Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 15065/17

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**Plaintiff**
and	
DR CHRISTOFFEL HENDRIK WIESE	**First Defendant**
ISAK HENDRIK JOHANNES VISAGIE	**Second Defendant**
GERT CHRISTIAAN VILJOEN	**Third Defendant**
FREDERICK RAUTEN HOFMEYR	**Fourth Defendant**

JUDGMENT: 9 SEPTEMBER 2022

~~(electronically delivered to the parties)~~

LE GRANGE J:

Introduction:

[1] The Plaintiff, ("SARS"), seeks an order declaring the Defendants liable, jointly and severally, to pay SARS the amount of R216.6 million in terms of sections 183 and 184 of the Tax Administration Act 28 of 2011 ("the TAA"). According to SARS, the

Defendants knowingly caused, or assisted in causing, Energy Africa Proprietary Limited ("the taxpayer") to dissipate a loan claim in that amount in favour of the taxpayer against Titan Share Dealers Proprietary Limited ("TSD") by declaring and transferring it as a dividend *in specie* to its holding company, Elandspad Investments Proprietary Limited, ("Elandspad"). SARS holds the view that the Defendants did so in order to obstruct the collection of certain tax debts.

[2] SARS further seeks an order to rely on the evidence tendered by the First, Second and Third Defendants at an inquiry held in 2015 and 2016 in terms of Part C of chapter 5 of the TAA for the purposes of proving its claim.

[3] By agreement between the parties an order was granted separating the following questions of law and fact for determination:

3.1 Firstly, is the evidence in the transcript of the inquiry admissible in these proceedings? If so, for what purpose is the evidence admissible?

3.2 Secondly, whether the secondary tax on companies ("SGT") and capital gains tax ("CGT") as referred to in the Particulars of Claim are each a "tax debt" for purposes of section 183 of the TAA.

Background:

[4] The salient facts underpinning this matter can be summarized as follows: During January 2007, Tullow Oil Plc and its subsidiaries ("the Tullow Group") undertook a restructure of its African operations ("the restructure"). Prior to the restructure, the taxpayer, formed part of the Tullow Group.

[5] The taxpayer on 25 January 2007 sold its shares and claims in Energy Africa Holdings Pty Ltd ("EAH") to Tullow Overseas Holdings BV ("TOH").

[6] SARS, on 16 November 2012 issued a notice in terms of s 80 J (1) of the TAA of its intention to make adjustments to the taxpayer's 2007 assessment pursuant to an audit that was conducted into the tax affairs of the taxpayer. According to SARS the taxpayer was liable for CGT and STC in an amount of some R 453 million and R 487 million respectively, on the basis that the transaction in question amounted to, inter alia, an impermissible tax avoidance arrangement as defined in s 80L of the Income Tax Act.

[7] The taxpayer, on 12 December 2012, requested an extension in order to respond to the audit finding and s 80 J (1) notice. An extension was granted by SARS to 31 March 2013, subject to the taxpayer signing an extension of the prescription agreement. The taxpayer complied with the request and a further extension was granted until 15 April 2013.

[8] According to SARS, the First Defendant on or about 19 April 2013, instructed the Second Defendant to procure the distribution of the loan claim against TSD to Titan Premier Investments (Pty) Ltd ("TPI") and the sale of the taxpayer to Friedshelf 1395 (Pty) Ltd.

[9] In the Amended Particulars of Claim, SARS made the following in paragraphs 14.1.1; 30; 31, 31.5; 32; 35.2 and 37, 37.1.

"14. On 16 November 2012, SARS addressed a letter to the taxpayer, in which it:

14.1 notified the taxpayer that SARS intended to:

14.1.1 make certain adjustments in respect of the taxpayer's 2007 income tax assessment, which would result in the inclusion of capital gains tax (CGT) on the disposal of a subsidiary in the amount of R 453 126 518 in terms of paragraph 8(b) read with paragraph 64B (3) of the eighth Schedule to the Income Tax Act[1]: and

14.1.2 issue an assessment for the tax payer's 2007 tax year in respect of secondary STC on a deemed dividend in the amount of R 487 205 316 in terms of s 64C (2)(a) of the Income Tax Act.

In paragraphs 30,

30. With full and actual knowledge of what is in paragraphs 8 to 15 above, the Defendant knowingly caused, or assisted in causing, the taxpayer to dissipate the loan claim by declaring and transferring it as a dividend *in specie* to its holding company, Elandspad, which in turn declared and transferred the loan claim as a dividend *in specie* to its own holding company TPI (the dissipation).

Paragraph 31;

31. The dissipation was effected at a time when, to the knowledge of the Defendants, the following debts constituted debts due to SARS for the purposes and in terms of section 169 of the TAA (the tax debts);

[31.1…31.4 referred to other tax debts.]

[1] Act no 58 of 1962

31.5 the amount R 487 205 316 respect STC, referred to in paragraph 14.1.2 above, which was then due, owing and payable, having become due, owing and payable no later than the last day of the month following the month in which the dividend cycle relevant to the dividend ended.

Paragraph 32;

32. Accordingly, at the time of the dissipation, the taxpayer had been assessed to income tax in the amount of R 122 420 199. 72 plus interest of R 43 724 273 and was liable for STC in the amount of R 487 205 316, being a total of R 653 349 788.72. (*The tax debts referred to paragraphs 31.1 to 34.1 above were extinguished after the dissipation in terms of a settlement reached between the taxpayer and SARS on 29 October 2015*).

Paragraph 35;

35. The amount of R 1 106 476 306 .72 constituted a "*tax debt*" for the purposes of section 183 of the TAA at the time of the dissipation. In amplification:

35.2 The debts pleaded in paragraphs 33 while not due and payable at the time of the dissipation is, on a proper construction of s 183 of the TAA, and for purposes of that provision, also a tax debt.

