Ex parte preservation orders: Krok v CSARS

This case was an appeal from the Gauteng Division of the High Court to the Supreme Court of Appeal ("SCA") pertaining to the **correctness of the granting of an ex parte preservation order application**that was brought against Mr Krok by the Commissioner of the South African Revenue Service ("SARS") **in terms of sections 163 and 185 of the Tax Administration Act** No. 28 of 2011 (the "TAA").

The Court had to determine the question having regard to the application of the **Double Taxation Agreement** ("DTA" – as amended by a protocol) between **South Africa and Australia**.The DTA provided for the mutual assistance between the two jurisdictions for the collection of taxes.

The entire issue arose from a **tax debt of 25 million AU$ owed to the Commissioner of Taxation of the Commonwealth of Australia who had applied through the Australian Tax Office ("ATO") to SARS to conserve the assets of Mr Krok that were held in South Africa as they were at risk of dissipation**.

Mr Krok entered into several agreements and arrangements whereby juristic entities around the world took control of his assets and the income derived therefrom. However, according to the ATO he continued to treat the assets and income as his own and he was therefore assessed to tax on the income that flowed from such arrangements.

Several arguments were advanced in the court a quo on behalf of Mr Krok.On the issue of **whether beneficial ownership had**

passed from Mr Krok to a legal entity in the British Virgin Islands, the court dismissed this by stating that whilst the contract entered into was under British Virgin Islands law,**the assets were here and therefore fell under South African law and that, with regard to immovable property the Deeds Registry Act No. 47 of 1937 had not been complied with,** and the formalities for the sale of movables had also not been complied with (delivery had not been proven), accordingly the juristic entity claiming beneficial ownership had not proven that the court a quo had erred in its finding.

The question remaining in the SCA was whether article 25A of the DTA could extend to periods preceding the effective date of the DTA, that is 1 July 2009. This issue was important because the tax obligation related to periods before 1 July 2009.

In this regard the SCA looked at certain international cases and went on to interpret the Protocol in question. **The SCA interpreted the application of the DTA to be in relation to "taxes of every kind and description" and not having any time limit as to the application of the tax periods to which the mutual assistance provision was effective**.That is, article 25 "provided no temporal limitations relating to exchange of information".

The effect of the judgment in this regard is that the two countries can only request a preservation order after the specific articles of the DTA came into effect but the application can be in relation to taxes which arose before the articles came into effect.

The appeal was therefore dismissed.

The lessons to be learned are as follows:

1. our Courts will look at substance rather than form when considering arrangements relating to ownership of assets; and,

2. **South Africa will comply with obligations placed on it in terms of a DTA** and therefore, assets held in South Africa are not safe from preservation orders where tax liabilities arise in jurisdictions that have tax treaties with South Africa and these sort of conservancy provisions exist therein.

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