REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA
HELD AT MEGAWATT PARK, JOHANNESBURG

CASE NO: IT 45585

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

……………………… SIGNATURE ………………………… DATE

In the matter between:

TAXPAYER M Appellant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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J U D G M E N T

This judgment was handed down electronically by circulation to the parties' representatives by e-mail. The date and time for hand – down is deemed to be 12h00 on the 14th of January 2022

DIPPENAAR J:

Introduction

[1] This is an appeal under section 107 of the Tax Administration Act[1] ("the TAA") pertaining to an employment tax incentive ("the ETI") in terms of the Employment Tax Incentive Act[2] ("the ETIA"). The parties agreed on the factual matrix against which the appeal must be determined and the relevant facts are common cause.

[2] The parties' agreement on the facts disposed of all the jurisdictional requirements. The appellant is registered as an employer as contemplated in section 3 of ETIA for the purposes of the withholding and payment of employees' tax by virtue of paragraph 15 of the Fourth Schedule to the Income Tax Act ('the ITA")[3]. As such, the appellant was eligible to receive the ETI instituted in terms of section 2(1) of the ETIA. In each month falling within a six month ETI tax period, being 1 September 2017 to 28 February 2018 ("the relevant period"), the appellant was eligible to receive the ETI in respect of all its qualifying employees as envisaged by section 6 of the ETIA, which amount was determined in terms of section 7.[4]

[3] There was no dispute between the parties that monthly returns in the form of monthly employer declaration ("EMP201") were submitted timeously by the appellant during the relevant period. Paragraph 14(2)(*b*) of Part II of the Fourth Schedule to the ITA, obligates every employer when making any payment of employees' tax, to submit a return to the commissioner. Paragraph 14(3) thereof obliges every employer to render to the respondent a return by such date as prescribed by the respondent by notice in the *Gazette*[5] or within such longer period as the commissioner may approve. This return is the EMP501 reconciliation.

[4] For purposes of the appeal it was common cause between the parties that for the relevant period, ETI of R3 757 633 was available to the appellant and that in the return, being an employer reconciliation declaration EMP501 ("the original EMP501") submitted by the appellant to the respondent on 31 May 2018, the appellant only claimed R 2 344 503 of its available ETI as a reduction of its PAYE debt to the respondent. The original EMP501 is the return which the

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1 28 of 2011.
2 26 of 2013.
3 58 of 1962.
4 It was common cause that the appellant met the jurisdictional requirements in sections 3, 4, 5 and 6 as read with the definition of "qualifying employee" in section 1 of the ETIA.
5 The relevant date in terms of *Government Gazette* No 41473, notice 168 of 2 March 2018 for the period 1 March 2017 to 28 February 2018 was 31 May 2018.

appellant was required to render for the relevant period in terms of paragraph 14(3)(*a*) of the Fourth Schedule to the ITA and is a "self-assessment".[6]

[5] The appellant objected to its self-assessment and submitted a revised EMP501 on 19 July 2018 ("the revised EMP501"), in order to correct the determination of its tax liability or refund as contained in the original EMP501. In the revised EMP501, the appellant included the understated amount of R1 413 130 and requested the respondent to refund that amount. The appellant further requested a reduced assessment of the employees' tax payable by it for the relevant period in terms of section 93(1)(*d*) of the TAA and tendered to submit revised monthly employer declarations ("EMP201") for the months September 2017 to February 2018, if required.

[6] The respondent disallowed the objection, resulting in the noting of the present appeal. The respondent further refused the reduced assessment, but this is not an issue to be determined in the present appeal. The appellant seeks the alteration of its assessment in the EMP501 and costs under respectively section 129(2)(*b*) and section 130(1)(*a*) of the TAA.

Issues

[7] The present appeal pertains to the understated ETI amount of R1 413 130 ("the understated amount"). The respondent referred to it as an "unclaimed amount". That amount is admitted for purposes of the appeal, although the respondent has not verified the amount. It is common cause that the appellant has not received the benefit of that amount. The respondent did not however admit any of the underlying amounts and figures by which it is constituted or the manner in which it was computed.

[8] The issues which must be determined are: (i) the proper application of the relevant legal principles and mechanisms relating to the payment of the ETI; (ii) the proper construction of the relevant statutory provisions that inform such principles and the recovery mechanisms to claim payment of the ETI; (iii) whether or not the appellant is entitled to claim and receive payment of the agreed quantum of ETI.

