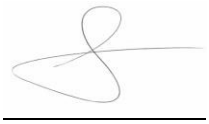
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: A2024-024644

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



SIGNATURE **DATE** **13 March 2026**

In the matter between:

BASF SOUTH AFRICA PTY (LTD) **APPELLANT**

And

COMMISIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE: **RESPONDENT**

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be uploaded on Caselines. The date for hand down is deemed to be on **13 March 2026**

JUDGMENT

Mali J, (Dippenaar J et Meersingh AJ) concurring

Introduction

[1] This appeal turns on two issues. First, whether the Tax Court, Johannesburg was correct in granting an order allowing the respondent, Commissioner for the South African Revenue Service (SARS) leave to amend its grounds of assessment (Rule 31 statement) in terms of Rule 31 (3) of the Rules of the Tax Court. Secondly whether the Tax Court was correct in refusing the appellant, BASF South Africa (SA) (Pty) Ltd (BASF) leave to make two amendments to its Rule 32 statement of grounds of appeal.

[2] The appellant, BASF, is a manufacturer and distributor of catalysts which are manufactured amongst other materials. Platinum Group Metals (PGMS) purchased from its connected company BASF Metals GmbH incorporated in Switzerland (BASF Zug). The PGMs are liquified and mixed with other chemicals for them to be applied as coating to the substrate that form the catalysts. The catalysts are sold to South African customers referred to as original equipment manufacturers (OEMs). The appellant's principal activity is the manufacture, import and sale of chemical products. It has a catalyst division which is involved in the manufacture and sale of catalysts for use in the abatement of exhaust emissions from motor vehicles.

[3] The parties are embroiled in a Tax Appeal in a matter concerning additional assessments raised by the respondent in a transfer pricing transaction governed by section 31 (2) of the Income Tax Act, 58 of 1962 (ITA), as it was in 2011. The section provides as follows:

"Where any supply of goods or services has been effected-

(a) between- (1) (aa) a resident; and (bb) any other person who is not a resident; (b) between those persons who are connected persons in relation to one another, and (c) at a price which is either - less than the

price which such goods or services might have been expected to fetch if the parties to the transaction had been independent persons dealing at arm's length (such price being the arm's length price); or

(ii) greater than the arm's length price, the Commissioner may ... in the determination of the taxable income of either the acquiror or supplier, adjust the consideration in respect of the transaction to reflect an arm's length price for the goods or services".

[4] Section 31 is an anti-avoidance measure, seeking to counter situations where multinational enterprises utilise non-arm's length transactions to shift profits. Section 31 as it read in 2011 was only concerned with whether the prices paid for goods and services between related entities were above or below an arm's length price.

[5] The Respondent also raised that the judgment of the Tax court and orders were not appealable because they were interlocutory orders. The parties were requested to file submissions on appealability. We first deal with appealability.

Appealability

[6] The submission on behalf of the Respondent was that the orders are not appealable because they are interlocutory orders with no final effect. The submissions on behalf of appellant were that the orders are appealable as the appeal is based on whether Tax Court had the competency to make the orders and whether the amendments were permissible in terms of R31(3) and R32(3) respectively.

[7] In substantiation it was argued that the Tax Court had no competency to grant the order in favour of the Respondent because SARS' amendments offended the provisions of Rule 31 (1) of the Tax Court Rules (IT Rules). On the other hand, the Tax Court had competency to grant the order in favour of the appellant because the amendments sought by the appellant did not offend Rule 32 (3) of the IT Rules. In support of the contention the appellant submitted what is impugned is the competence of the Tax Court to order

amendments, which competence stems from the parties ‘s entitlement under the Rules of the Tax Court.

[8] Rule 31 (3) pertains to whether the amendments are permissible in the case of the respondent's amendment of its Rule 31 statement) and Rule 32(3) (in the case of the appellant's amendment of its Rule 32 statement). The Tax Court's competence to order the amendments therefore flows from the parties' competence to make them under the Rules.

