REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: IT 24578

(1)	REPORTABLE: **NO**	
(2)	OF INTEREST TO OTHER JUDGES: **NO**	
(3)	REVISED.	
27 January 2021		**CJ COLLIS**
DATE		SIGNATURE

In the matter between:

DEF MINING (PTY) LTD Applicant/Appellant

and

THE COMMISSIONER FOR Respondent

THE SOUTH AFRICAN REVENUE SERVICE

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 27 January 2021.

J U D G M E N T

COLLIS J

INTRODUCTION

[1] This is an opposed application, at the instance of the applicant in terms of Tax Court Rule 35(2) of the rules promulgated under section 103 of the Tax Administration Act 28 of 2011. The applicant wishes to amend its Statement of Grounds of Appeal in terms of Rule 32 of the Tax Court Rules.

[2] In terms of the proposed amendment, the applicant wishes to effect the following amendment to its Rule 32 Statement:[1]

[2.1] By introducing as an additional ground of appeal, the deductibility of the applicant's qualifying expenditure for the 2013, 2014 and 2015 income tax years of assessment from income derived by the taxpayer from its mining operations, as contemplated in section 11(*a*) of the Income Tax Act 58 of 1962 (as amended) ("the ITA");

[2.2] By attaching Annexure "DEF" to its Rule 32 Statement: a document of a factual nature, reflecting the classification of the appellant's expenditure during the 2013, 2014 and 2015 income tax assessments; and

[2.3] By providing a summary of the appellant's arguments in relation to the expenditure, with reference to the provision(s) of the ITA in terms of which it contends such expenditure stands to be deducted.

[3] The respondents' grounds of opposition are premised on the following:[2]

[3.1] The respondent contends that the appellant previously has **'abandoned' the ground of appeal sought to be introduced (i.e. the deductibility of its qualifying expenditure in terms of section 11(a) of the ITA),** by not previously including same as part of the appeal; and

[3.2] The respondent contends that the contends of **Annexure "DEF"** to the appellants notice of amendment is irreconcilable with the documents furnished to the respondent, in that the amounts changed and that the amendment seeks to raise and claim amounts that were not all included during the objection.

---

1 Notice of Intention to Amend dated 25 September 2020. Index 003-2.
2 Letter of objection Index 004-2.

AMENDMENTS

[4] Tax Court Rule 35 provides for the amendment of a party's statement under Rule 31, 32 or 33. The relevant Tax Court Rule reads as follows:

> **'35. Amendments of statements—**
>
> (1) The parties may agree that at statement under rule 31, 32 or 33 be amended.
>
> (2) If the other party does not agree to the amendment, the other party who requires an amendment may apply to the tax court under Part F for an order under rule 52.'

[5] Tax Court Rule 52(7) provides as follows:

> **'52. Application provided for under rules-**
>
> …
>
> (7) A party seeking an amendment of a statement under rule 35, may apply to the tax court under this Part for an appropriate order, including an order concerning a postponement of the hearing.'

[6] In the present instance, the applicant has provided the respondent with its notice in terms of Tax Court Rule 42(1) read with Uniform Rule 28(1) wherein it seeks to amend its Rule 32 Statement.

[7] Rule 42(1) of the Tax Court Rules reads as follows:

> "if these rules do not provide procedure in the tax court, then the most appropriate rule under the Rules of the High Court made in accordance with the Rules Board for Courts of Law Act and to the extent consistent with the Act and these rules, may be utilised by a party or the tax court."

ONUS

[8] The *onus* is on an applicant seeking the amendment, to establish that the respondent will not be prejudiced by the amendment.

[9] In deciding whether to grant or refuse an application for an amendment the court exercises a discretion and in so doing leans in favour of granting it in order to ensure that justice be done between the parties in deciding the real issues between them.[3]

[10] Amendments will usually be allowed unless the amendment is made *mala fide* or would cause prejudice to the other party which cannot be compensated by a costs order or some other suitable order such as a postponement.[4]

---

3 Thekweni Properties (Pty) Ltd v Picardi Hotels [2008] 1 ALL SA 172.

4 Imperial Bank Limited v Hendrik Barnard NO (349/12) [2013] ZASCA 42 (23 March 2013) at par 8.

[11] In circumstances where an amendment is sought at an advance stage of the proceedings such party is to provide an explanation for the delay. In the decision *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty)* 2002(2) SA 447 (SCA) at 462-464, it was held that the following considerations would apply:

> "The first matter which the applicant has to prove is that he did not delay his application after he became aware of the evidentiary material upon which he proposes to rely. Furthermore, he must explain the reason for the amendment and show prima facie that he has something deserving of consideration, a triable issue. A triable issue is (a) a dispute which, if it is proved on the basis of the evidence foreshadowed by the applicant in his application, will be viable or relevant, or (b) a dispute which will probably be established by the evidence thus foreshadowed. The greater the disruption caused by an amendment, the greater the indulgence sought and accordingly, the burden on the applicant to convince the Court to accommodate him."

