IN THE TAX COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

CASE NUMBER: 12821

DATE: 12 December 2016

MR X Appellant

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

MEMBERS IN COURT

Mrs Christene Fourie;

Mr Churchill Mrasie; and

MABUSE J:

[1] This is an appeal by the appellant, Mr X, against the decision of the respondent, the Commissioner of the South African Revenue Services ("the Commissioner"), to raise

additional income tax against him in respect of the 1998 and the 2000 years of assessment. These are the disputed assessments.

[2] The appeal arises from the following circumstances. On 30 September 2008, in the Letter of Assessment the Commissioner, acting in accordance with the provisions of s 78(1) read with s 79 of the Income Tax Act 58 of 1962 ("the Act as amended"), raised two separate assessments ("additional assessments"), one for the 1998 year of assessment, in respect of all the amounts received by or accrued to X in the period 1985 to 1998. The amount involved in the said period was R87,762,332.92 ("R87 million"); and the other for the 2000 year of assessment, in respect of income tax assessed in the amount of R2 million additional tax in terms of the provisions of the then but now repealed s 76(1)(*a*)(*b*)(*c*) of the Act.

[3] The additional assessments arose from the following circumstances. On 20 December 2007 in a Letter of Findings, the respondent gave notice to the appellant that it would conduct an examination of the appellant's tax affairs. In doing so the respondent discovered that during 1999 the appellant was paid R2,000,000.00. The said amount was part of the R6,000,000.00 which was from Y and said to be a profit credit payable to the appellant and two other directors in equal shares. The appellant treated the said amount of R2,000,000.00 as capital and failed to disclose it in his tax return for the 2000 tax year.

[4] THE LAW

The respondent, on the other hand, treated the said amount as gross income as contemplated by s 1(*c*) of the Act. The said section defines gross income as follows:

> *"(i) In the case of a resident, the total amount in cash or otherwise received by or accrued to or in favour of such resident; or*
>
> *(ii) …*

during such year or period of assessment, excluding receipts or accrued of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued … namely –

(c) any amount, including any voluntary award, received or accrued in respect of services rendered or to be rendered or any amount (… received or accrued in respect of or by virtue of any employment or the holding of any office, …)"

Section 99 of the Act states that:

"If at any time the commissioner satisfied –

(a) that any amount which was subject to tax and should have been assessed to tax under this Act has not been assessed to tax; or

(b) that any amount of tax which was chargeable and should have been assessed under this Act has not been assessed; or

(c) …

he shall raise an assessment or assessments in respect of the said amount or amounts, notwithstanding that an assessment or assessments may have been made upon the person concerned in respect of the year or years of assessment in respect of which the amount or amounts in question is or are assessable, and notwithstanding the provisions of s 81(5) and 83(18): provided that the Commissioner shall not raise an assessment under this subsection – (i) after the expiration of three years from the date of assessment (if any) in terms of which any amount which should have been assessed to tax under assessment was not so assessed or in terms of which the amount of tax assessed was less than the amount of such tax which was properly chargeable, unless the Commissioner is satisfy that the fact that the amount which should have been assessed to tax was not so assessed or the fact that the full amount of tax suitable was not assessed, was due to fraud or misinterpretation or non-disclosure of material facts; or …"

[5] The Commissioner informed the appellant in the Letter of Findings that as far as he was concerned, the R2,000,000.00 accrued to the appellant and received by him was in fact for services rendered or to be rendered by him and was therefore not of a capital nature. Accordingly the R2,000,000.00 should be taxed in the 2000 year of assessment under paragraph C of the gross income. The failure to disclose the said amount arose from the appellant's non-disclosure of a material fact, alternatively from misrepresentation. The Commissioner contended that for the afore going reason the three years period referred to in s 79(1) of the Act was not applicable in this case.

[6] The aforementioned Letter of Findings contained an advice that, in the event the appellant did not agree with the respondent's findings, he should, within fourteen (14) business days of 20 December 2007, respond or give written reasons supported by any documentation to the findings of the Commissioner. He was warned that if he failed to act accordingly the assessments would be raised accordingly.

[7] ADDITIONAL TAX

According to the provisions of s 76(1) of the Act, once it was established that income as intended in s 1(*c*) of the Act has been omitted from, or understated in a taxpayer's tax return or that an incorrect claim for deductions has been made, 200% additional tax is automatically imposed. The said s 76(1) provided as follows:

> *"A taxpayer shall be required to pay in addition to the tax chargeable in respect of his tax income—*
>
> *(a) if he makes default in rendering a return in respect of any year of assessment, an amount equal to twice the tax chargeable in respect of taxable income for that year of assessment; or*
>
> *(b) if he omits from his return any amount which ought to have been included therein, an amount equal to the difference between the tax as calculated in respect of the*

taxable income returned by him and the tax properly chargeable in respect of his taxable income as determined after including the amount omitted; or

(c) if he makes an incorrect statement in any return rendered by him which results or would, if accepted, result in the assessment of the normal tax at an amount which is less than the tax properly calculated, an amount equal to twice the difference between the tax as assessed in accordance with the return made by him and the tax which would have been properly chargeable."

According to the Commissioner, so it seems, the imposition of such an additional tax did not require a finding of deliberate intention to evade tax. Such additional tax may be imposed even where carelessness or inadvertence or negligence was established.

[8] Section 76(2) of the Act though gave the respondent the discretion to remit a portion or all of the additional tax assessed in terms of s 76(1), provided that he may not do so where there was a deliberate intention to evade tax. He may only do so if the taxpayer satisfied him that there were extenuating circumstances why such additional tax or the whole of it should not be imposed.

[9] The respondent gave an indication to the appellant that he intended imposing additional tax based on s 76(1) of the Act. The respondent afforded the appellant an opportunity to furnish reasons or to make representations within the fourteen days of 20 December 2007 why the said additional tax should not be imposed.

[10] INTEREST ON UNDERPAYMENT OF TAX

In terms of the provisions of s 89*quat*(2), of the Act, interest is chargeable on the underpayment of provisional tax where such underpayment arises from the circumstances set forth in s 76(1)(*a*)(*b*) and (*c*) of the Act. The said section 89*quat* (2) provides that:

"(2) If the taxable income of any provisional tax payer as finally determined for any year of assessment exceeds –

(a) R20,000.00 in respect of a company; or

(b) R50,000.00 in the case of any person other than a company,

and the normal taxpayer by him in respect of such taxable income exceeds the credit amount in relation to such year, interest shall, subject to the provisions of subsection (3), be payable by the taxpayer at the prescribed rate on the amount by which such normal tax exceeds the credit amount, such interest being calculated from the effective date in relation to the said year until the date of the assessment of such normal tax."

[11] Section 89*quat* (3) of the Act gives the Commissioner a discretion to review the s 89*quat*(2) interest charged and where permissible to remit or reduce the charge. The Commissioner may only reduce or remit the interest charged in terms of s 89*quat* (2) if it is satisfied that –

(a) in respect of the omitted or understated income adjustments, that the taxpayer has, on reasonable grounds, contended that such amounts should not have been included in the taxable income; and/or

(b) in respect of the overstated or non-deductible expenditure or allowances, that the taxpayer has, on reasonable grounds, contended that such amounts should have been allowed.

[12] Finally the appellant was given an opportunity to make written representations for the adjustments with regard to interest chargeable. Such representations were to reach the Commissioner within fourteen days of 20 December 2007.

[13] LETTER OF FINDINGS IN RESPECT OF THE TAX YEARS 1988 TO 1998

The summary of this proposed adjustments in respect of the tax years 1988 to 1998 were as follows:

(1) The amount of adjustment was R87 million which was described as undeclared cash appropriated from sales. The said amount was regarded as gross income in terms of s 1(*c*) of the Act for the Income Years 1988 to 1998.

(2) A further adjustment in the sum of R237,000.00, which amount represented undeclared cash withdrawings, was regarded by the Commissioner as gross income in terms of s 1(*c*) of the Act for the tax years 1985-1998.

[14] UNDECLARED CASH SALES

The audit findings of the Commissioner were that in the conduct of the various businesses of Z Entity Store, the appellant conducted a cash business in respect of which the cash proceeds accrued to the appellant for his personal benefit. The appellant failed to declare these proceeds in his tax returns for the relevant tax years. The cash from the undisclosed cash business was used in the following three manners:

(a) it was utilised to make further cash purchases of stock from traders operating in the informal sector with no formal records;

(b) the stock was sold for cash and the cash was never disclosed to the authorities;

(c) a portion of the proceeds of the undisclosed business cash was expatriated overseas for the appellant's benefit.

