IN THE TAX COURT OF SOUTH AFRICA

(JOHANNESBURG)

CASE NUMBER: 13472

DELETE WHICHEVER IS NOT APPLICABLE

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

In the matter between:

MR. Z Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Coram: WEPENER J ET A. TEICHERT ET A. ESAT - MEMBERS

Heard: 5, 6, and 7 November 2014

Delivered: 18 November 2014

JUDGMENT

WEPENER J (A. TEICHERT ET A. ESAT CONCURRING):

[1] The appellant, a business man, appeals against a decision of the respondent, the Commissioner of the South Africa Revenue Service (the Commissioner), that the appellant's income for the 2008 year of assessment be adjusted with the proceeds received by the appellant in terms of the sale of shares. The further issues of the imposition of an understatement penalty and interest on the underpayment only become relevant once the first issue is answered.

[2] It would be convenient to set out the facts with reference to a set of common cause facts agreed upon by the parties at a pre-trial conference:

'1.1 From the statement of Grounds of Assessment and Statement of Grounds of Appeal, the following facts appear to be common cause:

1.1.1 In or about November 2003 A Investments Limited ("A") sold its 47.3% shareholding in B (Pty) Ltd trading as BCD ("BCD") to F. This constituted A's entire shareholding in BCD.

1.1.2 On 28 August 2007 Appellant, together with Mr X sold 600 000 ordinary par value shares of R0,01 each, in the issued share capital of BCD to F. The shares represented 30% of the total issued share capital of BCD, with Appellant holding 27,005% and Mr X holding 2,995% thereof.

1.1.3 The aforementioned shares were sold for R935 000 000 with the proceeds being divided as follows:

- R841 655 833 to Appellant for his 540 100 shares; and
- R93 344 167 to Mr X for his 59 900 shares

1.1.4 Appellant and Mr X sold their respective shareholding to F in their capacities as registered and beneficial owners of the shares.

1.1.5 On 3 September 2007, F paid the purchase price of R935 000 000 into Appellant's bank account.

1.1.6 In or about June 2006, A advised Appellant that it had discovered that Appellant withheld material information from A when he represented A during its transaction with F. A further advised Appellant that the withheld information would have had a bearing on whether or not to dispose of its entire shareholding in BCD. On that basis A advised Appellant of its intention to institute a damages action against Appellant.

1.1.7 On 8 October 2007, A instituted a damages action against Appellant on the basis of the 2003 transaction and in particular Appellant's failure, as A 's agent, to advise A that F would be prepared to agree to extend minority protection to A .

1.1.8 A claimed an amount of R925 000 000 as damages, on the basis that that was the value of the shares and claims which it would have held and which it lost by virtue of it having disposed of its shares and claims in and against BCD.

1.1.9 On 15 October 2007, A and Appellant entered into a settlement agreement in relation to the damages claim. The settlement was thereafter made an order of court on 31 October 2007.

1.1.10 In terms of the settlement, Appellant agreed to pay A an amount of R694 888 271 in full and final settlement of its claim.

1.1.11 The settlement agreement records that:

- Appellant misconducted the tag along minority protection rights to which A was entitled as a minority shareholder of BCD; and
- A decided to totally disinvest in BCD due to their loss of control and the fact that F was not offering any minority protection.

1.1.12 Appellant deducted a portion of the settlement amount paid to A , namely R625 437 601 from the purchase price received from F on 3 September 2007, to arrive at the amount of

R216 218 233 which Appellant regards as proceeds for purposes of paragraph 35 of the Eighth Schedule to the Income Tax Act, 58 of 1962, ("the Act").

1.1.13 The respondent conducted an income audit on the Appellant in respect of the 2007 and 2008 tax years of assessment.

1.1.14 The tax audit was finalised on 10 December 2012.

1.1.15 Following the audit, the Respondent increased the proceeds of R216 218 233 by an amount of R625 437 601 to arrive at proceeds of R841 655 833.

1.2 No material fact appears to be in dispute.

. . .