[9] According to the Respondent the decisions constitute interlocutory applications as contemplated in section 117 (3) of TAA which provides that the Tax Court may hear and decide an interlocutory application or an application in a procedural matter relating to a dispute under this Chapter as provided for in the ‘rules’. The chapter referred to is Chapter 9 of TAA.
Section 129 falls under chapter 9 and provides as follows:

“In the case of an assessment or “decision” under appeal or an application in a procedural matter referred to in s 117 (3), the tax court may
(a) confirm the assessment or “decision”,

(b) order the assessment or “decision” to be altered;

(c) refer the assessment back to SARS for further examination and assessment; or

(d) make an appropriate order in a procedural matter.”

[10] Interlocutory orders are decisions made by the Tax Court as in (a) above and further the order is a decision in a procedural matter as in (d) above. Furthermore, an amendment is a procedural matter catered for under Rule 52 (7) which provides that a party seeking an amendment of a statement under rule 35, may apply to the Tax Court under this part for an appropriate order, including an order concerning a postponement of the hearing. The Tax Court is empowered to grant amendment sought in terms of Rule 35. Of significance is a difference made by the TAA between procedural matters and interlocutory matters. A procedural matter determines how the main matter should proceed or issues to be determined in the main hearing. It

governs how a lawsuit or case is conducted, with the goal of ensuring that justice is administered fairly and efficiently.

[11] Both parties amongst others rely on *Commissioner for SARS v Free State Development Corporation (Free State)* [1] . The Respondent refers to paragraph which states:

"…5 The order deals with the granting of an amendment. Ordinarily, this would be a purely interlocutory order, which does not dispose of any issue in the main appeal. In Macsteel Tube and Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles (Mac Steel) this Court held that:

'It is true that the refusal of an amendment may have a final and definitive effect because a party may be precluded from leading evidence at the trial in respect of the aspects which were to be introduced by the amendment of the pleadings. However, the granting of an amendment does not, without more, have that effect. Ordinarily, an order granting leave to amend is an interlocutory order which is not final and definitive of the rights of the parties." ***[added insertion]***

[12] The SCA in the paragraph referred to above was not ruling or passing a judgment on the appealability; rather it was stating what it could be in the ordinary sense and referred to *Macsteel*. There is no blanket approach on the question of appealability of interlocutory orders. A court faced with the question of appealability as in the present case must engage on an exercise whether the order /s are purely interlocutory and do not dispose any issue in the main appeal. If it disposes of the issue in the main appeal, it is appealable because it has final effect.

[13] In the present instance, if the orders granted by the Tax Court are not appealable, the pleadings complained about would get to the main appeal whilst the appellant does not agree with the manner of pleading. In the view of this court the pleadings will have a final effect. The appellant will be

[1] [2023] ZASCA 84

expected to answer to the assessment which it alleges is a novation on legal and factual grounds. This will be prejudice to the appellant if it would be required to deal, in the tax appeal, with the additional benchmarking studies and the MNE Group Synergies ground, when the Respondent is not permitted to rely on them as a matter of principle and they are not properly issues in dispute.

[14] The Respondent's counter argument that the appellant will have an opportunity to deal with the issues raised in Rule 31 (3) in evidence cannot pass muster because the respondent would be the first to raise that the appellant did not plead to the issues at the relevant time, i.e at the pleading stage. The court of first instance will not have time to alter the decision as held in paragraph 6 of *Free State* as follows:

The right to appeal a decision of the Tax Court falls under s 133(1) of the TAA, which provides that '[t]he taxpayer or SARS may in the manner provided for in this Act appeal against a decision of the tax court under sections 129 and 130'. It is trite that, in the ordinary course, to be considered appealable, the order or decision must be 'final in effect; not susceptible of alteration by the court of first instance; definitive of the rights of the parties, and, the order must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings'

