REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	**NOT** REPORTABLE
(2)	**NOT** OF INTEREST TO OTHER JUDGES

CASE NUMBER: A2023-077887

DATE: 27th August 2024

In the matter between:

T A L T Appellant

and

THE COMMISSIONER FOR
THE SOUTH AFRICAN REVENUE SERVICES Respondent

Neutral Citation: *T A L T v CSARS (A2023-077887)* **[2024] ZAGPJHC ---** (27 August 2024)

Coram: Adams, Wilson *et* Wanless JJ

Heard: 28 February 2024

Further Submissions: 24 April 2024

Delivered: 27 August 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 15:00 on 27 August 2024.

Summary: Appeal from the Tax Court – whether the taxpayer impermissibly raised new grounds of objection to additional assessment – the prescription of

SARS's entitlement to raise additional assessment – raised by the taxpayer in its objection letter – further ground of objection relates to the so-called 'merits' of the additional assessment – taxpayer makes out a case that it is not liable to pay tax on the additional income which took into account an alleged capital gain – Tax Court Rule 32(3) – a new ground of appeal may be included in rule 32 statement by taxpayer – 'unless it constitutes a ground of objection against a part or amount of the disputed assessment not objected to under rule 7' – Court found disputed assessment objected to under Rule 7 – as contemplated in Rule 32(3) – the determination in terms of which the disputed 'taxable capital gain' was included in the taxpayer's taxable income – and the basis for the objection, or the ground of objection, was prescription – there is only one amount in dispute, that being the amount included in the taxpayer's taxable income giving rise to the tax liability flowing therefrom –

The fact that the taxpayer objected on the ground of 'prescription' does not mean that it did not object to the inclusion of the said sum in its taxable income – precisely what it objected to, albeit on the grounds of 'prescription' –

Rule 32(3) therefore engaged –

Appeal upheld with costs.

ORDER

On appeal from: The Tax Court, Johannesburg (Bam J sitting as Court of first instance):

(1) The appeal of the taxpayer against the order of the Tax Court dated 6 July 2023 is upheld with costs.

(2) The order of the Tax Court is set aside and in its place is substituted the following: -

'(a) It is directed that the tax appeal in respect of the 2012 year of assessment under case number IT 25162, be consolidated with the tax appeals between the same parties in respect of the 2013 to 2016 years of assessment under case numbers IT 24870 and IT 25166.

(b) It is hereby directed that the applicant is entitled to rely, in respect of its 2012 year assessment, on the grounds of appeal pleaded in paragraphs 10 to 53 of its rule 32 statement filed in the underlying appeal proceedings for the consolidated 2013 to 2016 years of assessment, to the extent that these are applicable to the 2012 year of assessment.'

(3) The respondent (SARS) shall pay the taxpayer's costs of the appeal, such costs to include the costs consequent upon the employment of Senior Counsel (where so employed).

JUDGMENT

Adams J (Wilson *et* Wanless JJ concurring):

[1]. The appellant ('taxpayer') is an *inter vivos* discretionary trust. Its tax return for the 2012 tax period, in which the taxable capital gain was disclosed as nil, was assessed by the respondent (SARS) on 31 January 2013. On 6 March 2018, based on certain tax audit findings, SARS issued the Taxpayer with an additional tax assessment in respect of the 2012 tax year of assessment, in terms of which

a capital gain of R47 329 834 was included in the taxpayer's taxable income for that year. The aforesaid additional assessment was in fact included in a 'finalisation of audit' letter from SARS advising the taxpayer of composite adjustments in respect of the tax period from 2010 to 2016. On 6 September 2018 the taxpayer objected to the aforesaid 2012 additional assessment 'only to the extent of the understatement penalty of R1 707 531 levied on the amount of R8 537 637'. On 10 October 2018 SARS disallowed the aforesaid objection, as well as objections relating to the additional assessments for the 2013 to 2015 tax years of assessment.

