REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

HELD AT MEGAWATT PARK, JOHANNESBURG

CASE NO: IT 13178

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED. NO

..... 31 March 2021
SIGNATURE **DATE**

In the matter between:

MR X Appellant

and

THE COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE Respondent

J U D G M E N T

SIWENDU J

Introduction

[1] This appeal is against an additional tax assessment raised on 26 July 2010 and a refusal by SARS to uphold the main objection to the assessment made on the appellant's tax for the financial years of 2005, 2006, 2007.

[2] The appellant, Mr. X, an adult businessman, is a registered taxpayer for Income Tax purposes with Income Tax reference number 00000. He resides in Johannesburg, and launched the appeal in terms of section 107(1) of the Tax Administration Act 28 of 2011 (the 'TAA').

[3] On the day of the hearing of the appeal, which was set down for two days, Advocate L (who had been on record for the appellant) advised the Court, out of courtesy, that the appellant's attorneys of record had withdrawn legal representation. Accordingly, Ms M (for SARS) sought an order in terms of Rule 44(7) of the Tax Court Rules, read with section 129 of the TAA, that the appeal should be dismissed and that the Court should make an order confirming SARS' revised assessment in terms of section 129(2)(*a*) and (*b*) of the TAA.

Prosecution of the appeal

[4] The appeal has been on the court roll numerous times but was removed at the instance of the appellant on each occasion. Ms M submitted that before the matter could be heard, the appellant requested that the matter be removed from the roll by agreement for settlement negotiations. Mr X's settlement offer was rejected by SARS and the appellant did not revise his settlement offer notwithstanding his undertaking to do so.

[5] SARS applied for a hearing date and the matter was set down for 26-28 October 2020. On 23 October 2020, the appellant requested that the matter should stand down to allow him to make a settlement proposal. SARS agreed to stand the matter down to 27 October 2020 for purposes of settlement.

[6] Unfortunately, the appellant's previous counsel passed away. To allow him an opportunity to appoint a new counsel, on 27 October 2020, parties agreed to postpone the matter to 23 November 2020 so that the new counsel could have an opportunity to acquaint himself with the case. The trial set down for 23 to 25 November 2020.

[7] On 24 November 2021, the appellant made a substantive application for yet another postponement stating in his founding affidavit that –

> '2.3.8 I have been advised that the Registrar of the Court has possible dates for 4-5 February 2021 and I undertake that should the postponement be granted, that I will be ready to

> proceed on those days, failing which the matter can be automatically struck from the roll or dismissed with costs.'

[8] The Court postponed the hearing of this matter to 4-5 February 2021, the day the appellant's attorney and counsel withdrew. It had been made clear that the postponement was the final one, and the Court would not entertain further delays in this matter. Accordingly, the hearing of the appeal on 4 February 2021 proceeded in the absence of the appellant.

Factual background

[9] The appellant earned his living from two parallel business ventures, one as a book maker and the other as a futures equity trader. Even though there is a dispute on the papers on the capacity in which he was employed, before starting his own businesses, the appellant worked at the stock brokerage firm, N & T Company (as a derivatives trader). SARS claims that the appellant worked as a derivatives trader and was thus using his experience as a derivatives trader in a stock brokerage firm, operating a business as a futures equity trader. The appellant operates an account with Y Bank.

[10] The bookmaking business entailed accepting and placing horseracing bets from private individuals and the public (the punters). If the bets placed with the appellant win, he is obliged to pay out the winnings to the relevant punters. To mitigate the exposure to risks from winning bets, he places hedging bets with other bookmakers. SARS believes the hedging strategy entails the appellant betting in the opposite direction of the bets placed. He claims bets with other bookmakers is in the same direction. Nevertheless, when the bets placed win, the appellant is obliged to pay-out the winnings to the relevant punters.

[11] For purpose of monitoring the betting transactions, the appellant maintained a spreadsheet on a daily basis. SARS claims the appellant is required, for purposes of monitoring its betting transactions, to generate and issue settling statements and statements of accounts for each punter in respect of bets accepted by him. Similarly, the appellant, as a punter in respect of its hedging bets, is issued with settling statements and statements of account by the other bookmakers. To counter this, the appellant claimed there were no directives in the industry to issue settling statements and statements of account during the relevant assessment period. The appellant argued that in respect of hedging bets, he was never issued with any settling statements or statements of account by other bookmakers. Settling was done verbally on a mutually agreed figure on a weekly basis, and not on presentation of a statement as alleged. The appellant argued that at no stage whatsoever did SARS ever raise the issue of 'settling'. According to the appellant, this issue was new and was never raised or addressed by SARS, and no facts were given for this allegation and the nexus to the assessments.

