REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

HELD AT GAUTENG LOCAL DIVISION, JOHANNESBURG

Case NO: IT 24988

(1)	REPORTABLE: ~~YES/~~**NO**
(2)	OF INTEREST TO OTHER JUDGES: ~~YES/~~**NO**
(3)	REVISED.
…………………….. SIGNATURE	**5 August 2021** DATE

In the matter between:

CZY Appellant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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J U D G M E N T

Vally J (Vincent Kekana and Zeyn Mia)

Introduction

[1] The appellant appeals to this court against the decision of the respondent (SARS) to impose an understatement penalty (UP) in terms of sub-section 223(1) of the Tax Administration Act, 28 of 2011 (TAA). The UP was levied in relation to the 2014 year of assessment. It was levied at the rate of 25%. This was done in terms of item (ii) of the Table set out in section 223 of the TAA.[1]

[2] Given that SARS bore an onus – the nature of which is dealt with later – in this matter it commenced with its case first. It led one witness. At the close of its case, the appellant applied for absolution from the instance (absolution). This raised the question of whether such a remedy avails a taxpayer in a case where the taxpayer has been levied with a UP. This is a legal question. It is decided by myself only.

Facts

[3] The appellant engages in the business of wild game farming. During the course of the 2014 financial year the appellant acquired wild game or "exotic animals" (in the words of the appellant) for purposes of the business. This purchases of wild game could qualify as an expense incurred in the course of earning an income. And so in its 2014 tax return (return) the appellant reflected the purchase as an expense incurred in the course of earning an income.

[4] SARS conducted an audit of the appellant's returns for the 2014 to 2016 years. On 18 May 2018 it issued an assessment indicating that it rejected the appellant's claim for expenses for the acquisition of livestock for the 2014 year. Four days later, on 22 May 2018 the appellant responded to the assessment indicating that it agreed with SARS that the claim ought not to have been made, but contended that SARS should not impose a UP. On 13 June SARS issued a Finalisation of Audit Letter wherein it levied a UP at the rate of 100%. The appellant lodged an objection to the levying of the UP. On 5 September 2018 SARS allowed the objection, but only partially. The UP was reduced to 25%. The appellant's appeal is directed at this partial allowance of its objection.

[5] After the objection was lodged, the UP for the claim of the purchase of the "livestock" was reduced from R6 255 972.00 to R1 556 268.00. There was also a UP for overstating operating expenses amounting to R5 387.90. The total UP imposed was thus R1 562 105.90. Only the UP imposed for the claim associated with the purchase of "livestock" is under appeal.

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[1] The Table is set out in [25].

The legislative provisions

[6] Subsection 222(1) of the TAA reads as follows:

> "In the event of an 'understatement' by a taxpayer, the taxpayer must pay, in addition to the 'tax' payable for the relevant tax period, the understatement penalty determined under subsection (2) unless the 'understatement' results from a *bona fide* inadvertent error."

[7] In terms of subsection 102(2) of the TAA SARS bears the onus to prove the facts on which it based the imposition of the UP. The subsection provides;

> "The burden of proving whether … the facts on which SARS based the imposition of an understatement penalty under Chapter 16, is upon SARS."

[8] Subsection 129(3) of the TAA attends to the powers this court is endowed with when faced with an appeal against a UP.

> "In the case of an appeal against an understatement penalty imposed by SARS under a tax Act, the court must decide the matter on the basis that the burden of proof is upon SARS and may reduce, confirm or increase the understatement penalty."

