REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

HELD AT HELD AT PORT ELIZABETH

CASE NO: 24622

(1) REPORTABLE: **YES**

(2) OF INTEREST TO OTHER JUDGES: **YES**

(3) REVISED.

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SIGNATURE DATE

In the matter between:

TAXPAYER W Appellant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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J U D G M E N T

VAN ZYL DJP:

[1] This matter concerns the decision of the Commissioner for the South African Revenue Corporation (the appellant) in terms of section 222 of the Tax Administration Act 28 of 2011, as amended (the Act). In terms of section 222 a taxpayer "must" pay a penalty in addition to any tax payable in respect of a certain tax period in the event of an "understatement". An understatement is defined in section 221 to mean:

> "any prejudice to SARS or the *fiscus* as a result of—
>
> (*a*) a default in rendering a return;
>
> (*b*) an omission from a return;
>
> (*c*) an incorrect statement in a return; or
>
> (*d*) if no return is required, the failure to pay the correct amount of 'tax', or
>
> (*e*) An 'impermissible avoidance agreement'."

[2] The understatement penalty is the amount resulting from applying the highest applicable understatement penalty percentage accordance with the Understatement Penalty Percentage Table (the Table) in section 222(1) of the Act to each shortfall determined under subsections (2) and (3) of section 222. The understatement penalty percentage Table is as follows:

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

(iii)	No reasonable grounds for 'tax position' taken	50%	75%	25%	0%
(iv)	Gross negligence	100%	125%	50%	5%
(v)	Intentional tax evasion	150%	200%	75%	10%

[3] The facts are mostly common cause and without any controversy. As stated, the appellant is a close corporation. It appointed and employed a firm of professional accountants to prepare and complete its tax returns for the 2016 tax year. On the advice of the accountant, a decision was made to change the appellant's property, plant and equipment accounting policy to bring it in line with the wear-and-tear rates of the respondent.

[4] The change of the accounting policy involved the long-term realignment of the depreciation policy of the appellant, to the official wear and tear rates of the respondent that are allowed as a tax deduction. The aim was to neutralise the effects of deferred tax in the books of the appellant. The extent thereof in the short term was that the appellant increased its depreciation expense over and above the official wear and tear rates of the respondent, in order to neutralise the short-term differential, which differential had created a current deferred tax consequence.

[5] This change in the appellant's accounting policy, which was motivated by the fact that it was less complicated, was thereafter reflected in the financial statements of the appellant that were prepared by the accountants. However, when the accountants did a tax computation in preparation of the submission of the appellant's tax return, they omitted to add back the wear-and-tear adjustment made in line with the change in accounting policy. Adding it back would have resulted in the assessed loss of the appellant to be reduced during the 2016 tax year. This failure to add the adjustments back into the tax computation resulted in it being omitted from the tax return completed by the accountant and submitted to the respondent. This resulted in an overstatement of the appellant's assessed loss and consequently the understatement of future taxable profits. The amount in question was R12 696 518-00.

[6] The respondent subsequently conducted an audit of the appellant's tax affairs for the tax years 2012 to 2016. During the audit the discrepancy was noted and the accountants were informed that the wear-and-tear deduction reflected in the appellant's tax return was incorrectly calculated. The respondent then adjusted its assessment for the tax period in question accordingly. The appellant did not dispute the incorrect statement in its return and agreed to the adjustment.

[7] The respondent considered this to constitute an understatement as envisaged in section 221 and proceeded to impose an understatement penalty. In applying the Table the respondent categorised the appellant's behavior as falling under item (ii), **"Reasonable care not taken in completing return"**. It considered the respondent's case to be a standard one, and imposed an understatement penalty percentage of 25%, amounting to R890 926-26.

[8] The appellant thereafter lodged an objection to the imposition of the penalty. It contended that there was no prejudice to the respondent by reason of its failure to reflect the wear and tear component in its return. Further, that its omission to do so was a *bone fide* inadvertent error as contemplated in section 222(1) of the Act, and consequently that it must be excused from paying an understatement penalty. The respondent disallowed the objection. The appellant then lodged an appeal to this Court on the same grounds.

