IN THE TAX COURT OF SOUTH AFRICA

(HELD IN CAPE TOWN)

CASE NUMBER: 13238 & 13164/2008

DATE: 8 DECEMBER 2014

In the matter between:

ABC (PTY) LTD Appellant

and

COMMISSIONER FOR SARS Respondent

EX TEMPORE JUDGMENT

ROGERS J:

[1] This is an application by the respondent, the Commissioner of the South African Revenue Service, to amend his grounds of assessment in terms of rule 10 of the rules which previously governed proceedings of the tax court, together with a counter-application by the taxpayer to strike out a paragraph and certain words from the Commissioner's grounds of assessment. The application and counter-application raise the same essential question, which concerns the extent to which the Commissioner may travel beyond the matters on which he initially expressed satisfaction pursuant to s 103(2) of the Income Tax Act 58 of 1962 and whether and to

what extent the Commissioner in the present case is attempting to travel beyond the matters on which he was previously so satisfied.

[2] The background of the matter very briefly as it appears from the documents in the dossier is as follows. During March 2002 the taxpayer, which operated a call centre in Cape Town, sold its assets to XYZ with effect from 1 March 2002 for a price of R1 million. In terms of that transaction XYZ was granted an option to acquire all the shares in the taxpayer for R1,00 within a certain time period. As a result of this transaction the taxpayer had by 30 June 2002 ceased its operations.

[3] During November 2002 XYZ started looking for a buyer for the Cape Town call centre business. A company called D Company (Pty) Limited ('D Company') was interested. Initially those negotiations came to nothing. On 5 March 2003 and at a stage when the negotiations were apparently not ongoing, XYZ exercised its option to acquire the shares in the taxpayer for R1,00 and thus became the sole shareholder of the taxpayer. At that stage the taxpayer had an assessed loss exceeding R85 million.

[4] On 7 May 2003 the taxpayer and XYZ, which now

controlled it, concluded an agreement which resulted in the restoration of ownership of the Cape Town call centre business to the taxpayer with effect from 6 March 2003, again for a price of R1 million. In its correspondence with SARS the taxpayer has provided its version of this reversal. It has to do with the fact that, because of litigation in which the taxpayer was initially involved, XYZ did not wish to acquire the business through the shares in the company, or at least not until those matters were resolved, as they had been by March 2003.

[5] Some months later the negotiations between XYZ and D Company resumed and this resulted in XYZ, on 25 November 2003, concluding an agreement with D Company for the sale of the shares in the taxpayer to D Company. Pursuant to that sale agreement D Company nominated a subsidiary, E Company Investments (Pty) Limited ('E Company'), as the purchaser. So it was that E Company became the sole shareholder of the taxpayer. The taxpayer then continued its Cape Town call centre operations and apparently its operations under E Company's control were also expanded considerably. Substantial income was earned over the tax years 2005 to 2008.

[6] The essential question raised by s 103(2) is whether the Commissioner is entitled to have disallowed the set-off of the

taxpayer's assessed losses which were in existence as at 2003 against the income earned in the taxpayer's 2005 to 2008 tax years. As is usual in these matters, the tax dispute between the parties started with an audit which resulted in SARS on 10 December 2009 writing a letter to the taxpayer setting out the results of its audit findings and proposed adjustments to the taxpayer's assessments for the years 2005 to 2008.

[7] The taxpayer's advisors responded to these audit findings in a letter of 13 May 2010. In its original audit findings SARS had not made mention of the sale of shares to D Company/E Company in November 2003 and it appears that, at the time of making its audit findings, SARS was not aware of that further change in shareholding. I call it a further change in shareholding because there was, of course, a first change in shareholding when XYZ acquired the shares in the taxpayer for R1,00 in March 2003.

[8] Having considered the taxpayer's response, SARS maintained its view that the adjustments to the assessments should be made and it issued an assessment letter of 30 November 2010, setting out the reasons for the proposed assessment. This letter included some of the additional material which had been disclosed in the taxpayer's response to the audit findings.

[9] By way of a letter of 22 February 2011 the taxpayer objected to the revised assessments. The objection was disallowed by SARS on 15 November 2011. At some stage after the disallowance the taxpayer noted an appeal, though the document itself is not in the dossier.