[9] As mentioned above the appellant applied for absolution immediately after SARS closed its case. This raised the question of whether the relief of absolution applied in tax disputes where SARS bore the onus to prove the tax liability – albeit as a result of a UP – of the taxpayer. In the High Court it is catered for in sub-rules 39(3) and 39(6) of the Uniform Rules of Court (Uniform Rules). This court, on the other hand, does not have any equivalent rules: there simply is no allowance made for absolution in this court's rules. This court's rules are not as extensive as the Uniform Rules. This is understandable, as it is a specialist court where the disputes are narrow and the issue a singular one. The issue in general terms is whether the tax liability of a taxpayer has been correctly determined by SARS. In the High Court, however, the issues are manifold and the disputes are wide-ranging. There is, in that case, a need for wide-ranging extensive rules to cater for the numerous circumstances that may arise during the life of the litigation, i.e. from the moment litigation is launched until the matter is finally determined. This major difference notwithstanding, the drafters of this court's rules recognised that the said rules may not cater for all the circumstances that may arise in this court, even though the issues brought may be narrow and circumscribed. To deal with this they introduced a rule broad enough to take advantage of the Uniform Rules to ensure that the dispute in this court is adequately addressed. It is rule 42 of this court's rules, which provides that:

> "If these rules do not provide for a procedure in the tax court, then the most appropriate rule under the Rules for 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."

[10] The appellant submits that this court should import the provision of sub-rules 36(3) and 36(9) of the Uniform Rules, and come to the conclusion that absolution is available in tax disputes where SARS, as in this case, bears the onus to show that the tax liability imposed by itself on the taxpayer is correct and valid.

Analysis on absolution

[11] There is certainly no doubt that sub-rules 39(3) and 39(6) can be accessed by this court to entertain the application for absolution. That said, whether absolution avails a taxpayer in a case where a UP has been imposed upon it has to be decided with reference to subsections quoted above in [6] – [8].

[12] Sub-section 102(2) places the burden of proving the facts upon which the UP is based upon SARS. Subsection 222(1) makes the payment of a UP imperative unless the understatement is a result of a *bona fide* inadvertent error. Subsection 129(3) requires this court to make its decision on the basis that the burden of proof is on SARS, and then either "reduce, confirm or increase" the UP. This court cannot leave the matter undecided. If it finds that SARS has not met the onus it must give judgment in favour of the taxpayer.

[13] Absolution is a particular remedy in which the defendant is absolved because the plaintiff failed to make out a case in which a reasonable court would find in its favour. As such, the defendant would be absolved without having to meet the case of the plaintiff. Simply put, there is no case for the defendant to meet. Absolution does not result in the finalisation of the matter. Its effect is to place the parties in the same position as they were before the litigation began, ie. as if the case had not been brought at all. In such a case, the plaintiff against whom absolution has been granted has every right to re-commence with the same claim *de novo.*[2]

[14] In a tax matter the position is significantly different. This is manifest by looking at this case itself. SARS has issued an assessment, which includes the UP. The assessment has legal effect unless withdrawn, amended or overturned by this court. The appellant objected to the assessment. It succeeded partially. The UP was reduced from 100% to 25%. The appellant is now liable for the UP set out in the outcome of the objection – 25% of the understatement. That is the new assessment. It replaces the old one and it now is the one that is legally binding on the appellant.

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2 *Corbridge v Welch* (1891-2) 9 SC 277 at 279; *Colman v Dunbar* 1933 AD 141 at 163; *Liberty Group Ltd v K D Telemarketing CC and Others* 2019 (1) SA 540 (GP) at [8].

[15] Should this court grant absolution it would still be liable for the UP. In other words, it would not be absolved in the same manner as a defendant in litigation in the civil courts. It is of course possible that SARS may after absolution is granted reconsider its position, but it is not legally obliged to do so. It could if it wished persist with its position. This demonstrates that allowing for absolution in a tax case would not make much sense. There is therefore, in my view, sound logical reason for not catering for absolution in the rules of this court.

[16] In the result I come to the conclusion that the remedy of absolution from the instance does not avail an appellant in this court. Should the appellant wish to take the view that SARS has failed to discharge its onus, it should close its case and argue for the court to reduce the UP to zero. Should it succeed the matter would be finalised, at least in this court. Absolution on the other hand would still leave the matter pending in this court, as the appeal and the assessment would remain in place.