[9] In essence, the central issue is whether the respondent is correct in contending, as in its dismissal of the appellant's objection, that on a proper interpretation of section 9(4) and section 10(3) of the ETIA and the deeming provisions contained therein, the appellant is not entitled to recover the understated amount. The respondent's case is that the deeming provisions in the aforesaid sections create a time bar clause, that no amounts could be claimed once the

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[6] In terms of section 1 of the TAA, an assessment means the determination of a tax liability or refund, by way of self-assessment or by SARS.

prescribed periods had expired and that any unclaimed amounts would be forfeited. The respondent argued that the appellant was only entitled to deduct the monthly qualifying ETI amounts from the PAYE payable by it when it submitted the monthly EMP201 returns. The submission of the assessment EMP501 which was due on 31 May 2018 for the relevant period, afforded the appellant the last opportunity to adjust for, claim and recover ETI for the relevant period under the ETIA. As the appellant failed to claim the understated amount on any of the permissible occasions, section 9(4) and section 10(3) in essence provide that any unclaimed amount of ETI is deemed to be nil thereafter. Consequently, the appellant was not entitled to claim any understated amount thereafter.

[10] The appellant's case is that it is entitled to recover the understated ETI amount, being an amount contemplated in section 2(2) of the ETIA and it being entitled to receive payment of that amount as one contemplated in section 10(2) in respect of the relevant period ending February 2018. The appellant argued that the deeming provisions in section 9(4) and section 10(3) of the ETIA, read in context and in the light of that act as a whole, do not result in it having forfeited its right to claim the understated ETI amount.

Principles applicable to statutory interpretation

[11] Before turning to the relevant statutory provisions and their interpretation, it is apposite to refer to the relevant principles. The Constitutional Court in *Cool Ideas 1186CC v Hubbard and Another*[7] expressed the fundamental test of statutory interpretation in these terms:

> " ... the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
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> (b) the relevant statutory provision must be properly contextualized; and
>
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."

[7] 2014 (4) SA 474 (CC) at para [28], pp484-485.

[12] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[8], Wallis JA in a unanimous judgment of the Supreme Court of Appeal stated the principles pertaining to interpretation thus:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document".

[13] In relation to tax law, the ordinary principles pertaining to the interpretation of statutes apply.[9]

The applicable statutory framework

[14] It is apposite to first consider the context within which the ETIA was promulgated and the circumstances attendant upon its coming into existence. The context of the statutory provisions and ETIA cannot be considered in isolation but must be considered against the backdrop of other applicable legislation pertaining to employees' tax as the legislature employed the statutory regime already available for the deduction, withholding and payment of employees' tax as a convenient vehicle for administering the claiming and receiving of ETI by eligible employers in respect of eligible employees in their employment.

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8 2012 (4) SA 593 (SCA) paras [18]-[19] at 603E-605B.

9 Secretary for Inland Revenue v Kirsch 1978 (3) SA 93 (T) at 94D.

[15] Employees' tax is regulated by section 5(1)(*c*) of the ITA, which provides for an annual payment of an income tax[10] in respect of the taxable income received by or accrued to or in favour of any person, other than a company, during the year of assessment ending during the 12 months ending the last day of February each year, subject to the provisions of the Fourth Schedule. Part II of the Fourth Schedule pertains to employees' tax and obliges employers to deduct tax.

[16] Paragraph 2(1) of Part II empowers and obliges every employer, whether registered under section 15 or not to, *inter alia*, deduct of withhold from the amount of remuneration payable to an employee an amount by way of employees' tax in respect of the liability for normal tax of that employee and further, an employer must, subject to the ETIA pay the amount so deducted or withheld to the respondent within seven days after the end of the month during which the amount was deducted or withheld.

[17] Paragraph 14(1)(*b*) enjoins every employer to inter alia maintain a record in respect of each employee showing the amount of employees' tax deducted or withheld from the amounts of remuneration contemplated in paragraph 14(1)(*a*). Paragraph 14(2)(*b*) obligates every employer, when making any payment of employees' tax, to submit a return to the respondent, being a monthly employer declaration ("the EMP201"). The amount so deducted or withheld must be paid to the respondent within seven days after the end of the month during which it was withheld or deducted, save where a person ceases to be an employer before the end of a month, in which it must be paid within seven days thereafter. Paragraph 14(3) obliges every employer to render a reconciliation return by a date as prescribed by the respondent by notice in the *Gazette* (the EMP501), subject to certain conditions where an employer ceases to be such or ceases to conduct business.