[15] To the above the SCA referred to the case of *Zweni v Minister of Police*[2]*.* The appellant referred to paragraph 11 of *Free State*, wherein the SCA dealt with the questions of competence as follows:

the Tax Court's order "is appealable because it concerns the Tax Court's powers to grant the order which it did. SARS contends that such powers were lacking in terms of the Legislation and the Rules of the Tax Court. Questions of competence are always treated as having a final effect as a lack of competence would vitiate the decision"

[16] The appellant's submissions are on all fours with the above. The appellant complains that if the amendment sought by the respondent offended Rule

[2] 1993 (1) SA 523 (A)

31 (3) then it was not competent for the Tax Court to grant it. On the other hand, the Tax Court erred in refusing the appellant's amendments whilst it was competent for it to grant the amendments. Furthermore, at paragraph 44 of *Free State* the following was held:

> *"Applications for amendments seeking to retract incorrectly admitted legal consequences are normally granted by our courts (even on appeal), for 'the law would be prejudiced if cases were to be decided on what parties might, in ignorance, have agreed the law to be'. A court is not even obliged to consider prejudice to the other side in such circumstances. In Potters Mill it was held that:*
>
> *'Where a plaintiff alleges in a pleading that a particular law governs the case, whereas that law may not, an admission by a defendant that the law referred to governs the case does not make it so. What the law is has always been a matter for the court to determine, and it is well established that mistakes about the law which the parties make are not binding on a court. "*

[17] The appellant's complaint in part is that the respondent is changing the law. The amendment granted to the Respondent pertains to what the appellant believes is a change of legal grounds (Section 31 of ITA) by the Respondent. The SCA had another opportunity to decide on the appealability of the decisions of the Tax Court. In *Commissioner for the South African Revenue Service v Virgin Mobile South Africa (Pty) Ltd*[3] it was held:

> *"[8] Section 133 (1) addresses the issue of appealability in respect of decisions of the tax court: a taxpayer or SARS may appeal against 'a decision of the tax court under ss 129 and 130'. Section 130 has no relevance this appeal. The question is thus whether the dismissal of an application in terms of rule 30 of the Uniform Rules is a decision as contemplated in section 129 (2) of the TAA.*
>
> *[9] Section 129 (2) (d) gives the tax court the power to make appropriate orders in procedural matters relating to disputes. The taxpayer's appeal*

[3] 2025 (5) SA 427 (SCA) paras 8 -9

against Sars' additional assessment was a dispute under ch 9 of the TAA. Was the rule 30 application filed by the taxpayer a procedural matter relating to that dispute? If so, the decision the tax court is appealable. …"

[18] Although Rule 30 in the abovementioned case is in the Uniform Rules of Court, of importance it is a Rule meant to facilitate the hearing of the main matter, therefore Tax Court rules are also designed for the same purposes. Having regard to the above the decisions of the Tax Court in relation to procedural matters are appealable.

[19] Furthermore, an amendment is a procedural matter catered for under Rule 52 (7) which provides that a party seeking an amendment of a statement under rule 35, may apply to the Tax Court under this part for an appropriate order, including an order concerning a postponement of the hearing. The Tax Court is empowered to grant an amendment sought in terms of Rule 35. Of significance is a difference made by the TAA between procedural matters and interlocutory matters. A procedural matter determines how the main matter should proceed or issues to be determined in the main hearing. It governs how a lawsuit or case is conducted, with the goal of ensuring that justice is administered fairly and efficiently.

[20] The respondent's reliance on *Wingate Pearse v Commissioner for the South African Revenue Service*[4] is misplaced. It is distinguishable and dealt with issues pertaining to the onus of proof and the duty to lead evidence first. Those issues are purely interlocutory.

[21] Having regard to the above it is found that the orders of the Tax Court are appealable.