[15] A notebook was retained in which was recorded the income and disbursements relating to the undisclosed cash business, the whereabouts of which could not be established. Documentation, evidence relating to the cash consisted of schedule annexed as annexures 'A' & 'B' to the affidavit furnished by the appellants for the purposes of an enquiry in terms of s 74(*c*) of the Insolvency Act 24 of 1936 (the section 74(*c*) enquiry). According to annexure 'A' the accumulated

balance of the undisclosed cash amounted, up to the sale of the Z Entity business, to R209,406,332.39 ("R209 million") of which R207,761,368.29 ("R207 million") was expatriated overseas. According to the arrangements between the participants 40% of the proceeds of such undisclosed cash business was attributed and accrued to the appellant in his personal capacity. Accordingly the 40% of the proceeds of the undisclosed cash business attributed and accrued to the appellant in his personal capacity represented gross income as envisaged by s 1 of the Act. According to the Commissioner, the nett proceeds generated by the aforementioned cash business represented gross income as contemplated by s 1(*c*) of the Act. Such proceeds accrued to the appellant's benefit.

[16] The appellant accepted the aforementioned proceeds with a single mind to retain them for his benefit. Accordingly such proceeds constituted income received which is duly taxable under the Act.

[17] The Commissioner's Letter of Findings on the undeclared cash withdrawals were that during the latter part of the 1980's until sometime during 1996, cash was withdrawn from the Z Entity business on a monthly basis. Such withdrawals commenced with R500.00 a month and gradually increased to R2000.00 per month by 1996. Owing to lack of records, no specific details relating to such withdrawings were available. In terms of the provisions of s 1(*c*) of the Act, the said monthly withdrawals, starting from R500.00 per month to R2000.00 per month up to 1996, represented gross income inasmuch as it represented an amount received in respect of services rendered by virtue of the holding of an office in the Z Entity group. The said amounts would, according to the Commissioner, be taxed in accordance with schedule annexure '1' under paragraph 1(*c*).

[18] The appellant was invited to challenge the respondent's findings. This challenge he had to make in writing supported by any documents not later than 7 August 2008.

[19] ADDITIONAL TAX: SECTION 76(1) OF THE ACT

In terms of s 76 of the Act, additional tax was levied on the appellant in respect of the income that the appellant had failed to disclose in his tax returns. Such additional amount was levied on the basis that it was omitted or on the basis furthermore that it was an understatement in tax returns that an incorrect claim for deduction was made. In such a case the taxpayer shall be required to pay an amount equal to twice the tax properly chargeable. S 76(2) of the Act gave the Commissioner a discretion to remit a portion of or all of the additional tax. With the proviso that where he was satisfied that there was an intention to evade taxation, he may not remit the additional tax unless there were extenuating circumstances.

[20] Holding the view that there was an intention to evade taxation, the Commissioner believed that additional tax of 200% should, in accordance with the terms of s 76(1)(*b*) and (*c*) of the Act, be levied. The appellant was advised to challenge the Commissioner's findings in writing. He was advised furthermore to submit written representations to the Commissioner by not later than 7 August 2008.

[21] INTEREST ON THE PAYMENT OF PROVISIONAL TAX

The appellant was also informed that, in terms of s 89*quat*(2) of the Act, interest would be charged on the underpayment of provisional tax arising from the adjustments. In addition, it was also pointed out to him that, in terms of s 89*quat*(3), the Commissioner had a discretion to review the s 89*quat*(2) interest charged and, where appropriate, to remit or reduce the charge. It was furthermore pointed out to him that the Commissioner could only exercise his discretion in terms of s 89*quat*(3), if he was satisfied that, in terms of the omitted or understated income adjustments, the taxpayer has, on reasonable grounds, contended that such amounts should not have been included in the taxable income.

[22] The appellant was then afforded an opportunity to make written representations to the Commissioner in respect of any one of the adjustments. Such written representations were to reach the Commissioner by not later than 7 August 2008.

[23] Notwithstanding the appellant's responses as contained firstly in his letter dated 18 February 2008, and secondly, in his letter dated 14 August 2008, the Commissioner, and in particular on 30 September 2008, issued an Assessment Letter in which the appellant was informed that revised additional notices of assessment, a statement of account relating to tax, additional tax and interest arising from the adjustment set forth would be issued as follows:

(a)(i) undeclared cash appropriated from sales for the tax year 1985 to 1998 in terms of s 1(*c*) of the Act – R37,693,139.40;

(ii) additional tax imposed s 76(1) of the Act – R75,386,278.80

Total R113,079,417.20;

(b)(i) undeclared cash drawings in terms of s 1 of the Act – R106,650.00 for the tax year 1995 to 1998 gross income in terms of s 1(*c*) of the Act;

(ii) additional tax in terms of s 76(1) of the Act – R213,300.00

Total R319,950.00;

(c)(i) income received for services rendered during the tax year 2000 regarded as gross income by the respondent in terms of s 1(*c*) of the Act – R900,000.00;

(ii) additional tax imposed in terms of s 76(1) of the Act – R1,800.000.00

Total R2,700,000.00

Grand total R140,399,367.20.

[24] LETTER OF ASSESSMENT

In the said Letter of Assessment the respondent furnished explanatory notes and reasons for its findings in respect of all the adjustments and in all instances referring to the law as set out in the

applicable sections of the Act. In addition and *ex abudandi cautela* the Commissioner explained in the same letter the whole procedure relating to the Objections and late Objections.

Finally, the appellant was notified that the total amount payable was computed as follows:

Adjustments: R38,699,789.40

Additional tax: R77,399,578.80

Interest: R149,637,870.31.

[25] On 28 November 2008 the appellant, through his then attorneys and acting in terms of Rule 3(1)(*a*) and under s 107(*a*) of the Act, requested the respondent to furnish him with his reasons for the findings.

[26] Per his letter dated 3 February 2009, the Commissioner furnished the appellant with full and adequate reasons for its assessments. The reasons the Commissioner furnished the appellant with were not any different from the findings contained in both the Letter of Findings dated 20 December 2007 and the Letter of Assessment of 30 September 2008.

[27] On 17 March2009, the appellant's attorneys lodged an objection to the assessments. Briefly the objection was as follows:

27.1 that the extraction of the expatriated funds was an unlawful appropriation (theft) of the corporate funds and that the monies concerned constituted gross income in the hands of the directors or members;

27.2 that the proceeds of the undeclared cash sales were at all material times held and controlled by Z Entity Store Fordsburg CC and/or Hathunani and had not accrued to the benefits of the appellant at any time; that therefore the gross income of R83,762,533.00 did not constitute "gross income" in the hands of the appellant in his capacity as a member or shareholder of the relevant corporate entities, did not represent remuneration for services rendered or the proceeds of theft, was a dividend distributed to members

pursuant to consensual decision by all shareholders or members and was therefore exempt from tax as a dividend;

27.3 that the appellant qualified for a bad debt allowance in terms of s11(1) of the Act;

27.4 that the sum of R83,762,532.00 qualified for a bad debt allowance;

27.5 the appellant objected to the use of the 1998 tax table to income which accrued during the years 1985 to 1997;

27.6 the appellant objected against the R2000.00 additional tax in respect of all the assessment if the objection against it is upheld;

27.7 that the taxpayer always held the *bona fide* view that these monies did not accrue or were not received by him and that income tax was not payable in respect thereof;

27.8 that the amount of R2,000,000.00 that the appellant received from Y did not accrue to him personally but to X's J (Pty) Ltd which in turn paid the amount to the appellant as a dividend and accounted to SARS for Secondary Tax on Companies (STC) liabilities;

27.9 alternatively that the sum of R2,000,000.00 which was paid as an enhancement of the sale price of the Z Entity business was of capital nature;

27.10 that the Commissioner was precluded from raising an assessment in respect of the sum of R2,000,000.00 after a period of more than three years from the date of relevant assessment as non-assessment of the said amount was not due to fraud or misrepresentation or non-disclosure save such of a material fact by the appellant.

[28] In a letter dated 1 April 2009 the Commissioner informed the appellant, through his then attorneys, that he had considered his objection to his assessments; that he would not allow the objection in full; and informed the appellant furthermore that, in respect of those portions of his objections that were accordingly revised, reduced assessments would be issued. With regards to the objections that were not allowed, the Commissioner painstakingly set such objections out and furnished his full reasons for not allowing them and again referred the appellant to the applicable sections of the Act.

[29] On 19 May 2009 the appellant's attorneys submitted, under cover of a letter of the same date, the appellant's notice of appeal against the Commissioner's assessments.

[30] On 4 November 2013, the Commissioner served his Statement of Grounds of Assessment on the Appellant. Attached to the Commissioner's Statement of Grounds of Assessment, were a copy of the Notice of Assessment marked "A"; a copy of the affidavit dated 21 May 2008, in which the appellant confirmed as the truth the contents of the statement made by the appellant himself, marked "B"; Clarifications and Further Details Currently Required Re Draft X Statement marked "C"; Response To Clarification And Further Details Currently Required Draft X statement marked "D"; and copies of the pages of the appellant's evidence at s 74(*c*) enquiry marked "E". The delivery of the respondent's Statement of Grounds of Assessment was followed by the appellant's delivery of his Statements of Grounds of Appeal.