[12] It is also trite, that a court hearing an application for an amendment has a discretion whether or not to grant it, provided that such discretion must be exercised judicially.[5]

[13] The primary object for allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done.[6]

[14] An amendment should not be refused simply to punish the applicant for neglect but where the amendment is not sought timeously the delay must be explained.[7]

FIRST GROUND OF AMENDMENT

[15] Section 11(*a*)- issue 'abandoned' by appellant. In respect of this first ground of the amendment, the applicant seeks to introduce an additional ground of appeal: i.e. the deductibility of its expenditure incurred during the 2013, 2014 and 2015 income tax years of assessment in terms of section 11(*a*) of the ITA.

[16] This ground of appeal sought to be introduced was previously raised by the applicant as a ground of objection, but not included as part of its grounds of appeal.[8] Its reason for its omission the deponent explains was due to advice obtained from X, its previous advisors, when it prepared its grounds of appeal.[9]

---

5 *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 565G.
6 *Cross v Ferreira* 1950 (3) SA 443 (C) at 447.
7 *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA (TkGD).
8 Founding affidavit para 13 to 13.5.3 Index 005-13.
9 Founding affidavit para 25 and 26 Index 005-17.

[17] In this regard the applicant specifically alleges as follows:

> 'The Appellant was advised at the time that the time that the Respondent's legal conclusions appeared to be correct in disallowing the second ground of objection, and accordingly the grounds of appeal were formulated to include the remaining issues only.'[10]

[18] It was only in preparation for the Tax Appeal matter that the applicant now received contrary advice than the previous, that its expenditure incurred for the 2013, 2014 and 2015 income tax years of assessment indeed qualify to be deducted under section 11(*a*) of the ITA.[11] It is on this basis that the applicant pursuant to such legal advice received instructed its legal representatives to attend to the preparation and delivery of its aforesaid notice of amendment dated 25 September 2020.[12]

[19] In addition, it also alleges that although the additional ground in the appeal will constitute a new ground in the appeal the respondent during the objection stage was given an opportunity to consider the ground raised and as such there can be no actual prejudice as contended for by the respondent. Its initial election "not to persist" with its second ground of objection in its grounds of appeal does not constitute an irrevocable "abandonment" of an issue in the Tax Court appeal.[13]

[20] On behalf of the applicant it was argued that this court ought to allow the amendment as the deductibility of the expenditure in terms of section 11(*a*) of the ITA, is an issue fit for consideration and therefore a triable issue. The additional ground sought to be introduced by the applicant will lead to a proper ventilation of the dispute between the parties, which dispute was evident from inception. Furthermore, that this issue is essentially a matter of legal argument and that it is indeed common cause that the expenditure was incurred by the applicant. Lastly, it was argued that it would be in the interest of justice and just and equitable to allow the amendment.

[21] On behalf of the respondent the arguments advanced were the following:

[21.1] The proposed amendment involves the withdrawal of an admission in the notice of appeal, alternatively, the objection is that the applicant's reliance on this ground was abandoned and waived.

[21.2] That the respondent previously considered the section 11(a)-issue and disallowed it on 6 September 2017 on the basis that the purpose of the expenditure was to develop the Gamsberg mine and consequently on the basis that such expenditure, is more closely related to the applicant's income-earning

---

10 Founding affidavit para 25 Index 005-17.
11 Founding affidavit para 27 Index 005-17 and Index 005-18.
12 Founding affidavit para 28 Index 005-18.
13 Founding affidavit para 29.3 Index 005-19.

structure and not its income-producing operations, the expenditure did not qualify for a deduction in terms of section 11(*a*) of the ITA. It is on this basis that the respondent concluded that the expenditure incurred by the applicant was of a capital nature and as such it did not qualify for deduction in terms of section 11(*a*) of the ITA.[14]

[21.3] Furthermore, this finding so made by the respondent, was admitted by the applicant in its appeal dated 16 November 2017. Pursuant to this finding the applicant even made an admission that the respondent was correct and that it will not base its deduction under section 11(*a*) of the ITA.[15]

[21.4 When the it thereafter delivered its Rule 32 Statement on 20 November 2018 it did not list the section 11(*a*)-issue, and as such the respondent accepted that this issue was effectively abandoned.