10. Settlement and Resolving of the Dispute:

10.1 The Appellant contends that the first issue in dispute is whether Respondent correctly adjusted the proceeds received by Appellant in terms of the sale of his BCD shares to F in the 2008 year of assessment, from R216 218 233 to R841 655 833;

This encompasses two alternative sub-issues, namely:

10.1.1 Whether the amount of R841 655 833 was 'received by' or 'accrued to' Appellant as contemplated in paragraph 35(1) of the Eighth Schedule to the Income Tax Act, or whether only the amount of R216 218 233 was received by or accrued to the Appellant;

In the alternative:

10.1.2 If it is found that the amount of R841 655 833 was received by or accrued to the Appellant, whether that amount should be reduced by an amount of R625 437 601 in terms of paragraph 35(3)(c) of the Eighth Schedule to the Income Tax Act.

10.2 The Respondent contends that the first issue in dispute is whether the Appellant has proven that the proceeds received from the disposal of his shares to F in September 2007 should, in accordance with paragraph 35 of the Eighth Schedule to the Act, be reduced by the settlement amount paid to A .

10.3 The parties agree that the second issue in dispute is whether Respondent correctly imposed an understatement penalty of R46 907 820 in respect of the BCD transaction.

10.4 The parties agree that the third issue in dispute is whether interest as contemplated in section 89quat of the Act was correctly levied.'

[3] During argument, counsel for the appellant submitted that the case which the appellant wished to advance on appeal namely, the link between a sale of shares in 2003 and this sale of shares in 2007, the proceeds of the latter which the Commissioner regarded as a capital gain for purposes of calculating the tax payable by the appellant, was not apparent from the papers or the common cause facts set out before this court. Save for the common cause facts, the appellant gave evidence at the hearing, during which evidence, he largely reiterated the facts but also introduced new allegations.

[4] The issue to be determined evolves around the possible link of a sale of shares during 2003 and the sale of shares by the appellant during 2007. During both his evidence in chief and in re-examination, leading questions were put to the appellant regarding this particular link, examples of which are set out below.

[5] The fact whether there is a link between the sale of shares of 2003 and that of 2007 is, of course, not proved by the appellant stating that there is such a link, as such are not statements of fact but conclusions by the witness. The question to be decided is whether the 2003 and the 2007 transactions are so linked as to satisfy the provisions of ss 35(1) and 35(3)(c) of the Eighth Schedule of the Income Tax Act.[1] That is the very issue which this court is called upon to determine.

[6] The veracity of the witness's conclusions on the very controversial issue is such that little or no reliance can be placed on the conclusions of the witness given to direct leading questions[2]. The following occurred in examination in chief:

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[1] Act 58 of 1962.

[2] See *Maritime Industries Trade Union of South Africa and Others v Transnet Limited and Others* (PA 5/01) [2002] ZALAC 19 (20 September 2002) at para 75.

'Counsel: And then also that R935 000 000 was received on the 3rd of September which included your portion of R841 656 833 was then already clear that you had to settle A out of these funds?

Mr Z: It was clear I had to settle a portion of that money to A '

The following is an example in re-examination. Referring the appellant to the terms of the settlement agreement between the appellant and A, counsel for the appellant then asked the appellant:

'Is this a reference to the 2003 / 2004 transaction?'

The witness answered in the affirmative. The problem with this answer is that although the document may contain a reference to the 2003 sale of shares, it is a reference to the sale of shares by A to F (Pty) Ltd ('F'), and not a reference to the sale of shares by the appellant to F. It does not show a link between the sale of shares by the appellant in 2003 and the sale of shares by him in 2007, despite a submission that this evidence (elicited by a leading question) proves the so-called link between the appellant's sale of shares in 2003 and the sale in 2007.

[7] Although Zeffert and Paizes [3] under the heading 'Leading questions' and 'Prohibition' suggest that[4]

'[t]he general rule is that in his examination in chief a witness may not be asked questions which suggest the tenor of the answer desired',

the learned authors also say[5] that during re-examination

'leading questions may not be asked any more than in examination in chief.'

[8] In *S v Rall*[6], Trollip AJA (as he then was) said:

'counsel is <u>prohibited</u> from putting leading questions to his own witness because of the risk that the witness may perhaps think that's such questions are an invitation, suggestion or even

[3] The South African Law of Evidence (2nd Edition).
[4] At p 895.
[5] At p 921.
[6] 1982 (1) SA 825 (A) at 831D-E.

instruction to him to answer them, not unbiasedly or truthfully, but in a way that favours the party calling him.' (own emphasis).

