Salary Sacrifices – tax case IT 12984

In the recent case of *ABC Limited v The Commissioner for the South African Revenue Service* (case number 12984, as yet unreported), the Tax Court had to determine whether the Appellant had entered into an effective salary sacrifice scheme with its employees in respect of motor vehicle benefits. If there truly was a salary sacrifice, only the taxable value of such benefit in accordance with the provisions of the Seventh Schedule to the Income Tax Act, No 58 of 1962 (Act) will have accrued to the employee, otherwise the amount expended by the Appellant to provide the benefit will have accrued.

By way of background, the Appellant operated an employee remuneration arrangement in terms of which the Appellant expended certain amounts in providing employment benefits to its employees (employment costs). One of these employment benefits related to the provision of a company vehicle where the employee could elect either:

- to receive the right to use the company vehicle as a benefit of his or her employment and the amount expended by the Appellant in providing the benefit would be deducted from the employment costs (company car scheme). The balance would be used for the provision of other remuneration benefits; or
- to receive a motor vehicle allowance where the amount of the allowance paid by each employee would be deducted from the employment costs (car allowance). In this instance as well, the balance would be available for the provision of other remuneration benefits.

The Commissioner for the South African Revenue Service (Respondent) assessed the Appellant on the premise that the

amounts allocated to the company car scheme constituted remuneration which accrued to the employees and were as such taxable in terms of Paragraph (c) of the definition of gross income in s1 of the Act. The Appellant objected to the Respondent's assessment, which objection was disallowed. The Appellant appealed the disallowance of the objection on the basis that a salary sacrifice agreement had been entered into between the Appellant and its employees and consequently there was no accrual of sacrificed amounts in respect of the employee's remuneration package.The Appellant further contended that the employment costs were subject to a contingency in that an employee first had to make an election before the employee would be entitled to anything. The employee would only be entitled to any benefit after an election had been made.

In respect of the company car scheme, the Appellant purchased the vehicle which was registered under the employee's name however ownership was retained by the Appellant.

Every employee who elected to participate in the company car scheme would be allocated a notional account where an amount would be credited towards the motor vehicle allocation. The employee was provided with a fleet card and any amount that was expended via the fleet card was debited against the credit allocated thereon. Further, any other costs incurred in respect of the vehicle such as insurance, fuel and interest were debited against the amount credited in the notional account. In the event of the employee spending more than was available in the notional account, such employee was obliged to make payment in the form of deductions from salary. In the event of the employee having underspent, such employee was entitled to reclaim the balance.

The Appellant contended that the benefits did not accrue to the employees, as the employment costs were contingent on the employees electing either of the options mentioned above. Only once the employee concerned had made an election, would he or

she be entitled to the benefit chosen. Therefore, the Appellant's obligation towards the employees was contingent on such choice being made.

The Respondent contended that the benefits paid by the Appellant in terms of the company car scheme remain part of the accrued income and that the salary sacrifice was 'not a genuine dimunition in the remuneration package arising from the costs to company.' The Respondent further contended that the divestment in favour of the company car scheme was not an antecedent divestment of the right to the money making up the sacrificed portion and therefore this still accrued to the Appellant. As a result the employees were entitled to an amount equal to the sacrificed portion in that the credit balance in the notional account was not forfeited in favour of the Appellant, but accrued to the employee as a right to claim such amount.

The Court agreed with the Respondent and held that-

"…once the employee made a choice, he became entitled to the use of the car subject to the payment of an amount to be administered on his behalf towards defraying whatever expenses are incurred. Debits were made against his allocation and any credit balance remained he still had a right to claim payment thereof. The employer made no contribution at all. I agree with the submission made on behalf of the respondent that the employee is entitled to the monies he agreed to allocate to the motor vehicle scheme as part of his gross income. This right accrued to the employee. The employer on the other hand is entitled to set-off the expenses the employee incurred for the private use of the employer's motor vehicle. This is a debt owed to the employer, but does not affect or impact on the definition contained in s1 paragraph (c) of the Income Tax Act that any amount received or accrued in respect of services rendered or to be rendered is taxable."

In other words, the employees became entitled to the income

and did not antecedently divest themselves of the right to the money since entitlement on the company car scheme account credit balance was not forfeited but paid out to them on request. The Appellant did not dispute this and the court accepted this as factually correct.

Interestingly, the Appellant submitted that in the event of the appeal not being upheld, the interest and penalties imposed should be remitted as there was no ill intent