IN THE TAX COURT

HELD IN DURBAN Case Nos 11045 and 11046

In the matter between

Appellants

and

THE COMMISIONER FOR THE Respondent

SOUTH AFRICAN REVENUE SERVICE

JUDGMENT

Hurt J

The two appellants carry on a business in partnership. On 1 September 1996, assessments were issued in respect of their income tax returns for the years ending February 1992 and February 1993. On 1 September 1997 an assessment was issued in respect of their return for the year ending February 1994 and on 1 March 1998 assessments were issued for the 1995 and 1996 tax years. During 1999, the respondent conducted an audit of the appellants' financial

affairs because he was not satisfied that the returns of income for 1992 and 1993 were accurate. These investigations caused the Commissioner to conclude that there had been incomplete and incorrect disclosure of the appellants' financial affairs in the returns for 1992 and 1993 and, acting in terms of section 79(1) of the Income Tax Act, Act No 58 of 1962, ("the Act"), he issued further assessments for those years during October 1999, in which he disallowed certain expenses which had been claimed in the original returns as deductions in terms of section 11(a). A similar procedure was adopted by the Commissioner in respect of the returns for the years 1994, 1995 and 1996, the additional assessments not being included in the dossier but, from the data in the correspondence, they appear to have been issued during October or November 2000.

Apparently as a result of the audit and the additional assessments, the appellants retained the services of a firm of tax consultants who analysed all of the returns and assessments and reached the conclusion that the revised assessments were erroneous for certain reasons. They also took the view that the original returns of income had contained an error inasmuch as the appellants had sustained

losses in respect of foreign exchange fluctuations, which losses were properly claimable as deductions from taxable income. Formal objections to each of the revised assessments were submitted to the Commissioner on 29 March 2001, after the expiry of the 30 day period prescribed by section 81(1) of the Act, and the Commissioner was asked to condone the late filing of the objections and (and I quote from each of the letters of objection) :

> "To exercise his discretion and allow an adjustment to be made which is in favour of the taxpayer and in doing so to revise the (relevant) assessment."

The Commissioner condoned the late filing of the objections to the revised assessments and conceded certain adjustments to those assessments based on the submissions of the appellants' tax consultants. However, in relation to the contention that the appellants were entitled to a revision of the original assessment based on the omission to claim deductions which would otherwise have been allowable, the Commissioner said the following :

> "I have considered your objection to the assessments for each of the 1992 – 1996 tax years and I am unable to allow it for the following reason:

1. Section 102(1) of the Income Tax Act 58 of 1962 states –

   "If it is proved to the satisfaction of the Commissioner that any amount paid by a taxpayer was in excess of the amount properly chargeable under this Act, the Commissioner may authorise a refund to such taxpayer of any tax overpaid: provided ……. so chargeable."

   whilst Section 102(2) of the said Act states –

   "The Commissioner shall not authorise any refund under this section unless the claim therefor is made within three years after the date of the assessment under which such tax was payable ……..'

2. The date of assessment under which such tax was payable in respect of each of the tax years referred to was as follows:

Tax Year	Date of Assessment
1992	01/09/1996
1993	01/09/1996
1994	01/09/1997
1995	01/03/1998
1996	01/03/1998

   The respective 'due dates' referred to in your objection are not the dates of assessment "under which such tax was payable" but rather they relate to the due dates on additional assessments which have recently been issued as a consequence of the taxpayer having failed to declare other income not related to the foreign exchange losses now claimed in terms of section 24(B).

> For each of the years of assessment your letter of objection is more than three years after the date of the assessment under which such tax was payable and the Commissioner is therefore precluded from authorizing any refund under section 102".

The appellants have appealed to this Court against the decision reflected in the above letter. It is common cause that the questions raised in the appeal are questions of law only and, in terms of section 83(4)(c) of the Act, they fall to be decided by me without the assistance of my learned assessors.

Now the objections framed on behalf of the appellants to each of the revised assessments were objections in terms of section 81, coupled with requests for condonation in terms of section 81(2). The Commissioner erroneously treated the appellants' submissions as applications for refunds under the provisions of section 102. That was a clear misdirection by the Commissioner and his decision, to the effect that he was absolutely precluded from granting any relief in respect of the unclaimed section 24B losses is accordingly reviewable. That, however does not end the matter. It is a well-established principle of law that, even if an administrative decision is flawed by misdirection or other irregularity, the Court will not interfere

with it unless the person seeking to have it set aside can satisfy the Court that he will suffer actual or potential prejudice if the decision is allowed to stand. The contention on behalf of the Commissioner is twofold, firstly that the appellants had no right to rely upon their own omission, in the original returns for the years in question, as a basis for objecting to the revised assessments and, secondly, that they were, in any event, limited to objecting only to aspects directly relevant to the new assessments and not to those which had been taken into account and dealt with in the original ones. If either of these contentions is right, then the appellants would not have been prejudiced by the Commissioner's erroneous approach to their objection for the simple reason that they did not have a valid basis for objection in the first place.