The basis of the appeal

[22] The first issue is whether the amendment of the Respondent's grounds of assessment (Rule31) in the amended statement constitutes novation as

[4] 2017 (1) SA 542 (SCA)

provided for in Rule 31 (3). If it does, then it was not competent for the Tax Court to grant same.

[23] The second issue is whether the Tax Court ‘s refusal of amendments proposed by the Appellant when it had competency to do so was correct either because the amendments did not fall within the limits or fell outside of what a taxpayer may include in its Rule 32 (3) statement (grounds of appeal)

[24] Rule 31 (3) provides:

"SARS may include in the statement a new ground of assessment or basis for the partial allowance or disallowance of the objection unless

it constitutes a novation of the whole of the factual or legal basis of the disputed assessment, or which requires the issue of a revised assessment".

[25] Rule 31 (3) is a prohibitor. SARS is not allowed to include a new ground if it changes or introduces the whole of legal basis or facts. Rule 32 (3) provides:

“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 disputed assessment not objected to under rule 7. [added underlining]

Summary of facts

[26] The Respondent conducted an audit on the appellant and found that the Appellant’s purchase of PGM's from a related party, BASF Zug, in the manufacture and distribution of catalysts was not at arm's length. It drew this conclusion after conducting a functional and comparability analysis to determine whether an arm's length consideration was paid for the purchase of PGM's for the manufacturing and distribution of catalysts to Original Equipment Manufacturers) OEM’s. In conducting the comparability analysis, SARS employed methods recommended by Organisation for Economic Co-operation and Development (OECD).

[27] The Respondent applied the Transactional Net Margin Method ("TNMM") with full cost mark-up ("FCMU") profit level indicator to reflect an arm's length price in respect of the tested transaction and to then adjust the appellant's taxable income for the 2011 tax year. The principle underlying the TNMM methodology is that, as a general principle, entities that participate in similar commercial endeavours (such as manufacturing similar products) in similar markets should enjoy similar profit margins. The application of the TNMM method involves the establishment of a benchmark range of profitability for comparable independent third parties, through a benchmarking study. The actual profitability of the tested taxpayer is then compared to this benchmark.

[28] A material inconsistency would be indicative of the taxpayer engaging in non-arm's length transactions with connected persons (although there may be another explanation, as the OECD cautions), justifying the making of an adjustment. Moreover, the benchmark study provides a basis for the quantum of any adjustment to be made to the taxpayer's taxable income, such adjustment to take place in the manner contemplated in section 31(2).

[29] The Respondent’s comparison of FCMU realised by comparable companies to the appellant reflected that for the financial years 2009 the appellant achieved a three-year weighted average FCMU of (0.60%) which fell below the minimum of the range of the comparable set of companies for the same period. Such comparison also showed that the Appellant achieved a FCMU of (1.00%) for the financial year 2011, which fell between the 10 minimum and lower quartiles of the range of the comparable set of companies for such period.

[30] The FCMU results achieved by the Appellant for the distribution of self-manufactured catalysts, for the financial year 2011 accordingly demonstrated that the transactions between the appellant and BASF Zug were not at arm's length. The consideration paid by the appellant in respect of the purchases of the PGMs from BASF Zug, and whether that was at arm's length, was determined by assessing the consideration realised by the Appellant after the manufacturing of the catalyst and the sale thereof to

OEMs. The respondent also evaluated the Appellant's total cost base incurred in acquiring the PGMs, other raw materials, manufacturing and distributing the catalysts, for purposes of determining the arm's length nature of the mark-up achieved by the Appellant.

[31] On the above basis, on 11 January 2016 SARS consequently issued an additional assessment and made an adjustment to the Appellant's taxable income for the 2011 year of assessment because the Respondent did not consider that the purchase price of the PGM's from BASF Zug, paid by BASF ZA, for the manufacturing and sale of catalytic converters to independent OEM's reflected an arm's length price.

