IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 14944/19

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Applicant

and

J COMPANY Respondent

JUDGMENT ELECTRONICALLY DELIVERED 29 FEBRUARY 2024

KUSEVITSKY J:

Introduction

[1] This is an application in which the Applicant, ("Sars") seeks an order compelling the Respondent ("the taxpayer") to comply with its obligation to respond

fully to requests directed to it in terms of section 46 of the Tax Administration Act, 28 of 2011 ("the TAA").

[2] It is common cause that section 46 notices were sent to the taxpayer requesting certain supporting documents. The taxpayer responded to the said notice and provided Sars with the requested information together with supporting documents, most of which had been heavily redacted. The relief sought in the notice of motion is that those documents be produced in a form free of redaction or alteration.[1]

[3] Prior to the hearing of this matter, the taxpayer brought an interlocutory application for these proceedings to be held in *camera*. That application was granted. That court however in its judgment held that the question as to the continued concealment of the taxpayer's identity should be a matter for this court to decide and that the interim order affording it anonymity was not to be construed as a blanket non-disclosure provision for all tax related matters. The taxpayer thus seeks for its anonymity to be extended to these proceedings and the resultant judgment as it contends that the disclosure of its identity and the nature of the dispute is likely to impair its reputation as a provider of advisory services to its clients.

Background

[1] The Notice of Motion seeks an order:

> "1. Compelling the respondent to comply with its obligation to respond to requests directed to it by SARS in terms of section 46 of the Tax Administration Act 28 of 2011 ("the TAA") on 4 September 2018, 1 October 2018 and 12 November 2018 ("the section 46 requests"), by furnishing to SARS all the information furnished to the applicant by the respondent in purported compliance with the section 46 notice in a form free of redaction or alteration;
> 2. Directing the respondents to pay the costs of this application."

[4] On 4 September 2018, Sars addressed a letter to the taxpayer requesting it, in terms of section 46 of the TAA, ("the first section 46 notice or "the Request")") to provide copies of specified relevant material to Sars. The letter states *inter alia* the following:

> "**REQUEST FOR RELEVANT MATERIAL**
> **YEARS OF ASSESSMENT: 2017-2018**
> **INTRODUCTION**
> 1. You are required to provide copies of the relevant material indicated below in respect of … ("the Company") within 21 business days from the date of this letter. This request is made in terms of section 46 of the Tax Administration Act, 2011.
>
> **RELEVANT MATERIAL REQUESTED**
> 2. Please provide copies of the Company's 2017 and 2018 annual financial statements ("AFS").
> 3. Please explain the nature of each amount comprising the sales and other expenses reflected in the ITR14 returns filed by the Company in respect of its 2017 and 2018 years of assessment. Please also provide supporting documentation of whatever nature that refers to or is related to any such amount, including but not limited to any invoice, legal agreement or related documentation, payment advice, internal or external memorandum or correspondence of any nature, including emails."

[5] The taxpayer responded to this request in a letter dated 28 September 2018. The taxpayer attached the requested annual financial statements to its response. It also annexed an income statement analysis for the 2017 year of assessment, consisting of some 21 items and a similar income statement analysis in respect of the 2018 year of assessment, consisting of some 44 items. Both schedules, whilst reflecting each item of income and expenditure, omitted the identity of the supplier or recipient of the services to which each item related. Supporting invoices relating to the income statement analysis schedules were attached. These invoices were heavily redacted. For instance, on some invoices, the identities of the debtors were redacted, as were the nature of the services rendered, including their VAT numbers.

[6] Redacted documents were likewise attached to the income statement

analysis schedule for 2018. The redactions affect eight invoices for advisory fees and various expenses incurred for professional services rendered in relation to the instructing of attorneys and a consulting service. Similarly, the identity of the attorney dealing with the matter was redacted, as was the subject matter of the professional services rendered. In some instances, the attorney's bank details were also redacted.

[7] There were some complete invoices without redaction, whilst in others, the name of the client was retained, however the nature of the services rendered, the invoice number, their reference details, as well as their bank details, were redacted. In this letter, they did not explain the reason for the redactions - they merely stated, *inter alia*, that it noted that the taxpayer "*has not been notified of any audit by Sars and would therefore technically speaking not have been obliged to respond to the Request at this time*." They also indicated the non-inclusion of certain invoices relating to stationery and bank charges.

[8] Various correspondence ensued requesting compliance. On 1 October 2018, Sars contended that the taxpayer was non-compliant with section 46 and again requested the taxpayer to provide it with the un-redacted copies of all documents within five days. The taxpayer in a letter dated 16 October 2018 replied and stated that it was *inter alia* of the view that the request for relevant material was only in respect of the *taxpayer*, and that the redacted information on the invoices supplied related solely to the identity of the taxpayer's clients and suppliers and the details of services provided by the taxpayer to its clients - in other words, parties other than the taxpayer, whilst the taxpayer is the sole taxpayer in respect of which the Request had been made.

[9] The taxpayer stated further that '*none of the redacted information contemplated in the preceding paragraph has any impact on the administration of any tax Act in relation to the taxpayer and thus does not constitute 'relevant material' for the purposes of Sars administering any tax Act in relation to the the taxpayer as contemplated in section 46(1) of the TAA'*. They concluded, *inter alia*, that all of the relevant information was provided even though the taxpayer was not strictly obliged to provide same and that they maintained that they were fully compliant with section 46(1) of the TAA in so far as the Request is in respect of Sars administering any tax Act in relation to the taxpayer. They also advanced that, to the extent that the relevant material related also to the taxpayer's clients and service providers, that Sars has not complied with the TAA in determining an "*objectively identifiable class of taxpayers"* as required in section 46(1) and section 46(2)(a) of the TAA and that, plainly put, Sars was embarking on a fishing expedition.