[31] When the appeal commenced the Court was called upon to decide the following issues:

31.1 The appellant's leave to amend his Statement of Grounds of Appeal and Objection. The appellant's approach with regard to this point was that whether or not the application was granted, he would be able to proceed with the matter;

31.2 The point *in limine*

(1) the appellant raised a point *in limine* that the Commissioner has not established any grounds for assessing the appellant in respect of the taxable income for each year commencing on 1 Marchand ending on 28 February from 1985 to 1997; that no such assessments have been raised and no such assessments are before the Court; that there is simply no authority for the Commissioner in the Income Tax Act or any other Act administered by the Commissioner to levy tax from income for an accumulated debt period of 13 years in one assessment;

31.3 the second main point raised on behalf of the appellant related to the question whether the monies which were expatriated were received by or accrued to the appellant;

31.4 the third broad issue which essentially was raised in the alternative related to whether the expatriated amounts were exempt from taxation because they constituted dividends as defined in the Act.

31.5 **Prescription**

It is contended by the appellant that the expatriated amounts from Z Entity were received by or accrued to the appellant in the year of assessment during which they were so expatriated or designated for expatriation. Such amounts could only be included in the appellant's gross income for the years of assessment during which each such amount was so received or accrued. The appellant contended that since all the amounts in question were never received by or accrued to the appellant but expatriated during the 1987 to 1997 years of assessment, it is not competent to include the amount of R83,762,532.00 in the appellant's taxable income for the 1998 year of assessment. For this reason the assessment in terms of which the amount of R83,762,532.00 was purportedly included as the year assessment was invalid.

[32] The cornerstone of the appellant's case was that the whole business of the appellant was operated by the co-operations and companies ("the Z Entities") and not by the shareholders. Therefore, all the revenue derived from the wholesale business, whether disclosed or not, accrued to and was received by the relevant entities. The appellant contended that on the aforegoing basis the entire amount so expatriated could only have been in the hands of the entities to which the amount accrued to or was received and not in the hands of the shareholders. It was so because it was those amounts that were eventually distributed to the shareholders that accrued to them upon such distribution.

[33] According to the appellant, the dividends were subject to the secondary tax on companies in the hands of the relevant companies and co-operations. Accordingly, these amounts were, according to him, exempt from tax in the hands of the shareholders. Even if it was held that the expatriated amounts accrued to the shareholders at the time that they were expatriated, such accrual constituted distribution by the companies and co-operations of their accumulated or retained profits to their shareholders as dividends and were exempt from income tax in the hands of the shareholders.

[34] With regard to the last amount of R237,000,00 the appellant contends that the employer, and not him as the appellant, has an obligation to withhold the employees' tax on their remuneration and to pay it over to the respondent. The respondent has therefore the right of recourse against the employer and not against the appellant as the appellant was not the employer. That amount, according to the appellant, was exempt from tax because it represented withheld employees' tax on their remuneration. This amount was withheld by the employer.

[35] The tax year 2000

The amount of R2 million was part of the R6 million paid by Y to the relevant Z Entities as additional proceeds from the sale of their business to Y. The question now is whether the sum of R6 million represents the proceeds of the sale of Z Entities or the sum of R2 million represents additional proceeds from the sale of the business to Y. These additional proceeds were distributed by the relevant Z Entities to their shareholders as dividends.

[36] In the event of the Court finding, contrary to his view, that the amounts constituted remuneration for services rendered, it was pleaded by the appellant that the obligation to withhold the employees' tax and to pay it over to the respondent fell squarely on the shoulders of the employer and that he was not such an employer. With regard to additional tax the appellant contended that should the Court find against him, he pleaded that additional tax fell to be

remitted as the relevant omission were not based on fraud or intent to evade tax but on the tax positions taken by the applicant. In the event that the Court found for the Commissioner the appellant pleaded that interest fell to be remitted as the relevant omissions were not based on fraud or intent to evade tax but on the positions adopted by the appellant.

[37] THE EVIDENCE OF MR X

Right at the commencement of his evidence, the appellant nailed his colours to the mast when his counsel confirmed on his behalf that his case was that the respondent assessed a wrong party as far as the accrual and receipts were concerned. The business operatives of Z Entity Group of Companies were S Store. The individuals who were involved in the business of Z Entity Group were Mr G, Mr K and Mr L and the appellant himself. All four of these people were shareholders of the companies and the close corporations in the Z Entity Group. The appellant had a 40% shareholding in the Z Entity Group. Mr G himself had 40% shareholding in the Z Entity Group while the other shareholders had 10% each.

[38] Over a period of about 13 years approximately R207 million was taken out of the country. He was unable to verify the said amount but could not dispute it. The relevant amount was never disclosed in the financial statements of Z Entity Group. The monies that were removed from the Republic of South Africa came from the Store business. This money was taken out of the country by Mr G. At the time the money was taken out, he, the appellant, knew that it had to be declared to the authorities.

[39] Of the money that was taken out, he received physically R20 million. During the period in which he received the said R20 million he realised that he had to disclose it to the authorities. He admitted that it was not disclosed. Of the money that was taken out of the country he had agreed that he would get 40% of it and Mr K 10% and Mr L 10% and Mr G 40%. Mr M was Mr G's contact man in London. The money that was taken out of the country was ultimately taken to an

account opened in Switzerland. Mr M was in charge of the relevant account. He was aware that the reasons the Commissioner imposed tax on him was as contained in paragraphs 15.1.3 and 15.1.4 on page 70 of the Dossier. In paragraph 15.1.3 the Commissioner stated as follows:

> *"That the appropriated funds were not disclosed in his tax returns for the years of assessment 1985 to 1998. Prior to the expatriation of the funds to an offshore bank account, the funds were received by the appellant in the Republic;*
>
> *15.1.4 the amount so received did not constitute a dividend as there was no formal declaration or distribution by the Z Entity Store Group of entities within the statutory requirements of the tax legislation;"*

He denied that he received the said amount.

[40] If he wanted to use that money or part of it, he would have to contact Mr G who would in turn contact Mr M to make all the arrangements for the payment. Whenever they wanted more money they were never able to access it in the foreign account. When they wanted money they would telephone Mr G who would then phone Mr M and Mr M would then transfer the money. They had to do so through Mr G. They did claim payment of the foreign money but were never successful.

[41] He testified that on one occasion he and Mr G travelled to Switzerland to open an account but Mr M was the person who did everything. What they did at the bank in Switzerland was just to sign some paperwork. When he was asked whether he withdrew money from the foreign account he said that whenever he requested money or something they used to take it out either from the Z Entity or from Clearwater Account. He was not sure as to how the money was transferred. He received R20 million from the funds that were expatriated overseas. He does not know what happened to the rest of the money. He understood from the time he received the R20 million that the money was his.

[42] He remembered that he testified on a number of occasions during the s 74(*c*) enquiry in 2008. At the enquiry he was asked if he remembered if the money accrued to him. He admitted that the money accrued to him because the company was his. He admitted during the said enquiry that the money was his money because the company had given him money that belonged to him. He only understood afterwards that the money never accrued to him because he never got it in his hands. It was overseas. He understood on that basis that the money never accrued to him. It did not accrue to him because he never received it physically or, as he put it, he never got it in his hands because it was overseas.

[43] At that particular time of the enquiry he did not understand the meaning of the word "*accrue*". He continued and told the Court that he did not understand the meaning of the word "dividend". At no stage did the four of them as shareholders of Z Entity Group declare a dividend because they were not aware of the requirements of the Companies Act to declare a dividend.

[44] The money that was taken out of the country came from the '*ooplang'* sales to customers of the Z Entity Group. When the customers paid the money it belonged to Z Entity. When the money was taken out of the country it belonged to Z Entity. When the money was overseas Mr G had the right to decide whether the money could be distributed to him.

[45] <u>THE EVIDENCE OF MS V</u>

At the outset, I wish to point out that the evidence of this witness was in line with the Letter of Findings and Assessment Letter dated 30 September 2008. If anything there was very little difference between the contents of the said Letters of Findings and Assessments and her evidence. She testified that in 2007 she was appointed as an auditor. She was the one who raised the disputed assessments. When she was appointed as an auditor, the s. 74(*c*) enquiry which she attended in her capacity as an auditor, had already started. She was present when the appellant gave evidence at such an enquiry and she was aware that, for the purposes of the said

enquiry, the appellant tendered evidence, among others, by way of an affidavit and, having done so, answered the clarification questions.

[46] She identified the relevant affidavit in the dossier as well as the clarification document which was marked 'C' in the dossier. The document that I have referred to as annexure 'C' in the dossier, called the Clarification Document, consisted of a number of answers to a list of questions that had been given to the appellant and the other people referred to as shareholders. Also contained in the dossier was another document called the Response To Clarification and Further Details Currently Required Draft.