Paragraph 37;

37. On 21 August 2013, SARS addressed a finalization of audit letter to the taxpayer in which the taxpayer's additional income tax liability for the 2007 year of assessment was fully described ("the finalization of audit letter"). The letter recorded the following:

> 37.1 a notice of additional assessment in respect of the taxpayer's 2007 income tax assessment, resulting in the inclusion of capital gains tax *(CGT)* on the disposal of a subsidiary in the amount of R 453 126 518 in terms of paragraph 8(b) read with paragraph 64B (3) of the eighth schedule to the Income Tax Act, and understatement penalties of R 679 689 777.

[10] On 15 April 2013, the attorney of the taxpayer addressed a letter to SARS, disputing any tax liability on the grounds as relied upon be SARS being 'substance over form' and the alternative under GAAR[2]. The taxpayer's only asset during all relevant times was a loan claim against TSD in the amount of R 216.6 million ("the loan claim").

[11] According to the taxpayer, the transaction was not simulated and contended that the deemed dividend provision contained in section 64 C (2)(a) of the ITA is not applicable, and that the transactions under consideration do not constitute impermissible avoidance arrangements as envisaged in section 80A of the ITA. The main purpose, according to the taxpayer, was not to obtain a tax benefit, and therefore the Commissioner was not entitled to invoke the provisions of section 80B of the ITA.

[12] On 19 April 2013, before SARS assessed the taxpayer to tax, penalties and interest, which eventually amounted to some R3.2 billion in total, the taxpayer disposed of its only asset by making a distribution to the taxpayer's sole shareholder Elandspad. From Elandspad it was immediately on-distributed to TPI, the holding company of Elandspad. According to SARS, in terms of s 64C (2)(a) of the Income Tax Act, the

---

[2] In November 2006, Part IIA of the ITA dealing with impermissible avoidance arrangements was introduced. This is more commonly known as the new general anti-tax avoidance rules (GAAR).

distributions are deemed to be dividends declared by the companies and paid to its shareholder.

[13] Subsequent to the conclusion of the sale of shares agreement in September 2013, the attorneys for the taxpayer replied to the finalization of the audit letter. It advised SARS that the taxpayer disputes any liability and that the taxpayer did not have any cash or assets and could not pay the disputed tax. On 24 October 2014, SARS was informed that the taxpayer was dormant and in April 2016 the taxpayer was finally wound-up by an order of this Court.

[14] SARS called one witness, namely Mr. A S Kane ("Kane"), the lead auditor in the auditing of the taxpayer affairs since its commencement in 2010, to testify. The witness gave a general overview how SARS calculated CGT and STC. According to Kane, the disposal of the taxpayer's shares and claims ("the disposal") to TOH in January 2007, was considered by SARS to be a disposal to a connected person not at market value, and that the difference in price between what was paid and the market value, was the deemed dividend. Kane testified that if the disposal was at market value, a deemed dividend would not have occurred as it would be regarded as a distribution.

[15] According to Kane, SARS addressed a letter on 16 November 2012 to the taxpayer in which it notified the latter that it intends to; firstly, make certain adjustments in respect of the taxpayer's 2007 income tax assessment, which would result in the inclusion of CGT in the amount of R453 126 518 on the disposal of a subsidiary in terms of paragraph 8(b) read with paragraph 64B(3) of the eighth schedule to the ITA15; secondly, issue an assessment in respect of the taxpayer's 2007

tax year in respect of its STC liability in respect of a dividend in the amount of R487 205 316, which liability was deemed to have arisen in terms of section 64C(2)(a) of the ITA16; thirdly, SARS communicated the various findings of the audit that was done on the information furnished to it by the taxpayer; and lastly, issued a notice in terms of section 80J(1) of the ITA.

[16] Kane testified that, as the proposed adjustments are related to the EAH disposal in January 2007, the Commissioner's primary ground of substance over form is premised upon the alleged fact that the true consideration for the disposal and or acquisition of the shares of EAL was USD1.2 million and to the extent that it is contended to be USD 543.76 million or USD 544.96 million, such amounts are simulated, and the true substance of the transaction is that EAL disposed of its subsidiary EAH to a connected person at a value that did not reflect an arms-length price. Kane further testified that in terms of the alternative ground based on the GAAR provisions as contained in sections 80A to 80L of the ITA20, the Commissioner holds the view that (a) the capital gain disregarded as a result of the participation exclusion in paragraph 64B(2) of the ITA should be treated as a net capital gain under paragraph 8(b) resulting in CGT of R 3 125 010 47021; and (b) there was a deemed dividend in terms of s 64C(2)(a) of the ITA to the extent that the value assigned to the EAH shares and a claim of USD 543.76 million exceeded the alleged consideration of USD 1.2 million, and STC was consequently payable on the deemed dividend of USD 542.56 million which equals about R 3 897 642 528.

[17] According to Kane, the taxpayer was as a result afforded a period of 60 calendar days in terms of s 80 J(2) of the ITA[3] to submit reasons why the provisions of Part IIA of the Act should not be applied.

[18] Kane also stated that where SARS identifies potential adjustments in an audit of a material nature, s 42(3) of the TAA permits the taxpayer 21 business days to respond in writing, or the further period that may be required, based on the complexities of the audit.

[19] According Kane, the alternative grounds relied upon under GAAR are no longer of any relevance to this matter.