[9] On a reading of the statements filed by the parties in terms of the Rules setting out their respective positions, the appeal raises two questions. The first is whether there has been any prejudice to the respondent as a result of the incorrect statement in the appellant's tax return. If the respondent is found to have been prejudiced, the next question is whether the appellant should be excused from paying the penalty on the basis that the understatement was as a result of the *bona fide* inadvertent error of the kind contemplated in section 222(1) of the Act. At the hearing of the matter both parties were in agreement that the first question remained in issue, and must be decided notwithstanding the fact that in the minute of a pre-Trial conference held by the respective legal representatives, the issue of prejudice was not pertinently mentioned.

[10] By way of introduction, the nature of the present proceedings were described as follows by Nava JA in *African Cash and Carry (Pty) Ltd v Commissioner for Inland Revenue* ((738118) [2019] ZASCA 148 (21 November 2019)):

> "The point of departure should always be that a tax court is a court of revision and, 'not a court of appeal in the ordinary sense'. The legislature 'intended that there could be a re-hearing of the whole matter by the Special Court and that the Court could substitute its own decision for that of the Commissioner', if justified on the evidence before it. A tax court accordingly re-hears the issues before it and decides afresh whether an estimated assessment is reasonable. It is not bound by what the Commissioner found. In rehearsing the case it can either uphold the

> opinion of SARS or overrule it and substitute it with its own opinion. The powers of the tax court and its functions are unique. It places itself in the shoes of the functionary and re-evaluates the facts and circumstances of the subject matter on which the assessments were based."

[11] In terms of section 102(2) of the Act, the burden of proving the facts on which the imposition of an understatement penalty is based, is upon the respondent. Section 129(3) of the Act in turn obliges ("must") this Court to decide an appeal against an understatement penalty on the basis that the burden of proof is on the Respondent. In *Purplish Holdings (Pty) Ltd v the Commissioner for the South African Revenue Service (76/18) [2019] ZASCA 04 (26 February 2019)* it was held that, by reason of the position of the burden of proof, it is incumbent on the respondent to "not only show that the taxpayer committed the conduct set out in items (*a*) and (*b*) of the definition of "understatement in section 221 of the TAA, but also that such conduct caused it (SARS) or the discus to suffer prejudice". (At para [20].)

[12] It is common cause that the submission of incorrect information in the appellant's tax return falls with the provisions of paragraph (*c*) of the definition of "understatement". It is also not in dispute that the appellant did not stand to derive any immediate financial benefit from the incorrect statement in its tax return. The reason is that the understatement of the assessed loss did not operate to reduce the appellant's tax liability in the 2016 tax year.

[13] In argument the appellant submitted, that there was no prejudice to the respondent as envisaged in section 221 as the error was discovered during the audit process; that the error was corrected; and consequently, that it did not have any impact on the respondent in its collection of taxes. That the incorrect statement was detected and rectified by the issuing of an adjusted assessment is not of any consequence. The premise of the provision for the imposition of a penalty in section 221, is the existence of an incorrect statement, or one of the other acts or omissions in the definition of understatement. It presuppose that incorrect statement had come to the knowledge of the respondent. Knowledge thereof would in turn, as in the present matter, no doubt result in its correctness, and the issuing of an adjusted assessment to eliminate the effect of the misstatement on the tax position of the taxpayer.

[14] In the *Purplish* judgment referred to earlier, it was held that prejudice as contemplated in the definition of an understatement in section 221, is not only determinable in financial terms. This finding is consistent with the word "any" prejudice in the section. The word must be given a wide meaning.