Could the appellants rely on their own omission as a basis for objecting to an assessment?

I was not referred in argument to, nor have I been able to find, any authority dealing with this question. Section 81(1) confers the right to object upon "a taxpayer who is aggrieved by any assessment". At first sight it does seem curious to describe a taxpayer, who has

mistakenly omitted to claim a particular deduction, as “aggrieved” by the resulting assessment, since the error in it is due to his own act. The general approach of our courts to the interpretation of the word “aggrieved” is stated thus in the case of ***The Administrator, Tvl, and The Firs Investments (Pty) Ltd v Johannesburg City Council*** **1971 (1) SA 56 (A)** at page 60 :

> “In reference to some English statutes where the rights of a "person aggrieved" fell for interpretation, the English Courts generally took the view that, to be "aggrieved", a person must be not merely dissatisfied with or even prejudiced by an act or decision performed or taken under statutory powers. He must be deprived of something to which he was legally entitled or he must have been subjected to a legal burden (e.g. a duty to pay costs or execute works). The English Courts have generally denied *locus standi* to persons claiming to be "aggrieved" by a decision unless they have been able to point to an encroachment on vested rights or the imposition of a new legal obligation.”

Hoexter JA adopted a similar approach in the case of ***Francis Hill Family Trust v SA Reserve Bank and Others*** **1992 (3) SA 91 (A)** at page 102 :

> “Leaving aside the significance of statutory context in particular cases, the tenor of decided cases in South Africa points, I think, to the general

> conclusion that the words 'person aggrieved' signify someone whose legal rights have been infringed - a person harbouring a legal grievance."

Can the appellants be heard to complain that any right of theirs has been infringed by the circumstance that their assessments do not take account of certain losses, qualifying for deduction from their taxable incomes, in the years between 1992 and 1996? It seems to me that, while they could probably not invoke the provisions of section 102 at this stage in order to seek "a refund of tax overpaid", they can be said to be entitled to contend that the foreign exchange losses apparently sustained in each of those years should properly have been set off against the amounts which have become payable in respect of the revised assessments.

As **Mr Wallis**, for the appellants, stressed, the fundamental object of tax legislation is to exact from each citizen his due. What is "due" is, in each case (questions of penalty aside), strictly prescribed by statute and the amount of the taxpayer's taxable income must, in the process of assessment, be accurately determined preparatory to the calculation of the amount which he (or she) is required to hand over

to the *fiscus*. In that light, it is clear that a taxpayer whose taxable income has been determined on an erroneous basis is always "aggrieved" even if the source of error is entirely attributable to him. Of course, where the error results in an over-assessment of taxable income, the taxpayer would ordinarily avail himself of the statutory *condictio indebiti* provided by section 102 (available to him at any time within three years of the date of assessment) rather than lodging an objection in terms of section 81 (which would have to be done within 30 days or within an extended period allowed by the Commissioner at his discretion). Accordingly it is perhaps not surprising that there is a dearth of authority as to whether a taxpayer can rely on his own mistake as a basis for an objection in terms of section 81. In my view he can do so.

Is the right of objection to a revised assessment limited to the matters germane to the revision?

In this regard the respondent relied principally on the judgment of **Ingram K.C.** in ***ITC No. 616 (14 SATC 471*** at page 473). In that case, the Commissioner had raised additional assessments under the provisions of section 66(1) of the then Act, which provisions may, for

the purposes of this decision, be taken to be identical to those of the applicable section 79(1). The taxpayer objected to the additional assessments on the basis that the original assessment had been arrived at on an erroneous basis and required to be recalculated. The learned President said the following (*loc. cit.)*:

> "The section is not concerned otherwise with the original assessment or with the computations and figures which led to it. Here the amounts which should have been assessed subject to tax are the sums omitted, according to the Commissioner, i.e. the sum of £200 in 1942 and £500 in 1943. The Commissioner having ascertained those amounts, his remaining task is to raise assessments in respect of such additional amounts in terms of section 66(1). So in his assessments, he brings up these sums of £200 and £500, being the amounts which should have been assessed subject to tax, and the tax payable thereon is 13s. 4d. and 15s. in the pound respectively, that is £133 6s. 8d. in one case and £375 in the other. In so doing there is no necessity for the Commissioner to enter into any of the previous calculations, for instance one item, the pre-war standard. *The assessment is confined to the amount previously omitted. When therefore an appeal is taken against these assessments, it is necessary to confine it to these particular amounts which are the subject of the assessments and the appellant has no right under cover of the additional assessments to raise objections which might have been germane to the original assessments. The fact that in the additional assessment notices the calculation has been set out again cannot change the assessment itself."* (My italics.)

It was submitted by **Mr. Koekemoer**, for the respondent, that ***ITC No. 616*** still has substantial persuasive authority, notwithstanding the repeal of Act 31 of 1941 by the current Act and the several subsequent amendments to the Act. He submitted further that the decision was consistent with a number of subsequently decided cases, in some of which the decision had been cited with express approval. He referred the Court in this regard to ***ITC No. 724, 17 SATC 498; ITC No. 848, 22 SATC 79*** and ***ITC No. 1330, 43 SATC 65***.

As to the decision in ***ITC No. 616*** itself, **Mr. Wallis** submitted, firstly, that no reference was made in the judgment to the wording of the applicable sections of the Act themselves and, secondly, that it was a decision made in relation to an Act which has since been repealed and replaced. He also pointed out that a "previous decision" to which the learned President of the Court had referred had not been cited or specified. He referred the Court to ***Silke on South African Income Tax,*** **Vol. 3, para 18.23,** where the learned author comments (with specific reference to ***ITC No.*** 616) that:

> "A taxpayer's objection to an additional assessment, it has been suggested, is limited to the amounts assessed under the additional

> assessment. Any objection germane to the original assessment is not allowable. But this view may well be incorrect."

The cases to which the Respondent's counsel made reference as supporting the decision in ***ITC No. 616*** (insofar as it purported to restrict the taxpayer's right of objection) do not, in my view, do so, at least with any measure of authority which binds me. In ***ITC No. 724***, the taxpayer had objected to the "original assessment" on a particular ground and the objection resulted in a revised assessment. The taxpayer then raised two grounds of objection to the revised assessment. One of these grounds related to matters relevant to the original assessment. The Commissioner took the point that the taxpayer was not entitled to object to the revised assessment on a ground which it had been open to him to take in regard to the original assessment. **Pollack AJ** referred to the provisions of the then applicable sections 77(6) and (7) of Act No. 31 of 1941 which were to the following effect : -

> "(6) On receipt of a notice of objection to an assessment the Commissioner may reduce or alter the assessment or disallow the objection and shall send the taxpayer notice of such alteration, reduction

> or disallowance, and record any alteration or reduction made in the assessment.
>
> (7) Where no objections are made to any assessment or where objections have been allowed or withdrawn, such assessment, or altered or reduced assessment, as the case may be, shall, subject to the right of appeal hereinafter provided, be final and conclusive."

Having pointed out that the taxpayer had no legal representation and had been unable to advance any argument in opposition to the point taken by the Commissioner, and, further, that the Commissioner's representative had been unable to refer him to any authority, the learned President said (at page 498) : -

> "I have come to the conclusion that (the Commissioner's) submission is well founded, and that the effect of section 77 and, in particular, of the two subsections to which I have referred, is to preclude a taxpayer from raising any objection to a revised assessment, at any rate if the objection is such that it might have been raised to the original assessment but was not so raised."

The reasoning process by which this conclusion was reached is not set out in the judgment. With respect, I have difficulty in following the logic of it. The situation where there had been no objection or where an objection had been withdrawn to the original assessment did not apply *in casu.* And it is, in my respectful view, reading too much into

the text of section 77(7) to interpret it as meaning that "those parts of the original assessment to which objection was not taken at the first stage are henceforth to be treated as final and conclusive, regardless of whether there is a subsequent revision of the assessment". There may be much to be said for the proposition that a taxpayer who does not object to a particular aspect of an "original" assessment, may not raise such an objection at a later stage after there has been a revision based on a totally different aspect. But, as has been reiterated *ad nauseam* in relation to interpretation of this legislation, concepts of common sense or even reasonableness are not to be assumed to be fundamental to the intention of the lawmaker. There is, of course, a further important consideration in considering the persuasive power of ***ITC No 616*** and ***ITC No. 724***, and that is that the definition of "assessment" was changed fairly radically in the Act and many of the difficulties (and anomalies) of interpretation discernible in the judgments under the 1941 statute and its predecessor have been removed. (See, in this regard, ***Comm. of Inland Revenue v Orkin and Ano.*** **1935 AD 18;** ***Irvin and Johnson (SA) Ltd v C. I. R.*** **1946 AD 483**.)