[20] During cross-examination, Kane conceded that the portions of his affidavit under the heading 'Substance over Form' and or 'general anti-avoidance rule assessment', (GAAR) was relevant. He further confirmed that he had to exercise a judgment whether

---

[3] Section 80J provides, inter alia, that:

> *'(1) The Commissioner must, prior to determining any liability of a party for tax under section 80B, give the party notice that he or she believes that the provisions of this Part may apply in respect of an arrangement and must set out in the notice his or her reasons therefor.*
>
> *(2) A party who receives notice in terms of subsection (1) may, within 60 days after the date of that notice or such longer period as the Commissioner may allow, submit reasons to the Commissioner why the provisions of this Part should not be applied.'*

to apply such provisions, prior to issuing an assessment. Kane also agreed SARS had to exercise their mind whether to raise an assessment in respect of CGT and or STC.

Determination:

[21] For the sake of expedience, I will first deal with the second question whether the SGT and CGT as referred to in the Particulars of Claim are each a "tax debt" for purposes of section 183 of the TAA.

[22] The First and Second Defendant on the first day of the hearing introduced an amendment to their plea. SARS did not object to it and delivered an amended replication in which it indicated that for the purposes of the current action, the definition of "tax debt" in section 1 of the TAA should be read as if it were not retrospectively amended. According to SARS it was to avoid the inevitable challenge to the Constitutional validity of the retrospective application of the amendment should SARS have adopted a contrary view.

[23] It needs to be mentioned that prior to the First and Second Defendant's amendment to their plea it was accepted by the parties that the only definition of "*tax debt*" was that contained in section 169(1) of the TAA. However, an amendment to the TAA effected by the Tax Administration Laws Amendment Act, 39 of 2013 dated 16 January 2014, provided for the retrospective amendment of the definition of "*tax debt*" to the date of commencement of the TAA.

[24] In the result, SARS adopted the position that as at 19 April 2013, the CGT and STC referred to in paragraph 14.1 of the plaintiff's particulars of claim were amounts of

tax due or payable, alternatively due by the taxpayer to SARS which it avers constituted tax debts as contemplated in section 183 of the TAA.

[25] Prior to the amendment, the definition of "tax debt" in section 1 of the TAA read as follows: "*tax debt' means an amount of tax due by a person in terms of a tax Act.*"

[26] After the amendment Section 1 of the TAA defines "*tax debt*" as an amount referred to in section 169(1), which in turn reads as follows:

> "*169. A debt due to SARS. – (1) an amount of tax due or payable in terms of a tax Act is a tax debt due to SARS for the benefit of the national revenue fund."*

[27] The main distinction is, in the section 1 definition the amount of tax is required to be "*due*" whereas in the section 169(1) definition it is required to be "*due or payable*".

[28] The principal submissions made by counsel for SARS, Mr. A R Sholto-Douglas SC, assisted by Mr. P Myburgh and Ms. S Mahomed can be summarized as follows: section 183 of the TAA falls under Chapter 11, which deals with the recovery of tax; the reference to a 'tax debt' as contemplated in s 183 should be read in context and its purpose as a reference to an amount of tax due and payable as contemplated in terms of s 169 and need not be then due and payable but could also have been anticipated; both STC and CGT were tax debts that were due and payable for the purposes of s 169 or due for the purposes of s 1 of the TAA; reading in its context and having regard to

its manifest purpose s 183 finds application in circumstances where an assessment is anticipated and not whether the tax debt is in existence as such an interpretation would negate or seriously undermine the purpose of the section and could lead to absurd consequences which could permit a third party to knowingly assist the taxpayer to dissipate assets with the intention of obstructing the collection of tax in circumstances where the taxpayer and that person anticipate a tax liability, but where the assessment has not yet taken place; the amounts ultimately assessed by SARS on 21 August 2013 in the instance of both STC and CGT, constituted tax debts as contemplated in s 183.

[29] On the issue of 'due and payable, it was submitted the CGT and STC argument, for which the taxpayer was subsequently assessed, need not to be traversed to find in favour of SARS. It was argued that the effect of assessing a taxpayer to tax is to retrospectively render tax due and payable when it ought to have been paid as in this instance where the STC on the deemed dividend, as assessed in August 2013, was due and payable by the end of the relevant dividend period, namely 28 February 2007, and in the case of CGT it was payable on 30 September 2007 which was the end of the 2007 income tax year.

[30] Mr. L S Kuschke SC, assisted by Ms. M O'Sullivan appeared for the First and Second Defendant. Messrs. E Fagan SC and G Quixley appeared for the Third and Fourth Defendant. In order to avoid unnecessary duplication in argument, Mr. Kuschke addressed the second question whilst the first was dealt with by Mr. Fagan. All the Defendants adopted the submissions made by the respective counsel on their behalf.

[31] At the heart of the Defendants' argument, on the second question, is a 'tax debt' properly construed requires SARS to issue an assessment to the taxpayer before it can invoke the provisions of s 183. According to the Defendants, SARS in correspondence had repeatedly acknowledged that the raising of the STC and CGT assessments only occurred on 21 August 2013 which meant it was after 19 April 2013 when the distribution was made. Mr. Kuschke's principle submissions can be summarized as follows: a distinction needs to be drawn between the following concepts, namely: when a debt is owing; - due; - payable (in the context of the phrase 'due and payable); and enforceable by SARS, to answer the question whether at the time of the distribution on 19 April 2013 the STC and CGT is a 'tax debt' for the purposes of s 183. It was contented that a contingent liability is not a debt and as such a contingent tax liability cannot qualify as a 'tax debt' under s 183.

[32] It was further contended that a 'tax debt' must be interpreted in a manner that fits in with the overall scheme of the Act, its context and purpose; to that extent it was submitted that ss 165 to 168 in Part C of the TAA deal with the concept of 'tax debt' in the context where it is referred to an assessment that had been raised; accordingly where SARS has audited a taxpayer and following from such audit determines that the taxpayer is liable for an amount of income tax, a 'tax debt' could only arise and become due, once an assessment has been made by SARS and the taxpayer had been notified of such assessment, which notification must comply with s 96 of the TAA.