[10] In December 2013 SARS delivered its statement of grounds of assessment in terms of rule 10 of the old rules. I refer to them as the old rules because at that stage, in December 2013, the new rules contemplated by the Tax Administration Act 28 of 2011 had not yet been promulgated, though the Tax Administration Act itself had already come into force. The new tax rules under the Tax Administration Act were promulgated with effect from 11 July 2014.

[11] Upon receipt of SARS' statement of its grounds of assessment in terms of rule 10, the taxpayer, through its attorneys, took objection to the matter which has now become the subject of the application and counter-application. The point of dispute was not resolved in further correspondence and this resulted in SARS issuing the present application and the taxpayer filing the counter-application.

[12] I must now briefly mention the relevant provisions of

s 103(2). The section starts out by saying that whenever the Commissioner is satisfied of certain matters, one of the things he may do is to disallow the set-off of a company's assessed loss against the income referred to in s 103(2). The parties in their correspondence and formal documents in the tax court were in agreement that there were three distinct components for the invocation by the Commissioner of s 103(2). As applied to the circumstances of the present case, these three components are the following: (i) Firstly, the Commissioner must be satisfied that a change in the shareholding of the taxpayer occurred. (ii) Second, the Commissioner must be satisfied that, as a direct or indirect result of that change in shareholding, income has been received by or has accrued to the taxpayer during a relevant year of assessment. (iii) And third, the Commissioner must be satisfied that the change in shareholding was effected by any person solely or mainly for the purpose of utilising an assessed loss of the taxpayer. It is when the Commissioner is satisfied of those three matters, as expressed with reference to the circumstances of the present case, that he could disallow the set-off of the assessed loss.

[13] The set-off of the assessed loss itself is a matter governed by s 20 of the Income Tax Act. The provisions of s 103(2) are an anti-avoidance measure which allows the Commissioner, when he is satisfied of certain matters, to

disrupt what would otherwise be the normal consequences of s 20 of the Act.

[14] The essential point of difference between the parties in the present case is the following. The taxpayer says that the mattes on which the Commissioner were satisfied when issuing the revised assessments were directed at the first change of shareholding which occurred in March 2003 when XYZ acquired the shares in the taxpayer for R1,00. It is that change of shareholding, so the taxpayer has argued, that satisfied the Commissioner that income had been received by or accrued to the taxpayer (whether as a direct or indirect result of the change in shareholding), and it is that change in shareholding, so the taxpayer argues, which the Commissioner was satisfied was effected solely or mainly for the purpose of utilising the assessed loss in the taxpayer.

[15] The Commissioner has, however, in his rule 10 statement made certain allegations which may suggest that he is relying not only the first change in shareholding but also the further change in shareholding which occurred in November 2003 when XYZ sold the shares in the taxpayer to D Company/E Company. It is clear from the counter-application that the Commissioner indeed wishes to rely not only on the first but also the second change in shareholding. He claims that he is

entitled to do so, that the paragraphs in the rule 10 statement which already foreshadow such reliance should be allowed to stand and that he should be allowed to amend para 40 of his statement of grounds of assessment in order to amplify the statement so as clearly to set out such reliance.

[16] There was some debate as to the provisions which govern my approach to the amendment application and to the counter-application. Both parties in their heads of argument seem to have assumed that, by virtue of rules 66 and 67 of the new tax court rules, I should apply the provisions of the new rule 31, which is the successor to the old rule 10. Rule 31(3) of the new tax court rules says that SARS may not include in its statement of grounds of assessment a ground that 'constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment'.

[17] I do not think that new rule 31(3) is applicable to an assessment of the amendment application. The rule 10 statement was filed at a time when the old rules applied. What I am concerned with is what may legitimately be contained in a rule 10 statement. I do not see how that can be affected by the coming into force of the new tax court rules. I accept that the new tax court rules apply to the form to be followed in bringing

interlocutory applications but the question of substance, as to what the rule 10 statement can contain, should I think be assessed with reference to the provisions of the legislation and the rules as they stood prior to the introduction of the new tax court rules, in other words in accordance with the rules which governed the original delivery of the rule 10 statement. Probably not much turns on this, though, because counsel expressed the view that rule 31(3) of the new rules in any event expresses the test which would apply to an amendment under the old rules.