[17] In any event, and should I be wrong in finding that absolution does not avail an appellant in the Tax Court, the entire bench – myself and my two assessors – applying "our minds reasonably" to the evidence presented by SARS have come to the conclusion that we could or might come to the conclusion that SARS has put up sufficient evidence to defeat the appeal. SARS has to prove only the facts upon which it based the UP, which includes that it suffered prejudice as a result of the UP.[3] This, we find, it did. It does not have to prove the qualification in subsection 222(1), ie. that the understatement resulted "from a *bona fide* error".

[18] Thus, even if the remedy of absolution was to avail the appellant, it nevertheless should fail in its endeavour, as we find, based on the evidence of the SARS' witness and the concession by the appellant that there was an understatement in its 2014 return, we might – acting reasonably – find in favour of SARS should the appellant close its case without leading any evidence.

The merits of the appeal

[19] SARS led the evidence of a single witness: a Ms AA. Her evidence was that she has been working in the SARS audit section for 24 years. On 2 October 2017 SARS issued the appellant with a notice of an audit. It requested certain documentation from the appellant. It received the documentation and she examined it.

[20] After scrutinising the documents she noticed that the appellant claimed an expense of R15 559 728.00 for the acquisition of "wild livestock" for the 2014 tax year. As a result of this claim the assessed loss for the year was R26 738 053.00. The appellant's assessment therefore reflected a tax liability of zero for that year. The farming income was R216 000.00.

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3 *Purlish Holdings (Pty) Ltd v Commissioner for SARS* [2019] ZASCA 04 (26 February 2019) at [21].

In terms of section 11 of the Income Tax Act 58 of 1962 (IT Act) read with paragraph 8(1) to the First Schedule of the Act the claim for expenditure for the purchase of livestock should have been restricted to R216 000.00. On 28 May 2018 the appellant's bookkeeper/accountant, ABC Auditors Inc (ABC), responded to the audit finding saying that the appellant agreed that the expenses for R15 559 728.00 should not have been claimed. As a result the claim of R15 559 728.00 for the purchase of livestock was disallowed. She drew attention to a Practice Note issued by SARS on 30 July 1999 (Practice Note 6/99) which explained to all game farmers what the legal position regarding the tax liabilities of game farming were. Practice Note 6/99 makes it patently clear that paragraph 8 of the First Schedule to the IT Act would be applicable to all game farming. She pointed out that paragraph 4.2.2. of the said Practice Note informs all taxpayers engaged in this business that:

> "Paragraph 8 of the First Schedule to the Income Tax Act provides that where any farmer during the year of assessment incurred expenditure in respect of the acquisition of livestock, the deductions in respect of the cost price of such livestock will be ring-fenced. The purchase price and the value of livestock held and not disposed of by a farmer at the beginning of the year of assessment will be limited to the sum of the income received and accrued to the farmer from farming together with the value of the livestock held and not disposed of by him at the end of the year of assessment.
>
> The balance of the purchase price, if any, will be carried forward to the following year of assessment, where the same principle will be applicable."

[21] As an expense cannot exceed the total income for the year, only R216 000.00 should have been deducted from the income earned and the balance of the cost of the acquisition of the livestock would have to be claimed in the 2015 tax year. Had this occurred the assessed loss for the financial year would have been R2 261 973.00. Instead because the amount of R15 559 728.00 was claimed as an expense the assessed loss was unduly said to be R26 738 053.00

[22] She noted that the objection to the levying of the UP was that there was:

> "No intentional understatement and no tax implications as there was still a loss and the purchase are [*sic*] just carried forward."

[23] She referred to the definition of "understatement" in section 221 of the TAA, which reads;

> "any prejudice to SARS or the fiscus as a result of—
>
> (*a*) failure to submit a return required under a tax Act or by the Commissioner;
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> (*b*) an omission from a return;
>
> (*c*) an incorrect statement in a return;
>
> (*d*) if no return is required, the failure to pay the correct amount of 'tax', or

(*e*) an 'impermissible avoidance arrangement'."