[33] According to Mr. Kuschke the s 80J (1) notice issued by SARS was merely a proposed assessment as it fell short of the true meaning of an 'assessment' as

discussed in CSARS v SA Custodial Services (Pty) Ltd[4] and of '*one whereby the document embodying the mental act is intended to be an assessment'* [5]. It was submitted SARS is not entitled interpret s 183 through the prism of s 169 which is an enforcement provision and deals with "Debts due SARS" in Chapter 11 as such definition differs from the definition in the overall scheme of the TAA. In addition it was mentioned that further support could be found in s 42 of the TAA[6] relating to audits that an audit letter does not result in an assessment but merely a proposed assessment.

---

[4] 2012 (1) SA 522 (SCA); see also
[5] (2003) 65 SATC 98 at 104E-F;
[6] Section 42 of the TAA provides:

> 42 Keeping taxpayer informed
>
> (1) A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit.
>
> (2) Upon conclusion of the audit or a criminal investigation, and where-
>
> *(a)* the audit or investigation was inconclusive, SARS must inform the taxpayer accordingly within 21 business days; or
>
> *(b)* the audit identified potential adjustments of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision referred to in section 104 (2).
>
> (3) Upon receipt of the document described in subsection (2) *(b)*, the taxpayer must within 21 business days of delivery of the document, or the further period requested by the taxpayer that may be allowed by SARS based on the complexities of the audit, respond in writing to the facts and conclusions set out in the document.
>
> (4) The taxpayer may waive the right to receive the document.
>
> (5) Subsections (1) and (2) *(b)* do not apply if a senior SARS official has a reasonable belief that compliance with those subsections would impede or prejudice the purpose, progress or outcome of the audit.
>
> (6) SARS may under the circumstances described in subsection (5) issue the assessment or make the decision referred to in section 104 (2) resulting from the audit and the grounds of the assessment or decision must be provided to the taxpayer within 21 business days of the assessment or the decision, or the further period that may be required based on the complexities of the audit or the decision.

[34] In respect of the the alternative grounds of GAAR (contained in Part IIA sections 80A to 80L of the ITA) are concerned, it was submitted that as SARS relied on these provisions in its assessment, the EAH disposal could only have been re-characterised from the date of the assessment, being 21 August 2013, as section 80J (3) provides that:

> *"(3) The Commissioner must within 180 days of receipt of the reasons or the expiry of the period contemplated in subsection (2)-*
>
> *(a) Request additional information in order to determine whether or not this Part applies in respect of an arrangement;*
>
> *(b) Give notice to the party that the notice in terms of subsection (1) has been withdrawn; or*
>
> *(c) Determine the liability of that party for tax in terms of this Part"*

[35] Mr Kuschke, accordingly argued that such re-characterisation under the GAAR provisions could only take place on the date of the assessment being 21 August 2013, and as such when the distribution was made there was no assessment, and thus no 'tax debt' for purposes of the GAAR provisions.

Discussion:

[36] Our law regarding the interpretation of a statute is trite[7]. In answering the question whether the contested term "tax debt" as contemplated in s 183 requires SARS to issue an assessment before invoking s 183 or can the contested term be read through the prism of s 169 which will allow SARS to issue a notice in anticipation of an adjusted assessment and thereafter determine the taxpayer's tax liability, the point of departure must be the language of the provision itself read as a whole, its context and purpose.

[37] The Supreme Court of Appeal in Capitec Bank Holdings Ltd and Another v Carol Lagoon Investments 194 (Pty) Ltd and Others,[8] has warned against the use of the oft-quoted case of Endumeni [9] as an open- ended permission to pursue interpretations that is self-serving, including what a witness considers a contract or provision in a statute to mean, as the latter is strictly a matter for the court[10].

[38] The provisions in terms of s 183 of the TAA provides as follows:

> "*183. Liability of person assisting in dissipation of assets – If a person knowingly assists in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt, the person is jointly and severally liable with the taxpayer for the tax debt to the extent that the person's assistance reduces the assets available to pay the taxpayer's tax debt."*

---

[7] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA.
[8] 2022 (1) SA 100 SCA at para 48 – 51.
[9] See ft 7.
[10] Capitec supra at para [48].

[39] It is obvious that the Legislature in enacting s 183 had a particular objective and purpose in mind and that is to hold a person(s) jointly and severally liable if he or she knowingly assist in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt. The sting of the provision is therefore against parties other than the taxpayer. It is therefore important to interpret the words, sentences and concepts in s 183 in a manner that will give proper effect to that intention of the Legislature taking into account the context and structure of the provisions within the TAA in order to elucidate the text[11].

[40] A closer look at s 1 of the TAA and in particular the introductory words under the heading 'Definitions' of which the relevant parts read, as follow: "*In this Act, unless the context indicates otherwise,… the following terms have the following meaning –"*, can only be interpreted that the meaning of a word or phrase have a particular meaning as defined unless the context indicates otherwise.

[41] In view of the above-mentioned regard must be had to the text and structure of the provisions of s 183 and whether the contested term in its context indicates that it is used differently with a different meaning or does it falls within the same meaning as defined Chapter 1 under 'Definitions' [12].

---

[11]Capitec, supra at para 51 the SCA held that:

> "Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.

[42] The provisions of s 183 is anchored in Chapter 11 of the TAA which covers Part A to F under the main heading *'Recovery of Tax'*. The phrase '*Debt due to SARS'* is defined in the heading of s 169 (1) and refers to an amount 'due or payable'. The latter has obviously a different meaning to that as defined in section 1.

[43] Read purposively, section 169(1) in my view illuminate the meaning of the phrase 'tax debt' within the provisions of Chapter 11 and in the latter context there is an obvious distinction.