[10] On 19 October 2018 Sars replied to the taxpayer's letter of response. It re-iterated *inter alia* that it was of the view that the Request constitutes a valid request for 'relevant material' as contemplated in section 46 of the TAA; that section 1 of the TAA defines 'relevant material' as any information, document or thing that '*in the opinion of Sars'* is foreseeably relevant for the administration of a tax Act and it is the opinion of Sars that is relevant, and not that of the taxpayer nor any other person that is the relevant opinion in determining whether any information, document, or thing is foreseeably relevant for the administration of a tax Act. Sars contended that it considers the material provided in an un-redacted form to be foreseeably relevant for the administration of a tax Act in relation to the taxpayer and/or its clients and

service providers. It says that the use of the phrase *"in respect of [the taxpayer]"* in the Request was not intended to limit the relevance of any material so requested to the tax affairs of the taxpayer, but rather to define the person to whom the Request was addressed. The taxpayer refers to this reply from Sars as the second section 46 notice Request "the second Request".

[11] On 2 November 2018, the taxpayer, through its attorneys of record responded, reiterating its position - the summary of which is the following: Sars' request (i) "*was only in respect of the tax affairs*" of the taxpayer; (ii) the redacted information did not fall within the ambit of the Request, nor did it have a bearing on the taxpayer's tax affairs and thus it has fully complied with its obligations under the TAA; and (iii) to the extent that the correspondence now purports to be in relation to other parties other than the taxpayer, Sars has not complied with the TAA in determining an "*objectively identifiable class of taxpayers*" as required in sections 46(1) and 46(2)(a) and Sars had embarked on an unwarranted fishing expedition.

Submissions by the Applicant

[12] In its founding affidavit, Sars contends that in seeking the un-redacted documentation, it is lawfully exercising its powers in terms of section 46 of the TAA. They require the Respondent to produce certain material "in respect of the taxpayer". They argue that it does not limit the enquiry only to the tax affairs of the Respondent and says that they are entitled to require the taxpayer, or another person to submit relevant material.

[13] Sars contends that there have been various attempts by it to elicit proper compliance with its section 46 notice. It states that the taxpayer is of the view that it has fully complied with Sars' request as it maintains the view that the redacted

information it provided to Sars was in accordance with section 46 of the TAA and that the redaction of certain details did not have an impact on Sars administration of any tax act. They however contend that by responding to the section 46 notice as it did, the taxpayer effectively acknowledged that the material it produced fell within the ambit of the Request and established a reasonable basis for requiring the un-redacted documents merely by having concealed so much of their content. Sars contends that the refusal of the taxpayer to comply with the section 46 notice is untenable and that the taxpayer is not entitled to withhold information or documentation from it, nor to unilaterally delete, and thereby conceal from Sars, information that appears on the documentation.

[14] Sars argues that the section 46 notice is aimed at establishing the nature of the business undertaken by the taxpayer and the parties with whom it transacted such business. They contend that the ascertainment of that information is a matter that falls legitimately within section 46 especially in this case, since how a taxpayer interacts with its clients and service providers, and who those clients and service providers are, is an issue that ostensibly goes to the administration of a tax Act in relation to a taxpayer. Thus, on a proper construction of section 46, a taxpayer cannot *mero motu* decide what information it will provide to Sars or what information is relevant for the administration of tax Acts. That decision, it says, is reserved to Sars in terms of the TAA and it is not for the taxpayer to attempt to perform this function on behalf of Sars. Nothing in section 46 of the TAA requires that prior to Sars making a request thereunder it must first have formed a view that there has been potential non-compliance by the taxpayer receiving the notice or any other taxpayer.

[15] Finally, in relation to the two requests, Sars argues that it is incorrect to say that a clarification or expansion of the target of the request to, in this instance, the taxpayer, its clients and service providers is impermissible as constituting a fishing expedition. They argue that there is no form prescribed for a request under section 46 and that such a request may be issued in any form so long as it is clear that the request is made in terms of section 46. There is however an admission in the founding affidavit that the terms of reference have changed, averring that it is of the view that the taxpayer's 'responses to the section 46 requests 'are insufficient, particularly having regard to the broadened requests contained in the subsequent correspondence'.

Submissions by the Respondent

[16] In its answering affidavit, the taxpayer identifies itself as a private company incorporated in South Africa which procures and provides advice and project management services to clients undertaking various corporate and commercial transactions. It charges a fee to clients for its services, and typically recharges to the client any amounts paid by it to specialist's advisors, including attorneys, engaged on behalf of the client. It contends that it is fully tax compliant; has furnished all returns required of it timeously and have paid all taxes owing to it by the due date as required. It states that it has provided the information as requested of Sars and has, on legal advice provided by its attorneys of record, redacted those parts of the documentation provided which falls outside the 'legitimate ambit of section 46.' Sars contends that it is irrelevant to this application if the taxpayer is a small business which might be fully compliant with tax laws and regulations. None of these considerations prohibit Sars from acting in accordance with its rights and obligations

under the TAA.