> "The word 'any' is 'a word of wide and unqualified generality. It may be restricted by the subject matter or the context, but prima *facie* it is unlimited.' (Per Innes CJ in *R v Hugo* 1926 AD at 271). There is nothing in the context of the provisions of the Act relating to understatement penalties to suggest that the word was used in a limited sense in section 221. On the contrary, a comparison of the sense of the words 'means ... prejudice to SARS of the *fiscus',* with and without the insertion of the word 'Any', suggest that its insertion indicates that the broadest

> range of prejudice must be taken into account when considering whether any of the stated defaults have resulted in prejudice to SARS or the *fescues."* (TCIT13725 DBN)

[15] There is nothing in the context provided by the provisions in chapter 16 of the Act, either individually or as a whole that is indicative of limiting prejudice to immediate financial prejudice to the respondent. "Any prejudice" is in our view wide enough to include the existence of a real risk that the misstatement will hamper the ability of the respondent to effectively and/or efficiently administer the provisions of the tax legislation, and to perform its functions in terms thereof by assessing and collecting taxes which are due to it.

[16] The case made out by the respondent in its statement in terms of rule 31 opposing the appeal, was that the prejudice suffered by the respondent was that, if it had "allowed the assessed loss, it would have been offset against income that the appellant would have received in subsequent years, thus benefitting the appellant". In her evidence, the respondent's witness, Ms. R, identified the prejudice as the potential benefit to the appellant of utilising the overstated assessed loss to reduce its tax liability in ensuing tax years. She explained that "If you have an assessed loss now, and next year you make a profit, you can actually offset that against your profits, and then what you have to pay SARS would be less".

[17] The prejudice on which the respondent relied is accordingly prospective or potential, in the sense that it stood to suffer actual financial prejudice in the ensuing Year if the incorrect statement in the return was not detected. The existence of potential prejudice, like actual prejudice, is a factual question to be decided on the evidence of a particular case. In answering this question the point of departure must be, as stated earlier, that the *onus* is on the respondent to prove the facts on which it based its decision to impose an understatement penalty. In the context of the present matter, the respondent would therefore have to show that on the probabilities there exists the potential for it to suffer prejudice in the ensuing tax years. The existence of that potential, on the facts of this matter, translates to an assessment on the evidence of whether the understatement of the assessed loss would have remained undetected in subsequent tax years.

[18] In her evidence Ms. R acknowledged, quite correctly so, that once one has regard to what is contained in the financial statements of the respondent, it is evident that the result of the failure to reflect the change in the accounting policy from a deferred tax liability to the wear and tear policy of the respondent in the appellant's tax computation, was that the appellant overstated its assessed loss in its tax return. What was put to Ms. R was essentially that this mistake was such an obvious one, that it would have been picked up in the following tax year, and corrected. Ms. R in her response could put it no higher than that there were no guarantees that that would have been the case. However, while the overall burden of proof remains on the respondent, the appellant's contention that it would itself have detected the error in the

subsequent tax year and corrected it, shifted an evidentiary burden to it to place evidence before this court so as to enable us to make an assessment of the probabilities.

[19] The appellant's only witness was Mr. H. He is an accountant in the firm employed by the appellant. On his advice a decision was taken to change the appellant's accounting policy by the elimination of deferred tax. This policy change was correctly incorporated and reflected in the annual financial statements of the appellant. However, it was omitted from the tax computation which he, albeit reluctantly, conceded in cross-examination, formed part and parcel of the financial statements. The financial statements were prepared and verified by himself. The respondent's tax return was in turn completed by a trainee accountant and verified by a partner in the firm.

[20] Mr. H testified that he was "very confident" that the failure to reflect the change in tax policy in the tax computation and the tax return would have been picked up when they did the 2017 financial statements, and "in reconciling the profits and the tax positions." This statement was premised on the accountants exercising reasonable care in the succeeding tax year, and going back to the financial statements of the previous year verifying that the assessed losses were correctly stated.