[44] The contention by Mr. Kuschke that the contested term must be interpreted as contemplated in s 165 to 168 in Part C of the TAA where those provisions envisage a 'tax debt' in the context of an assessment that had been raised and as such only become due, once an assessment has been made by SARS and the taxpayer notified of such assessment, is in my view unsustainable. Such an interpretation would not only be unbusinesslike but will also emasculate the very purpose of the TAA as a whole.

[45] Chapter 10 of the TAA deals with the tax liability and payment of tax by a taxpayer. Sections 165 to 168 is anchored in Part C which deals with the taxpayer's account and allocations of payments, deferral of payments and criteria for instalment payment agreements of that taxpayer. In the latter circumstances the construction placed on the phrase a 'tax debt' in the context of an assessment that had been raised and as such only become due, once an assessment has been made by SARS and the

---

[12]See Röntgen v Reichenberg1984 (2) SA 181 at 184H: Hoban v ABSA Bank Limited 1999 (2) SA 1036 SCA at para 12

taxpayer notified of such assessment, which notification must comply with s 96 of the TAA, cannot be faulted.

[46] However, Chapter 11 on the other hand deals with the recovery of tax, and Part D thereof wherein s 183 is nestled, deals with the liability and collection of tax debt from a party other than the taxpayer. In these circumstances, where the purpose and aim of the TAA is to hold a third party liable, the notice as issued by SARS on 16 November 2012, which included the notice in terms of 80J(1) is more than sufficient to fall within the true meaning of a 'tax debt' as contemplated in s 183. To interpret it differently, would in my view undermine the purpose and context of s 183 and the TAA as a whole.

[47] It will also lead to absurd consequences where, for instance, a party who knowingly assists the taxpayer dissipating assets where an assessment had been raised and a tax debt established "*due or payable*" to SARS, would be struck by the section, but if the same person assists the taxpayer, a day before the event that renders the tax debt due or payable, disposes of the assets in order to obstruct the collection thereof, would escape liability. The same would apply where a party who intentionally assists in the dissipation of a taxpayer's assets in order to obstruct the collection of a future tax debt, even if that tax debt were objectively uncertain at the time of the assistance, will escape liability.

[48] The above-mentioned are but a few scenarios that would permit a party to knowingly assist the taxpayer to dissipate assets with the intention of obstructing the

collection of tax in circumstances where the taxpayer and that person anticipate a tax liability. In my view such an interpretation cannot be consistent with the TAA as its efficacy would solely depend on timing.

[49] It follows that the meaning to be ascribed to the phrase "tax debt" where it appears in section 183 must prevail over that as defined in s 1 and must be read as reference to an amount of tax due or payable in terms of the TAA as advanced by SARS.

[50] In view of the above interpretation, the suggestion that s 183 will yield two equally plausible constructions is unfounded. It follows the application of the *contra fiscum* rule[13], does not arise in these circumstances as s 183 deals with liability of persons other than the taxpayer who knowingly assists in dissipating assets in order to obstruct the collection of a tax debt.

[51] Lastly, reading s 183 with s 169 that a tax debt is *'due and payable'* will not lead to two irreconcilable constructions. In this instance, CGT and STC for which the taxpayer was subsequently assessed were amounts already owing at the time of the dissipation on 19 April 2013 under the TAA. That is so as the assessing of a taxpayer to tax is to retrospectively render the tax due and payable when it ought to have been paid. In this instance the dictum Singh v Commissioner, South African Revenue Service,[14] a case dealing with the collection and recovery of VAT, is in my view relevant

[13] Telkom SA Soc Ltd v Commissioner, South African Revenue Service 2020 (4) SA 480 (SCA).

and applicable. In that context, the court held that:

> *"…an amount is due when the correctness of the amount has been ascertained either because it is reflected as due in the taxpayer's return or because the circumstances set out in s32(5) had been applicable (in both of which cases it is both due and payable) or if there is a dispute after the procedures relating to objection and appeal have been exhausted (in which case the amount so ascertained was due and payable with the return)."*[15]

[52] Furthermore, Singh at para 11, the court held that:

> *"An amount may be due but not yet payable, for example additional tax …. Conversely, an amount which is payable may not be due. This may be the case with an assessed amount prior to the final determination of a dispute: to the extent that the assessment is finally found to be correct, that amount was due (and payable) when the return was rendered; to the extent that the assessment was not correct, that assessment was not due at any time, but it*

---

[14], 2003 (4) SA 520 (SCA) para 10 and 11. See also In Commissioner for Inland Revenue v Janke, 1930 AD 474 at 485 where the following was said:

> "*Liability for poll tax (as for income tax) is an obligation incurred within the meaning of the section certainly not later than at the close of the year for which the tax is levied (*dies cedit*), although the tax may not be collectable before it is has been assessed (*dies venit*). It is true the actual amount of the liability is not known on the former date. For under the income tax laws there are various deductions and debatements to be made before the "taxable amount" of a person's income can be ascertained. But once these have been made according to law, and the amount determined, the determination operates* nunc pro tunc*."*

[15] Singh at [10].

was payable in terms of s 31(1), which provides that, where, in the circumstances contemplated in the section, the Commissioner has made an assessment of the tax payable by the person liable for the payment of such amount of tax, 'the amount of tax so assessed shall be paid by the person concerned to the Commissioner'. An example will illustrate this. Suppose the taxpayer renders a return for 100. The Commissioner assesses his liability at 200. In the fullness of time, the amount is finally determined at 125. 125 was therefore due and payable when the return was rendered. The balance of 75 was not due; but it was nevertheless payable in terms of s 31(1) because of the assessment. We do not think that the obligation to pay which s 31(1) creates can be interpreted other than as an immediate obligation. If the Commissioner's right is to demand payment forthwith then such remedies as are provided for non-payment should logically be interpreted in a manner which allows for exaction of the amount on default. Section 40(2)(a) provides such a remedy and the word 'payable' where it appears in that section must accordingly be construed as an existing obligation rather than a future or contingent one. Section 40(5), which precludes the challenge to an assessment in such proceedings, also justifies the conclusion that the right to exact the amount reflected in the assessment flows from the assessment itself and not some subsequent event. It should be noted that s 36, which requires payment of tax pending any appeal, recognizes that an obligation to

pay and the right to recover already exist; it does not create such obligations."