[17] The taxpayer also takes issue with the 'threadbare' contents of the founding affidavit, contending that the Applicant has failed to state on what basis it had purportedly formed an opinion that the requested information is 'foreseeably relevant for the administration of a tax Act.' It contends that it is insufficient in an application such as this to merely make the averment that it has formed the opinion that the redacted information is relevant without stating on what reasonable grounds it has formed the relevant opinion. It argues that Sars seem to be of the view that it has no duty to explain to either the taxpayer or to the Court, on what basis it purportedly formed the opinion that the requested information is 'foreseeably relevant for the administration of a tax Act'.

[18] It also argues that the Requests, despite the manner in which it is formulated, is not aimed at obtaining any information which may be relevant to the tax affairs of the taxpayer, instead it is aimed at solely attempting to ascertain who the taxpayer's clients are, what transactions the clients were advised on and in circumstances where Sars has no basis to consider that there has been any potential non-compliance by any such clients. The Requests, they say, therefore amount to nothing more than an open-ended fishing expedition in relation to the taxpayer's clients, which exceed the legitimate bounds of section 46.

[19] The taxpayer submits that a legitimate Request may pertain to the tax affairs of the recipient. It may also pertain to 'material…in respect of taxpayers in an objectively identifiable class of taxpayers'. It argues that the unspecific reference to '*clients and service providers'* of the taxpayer does not meet the requirements of an '*objectively identifiable class of taxpayers*.

[20] The taxpayer finally contends that Sars' case has not remained constant given the content of the two separate Requests. It argues that the first request pertained to 'relevant material indicated below in respect of the taxpayer'. The taxpayer argues that the information requested pertained to the tax affairs of it. It was only in later correspondence that Sars sought a wider field of reference, by contending in its second Request that Sars considered the requested material '*to be foreseeably relevant for the administration of a tax Act in relation to it and/or clients and service providers*."

Relevant statutory framework

[21] Section 46 of the TAA states the following:

> **"46 Request for relevant material**
>
> (1) SARS may, for the purposes of the administration of a tax Act **in relation to a taxpayer,** whether ***identified*** by name or ***otherwise objectively identifiable***, require the taxpayer **or another person to**, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires.
>
> (2) A senior SARS official may require relevant material in terms of subsection (1)-
>
> (a) in respect of **taxpayers in an *objectively identifiable class* of taxpayers;** or
>
> (b) held or kept by a connected person, as referred to in paragraph (d) (i) of the definition of 'connected person' in the Income Tax Act, in relation to the taxpayer, located outside the Republic.
>
> …
>
> (6) Relevant material required by SARS under this section must be referred to in the request with reasonable specificity."

[22] Section 1 of the TAA defines "relevant material" as follows:

"'relevant material' means any information, document or thing that in the opinion of SARS is **foreseeably relevant** for the administration of a tax Act as referred to in section 3."

[23] Section 3 of the TAA reads as follows:

"3. Administration of tax Acts.—

(1) SARS is responsible for the administration of this Act under the control or direction of the Commissioner.

(2) **Administration of a tax Act means** to—

(a) obtain full information in relation to—

(i) anything that may affect the liability of a person for tax in respect of a previous, current or future tax period;

(ii) a taxable event; or

(iii) the obligation of a person (whether personally or on behalf of another person) to comply with a tax Act;

(b) ascertain whether a person has filed or submitted correct returns, information or documents in compliance with the provisions of a tax Act;

(c**) establish the identity of a person for purposes of determining liability for tax;**

(d) determine the liability of a person for tax;

(e) collect tax debts and refund tax overpaid;

(f) investigate whether a tax offence has been committed, and, if so—

(i) to lay criminal charges; and

(ii) to provide the assistance that is reasonably required for the investigation and prosecution of the tax offence;

(g) enforce SARS' powers and duties under a tax Act to ensure that an obligation imposed by or under a tax Act is complied with

(h) perform any other administrative function necessary to carry out the provisions of a tax Act;

(i) give effect to the obligation of the Republic to provide assistance under an international tax agreement; and

(j) give effect to an international tax standard."

Discussion

[24] What is apparent from the founding affidavit is that the disputed invoices all seemingly relate or emanate to or from law firms, or for work being done by, or for,

law firms. It also seems that these invoices which had either been sent to, or received by the taxpayer in relation to these law firms - it was impossible to determine anything other than the date of the invoice and the amount reflected thereon. The identity of the client, the invoice number and the nature of the work undertaken had all been redacted. For illustration, in the 2017 financial schedule, one of the items reveal an invoice sent by a law firm in Windhoek, Namibia to the taxpayer who was billed an amount of N$ 34,500. This amount was apparently paid to a third party, whose identity had been redacted. The invoice number was also redacted, as was the identity of the attorney dealing with the matter. There was also a reference to an attachment to the invoice which had been omitted, rendering the invoice incomplete.

[25] As a starting point, from a reading of section 46, it is clear that a request for relevant material for purposes of administering a tax Act, relates to a *taxpayer*, whether 'identified by name' or "otherwise objectively identifiable". Furthermore, if one has regard to the definition of 'administration of a tax Act' as provided for in section 3 of the TAA, the powers granted to Sars in relation to the establishment of the identity of a person for purposes of determining liability for tax relates to its powers as found in section 3(2)(c) of the TAA. The Administering of a tax Act in section 3 of the TAA also *inter alia* includes obtaining full information regarding anything that may affect the liability of a person for tax; the obligation of a person to pay for tax, to determine the liability of a person to pay tax; to investigate whether a tax offence has been committed; to give effect of the obligation of the Republic to provide assistance under international tax agreements and to give effect to an international tax standard.