[24] In relation thereto she claimed that the understatement caused the fiscus prejudice. She rejected the claim of the appellant that there was no loss to the fiscus as the expense claimed made no difference since the business made a loss anyway. She said this argument fails to acknowledge that in terms of the TAA the appellant had to state the correct assessed loss in its return. By claiming for the entire purchase of "exotic game", the assessed loss was incorrect and the amount claimed far exceeded the income for the year, which, too, was incorrect. The moment that occurred subsection 222(1) – see [6] above – became operational. She said further that the incorrect return resulted in SARS expending time and money to remedy the situation. This time and money is irrecoverable and therefore constitutes prejudice to SARS. She reiterated that the Guide on UP prepared by SARS to assist taxpayers makes it clear that the fact that a tax consultant was used to complete the return does not absolve the taxpayer from liability for filing a return that contains an understatement.

[25] She said that on the basis of the explanation given to it by the appellant as to why the claim was made, SARS came to the conclusion that this was not a "*bona fide* inadvertent error". It was a case of gross negligence. SARS had provided Practice Note 6/99 to explain the tax position, a Guide on UP and, in addition, the appellant could easily have contacted SARS for assistance should it have been uncertain as to its tax liability. By failing to read these documents and by failing to contact SARS the appellant was, she said, grossly negligent. She referred to section 223 of the TAA to explain how the UP was calculated in this case. Section 223 expounds on the percentage amount of the UP that is to be levied in different situations. It is set out in the form of a Table, which reads:

1	**2**	**3**	**4**	**5**	**6**
Item	*Behaviour*	*Standard Case*	*If obstructive, or if it is a repeat case*	*Voluntary disclosure after notification of audit or criminal investigation*	*Voluntary disclosure before notification of audit or criminal investigation*
(i)	"Substantial understatement"	10%	20%	5%	0%
(ii)	Reasonable care not taken in completing return	25%	50%	15%	0%

(iii)	No reasonable ground for tax position taken	50%	75%	25%	0%
(iv)	Impermissible avoidance arrangement	75%	100%	35%	0%
(v)	Gross negligence	100%	125%	50%	5%
(vi)	Intentional tax evasion	150%	200%	75%	10%

[26] She said that the UP was reduced from 100% to 25% because SARS was willing to accept the appellant's claim that it did not deliberately understate its financial position in the return. She read a paragraph from the appellant's notice of appeal which regurgitates what is contained in a document issued by SARS titled *Guide to Understatement Penalties* and which is also contained in Interpretation Note No.69 that was issued on 12 February 2013 by SARS. The paragraph reads:

> "The fact that the services of an accountant are obtained is not definite proof of reasonability. Appropriate services can only be provided if all the relevant information and material facts pertinent to the tax liability are supplied to the professionals. Additionally, even though reliance on professional advice is usually indicative that the taxpayer has acted reasonably, the use of advice must be sensible and reliance on dubious advice will not be. It is however not reasonable to abdicate tax compliance in favour of professionals, the accountability in the final analysis lying with the taxpayer."

(Quote is verbatim.)

This paragraph, she said, shows that the appellant should not just have relied on the advice of ABC. By so doing it did not take reasonable care, as the contents were known or should have been known to the appellant had it taken reasonable care before signing off on the return that was submitted.

[27] The appellant in contrast claims that it was not negligent at all. Its case is that by seeking the assistance of ABC it acted responsibly. It led the evidence of one witness, Mr GG, who was at pains to make this point. He is a trustee of the appellant. The other trustees are his mother, his sister and one other "independent trustee".

[28] Mr GG's testimony was clear, coherent, confident and intelligent. He testified that the appellant was involved in the business of exotic game farming since 2009. He explained the nature of the business, which involves, *inter alia*, the purchasing of a male wild animal (bull) to breed with about 20 females. He manages the farm and all the financial affairs of the

appellant. From an early stage he contracted with ABC to “handle tax, salaries and VAT” of the business. It pays salaries every two weeks, and completes the VAT returns every two months. It also completes the annual financial statements and prepares the income tax returns. This is because he does not have the knowledge to perform these tasks. The owner of ABC is a Mr CC who is a Chartered Accountant and is himself an owner and operator of an exotic game farm. He fully trusted Mr CC. The tax returns are prepared by ABC, but he discusses them with Mr CC and consents to them before they are submitted. The 2014 tax return was discussed with Mr CC before he signed and filed it. The appellant was audited by SARS, at the conclusion of which he was informed that the UP was imposed. He decided to object to it. The objection, which he stands by, reads:

> “We were under the impression that livestock included cattle and sheep and were not aware that game purchased was to be included in paragraph 8(1) limitation.”