[47] The assessments that she raised were based purely on the three documents. In other words, these three documents constituted the foundation for raising the assessments. In particular she took into account the Disclosure relating to the undisclosed cash business of the Z Entity Group. At the said s. 74(c) enquiry, the appellant gave in, as part of his evidence, a two page document entitled Z Entity Store. This document constituted an annexure to the statement of the appellant in which he had, in paragraph 17 thereof, stated as follows about the schedules:

> *"17. We have schedules relating these funds which represents the best available information regarding the extent of the undisclosed cash business amounts up until the sale of the Z Entity business to Y. In addition we have a schedule regarding a calculation of foreign amounts deposited in foreign bank accounts. These schedules are annexed hereto marked 'A' and 'B'. The schedules were prepared by Mr H. He prepared those schedules on the basis of information furnished to him by Mr I (in respect of the schedule which reflects US dollars) and from vouchers and documents (none of which had been retained) reflecting the undisclosed cash drawings from time to time. That schedule is the accumulated final balance sheet of all the undisclosed cash amounts up until the sale of the Z Entity business to Y."*

[48] She told the Court furthermore that according to the said schedule, the total amount expatriated to Switzerland was R207 million. In the course of the investigation of the affairs of the appellant and his partners and entities, no other documents relating to the undisclosed expatriated cash were provided to her as a consequence of which she was forced to rely on only schedules 'A' and 'B' to the appellant's statement. According to her testimony during his evidence at the said enquiry, the appellant had testified that all the relevant documentation had been destroyed. Also in paragraph 17 of his statement, the appellant stated that Mr H had prepared schedules 'A' and 'B' from certain vouchers and documents which they had not retained. She herself was, since the enquiry and even before she raised the assessment, unable to find any other document relating to the undisclosed cash.

[49] In raising the assessments contained in the Assessment Letter dated 30 September 2008, she took into consideration these three aspects, namely:

(a) the undisclosed cash appropriated from sales;

(b) the undeclared cash withdrawings; and

(c) the income received from services rendered.

(a) Undeclared cash appropriated from sales

The undeclared cash appropriated from sales related to the appellant's 40% share of the proceeds from the undisclosed cash business.

(b) Undeclared cash withdrawings

According to the Response To The Clarification, the appellant stated that there were cash withdrawings that commenced in the latter part of 1980 until 1997 to 1998 thereafter.

(c) Income received for services rendered

This related to the sum of R2 million payment that had been received from the proceeds of the sale of the Z Entity Group to Y. The amount was paid for time and focus expended on

A Operations that had been required by the Z Entity Group. This amount of R2 million had not been disclosed by the appellant and was not of a capital nature.

[50] In the aforementioned Letter of Assessment, she made it clear that she intended raising two assessments, one for the tax year 1998 and the other for the tax year 2000.

50.1 1998 Assessment

The 1998 assessment was an additional assessment which was raised in terms of s 79(1)(*a*) of the Act. In terms of s 79(3) the full amount had accrued in the 1998 year of assessment. To raise the 1998 assessment she relied on s 79(3) of the Act which states that the provisions of s 78 are applicable in any assessment or additional assessment made by the Commissioner.

Section 78 provided as follows:

> *"In the event of a default in submitting a return or alternatively failure to submit information or the information that the commissioner is not satisfied with, the commissioner may estimate in whole or in part the taxable income for that year."*

The full amount in respect of assessment raised for 1998 was estimated by way of accruing that amount in 1998 year of tax. She had an amount which was not estimated which she placed into the 1998 assessment. It was only the period which she estimated. As there was no further information before SARS that would have enabled SARS to establish the precise day on which the relevant amounts were raised, there was no other way for her to raise the assessment in question. The appellant had failed to furnish SARS with the relevant documentation. In fact such documentation was never available by reason of the fact that the appellant had destroyed them.

50.2 2000 Assessment

The 2000 year assessment was an additional assessment raised by SARS in terms of s 79 of the Act, which was an additional assessment that had previously being issued to the appellant. Initially the appellant was assessed on the strength of the return that he had

filed for the 2000 tax year. An additional assessment was made in terms of s 79(1)(*a*) of the Act.

[51] About the appellant's objection to the application of the 1998 tax tables to income which accrued during the years 1985 to 1997, she told the Court that the assessment raised was in respect of the 1998; that was done in a manner that was least burdensome to the appellant and that no records relating to the undisclosed cash business were available. From 1985 to 1998 the effective rate ranged from approximately 43% to over 50%. The average rate for that particular period ranged between 45.2 or 45.3%. For the 1998 tax year, the appellant was taxed at 45%. Interest ran from 1998 and not from an earlier period. So in actual fact the appellant had the benefit of interest. The interest would have been more if it had been computed from 1985. So he enjoys the benefit of interest for a period of 15 years.

[52] ADDITIONAL TAX

According to her evidence, the basis for the decision to raise additional tax was a fact that the appellant and his partners conducted a cash business and failed to disclose the revenue to the tax authorities. In order to avoid detection, they used a point of sales that enabled them to keep separate records of these cash sales. To avoid detection, the amounts received in such cash sales were expatriated to a foreign bank. The records relating not only to the whole business but also to the very cash sales were deliberately destroyed. The entire scheme was carried, without reflection, for a continuous period of 15 years. It was for these reasons that the basis of the additional tax was 200%. The additional tax was levied on 40% of the R209 million. The 40% of the R209 million was R83 million.

[53] ADDITIONAL TAX IN RESPECT OF THE UNDISCLOSED DRAWINGS

She testified that additional tax in respect of the undisclosed drawings was levied at 200%. The reason for doing so was that there were no valid grounds for the appellant's aforegoing practice

provided by the appellant for the remittance of the additional tax. This was the case because the duty to satisfy the Commissioner that there should be a remittance of additional tax was on the appellant and the appellant had failed to furnish reasons as to why additional tax should not be raised. If he had done so, the Commissioner would have requested him to furnish reasons why the Commissioner should not levy additional tax. The appellant would have had an opportunity to furnish such reasons.

[54] She raised additional tax also in respect of the 2000 year of assessment. This was done because the appellant had failed to provide any reasons why the commissioner could not do so. At the time of the objection the rate of the additional tax in respect of additional tax for the year 2000 was reduced to 100%.

[55] THE EVIDENCE OF MR H

Mr H holds the following qualifications, Bachelor of Commerce from the University of Durban Westville, Honours in Bachelor of Commerce from the University of South Africa and is a Chartered Accountant.

[56] He set out his experience in his field of study as follows. He served articles for three years and, having completed his period of articles, worked for the same firm for two more years before he went for a period of a year into the commercial world. He then went into private practice for two years. He worked for other companies for a number of years before Z Entity Store head hunted him and managed to secure his services. He joined Z Entity Store in 1988. He was based at Z Entity Store and reported directly to Mr G.

[57] Although he was employed by Z Entity Store, he did work for all the other companies in the Z Entity Group or associated with the shareholders and partners. Together with his staff, his work entailed doing all the cash books, the purchases, recording of sales, doing the books of account

up to the trial balance for Z Entity Store. He would also review the trial balance of Z Entity Store CC and B Store, which would have been compiled by Mr K. He would also do all the sets of books of accounts of Z Entity Store, C. His duties included, among others, drawing up the tax returns of the various Z entities, Mr G and also of X, the appellant. He started doing the appellant's tax returns in 1989 and continued for a number of years thereafter until he left the Z Entity Group. Having commenced in 1988 he worked for the Z Entity Group of companies for a number of years until he asked the appellant to give the work to someone else around 1994 to 1995.

[58] At the four branches of the Z entities - Z Entity Group, Z Entity Store, B and C, there were two types of businesses conducted there. He described the systems as legitimate and illegitimate sales. The system of illegitimate sales was referred to as the *ooplang* sales. In view of the fact that there is no dispute about this system it is not necessary, in my view, to detail its evidence in this judgment.

[59] As soon as the proceeds of the *ooplang* sales were collected from the customer it belonged to the partners of the business which, in respect of Fordsburg, would be, among others, the appellant. The proceeds of the illegitimate sales were not part of that company's money. To show that it was not part of the companies' money, he never recorded it in the companies' books.

[60] The *ooplang* sales money was never banked. The cash was never shown as an asset of the company. These proceeds of the *ooplang* cash sales were retained as money that was syphoned out of the business. It formed no part of the record of the performance of the company. This money was for the benefit of the four partners, the appellant, Mr G, Mr K and Mr L. Records of the illegitimate sales were kept for four to five days. The pages would then be taken out and destroyed and only a record of the total amount would be kept.

[61] They had to be fastidious about the distruction of the records because it was not safe to keep records lying around. They had to minimise the amount of information that had to be kept. Save for a brief period there would be no paper trail. As a consequence, it was not possible for any person to tell how much of the R207 million was received in any given year. No one could tell how much of that money came from each branch that conducted *ooplang* sales because such records would also be destroyed. The money that came from the other branches of the Z Entity Group that conducted *ooplang* sales would be sent over to Store and would also belong to the partners.

[62] The *ooplang* money was kept in a box. The partners would from time to time, where the need arose, take money from the box for their own use, or, if they wanted to renovate the premises which belonged, not to the company but, to the four partners. Mr G and the appellant would from time to time draw money from the box. He would give Mr G cash and the amount he had taken out would be called drawings. They would record the amount they have taken out. The money was never refunded.

[63] From time to time Mr G would double check the money. If he had a source that could expatriate it he would instruct them to prepare a parcel of a certain amount of money. This parcel would be taken to his office so that he could dispatch it away. They did not keep account of the money sent out of the country but would instead keep a running total of such transfers. For this reason he was unable to establish the amount taken out of the country each year. Although he kept records of some money such records were kept for a particular period and destroyed because it was never safe to keep the full records.