[32] The Appellant objected to the additional assessment on 5 May 2016, challenging the Respondent's computation of arm's 'length' consideration. The Appellant's objection was that the price paid to Zug was arm's length prices. The Appellant's complaint was that SARS did not factor the use of high value input material in the Appellant's cost base in the computation. Ultimately, the Respondent disallowed the appellant's objection on 29 July 2016, because the Appellant did not provide any persuasive evidence for the selection of any point in the range, as it did not test the arm's length nature of the tested transaction, in terms of paragraph 11.4.7 of Practice Note No. 7. The Respondent adjusted the taxable income of the Appellant for the 2011 year of assessment by increasing the FCMU reflected by BASF for the 2011 year of assessment to the median of the arm's length inter-quartile range achieved by the comparable companies.

[33] The Appellant filed a notice of appeal and disputed that the amount determined by the Respondent (according to the TNMM, with FMCU profit level indicator) represented the arm's length prices for the relevant purchases of PGM's. The Respondent delivered a Rule 31 Statement of grounds of assessment in respect of the 2011 year of assessment on 24 July 2018.

[34] The matter proceeded in the Tax Court. On 24 July 2018, the Respondent filed a Rule 31 Statement in respect of the Appellant's 2011 year of assessment and relied on the grounds of assessment as set out in the letter

of audit findings. Therein, it sets out its conclusion that the tested transaction was not at arm's length together with the analysis which it undertook to arrive at such conclusion.

[35] In response thereto, the Appellant filed its Rule 32 Statement and set out its grounds of appeal. In its Rule 32 Statement, the Appellant inter alia raised new grounds of appeal and contended that:

The Respondent failed to have regard to the OECD Guidelines by failing to take proper account of the extraordinary increase in the price of rare earth minerals ("Rare Earths") which the appellant was required to absorb in the 2011 year and which had a material negative impact on its operating margins; and included MNE Synergies adjustment

[36] During the preparation of the appeal, the Respondent had to address the appellant's complaint pertaining to the transfer pricing analysis, as referred to earlier. It sourced an independent study from Dr Fügemann who conducted his own benchmarking study which resulted in three benchmarking studies. Dr Fugemann's study involved the identification of third-party companies that use high-value input material, such as PGM's and other precious metals, in their manufacturing process which should be included in their base cost. In determining an arm's length price, Dr Fügemann also considered the effect of group synergies. The Respondent also mandated Dr Fugemann to consider the approach suggested in the appellant's Rule 32 statement. In the conclusion of his report, Dr Fügemann agreed with the Respondent in that the Appellant's remuneration achieved in respect of the 2011 year of assessment does not adhere to the arm's length principle.

Arguments

[37] Appellant's arguments were that the Respondent's amendments sought to introduce new and different transfer pricing adjustments (in the alternative to the actual assessment, and on the premise that the Respondent fails to defend it) based on three entirely new benchmarking studies, as well as an independent purported adjustment based on a

factual premise (the "MNE Group Synergies" ground) which had nothing to do with the benchmarking studies and played no role in the additional assessment.

[38] The three new benchmarking studies and the MNE Group Synergies ground novate the legal and factual basis of the additional assessment, because they abandon in its entirety the original benchmarking study (on which the assessment was fundamentally premised).

[39] Furthermore, the Appellant submitted that the companies with which it was compared were in fact properly comparable but denied that the comparability analysis and selection of the TNMM was in accordance with, or permitted by, section 31(2). The arm's length nature of the purchase of PGMs from BASF Zug could properly be determined by reference to the consideration realised from the sale of catalysts to OEMs, save that the pass- through cost of PGMs to the OEMs was in fact effected at an arm’s length. It submitted that the comparability analysis, even if competent in principle, was improperly carried out for different reasons.