He now knows and accepts that the 2014 tax return contained an understatement. He did not know this at the time the return was filed and deferred completely to Mr CC, who he believed was an expert in tax related matters. By deferring to Mr CC he acted reasonably, so he claims. He did not seek the advice of SARS officials nor consult any of the documents made available by SARS, such as the Interpretation Note 69 or the Guide. He believes that it was reasonable on his part not to do so as that should be done by Mr CC. He could not explain why Mr CC did not do so, but would agree with the contention that Mr CC acted unreasonably by failing to contact SARS, or have regard to its publications such as Practice Note 6/99 and the Guide. He denied that he abdicated all responsibility for the tax return to Mr CC. In sum, the appellant’s case is that Mr CC gave Mr GG incorrect advice, and Mr GG was not unreasonable by acting on it.

[29] SARS has discharged that part of the onus requiring it to prove the facts upon which the UP was based, and that it was prejudiced as a result of the understatement. The appellant conceded that the 2014 return contained a claim for an expenditure that should not have been made: it claimed a deduction for R15 559 728.00, when it should not have claimed any amount. The prejudice SARS suffered need not be financial in nature:

> “… I agree that the use of additional SARS resources for purposes of auditing the appellant’s tax affairs indeed prejudiced SARS. As correctly conceded by counsel for the appellant in argument before this court, prejudice is not only determinable in financial terms.”[4]

[30] We agree with the contention of SARS that it suffered prejudice by having to expend resources to examine the appellant’s claim, which it must be recalled was for the acquisition of “wild livestock”, and it incurred costs by having to attend to the claim.

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[4] Id.

[31] In terms of section 222(1) of the TAA the appellant "must" pay a UP unless it arose "from a *bona fide* inadvertent error". In this case it is agreed that there was no such error.

[32] We do accept the appellant's contention that, because it relied exclusively on the advice of Mr CC of ABC, it cannot be held that it failed to take reasonable care in completing the return. In our view, while a reasonable taxpayer should take steps to ensure that it is familiar with the basic tax liabilities of its business, such as which expenses are claimable and which not, it was, in this case, understandable to leave the matter in the hands of the accountant who from Mr GG's perspective was knowledgeable on these issues. The appellant could have checked Practice Note 6/99, or the Guide or by calling SARS and seek advice, but did not because in its view that should have been done by the accountant who in this case is independent of the appellant. Most taxpayers do this and understandably so.

[33] Mr XY, for the appellant, drew our attention to a number of cases where the Supreme Court of Appeal (SCA) and this court found that, by seeking the advice of a tax expert, a taxpayer was found to have acted reasonably even if the advice was legally incorrect, and for that reason the taxpayer should be absolved from having to pay a penalty. In *Attieh*[5] the Gauteng High Court found that the taxpayer had sought the opinion of an expert "on a matter of law" and had therefore acted reasonably. As a result, he could not be held liable for a penalty of 25% as per category (ii) in the Table set out in [25] above, but however was liable for a penalty of 10% as the understatement fell into the category (i) of the same Table. The important point is that the expert advice sought concerned a legal question. The same had occurred in *Kangra*,[6] and *Foskor*.[7] Generally, it makes great sense to find a taxpayer has acted reasonably by relying on the opinion of a legal professional, as legal issues are rarely, if ever, fully grasped by ordinary taxpayers. Relying on the advice of an accountant or auditor in a matter that is more straightforward, and which the taxpayer could easily ascertain by having regard to documents issued by SARS in relation to that particular taxpayer's business, cannot as a matter of principle result in the conclusion that the taxpayer acted reasonably. In other words, acting on the advice of an accountant may be reasonable in certain cases, especially if the advice concerns a complicated area of accounting or tax liability.