[18] The ETIA was originally promulgated on 18 December 2013. The purpose of the ETIA is set out in the long title, which provides:

> "To provide for an employment tax incentive in the form of an amount by which employees' tax may be reduced; to allow for a claim and payment of an amount where employees' tax cannot be reduced; and to provide for matters connected therewith."

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[10] Described in the ITA as a "normal tax".

[19] In its preamble the purpose of the ETIA is stated to be:

> "SINCE the unemployment rate in the Republic is of concern to government;
>
> AND SINCE government recognizes the need to share the costs of expanding job opportunities with the private sector;
>
> AND SINCE government wishes to support employment growth by focusing on labour market activities, especially in relation to young work seekers;
>
> AND SINCE government is desirous of instituting an employment tax incentive, BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa as follows:"

[20] The purpose of the ETIA is thus to support employment growth in the private sector by creating an employment tax incentive to eligible employers in respect of eligible employees, especially young people, to curb the high unemployment rate in the country.

[21] The relevant portion of the explanatory memorandum[11] issued by National Treasury on the Taxation Laws Amendment Bill 17B of 2016, relating to sections 1, 4, 7, 9, 10 and 12 of the ETIA and the extension of the ETI beyond its initial three year period, ("the memorandum") provides:

> "**Proposal**
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> To extend the ETI programme beyond 31 December 2016, we propose the following refinements to its application:
>
> a) Extending the incentive: Allow claims beyond the current sunset of 31 December 2016, namely until 28 February 2019. The extension to the end of February is proposed in order to coincide with the end of the tax year. During this period further data and evidence on the performance of the programme can shed light on impacts of the programme.
>
> b) Limit back dated claims: Monthly claims can only be made up to the date of each 6-monthly reconciliation. After that no further claims for that reconciliation period can be allowed. At this time any excess becomes available as a refund."

[22] The memorandum reflects that the ETI scheme has been effective in promoting employment, especially of young workers, justifying the extension of the program. In its express terms, there is no indication that it was intended that an employer lose the benefit entirely at the end of a period. Rather, it envisages that at the end of each six month reconciliation, any excess

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[11] Memorandum on the Taxation Laws Amendment Bill 17B of 2016 dated 15 December 2016, paragraph 4.13 (Extension of the Employment Tax Incentive) III Proposal.

would become available as a refund to the employer. The memorandum does not in its terms envisage the forfeiture of the benefit.

[23] Before dealing with the relevant statutory provisions of the ETIA, it is apposite to note that the ETIA contains no express forfeiture provision particularising any circumstances under which an eligible employer forfeits the ETI. The only provision particularising circumstances under which an employer cannot claim the ETI are contained in section 8, which it is common cause, is not applicable.

[24] The relevant provisions requiring interpretation are sections 2, 9 and 10 of the ETIA, which must be interpreted in the context of the ETIA as a whole. As stated in *Endumeni*, consideration must be given to the language used in the relevant statutory provisions in light of the ordinary rules of grammar and syntax, the context of the provisions, the apparent purpose at which it is directed and the material known to those responsible for its production.

[25] The starting point is section 2, which provides:

> "**Instituting of employment tax incentive—**
>
> (1) An incentive, called the employment tax incentive in order to encourage employment creation is hereby instituted.
>
> (2) If an employer is eligible to receive the employment tax incentive in respect of a qualifying employee in respect of a month, that employer may reduce the employees' tax payable by that employer in an amount determined in terms of section 7 or receive payment of an amount contemplated in section 10(2) unless section 8[12] applies."

[26] Section 2(1) creates the ETI. It is undisputed that the appellant is an eligible employer and has an entitlement to claim. Section 2(2) envisages two methods of claiming or recovering ETI by an eligible employer: first; by the deduction of the monthly qualifying amount from the employees' tax payable to the respondent or second; by receiving payment of the ETI amount if it was an amount contemplated in section 10(2). The claim methodology is regulated by sections 9 and 10. A distinction must be drawn between how claims are dealt with during a period and how they are dealt with at the end of a period. Section 2 does not contain any forfeiture provision or time bar.

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[12] It was common cause that the provisions of section 8 of the ETIA is not applicable and did not disqualify the appellant from reducing the employees' tax payable by it with the amount of ETI available to it in respect of any particular month during the relevant period. Section 8 regulates the circumstances under which the employment tax incentive for reducing employees tax is not available, being where an employer has failed to submit any return as defined in section 1 of the TAA on the basis required by section 25 of the TAA or has any outstanding debt as defined in section 1 of the TAA.