[26] The question thus that needs to be answered is whether Sars is entitled to demand, without more, the un-redacted information from the documents already provided and which, as contended by the taxpayer, does not relate to it as the taxpayer but rather to its clients and suppliers - and as a consequence - does not fall within the definition of 'relevant material'. Secondly and in any event, if it is found to be material, then this Court has to ascertain whether there has been non-compliance of the TAA by Sars in determining an 'objectively identifiable class of taxpayers" as required in sections 46(1) and (2)(a) of the TAA and as a result, whether the Request amounts to a so-called "fishing expedition."

[27] I start of with the general principle of interpretation. As was stated in *Commissioner for the South African Revenue Services v Brown*[2], there can be little doubt, having regard to the language used in the light of ordinary rules of grammar and syntax, the context in which the provision appears and the apparent purpose of the Act, that the provisions of section 46 are peremptory. The explicit and unambiguous wording of the section simply does not allow for any other interpretation.

[28] This approach accords with international tax practice and in this regard, I was referred to *Australia & New Zealand Banking Group Ltd v Konza*[3] where it was held:

[2] (561/2016)[2016] ZAECPEHC 17 (5 May 2016) at para 39. See also Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA) at para 18
[3] [2012] FCA 196

> "It is… for the recipient to decide for himself, difficult though the task may be, which of the documents answer the description. If his decision is wrong, he exposes himself to prosecution and penalty. The existence of this hazard is not a sufficient basis for the conclusion that the section requires the Commissioner to give notice in such terms as would enable the recipient on reading it and on examining the documents in his custody or control to determine whether they fall within the ambit of the Commissioner's powers. To so hold would be to impose an impossible burden on the Commissioner. In many, if not most, cases he will be unaware of the contents of the documents of which he seeks production." ("my emphasis")

[29] *Konza* deals with section 264 of the Income Tax Assessment Act 1936 (Cth) ("ITAA") the mirror provision of section 46 of the TAA. In that matter, the Deputy Commissioner issued two notices to Australia and New Zealand Banking Group ("ANZ") requiring it to provide certain information about customers who have or who had accounts with it or any any of its subsidiaries in Vanuatu. ANZ argued, *inter alia*, that the notices were invalid in that if they were to comply with the notices, it would be breaching certain common law confidentiality obligations owed by it to the relevant customers of ANZ Vanuatu, as well, as well as certain secrecy provisions enacted in Vanuatu.

[30] Section 264 is given to the Commissioner to assist the Commissioner in performing the Commissioner's functions and responsibilities under the ITAA. Section 8 of the ITAA makes the Commissioner responsible for the 'general administration' of the ITAA. The Commissioner's functions and responsibilities include the assessment of taxable income of a 'taxpayer'; the assessment of the tax payable on that income; and the collection of the assessed tax. Section 264 (1) confers upon the Commissioner very broad investigatory powers in order for the Commissioner to perform those functions.[4] Referring to the Commissioner's powers

[4] paras 56 – 58 footnotes omitted.

under s 264, Mason J in *Federal Commissioner of Taxation v Australia and New Zealand Banking Group* (1979) 143 CLR 499 at 536 remarked as follows:

> "The strong reasons which inhibit the use of curial processes for the purposes of a "fishing expedition" have no application to the administrative process of assessing a taxpayer to income tax. It is the function of the Commissioner to ascertain the taxpayer's taxable income. To ascertain this he may need to make wide-ranging inquiries, and to make them long before any issue of fact arises between him and the taxpayer. Such an issue will in general, if not always, only arise after the process of assessment has been completed. It is to the process of investigation before assessment that s 264 is principally, if not exclusively, directed." The court confirmed that, like all statutory powers, the power must be used in a bona fide manner and for the purpose for which it was conferred and accordingly, the Commissioner must exercise the statutory power for the purposes of the ITAA, the primary purpose of which is the levy of tax upon taxable income. Furthermore, the Commissioner is permitted to conduct a 'fishing expedition' in the sense of a wide-ranging inquiry, to ascertain a taxpayer's taxable income.[5] This approach was confirmed in a full bench appeal[6] where the court concluded that the Judge at first instance correctly concluded that ANZ had not discharged its onus of establishing that the disclosure of particular information sought by the Notices would involve breach of any non-statutory obligation of confidence owed by ANZ to ANZ Vanuatu or its customers. The court obiter also remarked that any non-statutory duties of confidentiality under the laws of Vanuatu, and the correlative rights of customers are displaced by the requirement to furnish information under s 264(1)(a) of the ITAA."[7] (own emphasis")

[31] The court also held that there was no requirement that a notice under s 264(1)(a) must be limited (expressly or otherwise) to information directly relating to the assessable income of Australian taxpayers. It is sufficient that the Commissioner

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[5] *Konza supra* at para 66

[6] *Australia and New Zealand Banking Group Limited v Konza and Another* [2012] 206 FCAFC, FCR 450. The appeal with regard to the second Notice was upheld for lack of certainty.