[2]. On 9 November 2018 the Taxpayer 'noted' an appeal to the Tax Court, as provided for in terms of s 107(1) of the Tax Administration Act[1] (TAA), against SARS's decision to disallow the aforesaid objection. The appeal was stated to be in respect of all of the grounds of objection set out in the objection letter of 6 September 2018. On 28 June 2019 the taxpayer delivered a further letter of objection to the 2012 additional assessment, 'on the ground that the period of limitations for the issuance of an additional assessment had expired prior to 6 March 2018, having regard to the provisions of s 99(2)(a) of the TAA'. The taxpayer was therefore of the view that the purported additional assessment dated 6 March 2018 is invalid. This latter objection was also disallowed by SARS on 4 September 2019. And on 18 September 2019 the taxpayer appealed to the Tax Court this disallowance of the objection.

[3]. In its statement of grounds of assessment in terms of Rule 31 of the Rules promulgated under s 103 of the TAA ('Tax Court Rules'), SARS, in the Tax Court appeal under case number IT25162, averred that the taxpayer impermissibly raised further grounds of objection to the assessment in addition to disputing the imposition of the understatement penalty (raised in the 6 September 2018 objection letter) and the prescription issue raised by the taxpayer in the 28 June 2019 objection letter. That further ground of objection relates to the so-called 'merits' or the 'capital' of the additional assessment in terms of which the taxpayer

[1] Tax Administration Act 28 of 2011.

endeavours to make out a case that it is not liable to pay tax on the additional income which took into account the alleged capital gain of R47 329 834.

[4]. Before the Tax Court this preliminary issue was argued as an interlocutory matter. In that regard, the Tax Court was called upon to decide whether the taxpayer was entitled to raise an objection to the additional assessment on the ground that it was not liable to pay additional tax on the basis of taxable income, which included the aforesaid sum of R47 329 834. These were 'new' grounds of appeal in that the taxpayer did not rely thereon in its objection to the disputed income tax assessment for its 2012 year of assessment, which objection was filed in accordance with the procedure set out in Chapter 9 of the TAA, that being the procedure leading up to the underlying dispute between the parties being referred to the Tax Court in respect of the 2012 year of assessment.

[5]. On 6 July 2023, the Tax Court (per Bam J) found in favour of SARS on that aspect of the matter and, in the process, dismissed the taxpayer's application in terms of s 117 (3) of the TAA, read with Tax Court Rule 51(2), in which it sought *inter alia* an order directing that the taxpayer is entitled to rely, in respect of its 2012 year assessment, on the grounds of appeal in effect relating to the 'merits' or the 'capital' of the additional assessment.

[6]. It is that judgment and the order of the Tax Court which the taxpayer appeals against to this Full Court. In issue in this appeal is whether the taxpayer is or should be permitted to raise in its appeal these so-called 'new' grounds of appeal not raised in its objection letters. The aforegoing issue is to be decided against the factual backdrop of the matter and the facts, most of which are common cause and alluded to *supra*. Importantly, it is common cause between the parties that in its objection letters the taxpayer, in relation to the 2012 additional assessment, raised objections only in respect of the understatement penalties and the fact that, according to them, SARS was time-barred from raising an additional assessment three years after the first assessment was issued.

[7]. Rule 32 of the Tax Court Rules governs what a taxpayer's Rule 32 statement must, and what it may, contain. This is the only pleading filed by a taxpayer in a Tax Court appeal, and it is filed after SARS has filed its Rule 31 statement of the grounds of assessment and opposing the appeal.

[8]. Rule 32(3) was amended with effect from 10 March 2023, namely after the launch of the interlocutory application but before the judgment in the court *a quo*. It is therefore appropriate to quote Rule 32(3) both prior to and subsequent to its amendment with effect from 10 March 2023.

[9]. Prior to its amendment with effect from 10 March 2023, rule 32(3) provided as follows:

'The appellant may not include in the statement a ground of appeal that constitutes a new ground of objection against a part or amount of the disputed assessment not objected to under rule 7.'