[53] In view of the abovementioned, a tax debt either exists or not, depending on various factors, for instance, whether there has been a capital gain or whether a taxpayer has made a taxable profit or not. A tax debt thus exists irrespective of whether the taxpayer or SARS has made an assessment. Although the particular tax legislation in issue in Singh and Janke was different from that which applies in the present case, the principle remains the same. Therefore, where the taxpayer's liability to pay CGT and STC was disputed, a subsequent assessment establishes a liability for the payment of tax, that assessment has the effect of rendering the tax due and payable from the date on which the incorrect return was rendered or, where no return is rendered at all, when it ought to have been rendered. In the present instance, of the STC which is payable on the deemed dividend, as assessed on August 2013, it was due and payable by the end of the relevant dividend period, namely 28 February 2007. In the case of CGT (which forms a component of income tax) it was payable at the end of the 2007 income tax year for the taxpayer, which was 30 September 2007.

[54] Furthermore, the evidence of Kane regarding the general anti-avoidance rule assessment cannot be criticized. Ultimately the interpretation of a statute, as in this instance, is strictly a matter for the court to decide.

[55] To conclude, it follows that the Defendants who arranged the declaration of the dividend *in specie* can be held liable in terms of s 183 of the TAA in the absence of an assessment at the time of the dissipation.

[56] Turning to the issue of whether the evidence in the transcript of the inquiry is admissible in these proceedings and if so, for what purpose is it admissible.

[57] It is common cause that in terms of section 50 of the TAA[16], the First, Second and Third Defendants testified at an inquiry into the affairs of the taxpayer. The record of that inquiry consists of the transcribed evidence together with the documents to which reference was made during the testimony of the witnesses.

[58] SARS intends relying on the evidence tendered by the First, Second and Third Defendants at that inquiry, in the main trial. The Defendants hold the view that the transcript of an enquiry under s 50 of the TAA is inadmissible in subsequent civil proceedings against any of the Defendants, including against the Defendant who gave such evidence.

[59] The Defendants relied on the decision in Commissioner for the South African Revenue Services v Sassin and Others[17] ("Sassin") for the proposition that the transcript of an inquiry under s 50 of the TAA is inadmissible in subsequent civil proceedings.

[60] According to Mr Fagan, the Sassin judgment constitutes considerable persuasive authority and there is no good reason to depart from its *ratio decidendi* and conclusion.

---

[16] Section 50 deals with the authorization for an inquiry.
[17] [2015] 4 All SA 756 (KZD)

[61] SARS holds a different view. According to Mr Sholto- Douglas the views expressed by the learned Judge in the Sassin judgment was made *obiter* and is not binding authority for the proposition that transcripts in s 50 inquiries cannot be used in civil proceedings.

[62] It was further contended by Mr Sholto-Douglas that ss 50 to 58 of the TAA which fall within Chapter 5, with the heading "*Information gathering*" read in its context and having regard to its purpose makes it clear that the TAA has given SARS significant powers of inspection, verification, audit, criminal investigation, obtaining material and holding inquiries. It was further submitted that the TAA recognised the need to empower SARS to obtain information by various means for the very purpose of using that information in the performance of its constitutional and statutory function of collecting tax.[18]

[63] It is trite that in subsequent criminal and civil proceedings, the use of transcripts of inquiries obtained under statutory compulsion is different.[19]

[64] In the TAA, sections 56 and 57 are the two provisions dealing with the admissibility of evidence obtained at an inquiry held in terms of Part C of Chapter 5 of the said Act. Section 56(4) reads as follows:

---

[18] Commissioner, South African Revenue Service v A (Pty) Ltd and Others Gauteng Local Division case number 17418/2016) at par 88 (unreported).
[19] Hohne v Super Stone Mining (Pty) Ltd 2017 SA 45 (SCA) at para 24.

> "*Subject to section 57(2), SARS may use evidence given by a person under oath or solemn declaration at an inquiry in a subsequent proceeding involving the person or another person.*"

[65] In terms of 57(1) a person may not refuse to answer a question during an inquiry on the grounds that it may incriminate that person. However, s 57(2) provides that subject to certain exceptions, incriminating evidence obtained under section 57 is not admissible in criminal proceedings against the person giving the evidence.

[66] Section 56 reads as follows:

> *"Confidentiality of proceedings. (1) An inquiry under this Part is private and confidential.*
>
> *(2) The presiding officer may, on request, exclude a person from the inquiry if the person's attendance is prejudicial to the inquiry.*
>
> *(3) Section 69 applies with the necessary changes to persons present at the questioning of a person, including the person being questioned.*
>
> *(4) Subject to section 57 (2), SARS may use evidence given by a person under oath or solemn declaration at an inquiry in a subsequent proceeding involving the person or another person."*

[67] It is evident that in terms of subsection (4), SARS is entitled to adduce evidence given by a person at an inquiry at subsequent proceedings, subject only to the qualification that section 57(2) prevents its use in criminal proceedings.