[21.5] Furthermore, at no point thereafter i.e. when the parties met during a pre-trial meeting held around November 2019, was the issue ever raised in order for the respondent to be made aware of its intended amendment to revive the section 11(*a*)- issue.

[21.6] As things stands, the respondent was only confronted with the applicants' intention to amend its Rule 32 Statement on 25 September 2020, three years after this section 11(*a*) issue was abandoned and waived but more crucial that this intention is conveyed two weeks before the Tax Court trial was to commence and it is on this basis that the respondent submits that it will suffer irreparable prejudice and therefore, it requested this court not to allow the applicant to amend its Rule 32 Statement to include the section 11(*a*)-issue.

[22] An admission is an unequivocal agreement by one party with the statement of fact by another.[16]An applicant wishing to withdraw an admission must under oath provide a reasonable explanation both to the circumstances under which the admission was made and the reasons why it is sought to withdraw it.[17]

[23] In *Image Enterprises CC v Eastman Kodak Co and Others*,[18] the court held that abandonment means to give up something absolutely and once such a decision is taken, it is final and irrevocable.

---

14 Dossier Vol 1 at 96.
15 Dossier Vo 1 at 108.
16 1947 SA 699 (T) at 703.
17 *Amod v SA Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N).
18 1989 (1) SA at 485.

[24] In *Mahabeer v Sharma*[19] the court held that waiver is the deliberate abandonment, renunciation or surrender of an existing legal right by the right holder, acting with full knowledge of the right and that waiver takes the form of an agreement in terms of which a right is abandoned.[20]

[25] In *Coppermoon Trading 13 (Pty) Ltd v Government*, Van Zyl DJP, held that waiver are legal acts and stated their requirement as follows:

> "Waiver is the intentional and unequivocal renunciation or relinquishment of a known right. [21] The intention is determined objectively, that is, it is adjudged by its outward manifestation in the form of words, spoken or written, or in the form of conduct or a combination of words and conduct."

[26] Waiver is considered final and disposes of a matter.[22] As soon as there is waiver, the right waived is irrevocably destroyed.[23]

[27] By not including the section 11(*a*)-issue in its Rule 32 Statement the applicant created the reasonable impression that the applicant intended to waive its right to raise the section 11(a)-issue.

[28] In the present instance the applicant as mentioned relied on advice received in a report prepared by X Advisors to conclude that it would not persist with the section 11(*a*)-issue as a ground of appeal. This abandonment and waiver was not only conveyed to the respondent but it was also acted upon by the applicant, as it was not included in its Rule 32 Statement delivered to the respondent on 20 November 2018.

[29] Furthermore, at all material times throughout engagement with the respondent (as far back as 2017) the applicant was represented by the same legal team as it is today, and its affidavit is evidently silent as to why its legal representatives acted on this 'incorrect legal conclusion' made by X Advisors, that resulted in the section 11(*a*)-issue not being persisted with. What is also conspicuously absent from the application, is an explanation by its very legal representative to elucidate much further why a report previously accepted and acted upon all of a sudden now became a report containing advice which ought to be discarded and rejected.

[30] The applicant's failure to take this court into its confidence and to provide a reasonable explanation, as to why the admission was previously made, conveyed to the respondent, and its removal now sought to be withdrawn, places this court in a position where it finds it difficult to come to the assistance of the applicant. Differently put, the applicant has failed to explain

---

19 1983 (2) ALL SA 377 (D).
20 *Thomas v Henry* 1985 (2) ALL SA 416 (A).
21 *Mutual Life Insurance Co of New York v Ingle* 1910 TD 540 at 550.
22 *Road Accident Fund v Mothupi* 2000 (3) ALL SA 181 (A).
23 Christie & Bradfield *The Law of Contract in South Africa* 6 Edition at 456.

the circumstances under which it was made and the reasons as to why it sought to withdraw it.

[31] As a result, the amendment of the Rule 32 Statement to include the section 11(*a*)-issue will not be permitted.