[12] Following a tax audit and an analysis of deposits made to his bank account, SARS found that the appellant under declared income from his booking making business as follows:

Years	2005	2006	2007
Under-declared bookmaking income	3 874 112	4 811 686	4 475 408

[13] In so far as the Equity and Futures Trading Business is concerned,[1] the appellant operated an account with Z Securities (Pty) Ltd ('Z Securities') for purposes of trading on the South African Futures Exchange ('SAFEX') as Z Securities is a stock brokerage firm and a member of the SAFEX. SAFEX applies a cash settlement system for equity futures, meaning that the parties to an equity futures contract need only pay each other the profit on the equity futures itself. They need not pay for, or take delivery of, the underlying asset, in this case, the shares. For example, on 1 January 2013, when the T share is R100 each, the trader contracts to sell 500 T shares on 31 March 2013 at a strike price of R115 each. On 31 March 2013, the price of the T shares is R105 each. The trader makes a profit of R5 000 (R115— R105) x 500). In this example, the trader makes a profit if the price on 31 March 2013 is less than the strike price, and he makes a loss if the price on 31 March 2013 exceeds the price.

[14] An analysis of the appellant's bank statements of the futures trading account, for the period 1 March 2004 to 28 February 2007, from Z Securities revealed that the appellant did not declare the profits from his futures trading business as follows:

Description	**2005**	**2006**	**2007**
Non-declared profits from futures trading	219 900	760 500	949 500

[15] In addition, the appellant had not declared interest earned on his funds held by Z Securities and from the Y Bank call account:

Description	**2005**	**2006**	**2007**
Non-declared interest income	36 469	26 967	94 814

[1] Equity futures are futures contracts for the sale of shares as the underlying assets. A future (or futures contract) is a contract between two parties concluded through an organised exchange where one party agrees to sell and the other party agrees to buy a fixed quantity and quality of commodity or financial asset on a specified future date at a pre-determined price (the 'strike price'). A futures contract is an asset in its own right and it derives its value from the profit arising from the movements in the prices of the underlying asset.

[16] SARS issued additional assessments as a result, levying additional tax at 100% and interest as follows:

Description	**2005**	**2006**	**2007**
Under-declared book-making income	3 874 112	4 811 686	4 475 408
Non-declared profits from futures trading	219 900	760 500	949 500
Non-declared interest income	36 469	26 967	94 814
Total adjustments to taxable income	4 130 481	5 599 156	5 519 722
Tax thereon – capital amount	1 652 192	2 239 661	2 207 889
Additional tax	1 652 193	2 339 661	2 207 888
Interest	1 014 003	2 342 215	1 456 034
Total	**4 318 387**	**6 821 537**	**5 871 812**

[17] Aggrieved by the above additional assessments, the appellant objected to the additional assessments. He contended that the income tax audit findings were inconsistent with the documents, and, therefore, the findings were unfounded and unsubstantiated.

[18] SARS supplied the appellant with several assessments, differing each year and each time, without indicating and/or giving a breakdown as to how the figures were calculated and/or arrived at, and what the reason(s) was for each and every amendment.

[19] Reference is made to SARS' letter dated 27 October 2010 confirming SARS' attitude that direct confirmation by third parties, namely L & L Co. in respect of the proof of expenditure and loans, would be allowed and be sufficient. This proof was presented to SARS. However, despite written confirmation by SARS, some of the deductions were wrongly and inconsistently disallowed.

[20] The appellant claimed that irrational and inconsistent conduct by SARS is reflected in its correspondence, in respect of the 'disallowance of objection' dated 12 December 2011. In clause 2.5, the objection bearing the same terms were fully allowed for 2006 but disallowed for 2005 and 2007. In clause 3.5 the objection was allowed for 2006 but not for 2005 and 2007. In clause 4.6 it is stated that the objection is partially allowed in respect of punting and settling expenditure. With reference to the disallowance, SARS did not indicate which punting and settling expenditures could not be traced.