[68] The contentious issue now is whether the word "proceedings" in s 56 (4) is only limited to tax court proceedings as the subsection is anchored in the section titled *"confidentiality of proceedings".*

[69] The admissibility of evidence obtained at an inquiry has been raised in three related cases, but in two different courts. The first, related to Sassin where the claim of the defendants' was that the transcript is inadmissible. The second is in Commissioner for South African Revenue Services v Badenhorst trading as SA Global Trading and/or Global Trading and Others, Commissioner of South African Revenue Services v Vermaak & Others[20]. In Vermaak, SARS obtained a provisional preservation order against Badenhorst and Sassin in terms of section 163 of the TAA. The provisional order was made final against Badenhorst on an unopposed basis, whereupon the matter proceeded against Sassin where the same transcript in issue featured in that case. In Vermaak the court had no difficulty with the admissibility of the transcript, which, when read with Sassin's affidavit, showed him to be an unreliable witness. The question of admissibility was not challenged at all. In the third instance it was an application for leave to appeal the decision in Vermaak. In that matter the court, in dismissing the application, held that:

> *[5] The main reason for the application for leave to appeal is that, according to the respondents, there are conflicting judgments on the legal issues arising in this matter. The court was referred to the judgment of Seegobin J in the KwaZulu Natal Division of the High Court. It is clear from the reading of the judgment of Seegobin J that the court*

[20] (51232/2013, 56971/2013) [2015] ZAGPPHC 1085 (13 October 2015).

was not dealing with a preservation application in that matter as is the case in the present matter. Seegobin J referred the application to trial.

…

(7) I was referred to and I have read paragraph 69 of Seegobin J's judgment carefully and cannot agree that it is a finding in respect of section 50. In any event, as stated above, the section 50 inquiry's admissibility was never argued before this court and was not an issue at any stage.

[70] From the abovementioned it is obvious that the case under appeal proceeded with the admissibility of the transcript and that Sassin was not regarded as binding authority for the proposition that a section 50 transcript is inadmissible in subsequent proceedings.

[71] In the first matter, an application was brought by SARS against, *inter alia*, Sassin and Badenhorst, the latter being described by the court as the main perpetrator of a fraudulent VAT scheme. Badenhorst was insolvent and hence SARS focussed its attention on Sassin. SARS alleged that Sassin had received ill-gotten gains from Badenhorst, which he had then transferred to some of the other respondents. Sassin's liability as a result dependant in part, on whether he had been aware of the fraud against SARS and had been a party to it.

[72] Against this backdrop, the Court in Sassin made a number of findings, namely:

72.1 On the principles pertaining to disputes of fact in motion proceedings, the court found that the dispute raised by Sassin in response to SARS's case could not be considered *'far-fetched and clearly untenable'* and that *viva voce* evidence was thus necessary.

72.2 The court found that it was inappropriate to determine the matter on the papers in favour of the applicant as this contemplated a finding of fraud on the strength only of affidavit evidence. The court found that *"… this application has no prospect of succeeding as it stands."*

72.3 After finding that the application was defective for the above two reasons advanced, the court proceeded to deal with the question of the admissibility of the transcript.

72.4 With regard to the admissibility thereof the court found firstly, that the transcript was inadmissible for want of authentication, secondly that it was incomplete, as only part thereof had been attached to the papers and thirdly, Sassin and his wife were not given the right to cross-examine witnesses at the inquiry.

[73] In addition, the court expressed the view that the TAA did not permit the use of the transcript in those application proceedings and at para 69 held the following:

"I, accordingly, find that there is some substance in the argument advanced on behalf of the respondents to the effect that to permit the use of evidence compelled at a section 50 inquiry in subsequent civil proceedings against any person, would mean that SARS would enjoy an unfair advantage against such

> *person (in this case Mr Sassin) for at least two reasons; the first is that it could compel a person to put up his/her version under oath and to then use that version against him/her; and the second is that it would render the compelled hearsay evidence of other witnesses against such person to be admissible against him/her in the absence of an application under section 3 of the Law of Evidence Amendment Act 45 of 1988."*

[74] On a careful reading of the above-mentioned paragraph, the views expressed by the Court in Sassin were clearly obiter and cannot be regarded as binding authority. In fact, it is unclear why the Court deemed it prudent to deal with the remaining issues raised in the papers as the finding that the application could not be decided on the papers, as viva voce evidence was necessary, should have been the end of the matter.

[75] The Court's approach by attributing a meaning to the word '*proceeding'* that excludes judicial proceedings in court, whether civil or criminal, cannot be supported. Section 56(4) clearly empowers the use of the evidence in a subsequent proceeding, subject to the qualification in section 57(2), which excludes the use of incriminating evidence in criminal proceedings. It will also be at odds with the context and plain wording of the provision itself to exclude judicial proceedings, whether civil or criminal, from the word '*proceeding'*. There is also no textual reason to interpret *"proceeding"* where it appears in section 56(4) as meaning something different from where the plural of the same word appears in in the introductory part of s 56 and in section 57(2).

[76] Furthermore, the issue as discussed in Sassin that the transcripts may render compelled hearsay evidence, in the absence of an application under section 3 of the

Law of Evidence Amendment Act 45 of 1988, admissible does not arise in the present instance. In any event, s 56 (4) specifically allows the evidence given by one person at an inquiry to be used in a subsequent proceeding involving the person or another person. The subsection thus creates a statutory exception to the hearsay rule as s 3 of the Law of Evidence Amendment Act 45 of 1988 makes it application *"subject to the provisions of any other law*".