In ***ITC No. 848*** **(22 SATC 79)**, **Van Winsen J** purported to approve and apply ***ITC No. 616*** without analysing the decision. But it is apparent from the judgment that the taxpayer attempted, on appeal from a revised assessment, to raise a ground of objection which had been dealt with and disallowed (without protest or appeal) in regard to the original assessment. It was not a situation in which a ground of objection had been raised for the first time pursuant to a revision of the original assessment. In ***ITC No. 1330***, **Squires J**, made a passing, comparative reference to ***ITC No. 616***, and it is clear that the issue with which he was dealing was an entirely different one to that in the earlier case. (See **43 SATC 65** at p 70.)

For the above reasons, I do not consider that I am constrained to follow the decisions in ***ITC No. 616*** or ***ITC No. 848.***

Section 81(1) during relevant times provided that :

> "Objections to any assessment made under this Act may be made within 30 days after the date of the assessment, in the manner and under the terms prescribed by this Act by any taxpayer who is aggrieved by *any assessment in which he is interested.*"

The italics in the above quotation are mine. They seem to me to have considerable significance in construing the subsection for the purpose of deciding the issue under consideration. If the intention was to confine the right of objection, where there has been a revision of the original assessment, to “matters germane to the revised assessment”, then the legislator would surely have used the words “such assessment” instead of the italicised phrase. The effect of the wide reference in the italicised phrase must surely be to enable the taxpayer, in the event of reassessment, to require that the determination of his taxable income be revisited. An examination of the revised assessments for 1992 and 1993, which appear at pages 67 and 69, respectively, of the dossier in case no. 11045, bear this out from a practical point of view. The relevant part of the form is separated into two columns, the one headed “previously” and the other “now”. The “now” column does not simply reflect the additional income on which tax is payable, but the total taxable income arrived at after the process of investigation and revision. This practical record of the exercise is, in my view, fully consistent with the

definition of the term “assessment”, the relevant part of which, at the relevant time, read as follows : -

> “**Assessment** means the determination by the Commissioner, by way of a notice of assessment served in a manner contemplated in section 106(2)
> (a) of an amount upon which any tax leviable under this Act is chargeable; or
> (b) of the amount of any such tax;
> (c) . . . . . .”

The revised assessments effectively incorporate the “originals” and, together, they constitute “the determination . . . . .of an amount upon which . . . . . .tax is leviable (and) of the amount of . . . . such tax”. There is no indication which I have been able to find in the Act, that the Legislature intended to limit the wide language of section 81(1) in the case of a revised assessment. There is a further important consideration in favour of the “wide interpretation”. In this case, and also in the cases involving revised assessments to which I have referred, the basis for revision was comparatively uncomplicated, involving the “reversal” of amounts which had previously been allowed as deductions. The ambit of what would be “germane” to such a revision is obviously narrow. But what does one do in the case of an extensive revision becoming necessary? How would the

dividing line between what is, and what is not, “germane” to the revision be drawn? It is fortunately unnecessary for me to do more than pose the question, which I regard as unanswerable, for the purpose of deciding in favour of giving the words in section 81(1) their ordinary meaning.

The purpose of the lengthy *excursus* into the two questions which I have posed, and attempted to answer, above, has been solely to ascertain whether the appellants would suffer at least potential prejudice if the erroneous approach by the Commissioner to their objections is not set aside. On my construction of the Act they will, because they have a *prima facie* right to object on the basis on which they have done. This is not to say, of course, that I am of the view that the objections should be upheld. There are a multitude of factual considerations which would have a bearing on that aspect and which are not before the Court in these proceedings. Moreover it is the task of the Commissioner, in the first instance, to consider whether the objections should be entertained and whether they, or any of them, have merit.

In the result the appeals succeed. The decision of the respondent to disallow the appellants' objections in respect of the assessments for the tax years from 1992 to 1996, inclusive, as reflected in the letter of 11th October, 2001 (at pages 106 to 107 of the dossier in case no. 11045), is set aside and the matters are remitted to the respondent to be dealt with as objections in terms of section 81(1) of Act No. 58 of 1962.