquidated and thus not due.

[34.4] If no objection to an assessment made by the respondent in terms of s 31(1), is lodged by the vendor, the respondent, after the lapse of the 30 day period, may apply for judgment in terms of s 40(2)(a), because the amount is now due, having become

liquidated, final and conclusive by virtue of the provisions of s 32(5).

[34.5] Once an objection is lodged, the respondent may only obtain judgment in terms of s 40(2) if, in accordance with s 30(5) the objection has been withdrawn or the assessment altered or reduced. It is only then, again, that the amount for which the vendor is liable, has becomes due, because it is now liquidated.

[34.6] Pending finalisation of the objection procedures the respondent may not apply for judgment in terms of s 40(2)(a). Pending such finalisation, the amount in dispute is neither due, because it is not immediately claimable : the obligation to pay is suspended pending the finalisation of the objection procedures. The amount is also not payable, because, not being finalised, it is not immediately but only contingently payable.

[35] This brings me to the case where the vendor, having objected to the s 31(1) assessment and not being satisfied with the sec 32 decision or assessment of the respondent, appeals. He must do so within 30 days after having been notified of the outcome of the objection-procedures (see secs 33(1) and (2) which refer back to the provisions of s 32(4)). It is at this stage, and this stage only, that the 'pay now, argue later' philosophy enters into the picture. That is so because the obligation to pay the amount assessed in the course of the objection proceedings and of which notice was given to the vendor in terms of s

32(4), is not suspended by the noting of an appeal by virtue of the provisions of s 36, which expressly provide that the noting of an appeal does not suspend the obligation to pay the assessed tax etc immediately. The consequence of this provision is that payment of the amount assessed in terms of s 32 (not s 31) is no longer suspended and has to be paid immediately. It should be noted that the obligation to pay the amount assessed by the respondent in terms of s 31 is suspended by the lodging of an objection, because of the provisions of that section and s 32, whereas the obligation to pay the amount assessed in terms of s 32 is not suspended by the lodging of an appeal by virtue of s 36. This distinction is important, because it indicates, once again, that the respondent may only approach a court for judgment in terms of s 40(2)(a) of the Act after the objection provisions of the Act (s 32) have been completed and, as shown, these provisions are predicated on notice of the s 31 assessment having been given to the vendor concerned and the time in which he can lodge an objection with the respondent has expired or the objection has been dealt with in terms of s 32, as explained above.

Conclusion

[36] It follows that the question before us, *viz* whether a judgment in respect of VAT obtained by the respondent in terms of s 40(2)(a) of the Act, can be set aside because the appellant had not, prior to such judgment having been obtained, been given notice of the s 31 assessment on which the respondent relies, must be answered in the affirmative. The judgment obtained by the

respondent against the appellant in the present case cannot be allowed to stand, nor the other proceedings taken against the respondent pursuant to such judgment. The judgment of the court *a quo* can also not be allowed to remain in force.

[37] The following orders are made:

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the Court *a quo* is set aside and the following is substituted therefor:

(a) The judgment granted against the applicant on 18 July 2001 under case no 4467/2001 is set aside.

(b) The writ of attachment effected by the respondent pursuant to the aforesaid judgment, is hereby set aside.

(c) The respondent is ordered to pay the costs occasioned by this application, such costs to include those consequent upon the employment of two counsel.

P J J OLIVIER JA