[9] The general principle is that the asking of leading questions is prohibited[7] and forbidden.[8]

[10] There are no exceptional circumstances which prompt this court to exercise a discretion to allow the leading questions and answers to stand as evidence.[9] The impermissibility of the question and answer reflects the South African law as set out in *Rex v Ngcobo*:[10]

'Time and time when a witness hesitated the question was put, by the Court itself, in a form which suggested the answer which it was desired that he should make. Now it is an elementary rule of procedure that leading questions by the parties are <u>not permitted</u> in examination in chief. The reason it obvious – they substitute the theory or suggestion to the litigant for the unbiased observation of the witness. The rule is subject to exceptions, at the discretion of the judge, as, for instance, when the witness is shown to be hostile to the party examining him.' (own emphasis)

[11] Counsel for the appellant submitted that his opponent could, but did not, object to the leading questions. However, an objection raised by an opponent is neither necessary nor does it influence the prohibition against the asking of leading questions. In this regard the role of a presiding judge is not that of a silent umpire.[11] Harms JA (as he then was) said[12]:

'That is one side of the coin. The other is this:

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an

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[7] Zeffert and Paizes supra.
[8] Wigmore, *Evidence* para 770 (Chadbourn Rev. 1970), Schwikkard et al, Principles of Evidence 364.
[9] Wigmore para 776, Phipson on Evidence (16th Edition) para 12-21
[10] 1925 AD 561 at 564
[11] *Sager v Smith* 2001 (3) SA 1004 (SCA) para 21.
[12] In *Take and Save Trading CC and Others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) para 3.

administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

The same applies to civil proceedings: a Judge is not simply a "silent umpire". A Judge "is not a mere umpire to answer the question ''How's that?''" Lord Denning once said. Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources.'[13] (footnotes omitted)

'In the circumstances, despite the fact that counsel for the Commissioner did not object, the answers of the appellant to direct leading questions of the issue in dispute will be disregarded in this judgment as having no probative value.

[12] The additional evidence given by the appellant, in my view, leading questions and conclusions aside, does not substantially contribute to the agreed facts save in so far that the evidence explains, in the main, the motive of the appellant regarding his decision to effect payment of his debt to A pursuant to the claim instituted by it against the appellant as a result of the latter's breach of his fiduciary duty when acting as agent for A in a transaction between A and F.

[13] The appellant seeks relief based on the fact that the Commissioner disallowed the deduction of an amount of R625 437 60, which amount the appellant paid to A from the proceeds of his sale of shares in 2007, there being no link between the two incidence of sale.

[14] The provisions of s 35 are, in my view, clear and unambiguous. When a taxpayer disposes of an asset, the amount received therefore is the proceeds from the disposal. According thereto the amount received by the appellant is the sum of R841 655 833 for his 540 100 shares which he sold to F. As a result of the fact that A was suing the appellant for his breach of duty as agent to it, the appellant attempted to put A back in its position as shareholder. He could not succeed for reasons that are not relevant. In

[13] Also see *Quartermark Investments (Pty) Ltd v Mkhwanazi* [2014] 1 All SA 22 (SCA) para 20.

order to pay his debt to A the appellant then sold his shares to F and received the full price of the sale from F into his bank account.

[15] The appellant used a portion of these proceeds to settle the claim (for damages) which A instituted against him. The settlement or payment of A 's claim is a payment made by the appellant that has no bearing on the sale of his shares to F, nor has it any bearing on the sale by A or the appellant of shares to F in 2003. I am of the view, that the appellant consequently received the amount of R841 655 833 as a result of the disposal of his shares to F in 2007. Relying on cases such as *ITC 1973*,[14] the appellant submitted that because he was obliged to pay out the amount (of damages) to A, his gross income was reduced by the amount paid to A . The cases quoted in support of the argument do not support it. In the matter under consideration the appellant sold his own shares for R841 655 833 – his motive was to settle his debts for his unlawful prior conduct which is, in my view, irrelevant to the sale as such. He received no secret profit which would accrue to another on the sale of his shares to F. The argument that because the appellant had decided to pay a portion of the proceeds of the 2007 sale to A, he did not receive the whole amount unconditionally, is also, in my view, misplaced. There is no evidence of conditions attached to the payment by F. The appellant was indeed legally entitled to the proceeds of the 2007 sale to F and to dispose thereof as he deemed fit and he received the proceeds of the sale. The fact that he decided to pay A 's damages claim against him as a result of his breaches against A does not affect that fact that he disposed of his shares in 2007 and received an amount of R841 655 833 for that disposal.