[27] The appellant's claim is predicated on section 2(2) and its entitlement under section 10(1) to claim an excess amount at the end of the relevant period from the respondent in its EMP501. On its interpretation the deeming provisions in section 9(4) and section 10(3) are aimed at preventing an employer from benefitting twice from the same ETI.

[28] The rolling over of amounts is regulated by section 9 of the ETIA, the relevant portion of which provides:

> **"Roll over of amounts—**
>
> (1) Subject to subsection 4 and section 10(3), if in any month the amount of the employment tax incentive available to an employer exceeds the amount payable by the employer in respect of employees' tax, the amount of the employment tax incentive by which the employees' tax may be reduced in the succeeding month must be increased by adding the amount of that excess to the amount of the employment tax incentive that is available in that succeeding month.
>
> (2) If an employer does not reduce employees' tax in the amount of the employment tax incentive despite that amount being available to that employer, the sum of the amounts by which the employer would have been entitled to reduce employees' tax must be treated as an excess contemplated in subsection (1) in the first month that the employer reduces employees' tax in the amount of the tax incentive available to the employer.
>
> (3) If, by virtue of section 8, an employer may not reduce employees' tax in the amount of the employment tax incentive available to that employer, the sum of the amounts by which the employer would have been entitled to reduce employees' tax payable by that employer if the employer had not been subject to section 8 must be treated as an excess contemplated in subsection (1) in the first month that the employer is not subject to section 8.
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> (4) Any amount as contemplated in subsection (2) or (3) on the first day of the month following the end of the period for which the employer is required to render a return in terms of paragraph 14(3)(*a*) of the Fourth Schedule to the Income Tax Act, must be deemed to be nil in respect of each qualifying employee employed by the employer on that date."

[29] The relevant portion of section 10, headed "Reimbursement" provides:

> "(1) At the end of the period for which the employer is required to render a return in terms of paragraph 14(3)(*a*) of the Fourth Schedule to the Income Tax Act, payment of an amount equal to the excess contemplated in section 9(1) must be claimed from the South African Revenue Service in the form and manner and at the time and place prescribed by the Commissioner for the South African Revenue Service.
>
> (2) An amount equal to the excess contemplated in section 9(1) must be paid to the employer from the National Revenue Fund and be treated as a drawback from revenue charged to the National Revenue Fund.

> (3) Where an employer has claimed payment in terms of subsection (1), the amount of the excess in respect of the period to which the claim relates must be deemed to be nil in the month immediately following that period."

[30] The respondent has, as contemplated in section 10(1), prescribed the form, being the EMP501 and the time by which it must be rendered, being 31 May 2018, two months after the end of the relevant period, which ended on 28 February 2018. As envisaged in section 9(4), the first day of the month following the end of the period for which the employer is required to render a return in terms of paragraph 14(3)(*a*) of the Fourth Schedule to the ITA, is 1 March 2018. The EMP501 return was due and was submitted on 31 May 2018. On the agreed facts it was common cause that the total ETI amount claimed by the appellant in the original EMP501 was R2 344 503, in the amended EMP501 an amount of R3 757 633 was claimed and the understated amount was R1 413 130.

[31] In its heads of argument and during the hearing, the respondent focused on how the unclaimed amount arose, which was not addressed in the list of agreed facts agreed upon between the parties. The respondent presented an analysis of the original EMP201, EMP501 and the revised EMP501 returns to illustrate how the unclaimed amount arose. It argued that the unclaimed amount is not attributable to an excess of the kind referred to in section 9(1) or section 10(1) or 10(2) and that the appellant has succeeded in recovering the full quantum of ETI available from the sum of its PAYE liability in each month. The respondent argued that the appellant's claim was adequately covered by section 9(2) as the appellant succeeded in recovering the full quantum of ETI available from its PAYE liability in any given month in the relevant period and was further covered by section 9(4) in terms whereof the appellant cannot claim ETI in respect of any qualifying employee after 1 March 2018. It contended that in effect the appellant sought to increase the ETI claimed in each month over the period September 2017 to February 2018, save for February 2018. Thus, there was never any excess that had to be or could be rolled over under section 9 and the PAYE was always sufficient to allow the appellant to deduct the full sum of the qualifying ETI amount. It contended that these are new amounts sought to be claimed by the appellant which the deeming provisions of section 9(4) and section 10(3) declares as nil if they are not timeously claimed.