[40] The TNMM was an inappropriate method for the Respondent to use as the affected supplies involved the sale of PGM's, which are widely traded commodities in respect of which market prices can be readily ascertained, and which prices are largely not dependent on the negotiating positions of the parties to each transaction. The market prices of PGMs thus represent external comparable uncontrolled transactions and the Comparable Uncontrolled Transaction (CUP) method ought to have been adopted. Application of the CUP would have resulted in no adjustment to the consideration being warranted or required. TNMM was improperly applied, even if the TNMM was an appropriate methodology for SARS to have utilised. The way it was applied was flawed in at least the following respects:

[41] First, the Respondent failed to treat the cost of PGMs used in the manufacture of catalysts as a pass-through cost, notwithstanding that such treatment is in accordance with standard industry practice and is reinforced by, inter alia, the agreement between the Appellant and General Motors

("GM") in respect of which GM provides PGMs to the Appellant as free issue in the manufacture of catalysts, so that the cost of such PGMs is not charged to GM and the Appellant makes no margin on them; (in the case of OEMs) had negotiated the acquisition of PGMs at pass-through costs.

[42] Second, the Respondent identified "comparable entities" for purposes of applying the TNMM that were not in fact comparable with the Appellant. The Appellant compared entities involved in the manufacture of automotive parts other than catalytic converters. The latter are distinguishable from automotive parts in general by, inter alia, the use of high-value raw materials such as PGMs in their manufacture, the cost of which is not typically subject to mark-up as part of the sale price.

[43] The Respondent's arguments were that, in addition to the benchmark study that was conducted during the audit process SARS has, through an independent firm of experts (Dr Fugemann's report), conducted an additional benchmark study to identify companies that are comparable to the Appellant i.e. manufacturers that operate in industries that require high value raw materials in their cost base and which use such materials in their manufacturing.

[44] Reliance on additional material to corroborate an assessment does not on its own mean that an assessment has been changed or that the Respondent now relies on new factual or legal basis. In support of the use of other benchmarking sets, the Respondent referred to the 2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (July 2010) ("2010 OECD Guidelines") (and the further versions published in 2017 and 2022). Accordingly, a range of figures may result when more than one method is applied to evaluate a controlled transaction. Nevertheless, each separate range potentially could be used to define an acceptable range of arm's length figures.

[45] The Respondent argued that once the amendment is granted, the appellant would have the right to make consequential amendments to its statement of ground of Appeal and lead any evidence to meet the

comparable benchmark assessment conducted by Dr Fugemann and its experts are at liberty.

[46] The Respondent ‘s further contention was that the Appellant would be entitled to place all the necessary information before the Tax Court, including additional information that comes to light after the audit process since the hearing of the Tax Appeal is a hearing *de novo.* The Tax Court has wide powers to confirm, vary or remit an assessment to the Respondent for reassessment.

[47] Another submission made on behalf of the Respondent was that consideration of MNE Group Synergies does not constitute a new methodology or a different assessment. Group Synergies were dealt with as part of determining an arm’s length price and also to show that there is no pass through of PGMs as contended by the Appellant, as the Appellant must be remunerated for its role in the manufacturing process.

DISCUSSION

[48] The first question to be asked is what the legal and factual basis in Rule 31 are as compared to the legal and factual basis submitted in Rule 31 (3). The legal basis should be found in section 31 (2). That section is clear that the only item to be adjusted is “consideration.” The Respondent does not dispute that its Rule 31 (3) sought to include MNE Synergies adjustment. The operative mechanism for adjustment is confined to the “consideration” in respect of the affected transaction. Where the actual consideration deviates from the arm’s length consideration, the statute deems the consideration to be the arm’s length amount. Consequently, any adjustment to the taxpayer’s taxable income must flow from a characterisation or recalibration of the consideration itself. The statute does not, in its 2011 iteration, permit a separate or additional adjustment for items such as “synergies” or other economic benefits that are not directly reflected in the price or consideration for the transaction.

[49] The Respondent does not dispute that its amended Rule 31 statement sought to include an MNE Synergies adjustment or adjusted the

calculations based on MNE Synergies. Rule 31(3) limits what the respondent may include in a Rule 31 statement. It provides:

"SARS may include in the statement a new ground of assessment or basis for the partial allowance or disallowance of the objection unless it constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment".