[16] The second submission advanced on behalf of the appellant is that the R841 655 833 so received, falls to be reduced by the amount which he paid to A as damages. Reliance is placed on the provisions of s 35(3)(c) of the Eighth Schedule of the Income Tax Act, and it was argued that the 2003 sale of shares was 'any other event' which should reduce the amount of the appellant's proceeds on 2007.

[14] 67 SATC 236.

[17] I agree with the submission made by counsel for the Commissioner. The words 'any other event', are not used in isolation but appears in conjunction with a list of events which could be relied on so as to include any other event which is related to the disposal but not mentioned in the section.

[18] Appellant's counsel submitted that the words 'in any other event' are so wide that it includes, in this case, the amount paid by the appellant to A pursuant to the latter's damages claim. But the facts relied upon by the appellant do not support the contention, nor do the cases. The facts relied upon are:

'9.6.1 A initially proposed that it be reinstated as a shareholder of BCD, as if it had diluted only 51% of its shareholding at the time;

9.6.2 When F refused to reinstate A it became clear that A would have to be settled out of the proceeds to be derived from the sale of the shares to F;

9.6.3 Already prior to the receipt by Appellant of the R841 655 833, it was clear that the bulk thereof would have to be paid over to A to settle its claim against Appellant;

9.6.4 Appellant would not have had to pay the amount eventually agreed upon as being R625 437 601, if Appellant had not received the amount of R841 655 833.'

[19] The proposal of A to be reinstated is irrelevant to the sale of shares by the appellant to F. The fact that F refused to assist to reinstate A and the appellant used the proceeds of the sale of shares to pay for his breach is similarly irrelevant to the sale of the shares to F. The claim of A, which was settled, is a wholly different claim compared to the sale of shares by appellant to F.

[20] The fourth fact upon which the appellant relies is a non sequetur and without any foundation. The appellant would have had to settle his admitted liability for his delict from some or other source – whether he sold his shares in question or obtained finance in any other way.

[21] The cases[15] relied upon by the appellant are also distinguishable and at the same time instructive. In *Murray & Roberts* it was said:

'The crucial words are "wrongly charged for electricity on any other grounds". It is difficult to conceive of wider language. Manifestly such language was used to cover all other contingencies, foreseen and unforeseen, that may materialise and result in a consumer being wrongfully charged.'[16]

[22] Clearly, the 'any other' ground related to a wrong charge. No such wrong charge was made in this matter and it is also clear that the court held that the 'any other' ground had to result in such a wrong charge. It has not been shown that the appellant's delict and liability as a result thereof falls within an event which would qualify to reduce his liability to the Commissioner.

[23] In the *Ocean Manufacturing Limited* case it was held that the use of the word 'any' may be restricted by the subject matter of the context in which it is used.[17] I am of the view that the event (the appellant's delict) is wholly unconnected to the disposal of shares by the appellant to F in 2007.

[24] In this regard, counsel for the Commissioner relied on the application of the *ejusdem generis*-rule. The rule of construction known as the *ejusdem generis*-rule is sometimes expressed by the maxim *noscitur a sociis*, that is the measuring of a word may be ascertained by reference to those associated with it. In other words, where two or more words which are susceptible of analogous meaning are coupled *noscitur a sociis*, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general.[18]

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[15] *Murray & Roberts Properties (North) Limited v Bedfordview Village Council* 1983 (1) SA 1056 (A*), Commissioner for Inland Revenue v Ocean Manufacturing Limited* 1990 (3) SA 610 (A).
[16] At 1065D-E.
[17] 'Any is "a word of wide and unqualified generality. It may be restricted by the subject matter of the context, but *prima facie* it is unlimited" (per Innes CJ in *R v Hugo*). "In its natural and ordinary sense, any – unless restricted by the context – is an indefinite term which includes all of the things to which it relates." (per Innes JA in *Hayne and Co v Kaffrarian Steam Mill Co Limited* 1941 AD 363 at 371)'.
[18] P St J Langan: *Maxwell on Interpretation of Statutes* 12ed 289.