[32] The appellant objected to the respondent's analysis and its reliance thereon on the grounds that: (i) these averments were not made in the respondent's rule 31 statement and are contrary to the facts and the grounds relied on by the respondent therein; (ii) the averments are contrary to admissions made by the respondent and (iii) the averments are factually incorrect.

[33] There is merit in these objections for the following reasons. First, how the understated amount arose and the facts averred in the analysis and the conclusions drawn therefrom were not advanced in the respondent's rule 31 statement, to which it is bound for purposes of this appeal. Second, the respondent admitted that the appellant did not recover or receive the admitted understated amount of R1 413 130, rendering it unnecessary for purposes of this appeal to determine how the understated amount was calculated. Third, the appellant had tendered in its objection to provide revised EMP201 returns and it cannot be concluded that the respondent's analysis is accurate, considering the calculations provided by the appellant.

[34] The analysis and conclusions drawn therefrom by the respondent must thus be disregarded and cannot be accepted by this court. It can thus not be accepted that there was no excess during the relevant period as contended by the respondent, an argument heavily relied on by the respondent in its interpretation of the provisions of sections 9 and 10 of the ETIA. This also puts pay to the respondent's argument that the appellant's insistence that it is merely claiming an amount that existed at the end of the relevant period, i.e. on 28 February 2018, is misconceived as the claimed ETI amount was reduced on 28 February 2018 and only on 19 July 2018 increased in the amended EMP501 and the permissible time period for claiming had already passed by virtue of the time bar and the belated filing of the revised EMP501, could not avoid the impact of the deeming provision in section 9(4).

[35] The respondent relies on the deeming provisions in section 9(4) and section 10(3) in contending that the appellant forfeited the ETI benefit in May 2018. The respondent argues that the legislative purpose of sections 9 and 10 of ETIA is to promote a "use it or lose it policy" by effectively establishing a time bar for either claiming the excess, if there is one, or, if employers had already successfully reduced their PAYE liability, then by clearly precluding them from claiming any ETI that was unclaimed at the expiry of the period when the time bar is activated, i.e. on 1 March 2018. According to the respondent, on 1 March 2018, the amount was already nil, i.e. non-existent and the appellant could not claim as it did in the amended EMP501 on 19 July 2018.

[36] On the respondent's interpretation, as from 1 March 2018, all amounts of what might previously constituted an excess of qualifying ETI amounts in terms of section 9(2) must be deemed to be nil in terms of section 9(4) of the ETIA. In terms of section 10(1) an employer is enjoined to claim any such excess at the end of the period for which the employer is required to render a return in terms of paragraph 14(3)(*a*) of the Fourth Schedule to the ITA, being 28 February 2018 and not 31 May 2018. The EMP501 was required to be submitted on or before the prescribed date, being 31 May 2018 and afforded the appellant the last opportunity to adjust

for, claim and recover ETI for the relevant period. It is argued that as the appellant did not do so on any of the permissible occasions, section 9(4) and section 10(3) in essence provide that any unclaimed amount of ETI is deemed to be nil thereafter. Consequently, the appellant is not entitled to recover the understated amount or any portion thereof. In developing this argument, the respondent emphasised that section 9(1) commences with the words "subject to", indicating the primary importance or dominance of section 9(4) and section 10(3). It further argued that the nature of the deeming provisions in section 9(4) and section 10(3) are exhaustive of the subject matter in question and thus exclude what would or might otherwise have been included therein but for the deeming.

[37] In respect of section 10, the respondent argued that the excess should be claimed at the end of the period 28 February 2018 and in the form and manner prescribed, being the EMP501 which was to be submitted by 31 May 2018. In support of the argument, the respondent relied on its analysis of the EMP201's which shows that over the relevant period the appellant claimed an ETI amount in each month which it deducted from the total amount of employees' tax and the full sum of ETI was recovered meaning that there never was any excess that could be rolled over. I have already concluded that the respondent cannot rely on the analysis and the conclusions drawn from it.

[38] Our courts have held[13] that the phrase "subject to" has no *a priori* meaning. Whilst it is often used in statutory contexts to establish what is dominant and what is subservient, its meaning is not confined thereto and it frequently means no more than that a qualification or limitation is introduced so that it can be read as meaning "except as curtailed by". In my view, the qualification in section 9(1) falls into the latter category and means no more than the introduction of a limitation of the circumstances under which an excess amount can be rolled over to a succeeding month.