[21] The incorrect statement in the 2016 return was the result of a failure to exercise the diligence required in the circumstances. The aspect will be more fully dealt with later in this judgment. The respondent submitted that the level of the lack of care displayed by the appellant and its accountant was such that it cannot be said with any confidence that the mistake would have been detected in the succeeding year. We agree with this submission. The probability that the mistake would have been detected must be assessed against the serious lack of care displayed previously. Further in the succeeding year the opening balance would have been zero for both deferred tax and income tax payable in the balance sheet. There would accordingly have been no reason or motivation for the appellant of the accountant to check or verify the correctness of what is contained in the financial statements of the previous tax years. These are factors that carry more weight than simply the say so for H, and his rather vaguely motivated and uninspiring expression of confidence that the error would have been detected. We are accordingly not convinced that on the probabilities the mistake would have been detected and corrected in the subsequent year.

[22] In argument, the respondent submitted that it was also prejudiced by having to utilise its resources to conduct an audit of the appellant's tax affairs. To this extent reliance was placed on the finding in *Purplish* that the use of additional SARS resources for purposes of auditing the appellant's tax affairs constitute prejudice, as such resources could have been utilised for other matters (at para [23]).

[23] There are two reasons why there is in our view no merit in this argument. The first is that the issues for determination in the appeal are confined by rule 34 to those stated in the rules 31 and 32 statements of the parties. The respondent, on whom the *onus* rests, did not place any reliance in his rule 31 statement on prejudice arising from the utilisation of its resources for purposes of auditing the appellant's tax affairs. "... The dispute must be resolved on the issues raised by the parties and the enquiry confined to the facts placed before court. In this regard the pleadings are important and the parties will be kept to their pleadings, where a departure from the pleadings would cause prejudice or prevent a full enquiry." *(African Cash and Carry (Pty) Ltd v Commissioner for Inland Revenue supra* at para [53]).

[24] The second reason is that it is evident from a reading of the judgment in *Purplish* that this finding was made on the evidence placed before the tax court. The witness for SARS in that case pertinently identified the prejudice to SARS as the time, resources and costs incurred in considering the taxpayer's request for a refund. There is no such evidence in this matter. Further, on a reading of section 221, it is evident that the prejudice must be the result of one of the acts specified in paragraphs (*a*) to (*d*) of the definition of "understatement". It is accordingly incumbent upon the respondent, who bears the *onus,* to show not only that there is prejudice, but that there is a causal link between the action or inaction of the taxpayer, and the alleged prejudice. In the present matter the understatement Penalty was imposed in respect of an incorrect statement made in the 2016 tax year. The audit however covered the tax years 2012 to 2016. There is no evidence as to what prompted the respondent to conduct this audit. The evidence of MS. R in this regard goes not further than that the "case is profiled by SARS profilers, and allocated to the audit division, the manager then allocates the case to plan and execute the audit". Otherwise, than in the *Purplish* case, there is no evidence that was it not for the audit, the understatement would not have been discovered.

[25] That then brings us to the question whether the failure of the appellant to correctly reflect its assessed loss in the tax return resulted from a *"bona fide* inadvertent error." The term *"bona fide* inadvertent error" is not defined in the Act. The appellant placed reliance on the decision in *ABC Holdings (Pty) Ltd v The Commissioner for the South African Revenue Service (JTI 13772) [2016} ZATC 7* (4 November 2016)) for the submission that the incorrect statement in the appellant's 2016 tax return was nothing more than an innocent mistake, and that it accordingly was an error as envisaged in section 222(1) of the Act.

[26] In the *ABC Holdings* case the court looked at the dictionary meanings of the words *"bona fide",* "inadvertent" and "error," and concluded that it must follow therefrom that a *"bona fide* inadvertent error has to be an innocent misstatement by a taxpayer on his or her return, resulting in an understatement, while acting in good faith and without the intention to deceive" (at paragraphs [44] to [45]). This definition is with respect not very helpful. It goes no further than giving meaning to the words *"bona fide"* and "error", and still begs the question when on

error is, or is not said to be "inadvertent". The inclusion of the word "inadvertent" in section 222(1) cannot simply be ignored. The legislature chose to include it as a component of what is considered to be an excusable error, and it must be given meaning to.