[10]. The amended Rule 32(3) now reads as follows:

'The appellant may include in the statement a new ground of appeal unless it constitutes a ground of objection against a part or amount of the disputed assessment not objected to under rule 7.'

[11]. The amended Rule 32(3) finds application in this matter. That is so for the simple reason that rule 66(2) of the new Rules – contained in Government Notice R3146 and promulgated in Government Gazette No 48188 dated 10 March 2023, with effect from 10 March 2023 – provides that:

'[An] interlocutory application or application in a procedural matter taken or instituted under the previous rules but not completed by the commencement date of these rules, must be continued and concluded under these rules as if taken or instituted under these rules.'

[12]. Back to the facts in the matter.

[13]. It bears emphasising that, when the taxpayer objected to the additional assessment made by SARS in respect of its 2012 year of assessment in accordance with Rule 7, its ground of objection was that the period of limitations for the issuance of assessments had expired in terms of section 99(1)(a) of the TAA, and that the additional assessment made by SARS in respect of its 2012

year of assessment, in terms of which an amount of R47 329 834 was included in its taxable income as a 'taxable capital gain' in terms of section 26A of the Income Tax Act[2], as amended ('the Act'), was therefore invalid. A more colloquial way of expressing this is to say that the taxpayer's ground of objection was that its original assessment for the 2012 year of assessment had 'become prescribed' due to expiry of the relevant three-year period laid down in section 99(1)(a) of the TAA.

[14]. In its Rule 32 statement, the taxpayer relied on the new ground of appeal in relation to the 2012 year of assessment, which it considered it was entitled to do in terms of the previous Rule 32(3) of the Tax Court Rules. This was also done in the taxpayer's notice of appeal in terms of Rule 10(3).

[15]. The SARS additional assessment in dispute in relation to the 2012 year of assessment was, and is, based on the very same factual and legal grounds as those relied on by SARS in relation to the disputed 2013 to 2016 additional assessments. In addition, SARS relied for the 2012 assessment on the ground that it was entitled to disregard prescription in terms of section 99(2)(a) of the TAA, that being on the basis of fraud, misrepresentation or non-disclosure of material facts on the part of the taxpayer.

[16]. When the taxpayer delivered its Rule 32 statement in respect of all of the aforesaid appeals, it accentuated the fact that it relied on the new grounds of appeal in respect of the 2012 year of assessment. The new ground of appeal is the same as the grounds of appeal relied on in respect of the 2013 to 2016 years of assessment, which new ground will, if this appeal succeeds, be argued at the same hearing as the appeals in relation to the 2013 to 2016 years of assessment.

[17]. In a Rule 33 statement of reply to the Rule 32 statement of the ground of appeal, SARS took issue with the taxpayer's reliance on the new grounds of appeal in respect of the 2012 year of assessment, maintaining that it was

[2] Income Tax Act 58 of 1962.

prohibited from doing so in terms of Rule 32(3) prior to its amendment on 10 March 2023. On this basis SARS contended in the Rule 33 statement, and in the interlocutory application before the Tax Court, that the new ground was not in issue before the Tax Court in relation to the 2012 year of assessment.

[18]. Each of the additional assessments in dispute, namely those relating to the 2012, 2013, 2014, 2015 and 2016 years of assessment, concern the taxation of a 'taxable capital gain' – a single, globular amount, one amount for each year of assessment – derived by the taxpayer due to its vested rights thereto, and distributed by the taxpayer in the same year of assessment to its discretionary beneficiaries.

[19]. The main issue between the parties in the underlying appeal is whether, *inter alia* in accordance with the so-called 'conduit-pipe principle', the taxable capital gain in a single amount for each year of assessment is taxable in the hands of the taxpayer or whether it is taxable in the hands of the taxpayer's beneficiaries to whom it was distributed by the taxpayer during the same year of assessment as that in which it arose. In other words, so the contention on behalf of the taxpayer goes, the dispute is not as to the taxability of the taxable capital gain, as such, but rather as to the identity of the 'person' (as defined) in whose hands the gain is taxable. On SARS's version, the taxpayer is the person taxable thereon.