[25] It was held in *Commissioner of Customs v Joffe*[19] that:

'. . . it becomes necessary to consider how the *ejusdem generis* rule is applied. The case to which frequent reference has been made is that of *Tillmann's & Co. v SS. Knutsford Limited* (1908, 2 KB 385), and on page 399 in the judgment of Lord VAUGHAN WILLIAMS reference is made to a passage in Maxwell on the Interpretation of Statutes. He cites it not as an authority, but as a convenient frame on which to hang a series of cases which he proposes to refer. The passage is: "But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words; or, in other words, as comprehending only things of the same kind as those designated by them; unless, of course, there be something to show that a wider sense was intended."'

. . .

'. . .a definition given by Lord Campbell of the *ejusdem generis* rule – "That where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified."'[20]

[26] The *Joffe* decision relied on the judgment of the Appellate Division in *Director of Education, Transvaal v McCagie and Others*[21] where Innes CJ held that:[22]

'. . . the words "other evidence," are, no doubt, wide, but their interpretation must be affected by what precedes them. General words following upon and connected with specific words are more restricted in their operation than if they stood alone. *Noscuntur a sociis;* they are coloured by their context; and their meaning is cut down so as to comprehend only things of the same kind as those designed by the specific words- unless of course, there is something to show that a wider sense was intended.'

[27] The words, 'other disposition' where also considered in *Income Tax Case No 551*.[23] These words appeared in a sentence which read: 'deed of donation, settlement or other disposition'. In this regard, the court held that:[24]

'A deed of partnership is certainly not a deed of donation; neither is a settlement. The words "or other disposition" are *ejusdem generis* with "deed of donation" and "settlement". They cannot

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[19] 1934 WLD 8 at 10.
[20] At 11.
[21] 1918 AD 616.
[22] At 623.
[23] (1943) 13 SATC 204 (U).
[24] At 206.

possibly refer to a contract of partnership which is bilateral. The words in sub-sec(5) "of any person has stipulated. . ." clearly refer to a unilateral disposition.'

'The same considerations apply to the objection under sub-sec(3), where identical words are used – "by reason of any donation, settlement or disposition made by that parent", ie, of the minor child.'[25]

[28] Also in *Commissioner for Inland Revenue v Lunnon*[26], Innes CJ held as follows:

'Now the particular words to which the general expression relates are "salaries, stipends, wages, allowances," They are all "granted in respect of employment" in the sense that they are paid in return for the employment; and the benefit or advantage similarly granted must be a benefit or advantage also paid in return for the employment. The immediately preceding words "estimated annual value or any quarters of board or residence" undoubtedly refer to cases where such privileges form part of the consideration paid for employment, and the "other benefits or advantages of any kind" must be confined to such as the employee was entitled to demand. They cannot include a gift which the employer was under no obligation to bestow.'

[29] On the basis of the above authorities, counsel for the Commissioner submitted that the words which appear in paragraph 35(3)(c) refer to words of the same nature. The group in question is divided into two: Firstly, changes to the disposing agreement group; ie the cancellation, termination or variation of an agreement; and secondly, the group which falls under the release from an obligation ie waiver of a claim or release from an obligation.

[30] The first grouping follows from the definition of 'cancellation' as captured by Botha JA in *Secretary for Inland Revenue v Hartzenberg*[27] as follows:

'It is, I think, clear from the above provisions that the cancellation contemplated in sec. 5(2)(a) is a cancellation which terminates the relationship between the parties to the transaction, and restores to the seller his full rights of disposal over the property concerned. A purported cancellation of a transaction which does not have that effect, cannot have any effect either on

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[25] *Income Tax Case no 551* at 206.
[26] 1924 AD 94, 1 SATC 7 at 99.
[27] 1966 (1) SA 405 (A) at 409H.

the *jus in personam ad rem acquirendam* acquired by the purchaser under the transaction, and cannot, therefore, be a cancellation for the purposes of s 5(2)(a).'

[31] The second group means that the purchaser of the disposed asset no longer has an obligation to pay the proceeds of the disposal.