[27] The difficulty presented by giving a meaning to the phrase or the term on the basis of the dictionary meaning of each of the three component words thereof, is that the meanings attributed to the component words are very wide, and in a legal context very dissimilar. The words *"bona fide"* and "error" are relatively unproblematic. The meaning of good faith in a legal context is reasonably straightforward, namely a sincere, honest intention or belief that represents the mental and moral state regarding the truth.

[28] The dictionary meaning of the word "inadvertent" on the other hand, is linguistically not that straightforward. That this is so is evident from the dictionary definitions of the word. Burton's Legal Thesaurus defines 'inadvertent' as "accidental, blind, careless, disregardful, heedless, imprudent, inattentive, neglectful, negligent, oblivious, regardless, thoughtless, undersigned, undiscerning, unheedful, unheeding, unintended, unmeant, unmindful, unnoticing, unobservant, unpremeditated, unseeing, unthinking". It also states that associated concepts are "neglect, negligence".

[29] The Oxford English Dictionary defines 'inadvertent' as "not resulting from or achieved through deliberate planning". It also gives the following synonyms: "unintentional, unintended, accidental, unpremeditated, unplanned, unmeant, innocent, uncalculated, unconscious, unthinking, unwitting, involuntary, chance, coincidental, careless, and thoughtless".

[30] The word "error" is in turn defined in the Oxford Dictionary as "a mistake". It also gives the following synonyms: "The state or condition of being wrong in conduct or judgement". Black's Law Dictionary defines 'error' as "a mistaken judgment or incorrect belief as to the existence or effect of matters of fact, or a false or mistaken conception or application of the law".

[31] It is immediately evident that the dictionary meanings or definitions attributed to the word "inadvertence" is, in the context of provisions dealing with an understatement penalty in chapter 16 of the Act, problematic. As seen from the aforementioned definitions, the word includes as associated concepts "neglect", and "negligence". An "inadvertent" error can however not include any error that is the result of neglect? The reason simply is that it would be inconsistent with the nature of the wrongdoing for which the taxpayer is responsible in the Table and which is determinative of the quantum of the understatement penalty that must be imposed. The penalty is higher or lower depending on the level of blameworthiness attributed to the taxpayer's conduct. The scale of blameworthiness attached to the conduct of the taxpayer in the Table includes the punishable behaviours of "reasonable care not taken in

completing return", as well as "gross negligence". The meaning to be attributed to the word "inadvertence" can accordingly not include negligence as a standard of conduct that is excusable.

[32] A sound approach to interpretation in the present circumstances is to consider whether there is a sensible interpretation that can be given to the phrase that will avoid any anomalies. *(Panama Properties (Pty) Ltd and Another v Nel and Others NNO* 2015 (5) SA 63 (SCA) at para [27]). While the starting point is of necessity the language used by the legislature, the interpretation of legislative provisions is a unitary exercise requiring the consideration of text, context and purpose. (See *Natal Joint Municipal Pension Fund v Endowment Municipality* 2012 (4) SA 593 (SCA) at paras [18] to [19] and *better bridge (Pty) Ltd v MA silo and Others NNO* 2015 (2) SA 396 (GP) at para [8].)

[33] A comparison between chapter 16 of the Act and the penalty regime that preceded it speaks to the introduction of a more transparent, objective and predictable dispensation that is reflective of a constitutional dispensation that is based on the principles of transparency and accountability. The purpose of the exclusion of an error of the kind envisaged in section 222 of the Act from the imposition of an understatement penalty, is generally accepted to be to encourage voluntary compliance with tax laws by not taking punitive measures against taxpayers who made an understatement as a result of an honest mistake. *Commissioner for Inland Revenue v McNeil/22* SATC 374 and Income Tax Case No 1908 80 SATC 299 at para [50] and [51]. However, unreasonable and vaguely defined penalties may undermine this aim, and it is regrettable that the respondent has to date chosen not to provide any clarity and/or to issue guidelines with regard to the imposition of understatement penalties.