[20]. In respect of the 2012 year of assessment, so the taxpayer's contention continues, the one and only amount of the taxable capital gain is the amount of R47 329 834, and, apart from the prescription issue, the issue is whether, on SARS's version, this amount ought to have been subjected to tax in the hands of the taxpayer, or whether it ought to have been taken into account by the taxpayer's beneficiaries to whom it was awarded and distributed by the taxpayer in the same year of assessment.

[21]. It is the case of the taxpayer that, when it objected to the 2012 additional assessment, it objected to the disputed part or specific amount of the

assessment, that being the determination in terms of which a 'taxable capital gain' of R47 329 834 was included in its taxable income along with the concomitant tax liability arising therefrom. The taxpayer argues that there were in fact three parts or amounts assessed, namely: (1) the amount of R47 329 834, which determination is disputed by the taxpayer, and the new ground relates exclusively to this amount; (2) an amount arising from the disposal of the taxpayer's own assets, in relation to which there is no dispute between the parties; and (3) the imposition of penalties and interest by SARS, which have been objected to and appealed against separately. The only relevant determination in dispute, so the submissions on this aspect of the matter is concluded, is the inclusion of a taxable capital gain of R47 329 834 in the taxpayer's taxable income and the resulting tax thereon. And the ground of the objection was that the period of limitations for the issuance of assessments had expired. In other words, the taxpayer objected to the inclusion in its taxable income of a 'taxable capital gain' of R47 329 834 and the tax arising therefrom in respect of its 2012 additional assessment on the ground that the original assessment made by SARS had become prescribed due to expiry of the relevant three-year period. SARS had therefore been precluded from raising the 2012 additional assessment.

[22]. I agree with these submissions. The determination objected to was the inclusion in the taxpayer's taxable income of the amount of a 'taxable capital gain' of R47 329 834 and the tax liability arising therefrom. It was therefore the determination of this amount of a tax liability to which the taxpayer objected. The simple point is that the part of the disputed 2012 assessment objected to under Rule 7 – as contemplated in Rule 32(3) – was the determination in terms of which the disputed 'taxable capital gain' of R47 329 834 was included in the taxpayer's taxable income along with the resulting tax liability, and the basis for the objection, or the ground of objection, was prescription.

[23]. As submitted by the taxpayer, the additional assessment in dispute was 'the determination of the amount of a tax liability by way of assessment by SARS'. This necessarily involves the determination of both taxable income and the tax liability that results therefrom once the applicable rate of tax is applied. It therefore

follows, in my view, that the taxpayer's objection was, necessarily, an objection to the amount of the taxable income, being the amount of R47 329 834, giving rise to the tax liability determined by SARS and, as a matter of course, the tax liability resulting therefrom.

[24]. Moreover, it follows that the amount of the disputed assessment objected to under Rule 7 – as contemplated in Rule 32(3) – was the amount of R47 329 834 determined by SARS as being the 'taxable capital gain' to be included in the taxpayer's taxable income and giving rise to the tax liability flowing therefrom. It is so, as argued by the taxpayer, that there is only one amount in dispute, that being the amount of R47 329 834 included in the taxpayer's taxable income giving rise to the tax liability flowing therefrom.

[25]. In sum, the fact that the taxpayer objected to the inclusion of the said amount in its taxable income on the ground of 'prescription' does not mean that it did not object to the inclusion of the said sum in its taxable income. That is precisely what it objected to, albeit on the grounds of 'prescription'. I therefore conclude that the new ground of appeal does not constitute a ground of objection against an amount of the disputed assessment not objected to under Rule 7, as contemplated in Rule 32(3).