[18] The question as to the extent to which the Commissioner on the one hand and the taxpayer on the other could introduce new matter into their rule 10 and 11 statements not covered by the earlier steps in the assessment procedure is not entirely settled. In *ITC 1843* 72 SA TC 229 Claasen J held, with reference to such statements filed in connection with a VAT dispute, that both the Commissioner and the taxpayer were entitled to depart from their previously stated positions in letters of assessment and letters of disallowance on the one hand and objections and notices of appeal on the other. He reached this conclusion with reference to the manner in which rules 10 to 12 of the old rules were formulated, particularly that they expressed the relevant grounds in the present tense rather than specifically with reference to earlier documents.

[19] Subsequently in *HR Computek (Pty) Limited v The Commissioner for the South African Revenue Service* [2012] ZASCA 178 the court appears to have considered that at least the taxpayer does not have the freedom of amendment which Claasen J assumed. In *Computek* the Court seems not to have been referred to Claasen J's judgment. It may also be that in *Computek* the court was influenced by the decision in *Matla Coal v Commissioner for Inland Revenue* 1987 (1) SA 108 (A) which I would respectfully observe was decided at a time when s 83(7)(b) of the Income Tax Act expressly said that a taxpayer is limited to the grounds set out in his notice of objection. That provision was removed at a later stage from the Income Tax Act.

[20] Be that as it may, it appears to me that a distinction needs to be drawn between a tax appeal which is concerned with objective questions of fact and law on the one hand and tax appeals which are concerned with the exercise by the Commissioner of powers which he has upon being satisfied of particular matters. In the former class a case would belong the sort of situation where the Commissioner disallows an item of expense as a deduction on the basis that it is of a capital nature and then later seeks to support the disallowance on the new basis that it was not incurred in the production of income.

Various objective criteria must exist in order for expenditure to be deducted and it might be said that, subject to fair play and the other party being sufficiently forewarned before trial, it is not unfair that either party may raise additional grounds to show why, objectively speaking, the item was or was not deductible.

[21] In the case of the powers which the Commissioner can exercise upon being satisfied of particulars matters, one is dealing with a different situation. One is not dealing with a situation where the law prescribes that certain expenses shall be disallowed or certain income shall be taxed if a certain state of affairs objectively exists. One is dealing, rather, with a situation where a particular fiscal result follows only if the Commissioner himself is satisfied of certain matters. In the latter class of case it is the Commissioner's satisfaction upon the points in question which constitutes the jurisdictional fact for the issuing of the assessment.

[22] It is for this reason that one will find that, where the Commissioner's powers are so expressed, special provision is made for an appeal against the Commissioner's decision. In the case, for example, of ss 103(1), (2) and (3) of the Income Tax Act, s 103(4) says that any decision of the Commissioner under the preceding three subsections shall be subject to

objection and appeal. The reason this is necessary is that ordinarily speaking if a certain result were to flow upon the Commissioner being satisfied of the matters in question, there would not be an appeal, at least not the conventional appeal for which ss 81 ff of the old Income Tax Act used to provide.

[23] Even where there is not an express provision for an appeal against the Commissioner's satisfaction of certain matters, the tax court has assumed to itself the power at least to review the Commissioner's decision. For example, s 79(1) permits the Commissioner to issue additional assessments in certain circumstances but he may not do so after the expiration of three years from certain dates unless he is satisfied that the non-payment of the tax was due to fraud or misrepresentation or non-disclosure. It has been held that the Commissioner's satisfaction is a prerequisite for allowing a late assessment under that provision and that the court can at least take his decision under review on conventional review grounds.

[24] As applied to the present case, the question therefore is this: On what matters was the Commissioner satisfied when he invoked the power to disallow the set-off in the taxpayer's 2005 to 2008 years? Once one has determined that question, one will know what it is that the taxpayer had a right to appeal against in terms of s 103(4).

[25] The assessments were issued under cover of the letter of 30 November 2010 and that letter therefore can be taken to set out most fully and accurately the matters on which the Commissioner was satisfied. That letter should, though, be read in the context of what preceded it.

[26] One knows that at the time of the letter of audit findings of 10 December 2009 the Commissioner was not yet aware of the second change in shareholding of November 2003. He nevertheless considered, on the strength of the first change in shareholding, that he was entitled to disallow the set-off in the years in question. Clearly at that stage his foreshadowed satisfaction, although not yet final, was based on the first change in shareholding alone. As I have said, the taxpayer responded in May 2010 and additional information inter alia concerning the second change in shareholding came to light.