[34] The context of what will classify as an honest mistake must be provided by the provisions which follow on subsection (1) of section 222, and more specifically what the legislature has identified in the Table as constituting punishable behaviour. This is in my view an instance where the determination of what an inadvertent error is, must be done with reference to what it is not, that is, it is to be defined in the negative. In other words, an error is not inadvertent, and therefore inexcusable, where the taxpayer's action or omission can be classified as a failure to take reasonable care in the completion of his or her tax return, or as being intentional or grossly negligent. This approach to the question is in my view consistent with the dictionary definitions of the word "inadvertence", in that the meanings ascribed thereto are generally concerned with the nature of the attitude or disposition with which the person concerned acts or fails to act. This is in turn consistent with what underlies the forms of legal blameworthiness set out in the Table. (See generally Nettling, Potgieter and Visser *Law of Delict* 7th ed at page 129.)

[35] The conduct on which the respondent relies on is the alleged failure of the appellant to take reasonable care in completing its tax return. Reasonable care is not defined in the Act. The ordinary meaning thereof is however reasonably well settled. The Oxford English Dictionary defines 'care' as "3. Serious attention, heed; caution, pains; regard, inclination", and "reasonable" as "5. Within the limits of reason; not greatly less or more than might be thought likely or appropriate". Taking reasonable care in the context of rendering a tax return to the respondent accordingly means giving appropriately serious attention to complying with the obligations imposed under the tax legislation. At its lowest end, a *bona fide* inadvertent error, stated positively, is on our approach to the meaning to be attributed thereto, an honest mistake in the tax return of a taxpayer that occurred notwithstanding the maintenance of procedures reasonably adopted to avoid such errors.

[36] It can be accepted on the evidence that the incorrect statement in the respondent's tax return was an honest mistake. The question is whether the mistake was also inadvertent. The focus is accordingly on the standard of care taken by the taxpayer and the measures adopted by it to avoid errors in the submission of its tax return. Consistent with its meaning in other fields of law, reasonable care would require the taxpayer to take the degree of care that would be expected of a reasonable and prudent taxpayer in the position of the taxpayer concerned to fulfil his or her tax obligations. *(SVV Construction v Attorneys, Notaries & Conveyancers Fidelity Guarantee* 1993 (2) SA 577 (C) at 586J - 587A.) The question is whether on an objective analysis there has been a failure by the taxpayer to take reasonable care. It is a factual question that must be decided on the facts of each case. Reasonable care does not mean the highest level of care or perfection. As stated in *Maloney v Commissioner for Railways (NSW)* ([1978] 18 ALR 147 at 148):

> "Perfection or the use of increased knowledge or experience embraced in hindsight after the event should form no part of the components of what is reasonable in the circumstances. That matter must be judged in prospect and not in retrospect."

[37] In the present matter the appellant employed a firm of accountants to complete its tax return. The appropriate benchmark in determining whether a person having special skill or competence has breached the standard of reasonable care, is that level of care that would be expected of an ordinary and competent practitioner practicing in the field.

> "In deciding what is reasonable the court will have regard to the general level of skill and diligence possessed and exercised at the time by members of the branch of the profession to which the practitioner belongs." *(Van Wyk Lewis* 1924 AD 438 at 444)

[38] The appellant's accountant clearly failed to act with the diligence expected of him in the circumstances. The circumstances were that the accountant advised the appellant to effect a change to its accounting policy, but then failed to ensure that the change is reflected in the tax computation and in the tax return. That the mistake was carried over into the tax return, is indicative of the fact that the return was prepared solely with reference to what was in the tax computation, and without verification of its correctness against the financial statements.

[39] These failures speak of an absence of reasonable measures and/or the implementation of such measures to avoid the obvious mistake in question. There was no direct evidence with regard to the existence of any control measures that the firm of accountants put in place to check that the calculations in the tax computation were correct. Mr. H testified that the implementation of the policy change in the tax computation "slipped through the woodwork". There is no evidence of what the woodwork was, that is, whether there were any control measures to verify the correctness of the tax computation against the financial statements.