[64] When he joined the Z Entity Group in 1988 the system of the *ooplang* sales was already in place. The expatriation of money or the transfer of money to a foreign bank too was already underway when he joined the Z Entity Group. Initially he did not have any idea as to what was going on but

slowly picked up what was happening. He went with the flow of events. It continued until he left the Z Entity Group.

[65] He returned to Z Entity Group, but this time to B Store. It was while he was still at B Store that the negotiations with Y started. By May 1998 the deal with Y was struck. He then went back to Z Entity Group to work for Y. At this stage the *ooplang* sales had stopped.

[66] His understanding was that the money that had been transferred abroad belonged to the partners. It did not belong to the company. He never recorded it anywhere as the company's asset. He was part of the team that was involved in the negotiations for the sale of the business to Y. During such negotiations it was never disclosed to Y that there was a certain amount of money owned by those businesses Y was buying. The money that was transferred overseas was taken out of the company for the benefit of the partners. The four partners did not treat the money that was transferred overseas as the company's money. If the money abroad had belonged to the company, they would have disclosed it to Y as that would have formed part of the purchase price. The money would have been an asset of the company.

[67] He prepared the schedules marked 'A' and 'B' to the appellant's statement. It would be recalled that the applicant himself has already testified about these two annexures and has confirmed in his testimony that they were prepared by the witness. According to the annexures the total amount that was syphoned from the company was R209 million. From the said money was deducted the money that had been withdrawn by the partners over years. In these annexures and in particular annexure 'B' he was telling the shareholders and/or partners about the total amount syphoned out of Z Entity Store , B Store, Z Entity C and Group which belonged to them, the amount that was transferred out of the country and the amount that they had taken out. There are no other documents available apart from annexure 'A' and 'B' which would show how much was syphoned and how much was sent offshore.

[68] Once Mr K came with a letter to him, it was a faxed letter. He read the letter and it stated that *"for your services*". It was for services rendered by the appellant but he had to pay tax on it.

[69] If the appellant's share of R207 million was a dividend, he would have been told about it because he was the financial manager. He would have had to make some entries in the books. He would have had to reflect it indeed on his tax returns. No one of the partners or shareholders advised him that the agreed portions of sharing constituted the dividends. In 1992 a decision was taken to distribute dividends just prior to the implementation of the Secondary Tax on Companies ("STC") for dividends. This STC was paid and reflected in the appellant's 1992 and 1993 tax returns. In the entire period in which he was at Z Entity Group there was no declaration of dividends or distribution of income. The appellant's R83 million was not an exempt distribution by the company to him.

ANALYSIS OF THE EVIDENCE

[70] At the commencement of his argument, Mr W informed the Court that he wished to address the Court only on three issues. These, according to him, were firstly the 1998 year of assessment, which had conveniently been raised as a point in limine; the second main point related to the question whether the monies which were expatriated were received by or accrued to the appellant; thirdly and lastly, and only if the court decided that the expatriated funds were received by or accrued to the appellant, whether the expatriated funds were exempt from taxation because they constituted dividends as defined in the Income Tax Act. These were the three crucial issues as far as it related to the 1998 assessment.

[71] As far as the 2000 assessment was concerned, this is what he told the Court:

> *"I have informed our learned friends that we do not persist with our appeal as far as the 2000 assessment is concerned. By way of short hand, one might refer to it as the payment from Y. That is no longer an issue."*

This clearly was a concession that the 2000 assessment could stand as the appellant was no longer contesting it.

[72] During his cross-examination by Mr R, counsel for the Commissioner, the appellant admitted not only that of the R83 million which represented 40% of R207 million he had received R20million, but also that he was in law obliged to pay tax on it. He conceded that he had no reason why he did not pay tax on it. These admissions sounded a death knell to any challenge that the appellant might have had against payment of tax on the said amount of R20million. Accordingly the next question is whether the appellant is in law obliged to pay any tax on the balance of R63,762,532.00 ('R63 million"). The appellant's reasons for refusing to pay tax on this amount were, among others, that I will refer to, that he did not physically receive the said amount, whether abroad or in this country. The answer to the question whether or not the appellant should pay tax on the balance of R63 million is hinged to whether or not the original amount of R83 million was received by or accrued to the appellant and whether it should be regarded as his taxable income. The issue is dealt with hereunder.

WHETHER THE MONIES THAT WERE EXPATRIATED ABROAD WERE RECEIVED BY OR ACCRUED TO THE APPELLANT OR WHETHER THE AMOUNT OF R83 762 533 CONSTITUTED PART OF THE APPELLANT'S GROSS INCOME

[73] The bulk of the appellant's evidence, the concessions and admissions that he made during the course of his evidence came out during cross-examination by Mr R. His evidence was in some material respects inconsistent. An example of this was his testimony about the supporting

affidavit that was used in an attempt to amend his Statement of Grounds of Appeal and Objections. Initially he told the court that he had read it because he would not have signed it if he had not read it before. Subsequently, he told the Court that he only read it for the first time when he was asked to do so under cross-examination. This was clearly after he had signed it. Again at first he told the Court that he had signed it despite the fact that he had not given instructions as to what it should contain. He continued and told the Court at first that it was drawn up by his legal team without consulting him before it was placed before him for his signature. Later he changed his evidence and testified that it was drawn on his instructions. It is crucial to point out that although he claimed that he did not read it before he signed it, nowhere did he testify that it was read to him. The fact that the contents of the affidavit did not originate from him means that he never gave instructions that his Statement of Grounds of Appeal should be amended.

[74] This account for what it stated in paragraph 27 of his supporting affidavit for amendment of his Statement of Grounds of Appeal which states in part that:

> *"The hiring and firing of lawyers resulted in the lack of cordination or consistency in the approach to various written representations prepared and submitted to the respondent on my behalf by each one of them."*

[75] His further evidence was that he read his replying affidavit for the first time in court under cross-examination. Thereafter he became evasive and failed to answer simple questions like whether he approved his Amended Statement of Grounds of Appeal. There was no genuine reason, in my view, why he could not answer this simple question. He also gave conflicting versions on who the money that was expropriated belonged to and on whether or not he got some of it while it lay in a Swiss bank.

[76] He gave a number of contradictory reasons why he did not want to pay SARS the money he has been assessed. The first reason was that he did not want to pay SARS the assessed money

taken out of the country because the money did not belong to him but to Z Entity Group, implying thereby that the respondent had assessed a wrong party and that it was Z Entity Group that should have been assessed. The second reason was that he did not want to pay SARS the money assessed because he did not receive the money, whether in this country or in Switzerland, that had been taken out of the country. Thirdly he did not want to pay tax on the R2 million from Y because it was Y that was supposed to pay tax on the said amount. Fourthly he was advised by his auditors that he did not have to pay tax on the sum of R2 million. Fifthly he told the Court that he did not want to pay tax because the amount of assessment was too exorbitant for him. Sixthly, even if he had conceded ultimately that he was obliged to pay tax on the R20 million that he himself admitted he had physically received he gave no reason why he did not pay tax on the balance of the R63 million that was part of the 40% of the R207 million, in particular of the sum of R83 million.

[77] He admitted, still under cross-examination, that he received the sum of R2 million. That he received that amount was no longer in dispute. He made a further admission that the said amount of R2 million was in his hands. Still he gave no reason why he did not want to pay tax on the R2 million. In his written address, Mr W intimated to the Court that the appellant did not persist with the appeal as far as the 2000 assessment was concerned. Accordingly there was no longer any issue regarding the payment of tax by the appellant on the amount of R2 million that he received in respect of his services from Y. It is, however, important to point out that he still has not made any payment on the said amount.

[78] It is not in dispute that no records were available regarding the amount of R207 million was shipped out of the country. The money, according to him, and this was part of his evidence during cross-examination, belonged to the company and not to the four shareholders. What he actually meant was that the sum of R207 million belonged to the four shareholders, in other

words to him, Mr G, Mr L and Mr K. After he had confirmed that the money belonged to the four of them he prevaricated and told the Court that the money belonged to Z Entity Store.

[79] The following four reasons, if any, show clearly that when he told the Court that the money belonged to Z Entity Store he was not honest with the Court. In the first place he did not know whether the company he referred to was a public company or a private company or a close corporation. Secondly, despite the fact that he considered himself as a director of the company, he admitted that he never signed a balance sheet and in fact told the Court that he did not know what a balance sheet was. Thirdly, and even more importantly, when they sold the company and its assets they did not transfer, as part of the sale of the assets of the company, the amount in the offshore bank account. This amount was not transferred to the company. Fourthly, as the company had been sold, the money could therefore not have belonged to a company. There is therefore no merit in this evidence that the money belonged to the company. The evidence of Mr H showed that as soon as the *ooplang* sales were collected, the proceeds belonged to the partners or shareholders of the business. It also showed that the proceeds of the *ooplang* sales did not belong to the company as such proceeds were never regarded as an asset of the Z Entity Group. It was treated as an income for the benefit of the shareholders.