[27] Then came the assessment letter of 30 November 2010. In that letter the Commissioner expanded the factual background to include a number of additional facts disclosed in the response to the audit findings. In para 1.1.19 the Commissioner concluded the factual background by referring to the transaction in November 2003 by which XYZ sold the shares in the taxpayer to D Company.

[28] He then proceeded to set out his view of the law and application of the law to the facts. He first identified in paras 1.3.1 to 1.3.4 the three essential requirements for invoking s 103(2). He then dealt with each of those requirements under separate headings. In regard to the first requirement he said in paras 1.3.6 to 1.3.9 that the first requirement was fulfilled by virtue of the change of shareholding which occurred in March 2003 and by which XYZ became the sole shareholder of the taxpayer. He did not there refer to the second change in shareholding.

[29] In regard to the second requirement, which he dealt with in paras 1.3.10 to 1.3.18, he referred to the fact that when XYZ acquired all the shares in the taxpayer in March 2003 the company had been an empty shell, its business having previously been sold to XYZ. The Commissioner went on to refer to the re-vesting of the business in the taxpayer shortly after the acquisition of the shares. He then mentioned again the disposal of the shares in the company to E Company with effect from 1 October 2003. He set out the income which the company had earned. One can accept that this income was earned wholly or exclusively after the company had fallen under the control of E Company. But then he says in para 1.3.15:

‘It is my contention that after the change in shareholding effected by the Sale Agreement, the Company was not in a position to earn income beyond the reach of section 103(2) as any income would have had to have been diverted to it.’

[30] The sale agreement mentioned in this passage was defined in para 1.1.15 of the letter as being XYZ’s purchase of the shares in the company on 5 March 2003. Immediately after this passage the Commissioner emphasised that there is no limitation on the meaning of the ‘indirect result’ contemplated in s 103(2), in other words the earning of income not only as a direct but also as an indirect result of the change in shareholding. In context it appears to me that he was seeking to show that the subsequently earned income was at least an indirect result of the change in the shareholding mentioned in para 1.3.15. This is reinforced by what he says in para 1.3.17 (my emphasis):

‘Income was received by or accrued to the Company in consequence of the change in shareholding in the company whereby XYZ became the sole shareholder. The income was therefore received by or accrued to the Company as a direct, or at least indirect, result of that change in shareholding.’

[31] The phrase ‘that change in shareholding is, both in the context of what precedes it in para 1.3.17 and in the context of para 1.3.15, a reference to the first change in shareholding in

March 2003.

[32] The Commissioner then goes on to deal with the third requirement, namely whether that change in shareholding had as its sole or main purpose to utilise an assess loss. He sets out various circumstances designed, so it appears to me, to show that as at March 2003 XYZ had various courses open to it which might have better suited the continuation and expansion of the call centre operations without utilising what was by then the empty shell of the taxpayer. I do not need to comment on the merits of what the Commissioner says, but the conclusion he reaches, based on those considerations, is that XYZ only followed the route it did, namely to acquire all the shares in the taxpayer and re-vest the business in the taxpayer, in order to utilise the assessed loss.

[33] When he says in para 1.3.29 that he can come to no other conclusion than that the sole or main purpose of the ‘change in shareholding’ was the utilisation of the assessed loss, I have no doubt that he is referring to the first change in shareholding. That was the one he identified under the first requirement and also in his discussion of indirect results in relation to the second requirement.

[34] I must emphasise that the first requirement can never be

viewed in abstract, because the matters contemplated in the second and third requirement are matters which relate back to the change in shareholding which is the subject of the first requirement. The fact that the Commissioner in his letter, as part of its background and elsewhere, referred to the fact that there had been a second change in shareholding is not relevant unless he is linking the fulfilling of the second and third requirements to that second change in shareholding. On my analysis of the letter of assessment it is perfectly clear that he did *not* seek to link the second and third requirements to the second change in shareholding but to the first. I should say, though the merits of the matter are not before me, that this might be an entirely rational approach to the matter and the Commissioner may well be able to defend the assessments he issued on the basis of focusing only on the first change of shareholding which occurred in March 2003. But I must assess the amendment application and the counter-application on the footing that the proposed changes to the rule 10 statement will have real effect and would enable the Commissioner to rely on the second change of shareholding in order to invoke s 103(2) in a way or to an extent that he cannot do by relying only on the first change.