[39] The approach that our courts have taken pertaining to deeming provisions in legislation is usefully summarised by the Supreme Court of Appeal in *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari (Eastern Cape Parks),*[14] as follows:

> "[29] At the outset it is necessary to have regard to how deeming provisions in legislation have been dealt with in case law and by commentators. Bennion Statutory Interpretation (1997) 3 ed says the following about deeming provisions at 735:
>
> 'Deeming provisions in Acts often deem things to be what they are not. In construing a deeming provision it is necessary to bear in mind the legislative purpose.' [My emphasis.]
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> The first sentence of the quote is demonstrated by the facts in Mouton v Boland Bank Ltd 2001 (3) SA 877 (SCA) ([2001] 3 All SA 485). In that case the court was dealing with a deeming provision

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[13] Premier, Eastern Cape and Another v Sekeleni 2003 (4) SA 369 (SCA) para [13].

[14] 2018 (4) SA 206 (SCA) paras [29]-[33].

contained in the Close Corporations Act 69 of 1984, relating to the reregistration of a close corporation. The deeming provision there in question read as follows:

'The Registrar shall give notice of the restoration of the registration of a corporation in the *Gazette*, and as from the date of such notice *the corporation shall continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered.'* [Emphasis added.]

That provision deemed something to be what in fact was not so, namely, that the close corporation was never deregistered.

[30] An exposition of types of deeming provisions and how they should be construed is to be found in the decision of this court in S v Rosenthal 1980 (1) SA 65 (A). Trollip JA said the following at 75G-H:

'The words shall be deemed (word geag in the signed, Afrikaans text) are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, e.g. a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical connotation. Its precise meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction.'

[31] The court in Rosenthal went on to explain:

'Some of the usual meanings and effect [deeming provisions] can have are the following. That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, i.e., extending and not curtailing what the subject-matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrarily thereto, as being merely prima facie or rebuttable. I should add that, in the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely prima facie or rebuttable is likely to be supplementary and not exhaustive.'

[32] Trollip JA considered the deeming provision in issue in Chotabhai to be an example of an exhaustive deeming provision. In that case 'certain classes of Asiatics' were deemed lawfully resident for the purposes of the statute there in question and the court held that the deeming provision intended to exhaust the list of those who were to be included in that expression.

[33] The court in *Rosenthal*, at 76B-77A, had regard to *R v Haffejee and Another* 1945 AD 345, in which a war measure empowered a price controller to calculate and determine the cost, percentage of gross profit, price or factor of any goods. The controller's determination could be '*prima facie* proved' by the production of a statement in writing, purporting to have been issued by or on the authority of the controller, setting forth the determined cost, price, etc. Such cost, price, etc, in terms of the relevant provision was 'deemed' to be the true cost, price, etc. At 352-353 Watermeyer CJ, in considering the meaning and effect of deeming provisions, with reference to English case law, said the following:

'It is difficult to extract any principle from these cases, except the well-known one that the Court must examine the aim, scope and object of the legislative enactment in order to determine the sense of its provisions. Applying that principle to the present case, it seems that Regulation 14 was clearly a provision to *facilitate proof of matters which* might otherwise be difficult to prove in a Court of Law. It is an encroachment, and presumably a necessary one, on the rules of evidence, but I am not prepared to hold that the legislator intended to make the Controller's certificate *conclusive evidence* against an accused person. If it were conclusive, then an accused person would be precluded from establishing his innocence in a case in which the Controller's determination is in fact wrong, even if the error is merely due to a mathematical mistake. This is an unreasonable result which would follow from holding that the Controller's certificate is conclusive, and it is one which should be avoided if the words of Regulation 14 can be given a reasonable meaning which does not lead to such a result. (See the remarks of Lord Cairns in the case of *Hill v East & West India Dock Co* 9 AC at p 456.) In the present case there is no difficulty in construing the words to

> mean that the Controller's certificate must be accepted as correct, unless the contrary is proved by the accused and that, in my judgment, is the meaning of the regulation.' [Emphasis added.]"

[40] The precise meaning, and especially its effect, of the deeming provisions here in issue, must thus be ascertained from its context and the ordinary canons of construction. Applying the relevant principles and considering the context, I agree with the respondent that the deeming provisions in both section 9(4) and section 10(3) are exhaustive. I am not however persuaded that such conclusion assists the respondent.