[7] *supra* at para 30: "Any non-statutory duties of confidentiality under the law of Vanuatu, and the correlative rights of customers, are displaced by the requirement to furnish the information under s 264(1)(a) of the ITAA 1936. In particular:
(1) Section 264(1) abrogates contractual and equitable obligations of confidentiality that the recipient of the notice might owe to third parties under Australian law: the powers conferred by s 264 are not read down or qualified so as to exclude confidential information: *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 486-490; *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 521-522 (*Smorgon No 2*); *Fieldhouse v Deputy Commissioner of Taxation* (1989) 25 FCR 187 at 208; *May v Commissioner of Taxation* (1999) 92 FCR 152 at [17]. There is no reason to reach a different result where duties of confidence might arise under the law of Vanuatu. (2) Accordingly, any duty of confidentiality under the law of Vanuatu cannot affect the obligation of ANZ to provide information in the GIW to the Commissioner as required by the Notices. A fortiori, the existence of any duty of confidentiality cannot affect the validity of the Notices.

was seeking to ascertain information in relation to persons who may be subject to an Australian tax liability. The fact that some information furnished may not in the end relate to Australian taxpayers does not invalidate the notice[8].

[32] In a domestic context, the Applicant referred to the following passage from LAWSA which states as follows:

> "*It would be impractical for SARS to provide reasons in every request for information as to why the relevant material requested is considered relevant. Although SARS determines what relevant material is required, this does not mean that the taxpayer has no remedies during the audit process. The taxpayer may request SARS to withdraw or amend its decision to request material, pursue the internal administrative complaints resolution process of SARS, approach the Tax Ombud or the Public Protector. Information is the lifeblood of the commissioner's taxpayer audit activity, and the whole rationale of taxation would break down with the burden of taxation falling on the diligent and honest taxpayers if SARS had no effective powers to obtain confidential information about taxpayers who may be negligent or dishonest. Inadequate investigation of tax evaders, or aggressive tax planners who only purport to comply with tax laws, is unfair to taxpayers who are compliant. Allowing this would undermine public confidence in the tax system, and would reduce voluntary compliance by taxpayers, such compliance being an integral feature of an effective tax system*."

[33] In its replying affidavit, Sars also referred to the memorandum on the objects of the then Tax Administration Laws Amendment Bill, 2014 (the precursor to the Tax Administration Laws Amendment Act, 44 2014) which sets out the purpose of the definition of 'relevant material' that was in force at the time Sars issued the section 46 notice to the taxpayer in this matter. It noted that according to literature, the test of what is "foreseeably relevant" follows the following broad grounds, being:

[8] *supra* at para 40

(a) whether at the time of the request there is a reasonable possibility that the material is relevant to the purpose sought;
(b) whether the required material, once provided, actually proves to be relevant is immaterial;

(c) an information request may not be declined in cases where a definitive determination of relevance of the material to an ongoing audit or investigation can only be made following receipt of the material;

(d) there need not be a clear and certain connection between the material and the purpose, but a rational possibility that the material will be relevant to the purpose; and

(e) the approach is to order production first and allow a definite determination to occur later.

[34] If these broad grounds are adopted, then the scope of uncertainty would, in my view, be curtailed. The golden thread which emerges is that, in most cases, Sars does not know what information or documentation there is in order for it to fully discharge its function of assessing a taxpayer's tax liability. It therefore stands to reason that fs Sars does not know, then it requires a mechanism to be able to fulfil its constitutional mandate of fiscus collection in a manner that is open and transparent and within the bounds and scope of its power. There however also has to be a reciprocal obligation on the part of the taxpayer to play its part, since it can hardly be considered fair if a dutiful and law-abiding tax citizen is penalized for its compliance with the tax laws *viz* a *viz* aggressive tax planners with the sole purpose of evading tax laws or simply to avoid tax altogether. As contemplated in the memorandum, it is accepted that information is the lifeblood of a revenue authority's taxpayer audit activity and the whole rationale of taxation would break down and the

whole burden of taxation would fall on diligent and honest taxpayers if a revenue authority had no effective powers to obtain confidential information about taxpayers who may be negligent or dishonest.

[35] Furthermore, with regards to the taxpayers claim that Sars has failed to pass the second hurdle of identifying an 'objectively identifiable class of taxpayer", in my view, this aspect does not need to be considered by me if I find in my judgment that the taxpayer itself and identified by name, is obliged to provide information and documents in an un-redacted form of persons or entities which it deals with and which pertains to it since this may impact on Sars ability to properly assess the taxpayers liability. Even if I am wrong on this score, my view is that, given the fact that the majority of the redacted invoices relate to clients and suppliers of the taxpayer who seem to be in the legal field, I would find that there is sufficient information, notwithstanding the taxpayer's obstructive conduct in redacting the relevant information and concealing same from Sars, in order for the taxpayer to identify the class of taxpayers, i.e. the attorney and law firms, which forms the ambit of Sars' enquiry and to which the notice or request pertains.[9]

[36] Now turning to the Respondent's contention that Sars has not provided the Court with the objective basis on which it formed its opinion. Turning to international authority, in *Chatfield & Co Ltd v Commissioner of Inland Revenue*[10], the court, in a review of a decision by the Commissioner to issue notices to Chatfield to produce certain information, acknowledged the trite legal principle that the discretionary

[9] See fn 8 and compare where a portion of the relief in Konza was upheld on appeal for lack of clarity or certainty on the aspect of 'objectively identifiable class of taxpayers'.
[10] [2017] NZHC 3289; [2018] 2 NZLR 835

power vested in the Commissioner pursuant to section 17[11] is one of considerable potency. It is however, necessary in the public interest. The courts have recognized that extensive powers of inquiry are a fundamental feature of revenue legislation, as information is generally in the hands of taxpayers, who may have an incentive to act secretively. The Commissioner can seek information and documents that alert her to lines of inquiry. It has been recognized that the rationale of taxation would break down, and that the burden of taxation would fall only on diligent and honest taxpayers, if the Commissioner could not obtain information about taxpayers who may be negligent or dishonest in respect of their tax obligations.[12]