SECOND AND THIRD GROUND OF AMENDMENT

[32] As mentioned the applicant also wishes to attach Annexure 'DEF' to its Rule 32 Statement, which is a document of a factual nature, reflecting the classification of the applicant's expenditure during the 2013, 2014 and 2015 income tax years of assessment.[24] In addition, thereto, it wishes to provide a summary of its arguments in relation to its expenditure, with reference to the provision(s) of the ITA in terms of which it contends such expenditure stands to be deducted.[25]

[33] In respect of these grounds of amendments the applicant alleges[26] that the contents of Annexures "DEF1" to "DEF3" to the initial grounds of objection differ from that of Annexure "DEF" to the applicants' grounds of objection and that the reasons for the difference are the following:

[33.1] The initial annexures pertained to expenditure classified by the then applicant's advisors, X, as being in relation to prospecting. The latest annexure includes the classification of all expenditures, i.e. the total expenditures incurred by the applicant for the relevant years of assessment;

[33.2] The purpose of annexure "DEF" to the applicant's notice of amendment is therefore not only to cater for the section 11(*a*) argument, but to reflect the classification of all expenditure incurred by the applicant in respect of its Z Mine operations, i.e. the annexure also pertains to all of the remaining arguments in the appeal;

[33.3] Insofar as it is alleged that the total amount(s) of expenditure incurred by the applicant during the years of assessment (as reflected in Annexure "DEF") differ from that of the appeal, the contention is obviously incorrect. In fact, the difference(s) for each years of assessment is immaterial:

[33.3.1] 2013 YOA: R nil;

[33.3.2] 2014 YOA: R 102.88; and

---

24 Notice of Amendment para 3 and 4 Index 003-2.
25 Notice of Amendment para 9 Index 003-4 to 003-8.
26 Founding Affidavit para 34 to 34.3.3 Index 005-22 to 005-23.

[33.3.3] 2015 YOA: R 103.00

[34] Based on the above it was contended by the applicant that the whole part and amount(s) of the disputed assessment previously objected to for the 2013, 2014 and 2015 income tax years the assessment remained unchanged.

[35] Furthermore, that the contents of Annexure "DEF" is of a factual nature regarding the classification of expenditure during the relevant years of assessment.

[36] In addition, as the incurrence of the expenditure by the applicant as deductions is not disputed by the respondent [27] it is on the basis that it was contended that the respondent's objection is with any merit.

[37] The respondent likewise opposes the inclusion of Annexure "DEF" in that when compared to expenditure listed in Annexure "DEF1", "DEF2" and "DEF3" year by year in respect of the detail, description and the amount of the expenses listed, the expenses listed in each year is different; expenses previously listed in one year is now listed in another; expenditure amounts have changed; and additional expenses have now been listed.

[38] The refusal to accede to this amendment was conveyed by the respondent to the applicant in its letter of objection.[28]

[39] Based on the above, the respondent had argued that if the amendment was to be allowed it will now have to deal with expenditure which it did not previously have to do, more so where the applicant has previously accepted in its objection and appeal that certain of the expenditure was capital expenditure and that the concession was made by it that the contents between annexure "DEF" and annexures "DEF1", "DEF2" and "DEF3" is different.

[40] The applicant having made the concession that the contents of annexure "DEF" differs from annexure(s) "DEF1", "DEF2" and "DEF3" is indicative of prejudice to the respondent as it will now be required to meet a case, which was not previously presented to it more so in circumstances where it was not explained to this court as to the reason why annexure "DEF" was not presented to the respondent earlier on.

[41] Furthermore, the Tax Court Rules and specifically Tax Court Rule 7(2)(*b*) provides that a taxpayer lodging an objection must specify, in detail, the grounds on which the objection is made including the part or specific amount of the disputed assessment objected to; which of the grounds of assessment are disputed; and the documents required to substantiate the

---

27 Respondent's Rule 31 Statement para 13 & 16 Index 001-4 and 001-5.
28 Index 004-1 and 004-2.

grounds of objection that the taxpayer has not previously delivered to SARS for purposes of the disputed assessment.

[42] The proposed amendment by introducing annexure “DEF” is also not permitted in terms of the Tax Court Rules.

[43] For the reasons as set out above the amendment on these additional grounds also falls to be refused.

ORDER

[44] In the result the following order is made:

[44.1] The application is dismissed with costs, including the costs of two counsel.

C.J. COLLIS
JUDGE OF THE HIGH COURT

Appearances

Date of Hearing : 22 October 2020
Date of Judgment : 27 January 2021
Judgment transmitted electronically.