[35] Although the assessment letter is the document which sets out contemporaneously the Commissioner's actual

reasons for acting as he did, one can also have some regard to what followed in order to see whether one is reading the letter fairly or unfairly. In the objection letter of 22 February 2011 the taxpayer dealt with the background circumstances almost identically to the letter in which it had responded to the audit findings, ie dealt quite fully with the second change in shareholding and the role played by E Company in the subsequent expansion of the company's business. However, when the taxpayer turned in its letter of objection to consider the actual grounds of assessment and the three requirements isolated by the Commissioner, it is clear to my mind that the taxpayer understood the Commissioner to be focusing on the first change in shareholding and to be contending that it was this change in shareholding, coupled with matters said to be linked to it by way of the second and third requirements, that justified the disallowing of the set-off of the assessed loss.

[36] Thus in para 2.2.1 of that letter, in dealing with the change in shareholding, the taxpayer accepts that on 5 March 2003 XYZ acquired the shares. In dealing with the first requirement of s 103(2) the taxpayer does not at that point deal with the second change in shareholding. Similarly, in regard to the second and third requirements, the taxpayer is responding on the extent to which those requirements were or were not satisfied in relation to the first change in

shareholding, particularly in regard to the main purpose requirement. When the taxpayer says that the change in shareholding was not effected for the sole or main purpose of utilising an assessed loss, the change in shareholding which it is referring to is the one which it has just dealt with in relation to the first requirement. The taxpayer then expands on that third requirement in para 2.2.3.1 by saying:

'It is clear from the facts of this matter that XYZ's acquisition of the shares in the Company emanates from the Option representing rights secured by XYZ as part and parcel of its agreement with K Company to acquire the Cape Town Call Centre Facility under a particular set of circumstances.'

It was thus concerned with the acquisition by XYZ of the shares.

[37] The disallowance letter of 15 November 2011 does not take the matter further because it is expressed in the same terms essentially as the assessment letter. I would therefore read it in the way that I have already understood the assessment letter.

[38] As to the Commissioner's statement of the grounds of assessment, it appears to me that the author of the rule 10 statement had the letter of assessment and letter of disallowance in front of him or her, because the content of the rule 10 statement essentially distils the contents of these

letters under various headings. The application of s 103(2) to the facts of the particular case commences in para 29 of the rule 10 statement. In paras 29 to 32 the Commissioner refers to the March 2003 change in shareholding and then to the November 2003 change in shareholding. He concludes in para 31 on the first requirement by saying the following:

'There was thus a change in shareholding, first upon the sale of the shares in the appellant from K Company to XYZ with effect from 5 March 2003 and thereafter the shares were transferred from XYZ to E Company Investments.'

[39] He says that consequently the first requirement of s 103(2) has been met. I should flag at this point that the taxpayer is objecting to para 30, which refers to the November 2003 change in shareholding, and to the part of para 31 which refers to the second change in shareholding. However, and holding that point for the moment in abeyance, if one looks at what follows in the discussion of the second and third requirements, the rule 10 statement in its current form appears to me to follow more closely the letter of assessment in focusing on the first change of shareholding as having had the direct or indirect result of the earning of income by the taxpayer and as having been concluded for the main or sole purpose of utilising the assessed loss.

[40] The second requirement is dealt with in paras 33 to 41 of the rule 10 statement. That again does refer to both changes in shareholding, including in para 36 the disposal by XYZ of the shares to E Company. There is no objection by the taxpayer to para 36 as a statement of fact. There then follows the income that was earned by the taxpayer over the years 2003 and 2008. This is all very much as was set out in the letter of assessment. But then follows in paras 38 to 40 of the rule 10 statement essentially the same content as was contained in paras 1.3.15 to 1.3.17 of the letter of assessment. In particular, para 40 of the rule 10 statement concludes in relation to the second requirement as follows (my emphasis):

'Income was received by or accrued to the appellant in consequence of the change in shareholding in the appellant whereby XYZ became the sole shareholder. The income was therefore received by or accrued to the appellant as a direct, or at least indirect, result of that change in shareholding.'