[41] I agree with the appellant that there is a distinction between the return for the relevant period in May 2018 and the relevant period itself, which ended on 28 February 2018. This distinction is ignored by the respondent in its argument that the appellant forfeited its unclaimed ETI benefit from May 2018 as it disregards the first relevant period, which ends at 28 February 2018 and the date of the EMP501, being 31 May 2018. A distinction must also be drawn between the date on which the relevant periods ends and the date on which the deeming provisions in section 9(4) and section 10(3) take effect, being 1 March 2018 and March 2018 respectively.

[42] Section 9 cannot be considered in isolation. Section 9(1) regulates the rolling over of the qualifying ETI amount that can be recovered in any given month, which can be rolled over to the next succeeding month and added to the qualifying ETI amount recoverable in the succeeding month to the extent that the PAYE payable by an employer in the prior month was insufficient to allow the deduction of the full sum of the qualifying amount, subject to section 9(4) and section 10(3).

[43] Under section 9(2) an unclaimed amount is deemed to be an excess in a future succeeding month, subject to the provisions of section 9(4) and section 10(3). In terms of section 10(3) at the end of the period for which the employer is required to render a return, i.e. at the end of February 2018, the employer ceases to be entitled to recover unutilised ETI by rolling it over and adding it to the ETI available to it in the next period.

[44] The Legislature in section 9(2) and section 9(3) recognises that an employer may omit to claim ETI available to it as an unclaimed amount is treated as an excess contemplated in section 9(1). This is achieved by deeming any unclaimed amount to be an excess amount contemplated in section 9(1). The employer thus does not lose the benefit of available ETI that it omitted to claim.

[45] Read purposively and in context, the import of section 9(4) is to achieve that there is no rolling over of an excess amount at the end of the period. It does not mean that it cannot be claimed as of that date. The deeming provision in section 9(4) means that on the first day of the month following the end of the period to which the relevant EMP501 relates, i.e. 1 March 2018, any unclaimed amount is deemed to be nil. There is no rolling forward of the amount and at that time, the employer cannot roll the unutilised ETI amount forward by adding it to the ETI in the next period, which is achieved by the excess period being deemed to be nil in the month following that period, being March 2018. The next period thus starts with a clean slate. The employer now needs to claim such amount in terms of section 2(2) read with section 10.

[46] The provision does not have the intention that the employer loses the benefit of the unclaimed amount entirely. It is precluded from rolling forward that benefit but not from claiming it as a payment.

[47] Section 10 deals with reimbursement at the end of a period. In terms of section 10(1), if there is an excess amount at 28 February 2018, being at the end of the relevant period, that excess amount must be claimed from the respondent in the EMP501 for the relevant period. In terms of section 10(2) that amount must be paid from the National Revenue Fund. In terms of section 10(3) where an employee has claimed payment of the excess amount in the month immediately following that period, i.e. in March 2018, there is deemed to be a nil excess amount. In terms of section 10(3) at the end of the period for which the employer is required to render a return, the employer ceases to be entitled to recover unutilised ETI by rolling it forward and adding it to the ETI available to it in the next period and at that time, instead of being entitled to recover unutilised ETI by rolling it forward, the employer becomes entitled to recover unutilised ETI as a payment from the respondent in terms of section 2(2) and section 10.

[48] It follows that in March 2018 there is deemed to be a nil excess amount and the February 2018 excess amount is not rolled forward. Thus the ETI available for the next relevant period must be calculated with a clean slate which effectively prevents the reimbursed February 2018 excess amount being available to the employer in the next period and prevents the employer from benefitting twice from the same ETI.

[49] As at 28 February 2018 an unclaimed amount is not yet deemed to be nil, either under section 9(4) or section 10(3). Therefore any unclaimed amount existing on that date is an excess amount that can be recovered as a payment from the respondent for the relevant period ending on that date. Read in context, it cannot be concluded that the deeming provisions intended the

benefit to be lost to the employer entirely, but only from rolling forward the benefit and receiving that benefit twice.

[50] I agree with the appellant that there is no link between the deeming provisions in either section 9(4) or section 10(3) and the date on which the appellant was obliged to render the EMP501 being 31 May 2018. In terms of the deeming provision of section 9(4), the unclaimed amount on 28 February 2018 being the end of the relevant period is deemed to be nil on the first day of the month following the end of the period for which the return must be rendered, i.e. on 1 March 2018. Similarly, in terms of the deeming provision in section 10(3), the unclaimed amount on 28 February 2018 is deemed to be nil in the month immediately following that period, i.e. in March 2018. It is not yet deemed to be nil on the last day of the period, being 28 February 2018.