[21] The appellant denied that there was any income tax due and payable, either as assessed by SARS or on any other factual and/or legal basis. He claimed the interest for the futures trading was already included in the amounts he had declared as income, even though it was not disclosed separately as 'interest'.

[22] The bone of contention was that SARS had allowed the objection in respect of interest for the 2006 assessment but disallowed it for 2005 and 2007. SARS, on its own assessment (paragraph 3.5) in the correspondence dated 12 December 2011, stated that from the analysis of the betting bank account and the taxpayer's personal account it did not reveal any cash flow from the Futures transactions account with Z Securities (Pty) Ltd, except for the 2006 year of assessment. The cash flow from the Futures' transactions account with Z Securities (Pty) Ltd in fact appears also for 2005 and 2007.

[23] At the hearing, Ms M contended that SARS had conceded part of the complaint. It altered the assessment by adjusting the interest income and futures trading profit realised from the taxable income, which thus covered the period unaccounted for. SARS conceded with the appellant that the proceeds in the futures and trading account were capital in nature and raised capital gains tax throughout the relevant period. In addition, it allowed as deductions those expenses proved by the appellant,[2] and invited the appellant to explain the unexplained deposits. It also considered extenuating circumstances and imposed an additional tax at 50%, rather than 100% it was entitled to impose.

[24] The appellant, still aggrieved by the partial disallowance of the objections and the additional assessment raised by SARS on 26 July 2010, appeals to this Court. The appellant brought this appeal for adjudication by the court in terms of section 107(1) of the TAA which states that:

> '**Appeal against assessment or decision—**
>
> (1) After delivery of the notice of the decision referred to in section 106(4) [this is the notice informing the taxpayer of the outcome of its objection to an assessment by the respondent], a taxpayer objecting to an assessment or "decision" may appeal against the assessment or "decision" to the tax board or tax court in the manner, under the terms and within the period prescribed in this Act and the "rules".'

[25] It is common cause between the parties that SARS issued assessments in terms of which it included the deposits made into the appellant's bank account statement as part of his gross income. An analysis of the appellant's bank statements revealed that the appellant did not disclose all the deposits in his bank accounts.

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[2] The appellant has to discharge the burden of proof in terms of section 102(b) of the TAA.

Issues for determination

[26] The issues for determination are whether:

[26.1] The unexplained receipts and deposits in the appellant's bank account, together with the unaccounted expenses, formed part of the appellant's gross income of his bookmaking business and equity futures trading business as defined in s 1 of the Income Tax Act 58 of 1962 ('the Act'), for the relevant years of assessment, and entitled SARS to levy the additional assessment lies at the heart of the appeal.

[26.2] Interest income earned by the appellant on the funds deposited with the financial institutions form part of his 'gross income', as defined in section 1 of the Act, for the relevant years of assessment.

[26.3] The appellant has produced sufficient evidence to satisfy SARS that the failure to declare, or the under-declaration of income, was not done with intent to evade taxation or of any extenuating circumstances as contemplated in section 76(2) of the Act and is therefore entitled to a remittal of the additional tax imposed.

[26.4] The appellant has, on reasonable grounds, contended that the amounts in dispute should not have been declared in its income tax returns to justify the waiver and remittal of the interest in terms of section 89*quat* (3) of the Act.

[27] The appellant bears the burden of proof to show the assessment is incorrect. It is not for SARS to prove that the assessment is correct but rather to defend its assessment. Further, given the alteration of the assessment by SARS alluded above, the appeal court is still required in terms of the range of powers vested in it by section 129 of the TAA to *inter alia:*

[27.1] confirm the assessment or 'decision';

[27.2] order the assessment or 'decision' to be altered; or

[2.7.3] refer the assessment back to SARS for further examination and assessment.[3]

[3] See ABC (Pty) Ltd v Commissioner *for The South African Revenue Service* (VAT 1558) [2018] ZATC 7 (5 December 2018).