[80] On 21 May 2008, the appellant made a disclosure to the Commissioner regarding undisclosed income that he and those that he called his partners and shareholders appropriated from the Z Entity Group, retained these proceeds as their own and expatriated the proceeds to a foreign bank account in Switzerland. This evidence was also supported by the evidence of Mr H. The disclosure, as was shown in the evidence of Ms V, included an affidavit made by the appellant, and in addition, answers to the clarification questions which had been posed by the Commissioner. In the said affidavit, the appellant disclosed the methodology that he and his other shareholders or partners used in order to conduct what they called the *ooplang* sales. This was a term they used to describe the illegitimate cash sales where the proceeds were not

recorded in the business books of account and which were not disclosed to the commissioner. As at July 1998, when the appellant and his shareholders or partners sold the business of the entities in the Z Entity Group of companies, *ooplang* proceeds over the period of 1985 to 1998 amounted to the sum of R207 million. Of this amount the applicant was by reason of the agreement entered into, among the shareholders or partners, entitled to 40%. The appellant admitted that 40% of R207 million was his share. It was therefore his gross income.

[81] He told the Court, as he had told the s 74(*c*) enquiry, that 40% of the R207 million belonged to him. He testified that at the said inquiry he understood that the word "entitled" meant that he had the right to the money. Despite his evidence that at the enquiry he understood the word "entitled" and despite the fact furthermore that according to him "entitled" at the said enquiry meant that he had the right to 40% of the R207 million, when he was asked to confirm it, during cross-examination he prefabricated and told the Court that the money belonged to the company.

[82] But for the Letter of Assessment, the appellant would have continued holding the view that he was entitled to 40% of the R207 million. He only changed his view obviously after it had become clear to him that SARS would tax him on the money. He admitted that he has changed his mind as to who the money belonged to. This time he still says that the money belonged to him.

[83] *"Accrual*" does not mean, in this case, and in any other case, "*receive"*. What it means is that as long as the appellant was unconditionally entitled to the money. Therefore the whole amount of R83,762,532.92 accrued to the appellant. He was unconditionally entitled to it. It also means that if, through the instrumentality of another person, his share of the money was dealt with in accordance with his instructions, without him having physical control of the money, he has received it. Accordingly, income in the hands of a shareholder or partner is income in the hands of a taxpayer. In *Commissioner of Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA page 363i - , a case which dealt with, among others, the meaning to be assigned to the

word "*accrued*", in the definition section of gross income in the income tax at 58 of 1962. The Court held that:

> *"1. Income, although expressed as an 'amount' in the definition of "gross income" in section 1 of the Income Tax Act 58 of 1962, need not be an actual amount of money but may be "every form of property earned by the taxpayer, whether* corporeal *or* incorporeal*, which has a money value … including debts and rights of action." (See p. 3631.*
>
> *2. The second proposition was that no more was required for an accrual in terms of the definition of gross income than that the person concerned had become entitled to the amount in question (p. 365A). Thus any right acquired by a taxpayer during the year of assessment and to which a money value could be attached represented an accrual irrespective of whether it was immediately enforceable or not." See p. 365A-B*

[84] In ***SIR v Silverglen Investments (Pty) Ltd*** **1969 (1) 365 AD at page 376 H – 377, Steyn C J**, as he then was, had the following to say about *"accrual":*

> *"In terms of s 7(1) of the Act, income is deemed to have accrued to a person, inter alia, notwithstanding that it has not been actually paid over but remains due and payable to him, and he is required to include in this return a complete statement of such income."*

[85] I am satisfied that the commissioner, through the entire evidence of the appellant tendered at both the s. 74(c) enquiry and the appeal, has established that the amount of R207 million was accumulated through the *ooplang* sales; that the said amount was expatriated by the appellant and those he worked with to an offshore account; that they knew that the said amount should have been disclosed to SARS and they failed to do so. Furthermore I am satisfied that of the said amount that was expatriated abroad, the appellant received the sum of R83 million or the said sum accrued to him within the meaning of s 1(*c*) of the Act. Accordingly the Commissioner was correct to regard the whole amount of R83 million as the appellant's gross income and to subject the said amount to assessment. Finally I am satisfied that the appellant made cash withdrawals

from the business activities of the Z Entity Group or from the proceeds of the *ooplang* sales during the period 1985 to 1998 and failed to reflect these cash withdrawals in his tax returns for the said period. These facts the appellant has admitted.

[86] WHETHER THE 1998 ADDITIONAL TAX IS VALID TO THE EXTENT THAT IT PURPORTS TO TAX IN THE 1998 YEAR OF ASSESSMENT, AMOUNTS THAT ACCRUED DURING THE 1985 TO 1997 YEARS OF ASSESSMENT

This issue was raised as part of a point *in limine*. In his Statement of Grounds of Assessment the Commissioner pleaded as follows:

> *"3. On 30 September 2008, the Commissioner raised assessments, the additional assessments, in terms of the provisions of s 78(1) read with s 79 of the Income Tax Act 58 of 1962 as amended in ("the Act") on the appellant for the 1998 year of assessment (in respect of all the amounts received by or accrued to the appellant for the periods 1985 to 1998)."*

Disputed liability

19. The appropriate funds were not declared by the appellant in the tax returns for the years of assessment 1985 to 1998.

21. An enquiry conducted in terms of s 74(c) of the Act convened on various days between 21 May 2008 to 28 August 2008, the appellant make the following admissions:

21.2 the Z Entity Group of companies had a point of sale system that deliberately did not disclose certain cash sales. The full extent of the undeclared cash sales for the Z Entity Group of companies for the period 1985 to 1998 was the sum of R209,761,368.00;

21.3 his share of this undisclosed income was 40%, approximately R83 million;

21.4 during the period 1985 to 1998

21.4.2 the sum of approximately R83 million, accrued to X for his benefits, was accepted by him and was retained by him for his own benefit."

[87] It was argued by Mr.W that the notice of assessment for the 1998 year of assessment included an amount of R83,999,533 into the taxable income of the appellant for 1998 and that no additional assessments were issued for the 1985 to 1997 years of assessments.

[88] THE LAW

Normal tax is levied upon the taxable income received by or accrued to a person during the relevant year of assessment. Section 5 of the Act provides that:

"Subject to the provisions of the Fourth Schedule there shall be paid annually for the benefit of the National Revenue Fund, an income tax … in respect of the taxable income received by or accrued to or in favour of any person …

(c) during the year of assessment.

Section 1 of the Act defines "year of assessment" as "any year or other period in respect of which any tax or duty leviable under the Act is chargeable and any reference in this Act to any year of assessment ending the last or the 28th or 29th of February shall, unless the context otherwise indicates ……"

[89] Relying on the authorities of ***SIR v Silverglen*** **1969 (1) SA 365 A** (*"CIR v Silverglen"*) and ***Edgars Stores Ltd vs CIR*** **1988 (3) SA 876 A**, Mr W submitted that it is clear from such authorities that income tax is levied on an annual basis and that the Commissioner is not at liberty to tax amounts that accrued or received in one year in a subsequent year. The cases that Mr W relied on are, in my view, no authority for the proposition that the Commisioner is not at liberty to tax amount or amounts that accrued to or were received in the subsequent years.

[90] The case of *SIR v Silverglen supra* is, in my view, not authority that a commissioner was wrong in regarding the sum of R87 million as gross income for the years 1988 to 1998 and accrued the whole of the amount to the 1998 year of assessment. It only means that where the date on which the amount accrued is known, as well as the amount, the amount of accrual should be assessed in terms of the tax year of the accrual. It must be recalled that, unlike the instant case, the case of *SIR v Silverglen* was determined on the basis of s 24 of the Act. Section 24 provided that:

> *"(1) subject to the provisions of s 24J, if any taxpayer has entered into any agreement with any other person in respect of any property, the effect of which is that, in the case of movable property, the ownership shall pass or, in the case of immovable property, transfer shall be passed from the taxpayer to that other person, upon or after the receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount shall, for the purposes of this Act, be deemed to have accrued to the taxpayer on the day on which the agreement was entered into."*

[91] Accordingly, s 24(1) of the Act sets out a date when gross income accrues. That date is the date on which the agreement is concluded. It is the date that is known. In the case cited the relevant date was 10 December 1962:

"It may be that where an accrual has not been disclosed in the return for the year of accrual, the secretary could, under s 76(2), forego the additional tax payable under this section and include the amount in the gross income of the taxpayer for the year in which it is received; or that by arrangement with the taxpayer, tacit or otherwise, he would assess on the basis of receipts only."