[32] It is this context that 'any other event' must be understood. Whilst 'any' may ordinarily be a broad, unlimited term, it is in this instance limited by the two categories referred to above. The appellant can accordingly only rely on paragraph 35(3)(c) if the 'event' falls under one of the aforementioned two categories.

[33] In my view, the appellant's obligation to pay for his breach, does not fall within the parameters of 'any other event' provided for in s 35(3)(c).

[34] Silke[28] says:

'The fate of the income after it has accrued or been received is therefore of no consequence to the tax-gatherer. The ultimate destination of the income cannot affect its nature as income.'

[35] Having regard to the aforegoing, the Commissioner's inclusion of the amount received by the appellant for the sale of shares in 2007 for the 2008 year of assessment is, in my view, unassailable and the appeal against the assessment falls to be dismissed.

[36] Having come to this conclusion, there are two further issues to be considered. They relate to the understatement penalty in terms of s 221 of the Tax Administration Act[29] (the Tax Administration Act) raised by the Commissioner due to the deduction of the amount paid to A from the appellant's income and the imposition of interest in terms of the provisions of s 89quat of the Income Tax Act.

[37] It is common cause between the parties that the provisions of s 221 of the Tax Administration Act have been made retrospectively applicable to the appellant's assessment now under consideration. The Commissioner decided to impose an understatement penalty of R46 907 820 as a result of 'reasonable care not taken' by the

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[28] *Silke on South African Income Tax, Vol 1* chapter 2.19 p 2-28.
[29] Act 28 of 2011.

appellant or 'no reasonable grounds (existing) for (the) tax position taken'. This was said because the legislation and the facts are clear, without further elaboration. The reasons supplied in a letter of 10 December 2012 are:

- 'No portion of this income was included in gross income of the taxpayer;
- No portion of the proceeds has been repaid or has become repayable to the person to whom the asset was disposed of. In this case the shares were disposed to F, not to A, thus no proceeds were repaid or repayable to F.
- F has in terms of clause 6 of the sale of the shares agreement settled its debts to the taxpayer and Mr X on 3 September 2007. The agreement between the taxpayer, Mr X and F was therefore in no way cancelled, terminated or varied.'

[38] As a result, the Commissioner imposed a 75% penalty. Again, it is common cause that that the Tax Administration Act operates retrospectively and that its provisions should apply. According to the evidence of Mr Y, who testified on behalf of the Commissioner, the 75% penalty was arrived at by having regard to the fact that there were no reasonable grounds for the tax position taken by the appellant, but the decision was reached without a consideration of the full facts referred to in the Tax Administration Act which came into operation after the decision was taken and which is based on a table that has been replaced. Should the court find that the appellant indeed had no reasonable grounds for the tax position taken, the penalty provided for is 50%, but there was no reasonable basis for the Commissioner to conclude that the appellant had no reasonable grounds for his deduction. The unchallenged evidence of the appellant is that the tax position was taken as he believed that his calculation was correct and in terms of the provisions of the Eighth Schedule of the Income Tax Act. There was no intention to evade or delay payment of tax. He sought professional advice regarding the completion of his tax returns and denied being negligent during the submission of his returns. The tax advice was sought from chartered accountants as well as a tax consultant – although the evidence is somewhat uncertain whether a tax consultant was consulted regarding the particular return in question. I accept, however, that the appellant obtained professional advice regarding the submission of his returns and the deduction which is the subject of the dispute in this matter.

[39] This being so, the provisions of s 270(6D) of the Tax Administration Act, which is common cause as have being enacted retrospectively, are applicable. Section 270(6D) provides:

'If an understatement penalty is imposed as a result of an understatement, as defined in section 221, made in a return submitted before the commencement date of this Act, a taxpayer may object against the penalty under Chapter 9 (whether or not the taxpayer has previously objected against the assessment imposing the penalty) and if the return was required under –

(a) the Income Tax Act, a senior SARS official must, in considering the objection, reduce the penalty in whole or in part if satisfied that there were extenuating circumstances;
(b) . . .'