[34] One other case brought to our attention is that of *Eveready*.[8] In that case, the SCA found that this court had accepted that the taxpayer had acted "in good faith" by relying on the opinions of "two professional advisers" when claiming a deduction, and that this finding was a result of this court exercising its discretion judicially.[9] There is no indication as to whether any

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[5] *Attieh v CSARS* [2016] ZAGPJHC 317 (11 August 2016) at [28]
[6] *Kangra Group (Pty) Ltd v CSARS* 2019 (1) SA 520 (WCC) at [65]
[7] *South African Revenue Services v Foskor* [2010] 3 All SA 594 (SCA) at [50]
[8] *Eveready (Pty) Ltd v The Commissioner for the Revenue Service* [2012] ZASCA 36 (29 March 2012) (2012) 74 SATC 185 (SCA).
[9] Id at [25].

of the two opinions concerned a legal question. However, what is clear is that the finding of the taxpayer acting "in good faith" was derived from an exercise of discretion by the court. It was not a legal conclusion drawn by the court. It is therefore not of assistance to us in determining whether, as a matter of principle, once a taxpayer acts on the advice of a non-legal professional he should be found to have acted reasonably. It follows that, in our view, there was no finding by the SCA that reliance on non-legal professional advice in completing a return will always result in a finding that the taxpayer acted reasonably. The determination would have to be case specific. And in that regard factors such as the ignorance, naïveté, simple-mindedness and literacy level of the taxpayer would certainly have to be taken into account in determining whether the taxpayer acted reasonably by relying, without more, on non-legal professional advice.

[35] In this case, the appellant did what many taxpayers in its position would have done, which is to leave the matter in the hands of ABC. Mr GG is a farmer who, as he testified and which testimony was not refuted, was not conversant in tax related matters. Any reasonable farmer in his circumstance would leave tax related matters in the hands of an accountant. The fact that Mr GG would discuss the return with Mr CC before appending his signature does not detract from our finding. The discussion, as Mr GG testified, would not delve into the issue regarding the meaning and application of the First Schedule. On that issue he deferred entirely, and understandably so, to the opinion of Mr CC. On these facts and in these circumstances it cannot, in our view, be said that the appellant failed to act with reasonable care when completing the return.

[36] Once the understatement was made, and given that it was not as a result of "a *bona fide* inadvertent error", the UP as a matter of law had to be paid. The quantification of the UP would then be determined by reference to the Table set out in [25] above. We have found that the appellant took reasonable care in completing the return. However, this does not absolve it from having to pay the UP. The return contained an understatement and in terms of section 222(1) it must pay a penalty for this. We are also of the view that even if section 222(1) would not have made it mandatory for a penalty to be imposed, we nevertheless would have imposed a penalty upon the appellant for the understatement contained in its return. In our view the UP can be determined by reference to the Table in section 223 of the TAA see – [25] above]. In this case the UP would be 10% of the amount calculated in terms of section 222(2) of the TAA. It, in our view, falls in the category of "substantial understatement" reflected in row (i) and column 3 in the Table. The quantification of the UP amount that the appellant "must" pay we leave to the parties.

[37] Accordingly, the appeal succeeds in part. As the success is partial we are of the view that each party should pay its own costs.

Order

[38] The following order is made:

(a) The application for absolution from the instance by the appellant is dismissed with costs.

(b) The 25% understatement penalty imposed by the respondent on the appellant is set aside.

(c) The appellant is to pay an understatement penalty of 10%.

(d) The quantification of the 10% understatement penalty is to be undertaken by the respondent.

(e) Each party is to pay its own costs.

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Vally J

Judge: Tax Court, Johannesburg

I agree:

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Vincent Kekana

Tax Court, Johannesburg

I agree:

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Zeyn Mia

Tax Court, Johannesburg