[26]. I do not accept the contention on behalf of SARS, which was accepted by the Tax Court, that the taxpayer did not object to the capital amount of R47 329 834 in respect of the 2012 year of assessment. Neither do I accept the submission that the taxpayer did not raise '[an] objection on the merits' for the 2012 tax year. This submission was clearly a reference to the 'conduit-pipe principle' not having been raised in relation to the capital amount. However, this does not mean that the objection based on prescription did not challenge the inclusion of the capital amount of R47 329 834 in the taxpayer's taxable income in the additional assessment.

[27]. Rule 32(3) makes it perfectly clear that a taxpayer may rely on a new ground unless such ground constitutes a ground of objection <u>against a part or</u>

amount of the disputed assessment not objected to under Rule 7. In my view, it cannot be said with any conviction that the new ground of objection, based on the 'conduit-pipe principle', constitutes a ground of objection against a part or an amount not objected to under Rule 7. The simple point is that the new ground relied on by the taxpayer relates to the same part (the capital gain) and the same amount (R47 329 834) of the disputed assessment objected to. The new ground is nothing more than an additional ground in support of the same part and the same amount of the disputed assessment objected to under Rule 7.

[28]. This conclusion accords with what Keightley J held in *ITC 1912 80 SATC 417*. At para 36 Keightley J had the following to say:

'As I see it, on a proper examination of the grounds, the change in approach adopted by M under its new grounds of appeal essentially involves a re-packaging, for want of a better word, of the legal basis on which M now contends that the losses suffered in executing the scheme amounted to capital losses for M. It is correct in its submission that the two objections are alternative grounds, or reasons, for recognising the very same capital losses that M contends it suffered. The original objection was based on M being the sole beneficiary of the Trust, while the new grounds place reliance on M funding the purchase of the shares and bearing, both legally and *de facto*, the losses suffered in the process. In substance, it is the same issue that is before the Court on appeal: whether the capital losses arising from the employee share option scheme are capital losses which are deductible by M for capital gains tax purposes.'

[29]. I am furthermore bolstered in this conclusion by the findings of the SCA in *Commissioner, South African Revenue Service v Free State Development Corporation*[3], which dealt with an amendment to the respondent's pleading. At para 40, the SCA held as follows: -

'In the present case, the taxpayer raised the objection in its notice of objection that the payment received was not linked to a supply, but relied upon an incorrect legal conclusion in claiming that it was zero rated. It is thus distinguishable from *Computek*. In seeking to amend its grounds of appeal, the taxpayer claimed that the transactions were not subject to VAT because the transactions did not involve a supply. The basis of the objection and the claim for zero rating were similarly based on the nature of the transactions and the fact that the payments were not linked to an actual supply of goods and services. The amended grounds were thus clearly foreshadowed

[3] *Commissioner, South African Revenue Service v Free State Development Corporation* [2023] ZASCA 84 (31 May 2023).

in the objection. The nature of the taxpayer's objection to the whole of SARS's assessment has always been (and continues to be) the legality of imposing a VAT liability on the transactions under consideration.'

[30]. Importantly, at para 47, the SCA held as follows:

'In appropriate circumstances, a court will carefully scrutinise the substance of a particular transactions to establish its true nature. The amendment will permit the true issue between the parties to be ventilated. [*Pienaar Brothers (Pty) Ltd v Commissioner, South African Revenue Service* [2017] 4 All SA 175 (GP) para 41]. This basic principle of tax law is underscored by section 143(1) of the TAA, which provides that SARS has a duty "to assess and collect tax according to the laws enacted by Parliament and not to forgo a tax which is properly chargeable and payable." This principle must also relate to the corollary – SARS's obligation not to levy taxes which are not payable in terms of the law. This could be the situation if the amendment was not granted.' (Emphasis added).