[40] I am of the view that having received advice, there were reasonable grounds for the appellant to take the tax position which he did.[30] Nor can it be said that he did not take reasonable care – he did so by consulting the experts. The table contained in s 223 of the Tax Administration Act, which requires a penalty to be imposed based on the grounds set out therein, requires that a taxpayer pays a 10% penalty if a substantial understatement is made in a tax return. A substantial understatement is defined as meaning:
'A case where the prejudice to SARS or the fiscus exceeds the greater of 5% of the amount of tax properly chargeable or refundable under the Tax Act for the relevant tax period or R1 000 000.'

[41] It is common cause that the appellant's tax return does so contain a substantial understatement. It was not in dispute that the appellant's matter before the

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[30] The Tax Court, in the United States of America case of *Estate of Spruill v Commissioner* (88 TC 1197 (1987)), had to determine whether the fraud penalty was appropriately applied to an understatement of estate tax resulting from a large under evaluation of property. The valuation in turn was determined with the advice of an attorney and an accountant and was based on an independent appraisal. The court, in rejecting the penalty, had the following to say (88 TC 1197: 1245): 'When an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require a taxpayer to challenge the attorney, to seek a "second opinion", would nullify the very purpose of seeking the advice of a presumed expert in the first place. . . .'

Commissioner was a standard case with the result that the penalty of 10% would be applicable unless there are reasons for a different outcome.

[42] The appellant suggested that the provisions of s 270(6D) would allow for a reduction of the penalty to nil. I have no evidence that there were extenuating circumstances which would warrant the reduction below the provisions of s 223, ie a 10% penalty for a substantial understatement. The fact that the appellant relied on advice may have exempted him from the grounds contained in s 223 for harsher penalties but that fact, on its own and as bold as it appears in the letter of the chartered accountants and confirmed in evidence by the appellant, is not sufficient to satisfy me (or it could not satisfy the Commissioner) that there were extenuating circumstances. It is common cause between the parties that the onus to prove that such extenuating circumstances existed is on the appellant. No such circumstances were shown to be present.

[43] Although s 270(6D) requires that a taxpayer should object against a penalty for the objection to be considered, counsel for the Commissioner accepted that this court should deal with the issue as the appellant indeed objected to the imposition of the penalty, albeit prior to the coming into operation of s 270(6D). In all the circumstances, I conclude that the appellant's conduct constituted a substantial understatement regarding the income from his sale of shares and the penalty falls to be reduced to 10%.

[44] The final issue is the imposition of penalty interest by the Commissioner in terms of s 89qaut of the Income Tax Act. The parties were ad idem that the provisions of s 89quat(3) [31] of the Income Tax Act are applicable. The section allows for the Commissioner to exercise a discretion in certain circumstances.

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[31] 'Where the Commissioner having regard to the circumstances of the case is satisfied that any amount has been included in the taxpayer's taxable income or that any deduction, allowance, disregarding or exclusion claimed by the taxpayer has not been allowed, and the taxpayer 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 taxpayer on so much of the said normal tax as is attributable to the inclusion of such amount of the disallowance of such deduction, allowance, disregarding or exclusion.'

[45] When the correctness of a discretionary decision, which is subject to objection and appeal, is contested in the tax court, there is a re-hearing of the whole matter, including the question of penalties.[32]

[46] In Juta's Income Tax[33] it is said:

'The test as to whether the grounds are reasonable, is objective, in relation to actions of the taxpayer. A mere subjective belief by the taxpayer that a deduction should be allowed, without taking advice on the matter, is unlikely to be reasonable. On the other hand, the reliance by the taxpayer on expert advice, even if this is wrong, will in most cases constitute reasonable grounds for the action taken.'

There is no reason not to find that the appellant's reliance on advice was reasonable. No facts were proved to show that the appellant was nevertheless unreasonable. In the circumstances, I am of the view that the Commissioner's decision should be substituted with an order that the interest be waived in toto.

[47] The parties agreed that there should be no order as to costs.

[32] C*SARS v Foskor (Pty) Ltd* [2010] 3 All SA 594 (SCA) para 51.
[33] Dennis Davis et al Vol 2 in the notes pertaining to s 89quat(3).

[48] Having regard to the aforegoing, the following order is issued:

1. The appeal against the assessment for the 2008 tax year by the inclusion of the amount received by the appellant for the sale of shares, is dismissed.
2. It is directed that the understatement penalty is to be levied at 10%.
3. It is directed that the interest levied on the underpayment of provisional tax be remitted in whole.

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Wepener J