[40] The question is however not whether the accountant's conduct must be imputed to the appellant, and that it must be held liable for the payment of the understatement penalty by reason of the failure of its accountant to exercise reasonable care in correctly completing its tax return. To hold otherwise would be in principle inconsistent with the nature of the contract of mandate that regulates the relationship between the taxpayer and an accountant, and the rights and obligations that flow therefrom. *(Smit v Workman's Compensation Commissioner* 1979 (1) SA 51 (A) at 59 B). The general rule of our law is that an employer is not liable for the negligence or the wrongdoing of an independent contractor employed by him or her. *(Stein v Rising Tide Productions CC* 2002 (5) SA 199 (C) at 205 G and 297 F). The question is whether the appellant exercised the standard of care and diligence expected of a reasonable taxpayer in the completion and submission of its tax return. The answer as to what steps can be expected of a taxpayer will be determined by what was reasonable in all the circumstances of the particular case.

[41] The standard of care expected of a reasonable taxpayer must be informed by the duty placed on a taxpayer by the tax legislation. The duty to timeously file a correct tax return is that of the taxpayer and "there can be no exception to this at all". (Latch 1882 [2016] 78 SATC 165 at paras [31] and [36]) This is consistent with for example, section 153(3)(a) of the Act, namely that the taxpayer is not relieved from performing any "liability, responsibility or duty imposed under a tax Act" by reason, *inter alia* of the failure by his or her tax representative, that is, a person who is responsible for paying the tax liability of the taxpayer as an agent. In terms of section 25 of the Act a tax return must be "a full and true return", and the person signing the return is for all purposes "in connection with a tax Act to be cognisant of the statements are in the return".

[42] In complying with his duty to submit a correct tax return the circumstances relevant in determining if a taxpayer who made use of the services of an accountant had exercised reasonable care, will include, but is not limited to the nature of the matters which the accountant was asked to deal with. It may be reasonable for a taxpayer in the circumstances, and absent any reason to believe it to be wrong, to rely on professional expert advice and guidance on the appropriate tax treatment of differing heads of income and profit and loss which are not straight forward and of which the taxpayer has no or little knowledge of. (*ABC Holdings (Pty) Ltd v The Commissioner for The South African Revenue Service* (ITI 13772) [2016] ZATC 7 (4 November 2016) (CT) and *Mariner v HMRC* [2013] UKFTT 657 (TC) at para [15] to [27].) A reasonable taxpayer in circumstances where there is need for expert advice will obtain such advice with a view of ensuring that his tax return is correct. However, where the function that is assigned to the accountant, is the completion and filing of the taxpayer's tax return, the taxpayer's duty to render an accurate return would require him or her to take such steps as may be reasonable in the circumstances to avoid, as in the present instance, any obvious errors in the return. (*Mrs. X and The Commissioner for The South African Revenue Service* (13380) [2016] ZATC 3 (27 January 2016) at para [33]). In *Hanson v HMRC (supra)* at para [24] the position was correctly put as follows:

> "... A taxpayer cannot simply leave everything to his agent. A taxpayer must certainly satisfy himself that the agent has not made any obvious error. That might involve the taxpayer seeking to understand the basis upon which an entry on his return has been made by the agent. However in matters that would not be straightforward to a reasonable taxpayer and where advice from an agent has been sought which is ostensibly within the agent's area of competence, the taxpayer is entitled to rely upon that advice. At the heart of this issue is the extent to which a taxpayer is required to satisfy himself that the advice he has received from a professional adviser is correct. The answer to that will depend on the particular circumstances of the case."

[43] The present matter must on the facts be distinguished from the decisions in *Z v The Commissioner for The South African Revenue Service* (latch 13472/14 dated 18 November 2014 at para [40]) *and Attieh v The Commissioner for South African Revenue Service* (A 5024/2015) [2016] ZAGPJHC 371(11 August 2016) on which the appellant placed reliance in argument for the submission that, having obtained advice and making use of a firm of chartered accountants, it cannot be said that the appellant did not exercise reasonable care. In both of the aforementioned decisions the taxpayer in question intentionally took a certain tax position on the advice of tax experts. The taking of an incorrect tax position is dealt with in item (iii) of the Table. The question to be determined in that context is whether or not there

were reasonable grounds for taking the tax position. A tax position is defined in section 221 of the Act as:

> "an assumption underlying one or more aspects of a tax return, including whether or not—
>
> (*a*) an amount, transaction, event or item is taxable;
>
> (*b*) an amount or item is deductible or may be set-off;
>
> (*c*) a lower rate of tax than the maximum applicable to that class of taxpayer, transaction, event or item applies; or
>
> (*d*) an amount qualifies as a reduction of tax payable".

