

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Metcash Trading Ltd v Commissioner SA Revenue Service and another

Case CCT 3/00

Decided on 24 November 2000

Media Summary

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

In a judgment handed down this morning the Court dealt with the constitutionality of three sections of the Value Added Tax Act that make up a "pay now, argue later" rule. The first says that payment of an assessment is not suspended by an appeal, the second empowers the Commissioner to enforce payment by filing a statement with a court which acts as a civil judgment and the third puts the correctness of the assessment beyond challenge in such proceedings.

The Commissioner, holding that Metcash had claimed fictitious credits, assessed it for VAT of over R77 million plus double tax, a penalty and interest. He disallowed an objection and demanded payment, failing which he would use the Act's enforcement procedure. Metcash applied to the Witwatersrand High Court to block the threatened action. The judge, relying on a judgment of this Court in *Chief Lesapo v North West Agricultural Bank and Another*, found that the sections infringed the right of access to the courts protected by section 34 of the Constitution. The order of constitutional invalidity was referred to this Court for confirmation. Metcash supported the reasoning and conclusion of the High Court. It further contended that the double-tax provision was an unconstitutional form of administrative punishment for the commission of a crime. The Commissioner and the Minister opposed confirmation, saying that a taxpayer could take a refusal by the Commissioner to allow time for payment on review to a court. Even if there was an infringement of the right of access, quick and reliable recovery of VAT was of national importance and saved the provisions from invalidity under section 36 of the Constitution. Metcash countered that the provisions were too invasive and went further than foreign tax laws.

The unanimous judgment of the Court, prepared by Justice Kriegler, was that the High Court had erred and that none of the sections unjustifiably infringed the right of access to the courts. They are quite unlike those struck down in *Lesapo*, which allowed a land bank itself to sell up a debtor without recourse to a court of law. Here there was no analogous right to self-help and the courts could expressly not be by-passed. Anyway, the VAT system requires vendors themselves to collect and pay tax on their transactions, which means that an assessment necessarily involves a finding of dishonesty on the part of the

vendor. The Special Income Tax Court is geared to deal with such cases and a "pay now, argue later" rule is not unfair. In any event, to the extent that there is a restriction on the right of access, it is only partial and temporary and is subject to at least some judicial control. Having regard to the pressing national interest in enforcing honest and prompt payment of VAT, such limitation of the right of access to the courts as the "pay now, argue later" rule may constitute is justified under section 36 of the Constitution. The argument that double-taxation is some form of administrative punishment for the commission of a crime was not raised in the High Court and could not be considered in these confirmation proceedings.

In the result the Constitutional Court declined to confirm the invalidation of the three sections in question.