[41] This appears to me to be quite unambiguous and to be following the pattern of the assessment letter and the disallowance letter. Similarly, in regard to the third requirement, the purpose requirement, paras 42 to 54 follow very closely the reasoning and substantiation set out in the assessment letter and the disallowance letter. The circumstances which are put up as showing that there was a sole or main purpose are concerned with the purposes that

XYZ had in March 2003 to follow the route of acquiring the shares in the company and re-vesting the business in the company rather than other avenues which were open to it.

[42] It is my conclusion, therefore, that the change of shareholding, which formed the foundation for the Commissioner's satisfaction of the three requirements to invoke s 103(2), was the change of shareholding which occurred on 5 March 2003. The fact that the Commissioner referred to and accepted the fact that there had been a further change in shareholding does not, on a proper understanding and reading of the letter of assessment, disclose an intention to rely on the further change in shareholding as the change which had the result, directly or indirectly, of causing income to be earned by the taxpayer or as having been the transaction concluded for the sole or main purpose of utilising an assessed loss.

[43] In regard to the entitlement or otherwise of the Commissioner to depart from the grounds on which he was satisfied in a matter of this kind by way of an amendment of his rule 10 statement, I was referred to *ITC 1862* 75 SATC 34. That was a case arising under s 103(1) of the Income Tax Act and the question arose not in the context of an amendment to a rule 10 statement but rather in regard to the extent to which

the Commissioner at the end of a trial could rely on grounds not contained in his rule 10 statement. Nevertheless I think the following statement in paras 59 and 60 of the judgment of Desai J is relevant:

'59. Identifying the Commissioner's true case is important because of the nature of s 103. It involves the exercise of an extraordinary administrative power enabling the Commissioner to overturn the express and ordinary consequences of applying the Act. The exercise of that power involves his "determining" a liability for tax. An appeal in this context is against the Commissioner's "decision" (s 103(4)), namely his determination of a tax liability and its amount.

60. The basic jurisdictional requirement for the exercise of the power is that the Commissioner is "satisfied" of the various requirements. Once the Commissioner reaches the requisite level of satisfaction and exercises the power to determine the tax liability on the strength of such satisfaction, an appeal must of necessity go to whether he was justified in being so satisfied. He must stand or fall by his reasons for exercising the power. If the Commissioner did not make his tax determination on the basis of being "satisfied" about an alternative scheme, he cannot rely on the alternative when his s 103(1) determination is challenged on appeal.'

[44] I agree with those observations and they appear to me to apply as much to what can legitimately be relied upon by the Commissioner in his rule 10 statement as to what he can rely upon at the end of a trial in the tax court. That is not to say

that if, having assessed on the basis of being satisfied of certain matters, the Commissioner discovers other facts which cause him to be satisfied on other matters, he cannot issue a further assessment based on his new satisfaction. However, it is only upon reaching satisfaction on the new elements that he can then issue a fresh assessment. What he cannot do is support his existing assessment on the basis of matters on which he was not satisfied when he issued that first assessment.

[45] Whether the Commissioner in the present case would be time-barred from issuing an assessment focusing on the second change in shareholding or on the combined effect of the first and second changes in shareholding is not a question which arises for consideration on the present case.

[46] It follows for the reasons I have given that the application to amend must be refused and the counter-application to strike out must succeed. In regard to costs, rule 50(5)(a) of the new tax court rules, which govern these interlocutory proceedings, states that the tax court hearing an application under Part F of the rules may make an order as referred to in that part, together with any other order it deems fit, including an order as to costs. Although, when it comes to the substance of the tax dispute, costs are generally not awarded unless there has

been a frivolous use of power or an unreasonable basis of opposition, in interlocutory matters it is my experience that costs have generally followed the result, unless it would appear unjust to order costs on that basis.

[47] I thus make the following order:

[1] THE COMMISSIONER'S APPLICATION TO AMEND DATED 7 AUGUST 2014 IS DISMISSED WITH COSTS.

[2] AN ORDER IS GRANTED IN ACCORDANCE WITH PRAYER ONE OF THE NOTICE OF COUNTER-APPLICATION DATED 9 SEPTEMBER 2014, TOGETHER WITH AN ORDER THAT THE COMMISSIONER PAY THE TAXPAYER'S COSTS OF THE COUNTER-APPLICATION.

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ROGERS, J