[28] Ms M contended that the Court must grant a default judgment on the strength of Rule 44(7) promulgated under section 103 of the TAA, and the decision of the SCA in *Take & Save Trading CC and Others v The Standard Bank of SA Ltd*.[4] The Rule states that:

> '(7) If a party or a person authorised to appear on the party's behalf fails to appear before the tax court at the time and place appointed for the hearing of the appeal, the tax court may decide the appeal under section 129(2) upon—
>
> (*a*) the request of the party that does appear; and
>
> (*b*) proof that the prescribed notice of the sitting of the tax court has been delivered to the absent party or absent party's representative, unless a question of law arises, in which case the tax court may call upon the party that does appear for argument.'

[29] Based on the history of the appeal as well as the submissions made, and the late notification to the Court of the withdrawal of the appellant's attorney of record, the case for the determination of the appeal in the absence of the appellant is well grounded. The appellant has been aware of the looming appeal since November 2020. Submissions made before the Court is that he failed to provide instructions to his attorneys in preparation for the appeal. I turn to the merits of the appeal.

[30] In terms of section 11(*a*) of the Income Tax Act, the appellant is obliged to provide proof that such expenses are actually incurred and that they meet the requirements of section 11(*a*). In addition, in terms of the old section 76 of the Income Tax Act, the appellant must prove that exceptional circumstances exist that warrant a further remission of the additional tax.

[31] Section 76(1) of the Income Tax Act during the relevant years of assessment stated:

> 'The taxpayer shall be required to pay in addition to the tax chargeable in respect of his taxable income:
>
> (*a*) if he omits from his return any amount which ought to have been included therein, an amount equal to twice the difference between the tax calculated in respect of the taxable income returned by him and the tax properly chargeable in respect of his taxable income as determined after including the amounts omitted.
>
> (*b*) if he makes an incorrect statement in any return rendered by him which results or would if accepted result in the assessment of the normal tax at an amount which is less than the tax properly chargeable, an amount equal to twice the difference between the tax as assessed in accordance with the return made by him and the tax which would have been properly chargeable.'

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4 *Take & Save Trading CC and Others v The Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA).

[32] In terms of section 76(2)(*a*):

> 'The Commissioner may remit the additional charge imposed under sub-section (1) or any part thereof as he may think fit: Provided that, unless he is of the opinion that there were extenuating circumstances, he shall not so remit if he is satisfied that any act or omission of the Appellant referred to in paragraph (a), (b) or (c) of subsection (1) was done with intent to evade taxation.'

[33] Section 89*quat*(3) of the Act provides as follows:

> '(3) Where the Commissioner having regard to the circumstances of the case is satisfied that any amount has been included in the Appellant's taxable income or that any deduction, allowance, disregarding or exclusion claimed by the Appellant has not been allowed, and the Appellant has on reasonable grounds contended that such amount should not have been so included or that such deduction, allowance, disregarding or exclusion should have been allowed, the Commissioner may, subject to the provisions of section 103 (6), direct that interest shall not be paid by the Appellant on so much of the said normal tax as is attributable to the inclusion of such amount or the disallowance of such deduction, allowance, disregarding or exclusion.'

[34] After a query of how SARS arrived at its calculations, the following is apparent:

[34.1] The unexplained deposits fully appear in schedules on annexures 9, 11 and 13 for the relevant period and were considered by the Court.

[34.2] The reconciliation of the expenses claimed which appears on annexures 10, 12 and 14 of the schedules was presented for consideration.

[34.3] The appellant declared R174 644 as income while after the audit his income was found to be R4 294 125 including income from his futures account.

[34.5] SARS levied the appropriate tax as well as the additional tax, and thereafter reduced the tax assessment after the objection.

[34.6] SARS made a correction to its calculations and issued a further assessment.

[35] Having regard to all the facts above, the appeal must fail, and judgment is granted against the appellant in default.

Accordingly, the following order is made:

1. The appeal is dismissed.

2. SARS' revised assessments for the 2005-2007 years of assessment are confirmed.

3. The additional tax levied in terms of s 76 of the Income Tax Act 58 of 1962 is confirmed.

4. The interest imposed in terms of s 89quat of the Income Tax Act 58 of 1962 is confirmed.

5. The appellant is ordered to pay the costs of this appeal which costs are to include the employment of counsel.

T SIWENDU

JUDGE

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 31 March 2021.

Date of hearing:	4-5 February 2021
Date of order:	26 March 2021
Date of judgment:	31 March 2021