[37] In that case however, the initial request for documentation had come from a request by the Korean National Tax Service, who had requested the Commissioner to exchange information relating to New Zealand tax payers. The Commissioner then in turn requested the information from them, the basis for the request being that there was a mandatory requirement for exchange; that the Commissioner has an operational discretion to decide what information she considers necessary or relevant; and how it is to be obtained. One of the taxpayers, Chatfield, requested the Commissioner to disclose all relevant documentation that formed the basis of the notices. The Commissioner failed to produce the documentation or the information even after a request by the court to view the documents, with the understanding and

[11] Section 17 of the Tax Administration Act 1994 (New Zealand) – Information to be furnished on request of Commissioner: (1) Every person (including any officer employed in or in connection with any department of the government or by any public authority, and any other public officer) shall, when required by the Commissioner, furnish any information in a manner acceptable to the Commissioner and produce for inspection any documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Act or for any purpose relating to the administration or enforcement of any matter arising from or connected with any other function lawfully conferred on the Commissioner.
[12] *Chatfield* ibid at para 25

undertakings as to the appropriate confidentiality thereof. Counsel for the Commissioner advised that this proposal had not been acceptable to the Commissioner.

[38] Ultimately, Justice Wylie chastised the Commissioner's conduct saying that, in terms of the papers before her; and the failure of the Commissioner to produce the relevant documentation, stated that she was left with nothing but the say-so of the deponent that he had satisfied himself that the request was in terms of the DTA and New Zealand tax laws[13], and the nature of the information sought by the NTS was consistent with the grounds for the request, and that the information was of a sort which would broadly be expected to be necessary or relevant to any inquiry of the nature indicated in the request.

[39] I refer to the case since the taxpayer in *casu* similarly firstly questioned whether the say-so of Sars was sufficient to justify the relief sought (the subjective test) and secondly, the apparent lack of or 'thread-bare' detail that Sars provided in its application; and the extent to which the subjective element which decision-makers use as a justification for their requests in terms of section 46.

[40] Justice Wylie in *Chatfield* opined that the days when a court will accept an official's simple assertion that a power had been exercised are long over.[14] Referring

[13] The information was sought by the Commissioner pursuant to a request made by the Korean National Tax Service ("NTS") under Art 25 of the Double Taxation Relief (Republic of Korea) order 1983 ("The DTA"). The NTS had requested the Commissioner to exchange the information once it was obtained in New Zealand.
[14] Ibid at para 85

to the case of *Liversidge v Anderson*[15], an old English case where the majority judgment per Viscount Maughan asserted the proposition that the statutory provisions there gave the Secretary of State power to make various orders if he had "*reasonable cause to believe*" and held that, despite the *prima facie* meaning of these words, they might have a different subjective meaning if the thing to be believed was essentially something within the knowledge of the Secretary of State and a matter for his exclusive discretion.

[41] The majority view was ultimately rejected over time (and which progression I have no intention of interrogating in this judgment), suffice to say that the dissent of Lord Atkin, which is now favoured and followed, asserted that the words had only one meaning, and that they had never been used in the sense imputed to them by the majority. He protested against the strained construction put on the words which had the effect of giving an uncontrolled power to the Secretary of State, and denied that the words "*if a man has*" could ever mean "*if a man thinks he has*."[16]

[42] Thus the law as it now stands, if language is objective, the public authority whose decision is impugned will have to be prepared to show that the condition is fulfilled in a way which satisfies the Court. The court ultimately set aside the notices, the reasoning for which, I am of the view, finds application in the judgment of this Court. Wylie J held that an applicant for judicial review bears the burden of proof, on a balance of probabilities, but the evidential burden is relatively low where the facts are within the knowledge of the other party, and particularly where the court has to determine whether the relevant facts on which the exercise of the power in issue

[15] [1941] UKHL; [1942} AC 206 (HL)
[16] ibid at 85

turn, did or did not exist.

[43] In *casu*, the relevant facts are exclusively within the knowledge of the taxpayer and hence, the ability to foreshadow the subjective component, which I will address more fully in due course, has to come to the fore. Wylie J further stated that when the actions of public authorities are in issue, there is an expectation that the public authority defendants will explain themselves and disclose all relevant documents. The defendant authority can be expected to satisfy the court, and if it does not do so, the claimant can, in appropriate cases, get the benefit of the doubt. Similarly, where the facts lie peculiarly within the knowledge of one party, very slight evidence can be sufficient to discharge the burden of proof resting on the opposing party.[17] And this is precisely the crux of this matter. The taxpayer complains on the one hand that Sars has failed to lay a basis for the relief sought and has failed to state on what basis it asserts that the material so concealed is material to a tax Act. However, the information necessary to make such a determination is within the sole knowledge of the taxpayer and consequently, a taxing authority will have very little information at its disposal to make a determination. This brings me to the next inquiry. If a taxpayer then withholds such information, he cannot then assert that the decision-maker could not have applied its mind because of a failure to disclose the reasons for the decision, in this case, the reasons for the issuing of the section 46 notice. Put differently, a party cannot complain of a decision-maker's mere say-so, without more and in the absence of a lawful reason, if that party is the cause of withholding evidence or information necessary for the decision-maker to make that

[17] ibid at para 88

determination. This then brings me to the objective/subjective conundrum.