[31]. To borrow from *Free State Development Corporation*, if the taxpayer is not allowed the relief sought in the Tax Court, the true issue between the parties would not be ventilated – that being whether the taxpayer's taxable income for the 2012 tax year of assessment included the capital gain of R47 million. What is more is that a situation may arise in which SARS, contrary to its legal obligation, would levy taxes which are not payable in terms of the law. In any event, in my view, on a proper interpretation and having regard to the plain wording of Rule 32(3), the taxpayer ought to be allowed to rely on the new grounds in relation to the additional assessment for its 2012 year of assessment.

[32]. For all of these reasons, the appeal to the Full Court should succeed.

[33]. There is a further reason why, in my view, the appeal should be upheld and that relates to the *ratio decidendi* in the very recent judgment by the Constitutional Court in *Capitec Bank Limited v Commissioner for the South African Revenue Service*[4], which was handed down on 12 April 2024 – after the date on which the appeal was heard by the Full Court. This judgment was brought to the attention of the court by the appellant's legal representatives on 24 April

[4] *Capitec Bank Limited v Commissioner for the South African Revenue Service* 2024 JDR 1531 (CC).

2024. In that matter one of the issues which was required to be considered by the Constitutional Court is whether the taxpayer was entitled to raise the question of apportionment, having not pleaded this in the Tax Court. This question was answered in the affirmative by the CC, which held as follows at paras 93 and 94: -

'[93] Capitec, having lodged an objection, in terms of rule 7, against the whole of the disallowance, appealed to the Tax Court against the whole of the dismissal of its objection. Capitec's failure to advance an alternative objection against only a part of the disallowance would not have precluded it from including this alternative in its appeal to the Tax Court. What the Tax Court Rules preclude is the raising of a new ground that constitutes a new objection against a part or amount of a disputed assessment that was not objected to under rule 7. Since Capitec had objected to the whole of the disputed assessment, the alternative would not have involved an attack on a part of the assessment to which objection had not previously been taken.

[94] Capitec should nevertheless have pleaded the alternative, but the question is whether it should now be penalised for its failure to have done so. This judgment concludes that SARS should not have disallowed the objection in full. SARS, as an organ of state subject to the Constitution, should not seek to exact tax which is not due and payable.' (Emphasis added)

[34]. The principle iterated by this judgment is simply that a 'new' ground of objection should be allowed if not to do so could result in SARS exacting tax which is not due to it.

[35]. As for costs, same should be awarded to the taxpayer for the simple reason that SARS, in refusing to accept that the taxpayer is entitled to rely on the new grounds of appeal, acted unreasonably.

Order

[36]. Accordingly, the following order is made: -

(1) The appeal of the taxpayer against the order of the Tax Court dated 6 July 2023 is upheld with costs.

(2) The order of the Tax Court is set aside and in its place is substituted the following: -

'(a) It is directed that the tax appeal in respect of the 2012 year of assessment under case number IT 25162, be consolidated with the tax appeals between the same parties in

respect of the 2013 to 2016 years of assessment under case numbers IT 24870 and IT 25166.

(b) It is hereby directed that the applicant is entitled to rely, in respect of its 2012 year assessment, on the grounds of appeal pleaded in paragraphs 10 to 53 of its rule 32 statement filed in the underlying appeal proceedings for the consolidated 2013 to 2016 years of assessment, to the extent that these are applicable to the 2012 year of assessment.'

(3) The respondent (SARS) shall pay the taxpayer's costs of the appeal, such costs to include the costs consequent upon the employment of Senior Counsel (where so employed).

L R ADAMS
Judge of the High Court,
Gauteng Division, Johannesburg

HEARD ON:	28th February 2024
FURTHER SUBMISSIONS RECEIVED BY THE FULL COURT ON:	24th April 2024
JUDGMENT DATE:	27th August 2024
FOR THE APPELLANT	T Emslie SC
INSTRUCTED BY:	Werksmans, Sandton
FOR THE RESPONDENT:	N K Nxumalo
INSTRUCTED BY:	Madiba Motsai Masitenyane & Githiri Inc, Rivonia