[77] The argument advanced by the Defendants that by excluding the transcripts in judicial proceedings in court, Sassin has resolved the apparent contradiction, as it is impossible on the one hand for an inquiry to be both private and confidential and on the other to be used in subsequent High Court action proceedings, is unconvincing. The reading in of "confidential" into s 56(4) as done in Sassin is not consistent with the Constitutional Court's reasoning in National Director of Public Prosecutions and Another v Mohamed NO and Others[21], where the CC held that *'words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands'.*

[78] On a plain reading of sections 50 to 58, the manifest purpose of its provisions is to obtain information for subsequent use by SARS. That information may be used, for example, to assess a taxpayer's tax liability. The information may be obtained from anyone to whom the Act applies and by virtue of international treaties, even from those to whom the Act does not directly apply.[22] It makes no sense at all to read the TAA as

[21] 2003 (4) SA 1 (CC) at para [48]

on the one hand giving substantial powers of information gathering, investigation and inquiry and then regard that evidence so obtained at an inquiry as inadmissible in subsequent court proceedings. To do so would undermine SARS ability in carrying out its duty to collect tax.

[79] Moreover, in Part C of Chapter 5 of the TAA, SARS may seek an order to, inter alia, convene an inquiry into the tax affairs of a taxpayer, which include the appointment of the Commissioner, the recording of proceedings at the standard required to be used in a court of law, the right to have legal representation, the power of subpoena, the right to cross-examination etc. The suggestion that the information so obtained is inadmissible, is simply untenable as it would mean that these inquiries would serve little purpose.

[80] Our Higher Courts have dealt with the constitutionality in respect of admissibility of evidence and or transcripts of inquiries in other legislation. There are striking similarities between those provisions and that of the TAA. The decisions in the former is in my view instructive, for instance, sections 417 and 418 of the Companies Act[23] permit the holding of inquiries into the affairs of companies after their winding up. One of these is that, subject to certain provisos, a person testifying at an inquiry is required to answer any question put to him or her at the examination, notwithstanding that the answer might be incriminating him or her.

---

[22] Commissioner, South African Revenue Service v Van Kets 2012 (3) SA 399 (WCC).

[23] Act 61 of 1973

[81] In Ferreira v Levin[24] the Constitutional Court dealt with the constitutionality of s 417(2)(b) and invalidated only that part of section 417(2)(b) of the Companies Act in terms of which any answer given by a person at an inquiry under sections 417 and 418 of the Act could be used in evidence against him or her in subsequent criminal proceedings.

[82] In Bernstein v Bester[25] an application to invalidate sections 417 and 418 in their entirety, including in particular section 417(2)(b) in so far as it pertained to subsequent civil proceedings was also considered by the Constitutional Court. In considering the constitutionality of section 417 and 418, the Constitutional Court held that:

> *"There is accordingly no indication that the use of compelled testimony in civil proceedings is prohibited or held to be unconstitutional in other open and democratic societies based on freedom and equality."*

[83] In Benson, in re: Tait N.O. and Others v Jason and Others[26], the Court with reference to Bernstein at para 13 held that:

> *"The determination of the case makes it clear that the provisions of ss 417 and 418 do not in themselves bring about an unjustifiable infringement of constitutional rights. Whether or not such an infringement is actually occasioned in a given case is dependent on the manner in which the inquiry is conducted. The Constitutional Court's judgment in Bernstein also put paid to the argument*

---

[24] 1996 (1) SA 984 (CC) at para [156]
[25] 1996 (2) SA 751 (CC)
[26], (6832/2011) [2012] ZAWCHC 377 (5 December 2012).

> *that the procedural and evidential advantages that an interrogation in a duly conducted inquiry in terms of those provisions might give a claimant in subsequent proceedings occasion an unjustifiable infringement of the examiner right to equality.*

[84] The question of the extent to which reliance may be placed on admissions made by a witness in the course of being interrogated under section 417 of Companies Act was later addressed by the Supreme Court of Appeal in O'Shea NO v Van Zyl and Others NNO[27]. The question, in particular, was whether such admissions made by a witness could be used against his family trust as there was no evidence that the co-trustees had authorised "O" to speak on their behalf. The court held that the speaker under oath spoke for himself and not for another.

[85] From the abovementioned case law it is evident that the constitutionality of the aforesaid provisions had been established. As there are striking similarities between these provisions and those of the TAA, logic dictates that the evidence obtained in the investigative inquiry as contemplated in s 56 (4) is admissible and SARS may use such evidence given by the First, Second and Third Defendant in the main proceedings, provided that that such evidence is not used in criminal proceedings as contemplated in s 57(2).

---

[27] 2012 (1) SA 90 SCA

[86] Turning to the issue as to the purpose for which the evidence is admissible. In my view the answer must be found in s 2 of the Civil Proceedings Evidence Act no 25 of 1965 which provides as follows:

> "Evidence as to irrelevant matters. - No evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot condone or prove or disprove any point or fact in issue shall be admissible."

[87] On a plain reading of the section, the purpose for which the evidence is admissible is to prove or disprove all relevant fact(s) in issue in the current legal proceedings between the parties. This accords with the views of Arendse and Williams, *Silke on Tax Administration*, 2012 Service 4, 3.17 where they say:

> *"These provisions of the Tax Administration Act do not bar the use of self-incriminating evidence in civil proceedings against the witnesses who gave such evidence, for example, in proceedings in the Tax Court regarding tax liability arising out of a disputed assessment."*

[88] The final issue to consider is, the evidence given by the First, Second and Third Defendant, against whom it is admissible. In my view, the trial Judge in the main proceedings would be best placed to consider that point when exercising his/her discretionary powers in ensuring a fair trial[28]. To do so now would be to determine issues prematurely and may compromise the fairness of the main trial.

---

[28] See Vryenhoek v Powell NO and Others 1996 (1) SA 984 (CC) at para 153.

[89] For all the above-mentioned reasons, it follows that the separated issues fall to be decided in favour of SARS.

[90] In the result the following order is made:

1. The separated issues are decided in favour of SARS with costs, such costs to include the costs of two counsel.

_____

LE GRANGE, J