[44] Mr Janish for the taxpayer submitted that Sars' jurisdiction to exercise its powers under section 46 (1) is contingent upon the existence of three jurisdictional facts; the requirement must be to provide 'relevant material'; the power may only be exercised 'for the purposes of the administration of a tax Act; and the administration of the tax Act must be 'in relation to a taxpayer", which must be "identified by name or be otherwise objectively identifiable." This means that if one of these jurisdictional facts are not present, then the power may not be exercised and any purported exercise of the power would be invalid. I have already made my finding in respect of the latter contention.

[45] The Respondent seems to concede that central to the exercise of Sars powers, is the subjective opinion of Sars to determine what it deems as relevant or 'foreseeably relevant.' And therein lies the problem according to the Respondent. It contends that the words '*in the opinion of Sars*' insulates it from having to do anything more than to state that it has formed the opinion. In reliance for this proposition, I was referred to the case of *Walele v City of Cape Town* [18] which concerned a power for an official in a local municipality to grant planning approvals if he or she 'was satisfied' that the application complied with all legal requirements and that no disqualifying factors were present.[19] The official in that case had approved building plans, but the municipality had provided objective facts in the form of documents - to demonstrate that the official could be or was satisfied that none of

[18] 2008 (6) SA 129 (CC)
[19] ibid at para 54-55

the disqualifying factors that were applicable, was present. However, it had only put up certain documents.

[46] Jafta AJ explained for the Constitutional Court:[20]

> *"There can be no doubt that these documents could not reasonably have satisfied the decision-maker that none of the disqualifying factors would be triggered. None of these documents refers to those factors. If indeed the decision-maker was so satisfied on the basis of these three documents, his satisfaction was not based on reasonable grounds."*[21]

[47] He stated further that: "*The documents fall far short as a basis for forming a rational opinion. Nor does the mere statement by the City to the effect that the decision-maker was satisfied suffice.*"[22]

This is because:[23]

> "In the past, when reasonableness was not taken as a self-standing ground for review, the City's ipse dixit could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker's opinion is challenged on the basis that the subjective precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds."

[48] The Respondent argues that the effect of *Walele* is to make all jurisdictional facts objectively justiciable.[24] No matter the phrasing of a jurisdictional fact, a decision maker's mere assertion that it exists is not enough to make the exercise of

[20] *Id* at para 60.
[21] *Ibid*.
[22] *Ibid*.
[23] *Ibid*.
[24] Hoexter & Penfold at 417-419.

the relevant power lawful.[25] But this is precisely the point that Sars makes and the Respondent, in its reliance on *Walele*, does not even get out of the starting block. The *Walele* judgment is premised on the basis that documents have been provided, which it had in fact been. The decision maker in that case had access to the documents. That is an objective fact. The court held though that whatever documents it had, could not have satisfied the decision-maker to grant the planning approvals and that the decision-maker could not have been satisfied, on the documents so presented, that none of the disqualifying factors were applicable. In *Wingate-Pearse v CSARS*[26], reference was made to Jafta JA in the majority judgment of *Walele* who said in para 60 thereof that since the advent of the constitutional era, more than the decision-makers *ipse dixit* is now required if the subjective prerequisite of his or her being satisfied that a state of affairs exists, is challenged.[27] Meyer J went on to describe in *Wingate-Pearse* that although the words 'is satisfied' used in s 79(1) of the Income Tax Act, and now in s 92 read with s 99(1) and (2) of the Tax Administration Act, confer a subjective discretion on Sars, the court accepts that the discretion is not unfettered, and an objective approach must be adopted to that subjective discretion. Sars therefore must show that its subjective satisfaction was based on reasonable grounds[28].

[49] *Walele* is distinguishable from this matter. In *casu*, the objective facts, i.e. the provision of un-redacted documents, is not even present in order for a decision-maker to satisfy itself that the documents are either 'relevant material', or 'objectively

[25] See also *Wingate-Pearse v Commissioner, SARS* 2019 (6) SA 196 (GJ) in paras [56] to [61].
[26] 2019 (6) SA 196 at 61
[27] Wingate – Pearse ibid at 58
[28] ibid at para 61

identifiable'. But it is not even necessary for me to make this finding in favour of the Applicant. That is because, ultimately, it is the plain language and context of section 46 which guides us to the conclusion that it is the opinion of Sars that is of relevance and not that of the taxpayer. Sars does not even have to reach the aforementioned threshold, the powers afforded to it under section 46 entitles a decision-maker to call for documents that it considers may be relevant. The fact that the Respondent has deemed to conceal a large part of the information contained in the documents, in my view, only strengthens the perception that the attempted concealment might either be nefarious or not be *bona fide*, although I make no pronouncements in this regard.

Conclusion

[50] In its replying affidavit, Sars states that the nature of the taxpayer's business and the parties with whom it conducts business in order to generate taxable income and claim allowable deductions is a matter by its very nature relevant to the tax affairs of the company. I am in agreement with this contention. I am also in agreement with the contention that it is not a pre-requisite or incumbent on Sars to first determine that the tax affairs of a company are not in order prior to making a request. That is not the purpose of section 46. I am also in agreement that nothing prohibits Sars from broadening its scope of material or information sought, since the very purpose of section 46, which falls within scope of chapter 5, deals with the ambit of information gathering and the like. It would be an absurd proposition to restrict a fiscus gathering institution to one request in terms of section 46 for information sought and for it later to be precluded from issuing further notices in the event that information initially provided yields more questions or necessitates further investigation or inquiry.