See *SIR v Silverglen Investments* p 377 C:

> *"Accordingly in terms of the law, the amount of R347,603 despite the fact that it was paid on 8 August 1963, had accrued to the taxpayer during the tax year that had ended on 30 June 1963 by virtue of the provisions of s 24(1) of the Act."*

[92] In essence, the contentions of the appellant was that if income accrued to the appellant from 1 March1985 to 28 February 1998 the Commissioner is not at large to assess the income only in the 1990 year assessment as some of the income was received or accrued in the individual years from 1985 to 1997. Mr R argued against the appellant's point *in limine* on two bases. The first basis was that the point *in limine* that the appellant raised was not raised at the ground in the notice of objection but was only raised for the first time in the statement of appeal in April 2014. He argued furthermore that procedurally the appellant was precluded from raising a new ground in the statement of grounds of appeal. See also *H R Computek (Pty) Ltd v The Commissioner for the South African Revenue Service* Case NO.830/2011in which the Court cited with approval the following passage from ***Matla Coal Ltd v Commissioner for Inland Revenue 1987*** (1) SA 108 (A) Corbett JA held (at 125C-J):

> *"Section 81(3) of the Act provides that every objection shall be in writing and shall specify in detail the grounds upon which it is made. And in terms of s 83(7)(b) the appellant in an appeal against the disallowance of his objection is limited to the grounds stated in his notice of objection. This limitation is for the benefit of the Commissioner and may be waived by him …"*

[93] It must be recalled that the Commissioner's determination of taxable income or assessment depends entirely on the information that the taxpayer, such as the appellant, places before the Commissioner. In the absence of any such information there may not be an assessment. It is the duty of every taxpayer to place such information before the Commissioner annually, so as to enable the Commissioner to comply with the provisions of s. 5 of the Act. Now, the feet of clay in the appellant's case on this aspect is that the appellant has not placed any evidence before this Court as to the income he received or that accrued to him in each year from 1985 to 1997. The appellant is not in a position to do so because, having destroyed all his records to obliterate any paper trail, he cannot place any such evidence before the Court. The 1998 assessment has been estimated by reason of the fact that the whole of the undisclosed income that the appellant conceded had accrued to him in the period 1985 to 1997 was, in the absence of the records that

the appellants was, in law, obliged to keep, allocated to the 1998 assessment, in terms of the Tax Administration Act the South African System has been designed as one of self assessment. Accordingly, the duty lies on the taxpayer to retain his records of all the transactions. See in this regard ***Nedcash Trading Ltd vs Commissioner SARS and Another*** **2001 (1) 1109 CC at para's 16-22**. The 1998 assessment remains an additional assessment and not an estimated assessment as contemplated in s. 78 of the Act.

[94] Ms V testified that the 1998 assessment was an additional assessment raised in terms of s. 79(1)(*a*) of the Act. In terms of the provisions of s 79(1)(*a*), the full amount had accrued in the 1998 year of assessment. Section 79(3) of the Act provides that:

> *"If at any time the Commissioner is satisfied*
>
> *(a) that any amount which is subject to tax and should have been assessed to tax under this Act has not been to tax; or*
>
> *(b) that any amount of tax which was chargeable and should have been assessed under the Act and has not been assessed;*
>
> *(c) ….*
>
> *he shall raise an assessment in respect of the said amount or amounts, notwithstanding that an assessment or assessments may have been made upon the person concerned in respect of the year or years of assessment in respect of which the amount or amounts in question is or are assessable …"*

[95] Section 79(3) of the Act provides that s 78, which deals with estimated assessments of the Act, shall apply to additional assessments. It provides in (1) that:

> *"In every case in which any person makes default in furnishing information, any return or information the Commissioner is not satisfied with the return or information furnished by any person, the Commissioner may estimate either in whole or any part taxable income relating to which the return or information is required …"*

Ms V made in clear in her evidence that without the records, information and documentation which prove that the amount received by or accrued to the appellant in any specific year of assessment in the period 1985 to 1997, relating to the undisclosed cash sales, she estimated the taxable income accrued to him in the 1998 year. She did it by accruing the full undisclosed amount of *ooplang* the appellant had admitted she was entitled to in the periods 1985 to 1997 year of assessment, into the 1998 assessment. She added furthermore that this was the fairest method in which she could have raised the assessment. Accordingly, contrary to the appellant's contention, the assessment so raised was never an assessment in respect of several years but rather accruing to the full amount, the appellant acknowledged that he was entitled to by 1998, into the 1998 assessment. It therefore remained an assessment for a single year.

[96] The appellant cannot reasonable complain because he has failed to make returns in respect of such year or period of assessment as required by s 5(1) of the Act.

[97] A point was raised in the Statement of Grounds of Appeal that the assessment upon which the Commissioner relied failed to take into account the general deduction formula specifically exempting income and qualifying expenditure in order to arrive at a taxable income. The point was developed and a contention made that the assessment simply assumed that 40% of the undisclosed cash amounts appropriated from the Z Entity Store Group was equal to the appellant's taxable income. It is indeed correct that the Tax Administration Act imposes a duty on the Commissioner to prove the reasonableness of the estimate on which an assessment is predicated. In other words, the Commissioner must, when discharging his duty, prove that the methodology i\he employed in arriving at an estimate of the taxpayer's taxable income is reasonable and not irrational or arbitrary or was not reached capriciously. Although the appellant has complained about the manner in which the assessment was raised, he has not tendered any evidence showing how it was wrong to do so. He has led no evidence as to why it was not proper for the commissioner to raise the assessment in that manner. Of supreme importance with the

appellant is that nowhere in his evidence he suggests any alternative manner in which the assessment could have been raised. He has not complained that the assessment was unreasonable. Nowhere in his evidence did the appellant testify that he had placed information about his expenses or deductibles before the Commissioner. Without such information being placed before the Commissioner it was unreasonable for the appellant to complain about the fact that the assessment failed to take into account the general deduction formula. There was in my view no lawful basis for the Commissioner to apply in this particular case that formula.

[98] Ms V's evidence, on the rate of interest that was applicable as 1998, has not been challenged. It will be recalled that her evidence was that the appellant was taxed and the rate of 45% in respect of the 1998 assessment. There was no suggestion that the said rate of interest was inappropriate or unreasonable nor was it suggested that any other rate would have been appropriate in the circumstances of the case.

[99] Accordingly, the point *in limine* cannot succeed and is accordingly dismissed.

WHETHER THE EXPATRIATED FUNDS WERE EXEMPT FROM TAXATION BECAUSE THEY CONSTITUTED DIVIDENDS.

[100] The sum of money that was expropriated abroad could not have been a dividend. The appellant persisted with this defence that the money sent abroad was dividend despite the fact that he did not know what a dividend was. It will be recalled that it is the appellant's contention, in the alternative, that sum of R207 million consisted in its entirety of a dividend in his hands and in hands of his former partners or shareholders. This evidence has no merit in it. Firstly, he did not know until 2010 what a dividend was.

[101] One of the grounds of appeal raised in the appellant's Objections and Statements of Grounds of Appeal was that the expatriated funds were exempt from tax because they constituted dividends in his hands and in the hands of his former partners. In his evidence, the appellant did not rely on this defence and understandably so. Firstly, he told the court that he never signed any balance sheet despite the fact that he considered himself as a director of a company. It will be recalled that he said that he was a director of the company for a period of 44 years. Secondly, and more importantly, he confirmed in his testimony that at no stage did the four of them, as shareholders, declare a dividend. They did not do so because they were not aware of the Companies Act with regard to the declaration of dividends. Thirdly, he told the Court that he did not understand the meaning of "dividend" until the year 2010 during which year his nephew, one Cyril Bowan explained to him what a dividend was. Consequently the four shareholders could not, during the years 1985 to 1997 have declared the dividend if the appellant did not know until 2010 what a dividend was.

[102] There are other factors that convincingly demonstrate that the appellant's evidence that the expatriated funds constituted a dividend was a fiction. Mr H testified that if the appellants' share of the R207 million was a dividend, he would have been told about it because he was the financial manager of the Z Entity Group. In support of this evidence, he told the Court that he would have made the relevant entries in the books of accounts of the business about these dividends. He would have reflected such dividends in the shareholders' or partners' tax returns. That neither of the above took place is plain enough that no part of the expatriated funds was a dividend. No one of the partners or shareholders told him that their shares in the expatriated funds constituted a dividend. He confirmed that in the entire period he was at Z Entity Group, there never was any declaration of dividends or distribution of income. According to Mr H, the appellant's R83 million share was not exempt from tax.

[103] Ms V told the Court that in the course of the investigations of the affairs of the appellant, his partners and their entitities no documents relating to the undisclosed funds were placed before her. Equally no documents relating to this declaration of dividends was placed before her.

[104] The appellant's evidence was clear that he was unable to indicate to the Court what the source of such dividends was. He could not tell the Court which of the entities of the Z Entity Group declared a dividend. It is so because, as Mr H testified, proceeds of the *ooplang* sales from the branches that employed that system were all mixed up without knowing how much each branch made in a particular year. He was unable to point out how much dividend was declared in each year. He could not point out to any resolution taken by the shareholders to declare a dividend despite the fact that he was a director of the Z Entity Group. Accordingly, his case that the expatriated funds were dividends does not enjoy the support of his evidence.