[44] In the two cases relied on it was found that there were reasonable grounds for the taxpayer to have taken a certain tax position, as he or she did so on the advice of experts. This conclusion was reached with reference to the case of *Spruill v Commissioner* (887T 1197 (1987), a decision of a tax court in the United States of America. In that case the tax court had to determine whether the fraud penalty was appropriately applied to an understatement of estate tax resulting from a large under evaluation of property. The valuation in turn was determined on the advice of an attorney and an accountant and was based on an independent appraisal. The court, in rejecting the penalty, had the following to say:

> "when an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require a taxpayer to challenge the attorney, to seek a "second opinion", would nullify the very purpose of seeking the advice of a presumed expert in the first place..."

[45] The issue in the present matter is not whether the taxpayer concerned took reasonable care in relying on specialist expert advice, but rather whether it took reasonable care in completing its tax return. The failure to render a correct tax return was not the result of the appellant having taken a tax position on expert advice. It was simply the result of a failure to correctly complete the appellant's tax return as opposed to intentionally taking a tax position that later proved to be incorrect. Put differently, the *cuasa* of the error was not the appellant's reliance on the advice of its accountants to bring its accounting policy in line with the wear and tear rates of the respondent. In fact, there was nothing wrong with that advice. Rather, it was the failure to implement the advice, and to reflect the change in policy in the tax return, that resulted in an incorrect statement in the return.

[46] In this matter a reasonable taxpayer would at the very least have taken steps to satisfy itself that the accountant did not make an obvious error in the return. The appellant did not place any evidence before us with regard to measures it put in place or which it implemented so as to avoid such and error. We further agree with the respondent's submission that the appellant is not free from blame, and that in the circumstances of the case it should have been

alerted to the need to take reasonable care. Before the submission of its tax return the appellant would in the normal course of events have been required to sign off on the tax return prepared by its accountant. In the previous tax year, the appellant made a profit of 9 million rand. In the tax year concerned, it is recorded to have suffered a loss of in excess of 37 million rand. A diligent taxpayer would have been alerted by this and questioned it. The inescapable inference, in the absence of any evidence to the contrary by the appellant, is that it failed to scrutinise the tax return before its submission.

[47] We accordingly find that the incorrect statement in the appellant's tax return did not constitute a *bona fide inadvertent* error as envisaged in section 222(1) of the Act, and that the appellant failed to take reasonable care in completing its return. The appeal must accordingly be dismissed, with costs to follow the result. The costs are to exclude the wasted costs occasioned by the postponement of the matter on 10 September 2019. The postponement was occasioned by the failure of the Registrar of the Tax Court to forward the heads of argument filed by the parties to the Court. There is no merit in the submission by the Registrar that it was the duty of the parties themselves to have done so. It is the function of the Registrar to receive court process filed by the parties and to forward same to the Court. Being an employee of the respondent (section 121 of the Act), it is appropriate to order the respondent to pay the wasted costs occasioned by the postponement.

[48] In the result:

(a) The appeal is dismissed with costs.

(b) The reserved costs of 10 September 2019 are to be paid by the respondent.

D VAN ZYL
DEPUTY JUDGE PRESIDENT

Ms Kemp – (Accountant Member)
L Groener – (Commercial Member)

Counsel for the Appellant: Adv JM Barnard
Counsel for the Respondent: Adv ST Sheshoka

Date heard: 10 September 2019 and 22, 23 and 25 November 2019

Judgment Delivered: 11 December 2019