[51] In my view, Sars has a duty to ensure that income is not derived from illegal sources or from illegal activities. Sars is a statutory legal body whose function it is to collect taxes for the fiscus. Thus if a taxpayer conducts business with persons or entities outside of the South African borders, different tax considerations would be applicable and Sars would be entitled to make enquiries in order to establish if those provisions would be triggered.

[52] The request in my view is not unreasonable as a corollary consequence would be that the client would have a reciprocal duty or obligation to declare their income or expenses as the case may be, *viz. a viz.* the taxpayer in their financial statements. It may '*foreseeably'* also be relevant to a criminal investigation if it is being prohibited from assessing the material in order to exercise that discretion. It is not for a respondent to say that the applicant has failed to include the grounds or reasons to prove that the documents may be '*foreseeably relevant'* when the respondent obstructs the very production of the material in order for the decision-maker to make a decision.

[53] There is also the obligation of Sars in the administration of a tax Act to be able to see a reciprocal entry – if needs be – in the receiving persons bank account. In fact, one has to question, even if the taxpayer's intention is to protect its clients and suppliers, what the reason would be, for example, from withholding the information relating to the attorney who rendered the legal service to the client. Attorneys are first and foremost officers of the court and one can hardly imagine a situation where work done by them, in their professional capacity and unless declared privileged,

would be rendered outside the reach of the taxing authority and not susceptible to scrutiny by either a legislative functionary, or a court of law for that matter. What services could possibly be rendered to warrant a blanket protection or prohibition of disclosure. In any event, the taxpayer has not claimed a right to legal privilege as was the case in the matter of *A Company v C: SARS* 2014 (4) SA 549 (WCC). In that case, the applicants had applied for a declaratory order that certain content of two fee notes rendered by their attorneys to one of the applicant's was properly subject to the claim of legal advice privilege and on Sars insistence on being provided with unexpurgated copies of the documents concerned in terms of section 46 of the TAA.[29] Copies of the invoices in that matter had been supplied to Sars, but the applicants had redacted the content thereof that was subject to the alleged claim of privilege.

[54] In *casu*, the taxpayer does not claim privilege for the basis of its refusal to provide un-redacted versions of the documents. Its opposition is rather on the basis that a legitimate request from Sars may pertain to the tax affairs of the *recipient* and may also pertain to material in respect of taxpayers in an 'objectively identifiable class of taxpayers' and the unspecified reference to "clients and service providers" of the taxpayer does not meet the requirements of an "objectively identifiable class of taxpayers". It is thus unnecessary for me to consider the aspect of privilege, but I refer to it because the *obiter* commentary on attorney fee notes and privileged communications are instructive. It says the following:

> "Fee notes are not created for the purpose of the giving of advice and are not ordinarily of a character that would justify it being said of them that they were directly related to the

[29] *A Company* at para 3

> performance of the attorney's professional duties as legal adviser to the client. They are rather communications by a lawyer to his or her client for the purpose of obtaining payment for professional services rendered; they relate to recoupment for the performance of professional mandates already completed, rather than to the execution of the mandates themselves." [30] ("own emphasis")

[55] That case is distinguishable[31] from the present for the reason that I have alluded to in the first instance. But also secondly, the information redacted in *casu*, are the names of the clients or suppliers, invoice numbers, reference names or numbers, and even attorney names. It could hardly be argued that this would amount to privilege, even if that argument had been made.

[56] I lastly have to deal with the request by the taxpayer to extend its anonymity to this judgment. The Applicant argues that there is no reason why the principle of open justice should yield to the respondent's desire to have its name kept from the public record. The Applicant argues that it and taxpayers litigate regularly in all of the Courts including the Constitutional Court. While there may be situations justifying a departure from the default position, any departure is an exception and must be justified. This was authoritatively expressed in *City of Cape Town v South African National Roads Authority Limited and Others* [32]. In SANRAL, the court stated that while there may be situations justifying a departure from that default position, the interests of children, State Security or even commercial confidentiality, any departure

[30] A Company ibid at para 30
[31] in part because there the court distinguished a fee note which includes content which merely records, without disclosing their substance, or if the fee note refers to the advice only in terms that describe that it was given, without disclosing its substance, then the mere reference would be sufficient to invest the relevant content of an otherwise unprivileged document or communication with legal advice privilege. The position would be different if the fee note set out the substance of the advice, or contained sufficient particularity of its substance to constitute secondary evidence of the substance of the advice. See para 31 *ibid*
[32] SANRAL 2015 (3) SA 386 (SCA) at para [12] to [22]

must be justified. The Respondent has not really providing any persuading arguments to its continued anonymity. The high water mark is the contention that there is no reason for this court to depart from that which was already ordered in the interim application. I am not swayed by this argument, since quite plainly that court has left that determination to these proceedings. But that notwithstanding, I am of the view that given the nature of the information sought, that there may be a potential for commercial prejudice if I am to lift the veil, so to speak, of the taxpayer's identity. In any event, this Court's ruling would have no impact on the tax payer per se since tax legislation ensures the privacy and secrecy of taxpayers' confidential information within the realm of its administration.

[57] For all of the reasons advanced, Sars application must succeed. Accordingly, the following order is made:

ORDER:

1. The relief sought in prayers 1 and 2 of the notice of motion is granted.
2. The Respondent taxpayer is ordered to provide Sars with the un-redacted documents as referred to in paragraph 1 of the notice of motion within 21 (twenty-one days) of the date of this judgment.

D.S KUSEVITSKY

JUDGE OF THE WESTERN CAPE HIGH COURT

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