[105] It was argued by Mr R, and in my view quite correctly so, that neither the Companies Act 63 of 1977 nor the Income Tax Act recognises a dividend declared from the proceeds of a group of companies. Our law knows no group dividend declaration. A dividend must be declared not by a group of companies but by a particular company. Where a dividend is specifically declared in terms of the Companies Act such declaration must be made by a particular company. In the light of the failure by the appellant to tender any evidence that supports his defence of a dividend, this Court must inevitably find that no dividend could have been declared by the Z Entity Group in respect of the undisclosed cash sales. The court must again find that in the absence of any such disclosure of the dividends in the appellant's tax returns for a period 1985 to 1997, the said amount of R207 million could not be regarded as dividends. The onus rests on the appellants, in terms of s 102 of the Act, to satisfy the Court that the Commissioner's assessment was incorrect. The appellant has failed to discharge this duty.

[106] Relying on the short portion of the long definition of dividend, Mr W argued that from the income tax perspective it was not necessary for the company or the shareholders to call this amount a dividend. He developed his argument and contended that all that the Income Tax Act is interested in is whether the amount was distributed by the company to its shareholders. Whether they declared a dividend or not is of no consequence for the purposes of the Act. It was further argued that it was not required in terms of the definition of a dividend that the distribution be in the proportion of shareholding. That short portion of the long definition states that:

"In this Act, unless the context otherwise indicates, dividend means any amount distributed by a company to its shareholders."

[107] According to this short definition it is imperative that the company that declares a dividend must be identified. In this case there is no such evidence as to the identity of the company among the group of companies that declared a dividend or disputed any money. Lastly on this aspect, all the arguments that Mr W made about dividends must come to naught because as I pointed out earlier, and as was also pointed out by Mr R. The appellant did not rely on this dividend defence in his evidence.

WHETHER INTEREST LEVIED BY THE RESPONDENT CALCULATED AT THE PRESCRIBED RATE QUALIFIES FOR REMISSION IN TERMS OF s 89*QUAD*(3) OF THE ACT

[108] The Income Tax Court Rules states as follows:

> *"34. The issues in an appeal to the tax court will be those contained in the statement of the grounds of assessment and opposing the appeal read with the statement of the grounds of appeal and, if any, the reply to the grounds of appeal."*

"In terms of the Tax Court Rule 210(3) a taxpayer may not appeal on a ground that constitutes a new objection against a part or amount of the disputed assessment not objected to in terms of Rule 77."

This means that a taxpayer cannot raise a new objection in respect of an issue that was not raised when the taxpayer first objected to the assessment. Accordingly, as interest was not objected to in the original objections to the disputed assessments, the appellant may not raise it in this appeal. The appellant is accordingly concluded from raising it at this stage.

WHETHER ADDITIONAL TAX LEVIED BY THE RESPONDENT CALCULATED AT 200% QUALIFIES FOR REMISSION

[109] The appellant did not persist with this point. In the circumstances the Court will infer that the appellant has accepted the rectitude of the increase charged and the competent basis for doing so.

REASONS FOR DISMISSING THE APPELLANT'S APPLICATION TO AMEND THE STATEMENT OF GROUNDS OF APPEAL AND THE NOTICE OF OBJECTIONS

[110] The appellant brought an application to amend his Statement of Grounds of Appeal and his Letter of Objections. His reasons for doing so were, according to his supporting affidavit, threefold. The purpose of the amendment was to ensure that:

(a) the Statement of Grounds of Appeal complied with the Rules governing pleadings in the Tax Court;

(b) the appellant's case was pleaded in a complete and a great manner and that all triable issues are pertinently raised; and,

(c) the proper ventilation of the issues in dispute between the parties.

[111] The appellant had been advised that the current Statement of Grounds of Appeal which had been prepared by his erstwhile attorneys did not comply with the requirements of the Tax Court Rules. Both Rule 11 of the repealed Tax Court Rules and Rule 32 of the New Tax Court Rules prescribe certain requirements that the appellant's Statement of Grounds of Appeal must comply with that in denying or admitting the allegations contained in the respondent's Statement of Grounds of Assessment. To that end his Statement of Grounds of Appeal did not comply with the Tax Court Rules.

[112] According to the appellant, the feet of clay in his current Statement of Grounds of Appeal was that it did not set out material facts upon which his appeal was predicated but instead focused on factual allegations relied on by the Commissioner in raising the assessments. The proposed amendment was designed to rectify the defects by setting out such material facts relied upon for the appeal in paragraphs 3 to 43 of the amended Statement of Grounds of Appeal. Two more weaknesses he had identified in his current Statement of Grounds of Appeal were firstly that he did not deny or admit the allegations contained in the Commissioner's Statement of Grounds of Assessment and, secondly, that instead of setting out the facts which constituted the bases of his appeal, it consisted of legal arguments.

[113] He contended that in the absence of the material facts and legal grounds upon which he relied, his case was incompletely and inaccurately pleaded and key triable issues in dispute between him and the Commissioner were not prominently raised. His current Statement of Grounds of Appeal contained numerous inaccuracies.

[114] This application for amendment of both the Statement of Grounds of Appeal and the letter of objection was vigorously opposed by the Commissioner. The affidavit of one, Ms T, a major female attorney at the Commissioner's attorneys of record, provided a fodder for the Commissioner's opposition to the amendments. Ms T contended that the appellant's application

failed to comply with the Tax Court Rules and that it had not been properly brought. The application was opposed on the following grounds:

(i) the appellant had been *ipso facto* barred from bringing the application after 23 December 2014 by reason of an order of Frances J given on December 2014. On 1 December 2014 the Court, as per Frances J, made an order in which it directed the appellant to deliver any application for amendments to its Statement of Grounds of Appeal within 15 days of 1 December 2014, failing delivery of he's application within the aforementioned period he would be *ipso facto* barred from bringing such an application.

(ii) In terms of the Court order, the appellant had to launch his application the latest on 23 December 2014. This he failed to do and consequently became barred from doing so by operation of the Court order.

(iii) The appellant's view is that the dates between 15 December 2014 and 15 January 2015 were *dies non*. Firstly this argument lacks merit for if that were the case it would have left the commissioner with very little time within which to respond to the new grounds of objection. The matter was due to be heard shortly in January 2015. Secondly, on 24 December 2014 the appellant's attorneys filed a document they called *"amended statement of grounds of appeal"*. They would not have done this if they honestly believed in the *dies non*. Thirdly, if they believed that the dies non were still applicable, they would not have filed, on 9 January 2015, a notice of application to amend its statement of ground of appeal in which they sought to replace the appellant's statement of grounds of appeal dated 22 April 2014. Fourthly, mindful of the fact that the matter was on the roll for hearing on 26 January 2015 the court could not have made an order if the last day of launching an application to amend would have been 23 January 2015. Accordingly the *dies non* were applicable lacks merits.

(iv) To exacerbate matters, the appellant failed to give the Court an explanation why he was unable to launch his application to amend his statement of grounds of appeal within the time frame stipulated by the Court order.

"An amendment cannot however be had for the mere taking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made, some reasonably satisfactory account must be given for the delay." See ***Zarug v Parvathie NO*** **1962 (3) SA 972(D) at 876 C**

It must be pointed out further that the appellant had already failed to comply with a Court ruling by Makhaya J. On 21 December 2014 Makhaya J had granted the appellant leave to launch his application to amend by 25 November 2014. This was not done. The appellant just did not comply with the Court order. It would appear that the appellant's attorneys, to the detriment of the appellant's case, had adopted a supine attitude. Accordingly the Court is steadfast that the appellant was barred from launching this application to amend its Statement of Grounds of Appeal and Letter of Objection;

(v) the appellant sought to amend his notice of objection which was filed on 17 March2009, more than five years after the notice of objection was filed and after the Commissioner had considered the notice of objection and taken a final decision. According to her, by law, the appellant was precluded from bringing, at this stage, an application to amend his grounds of objection. The Court is incompetent to entertain such an application;

(vi) the appellant sought to amend the Statement of Grounds of Appeal filed in terms of the provisions of the now repealed Tax Court Rules and amend his Statement of Grounds of Appeal in accordance with the new Tax Court Rules;

(vii) by his amendment, the appellant sought to introduce new grounds of objection based on prescription relating to the 1998 additional assessment;

(viii) the contemplated amendment of the Statement of Grounds of Appeal would be prejudicial to the Commissioner's case;

(ix) that the contemplated amendment would introduce completely new grounds which were not contained in both the notice of objection and the Statement of Grounds of Appeal.

(x) counsel for the appellant had informed the Court that even if the application for amendment was refused, they were prepared, and would still be able, to conduct their case unhindered. Quite clearly in making that statement Mr W had assessed the appellant's case and had come to a conclusion that the appellant would not be prejudiced by an order of court refusing the application for amendment. He was satisfied that the contemplated new grounds of objection and new Statements of Grounds of Appeal could, for the purposes of the appeal, be dispensed with.

In the result, the following order is hereby made:

(a) The appellant's appeal against the decision of the respondent, the Commissioner of the South African Revenue Services ("the Commissioner"), to raise additional income tax against him in respect of the 1998 and the 2000 years of assessments is hereby dismissed, with costs which costs shall include the costs consequent upon the employment of two counsel.

(b) The decision of the Commissioner of the South African Revenue Services ("the Commissioner") to raise additional tax against the appellant in respect of the 1998 and 2000 years of assessments is hereby confirmed.

P.M. MABUSE
JUDGE OF THE HIGH COURT