Conclusion and costs

[51] The appellant's claim is not based on an entitlement to roll forward the unclaimed amount beyond 28 February 2018 or to benefit from that amount in a period after 28 February 2018. The appellant claims an entitlement to have the unclaimed amount existing at the end of the relevant period, i.e. on 28 February 2018 treated as being an excess amount existing at that date and to receive the benefit of that deemed excess amount for the relevant period as provided for in section 2(2). The deeming provisions of sections 9(4) and 10(3) only come into play on 1 March 2018 and do not apply in respect of the relevant period, which terminates on 28 February 2018.

[52] Applying the relevant principles and interpreting the provisions purposely and in context in their terms, it is concluded that the effect of sections 9(4) and 10(3) is that an employer cannot use a reimbursed unclaimed amount to reduce a further PAYE debt i.e. to benefit twice from the same ETI which is the mischief the Legislature has sought to prevent. Considering the entire tenor of the ETIA, it is not intended at the end of the period that the employer loses the benefit of the excess amount entirely and whilst an employer is precluded from rolling over that benefit, it is not precluded from recovering such benefit as a payment of an excess amount or a deemed access amount. It was undisputed that the appellant employed the persons necessary to qualify it to receive the ETI.

[53] Such interpretation is consistent with the stated purpose of ETIA, being to provide employers with a benefit that encourages employment creation. It is also consistent with the memorandum, which militates against the time bar interpretation contended for by the respondent.. The forfeiture of a benefit is an important consideration with substantial consequences which cannot be lightly inferred and an issue which the Legislature would have expressly addressed if that was the intention. If the respondent is permitted to withhold that benefit

from the appellant in the present circumstances it would be inconsistent with the purpose of ETIA as a whole and the relevant provisions providing for the recovery of that benefit by the appellant.

[54] On the respondent's interpretation it would result in the forfeiture by the taxpayer of a benefit given to it, in circumstances where there is no provision in ETIA for such forfeiture and the circumstances under which it will occur. The respondent's interpretation will create uncertainty and place taxpayers in the position where they are unable to be certain that a tax benefit provided for in ETIA can be relied on by them.

[55] For these reasons, it is concluded that the respondent's contention that the appellant has forfeited the unclaimed amounts is not sustainable and that the appellant is entitled to claim and receive payment of the agreed quantum of ETI.

[56] The respondent concedes that the self- assessment under EMP501 constitutes an assessment for purposes of the TAA, as defined in section 1 thereof. Thus, the objection and appeal procedures envisaged by the TAA apply. The order sought will not have any implications for a period other than the relevant period and will not alter the fact that on 1 March 2018 the appellant's excess amount and deemed access amount including the unclaimed amount is deemed to be nil in terms of sections 9(4) and 10(3) of the ETIA.

[57] It is well established that until such time as the determination of the amount of a tax liability or refund contained in an assessment is final, both the respondent and the appellant are entitled to correct it or take steps to correct it. Section 100 of the TAA regulates the circumstances in which an assessment becomes final. None of those circumstances are present and there is no impediment to granting the relief sought.

[58] The respondent did not challenge that the respondent's refusal to accede to the appellant's request for a reduced assessment in terms of section 93(1)(*d*) of the TAA, is not an issue which requires determination in the present appeal. No finding is made on that issue.

[59] The appellant sought a costs order against the respondent in terms of section 130(1)(*a*) of the TAA on the basis that the respondent's grounds of assessments are unreasonable. The respondent's ground of assessment was that the appellant is not entitled to recover the understated amount for the relevant period "as sections 9(4) and 10(3) of the ETIA in essence provide that any unclaimed amount of ETI is deemed to be nil". Considering all the facts and the dearth of authority on the issue, I am not persuaded that the respondent's basis of opposition can be characterised as unreasonable or that an adverse costs order should be granted.

Order

[60] The following order is granted:

[1] The appeal is upheld;

[2] The assessment in the EMP501 dated 31 May 2018 is altered so as to recognise the appellant's entitlement to receive payment of the understated amount (R1 413 130) in respect of the relevant period, being 1 September 2017 to 28 February 2018, in terms of section 129(2) of the Tax Administration Act;

[3] No order is made in relation to costs.

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EF DIPPENAAR
JUDGE OF THE TAX COURT JOHANNESBURG

WITH

____

MR BP VUNDLA
COMMERCIAL MEMBER

WITH

____

DR MF VAN WYK
ACCOUNTING MEMBER