Interpretation

[50] As established in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[5], interpretation requires a unitary consideration of text, context and purpose and must also consider the circumstances surrounding the creation of the provision, and the material known to those responsible for its drafting.

[51] Building on Endumeni, in Capitec *Bank Holdings v Coral Lagoon Investments 194 (Pty) Ltd*[6] it was held that the triad of text, context, and purpose should not be applied mechanically. Instead, interpretation involves understanding the relationship between the words used, the concepts they express, and the provision's place within the broader legal framework. The starting point remains the language of the provision.

[52] Insofar as the legal basis of the additional assessment is concerned, the Respondent relied on the application of section 31(2) of the Income Tax Act 58 of 1962, as it read in 2011. The language of the section is that the adjustment applies on *"consideration"* and nothing else. To apply the adjustment on other things not appearing in the language of the provision like MNE group synergies is a novation of the legal basis. There is no basis for such an adjustment on the language of section 31(2) as it read in 2011.

[53] The term *"consideration"* must be given its ordinary meaning within the context of the tested transaction. It refers to the price paid or value given. It does not, without clear legislative direction, extend to collateral

[5] *[2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.*

[6] *[2021] ZASCA 99, 2022 (1) SA 100 (SCA) para 25*

economic concepts such as group synergies. The Respondent ’s attempt to introduce such an adjustment was therefore legally incompetent and fell to be disregarded.

[54] Secondly, the facts alleged in the Rule 31 statement are straightforward: a single benchmarking study was undertaken and used as the factual basis for the assessment. However, in its amendment of its rule 31 statement, the Respondent brought three new benchmarks, thus changing the factual basis on which SARS exercised its discretion to make the actual transfer pricing adjustment. The introduction of entirely new benchmarking studies, relying on different data sets and different comparables, constitutes a material alteration of the factual foundation upon which the assessment was originally based and upon which the Respondent initially chose to plead. This is not a refinement or a clarification; it is a fundamental change of case.

[55] The Tax Court appears to have given weight to the argument that the additional benchmarking studies were obtained in response to comparability concerns first raised in the taxpayer’s Rule 32 statement. Both the notice of objection and the Rule 33 statement make it clear that the issue of comparability was already expressly raised in the notice of objection. The Respondent chose not to address these objections at the time and did not revise its assessment. It cannot now rely on the absence of those objections in the Rule 32 statement to justify its position when those same concerns were fully articulated in the objection. A taxpayer is entitled to assume that when it objects on specific grounds, and the Respondent does not amend the assessment, the dispute will be adjudicated because of the facts and grounds that gave rise to the assessment.

[56] The Respondent was not entitled to leave to amend because what it sought to introduce in its amended Rule 31(3) statement was not a mere amplification of its existing case, but a novation—an entirely new case based on new facts and new legal contentions. This is an exercise

prohibited by Rule 31(3) of the Tax Court Rules. The Rules of this Court, and of the Tax Court, are designed to ensure that disputes are defined with clarity and that neither party is taken by surprise. To permit the Respondent, at a late stage in the proceedings, to jettison the factual basis of its own assessment and replace it with a new one would be manifestly unfair to the taxpayer and contrary to the proper administration of justice.

[57] The Tax Court in its judgment did not address the issue or the impact of MNE synergies at all. It seems as if the Tax Court placed a premium on the importance of Dr Fugemann's report without segmenting the basis of section 32 of the ITA. While expert evidence, such as that of Dr Fugemann, is valuable in transfer pricing disputes, it cannot supplant the plain language of the statute. The Tax Court appears to have conflated the expert's views on economic theory with the legal question of what the statute permits. Section 31(2) permits an adjustment to consideration; it does not permit a separate adjustment for MNE synergies. The failure to segment this analysis, and to address the statutory basis for the synergy adjustment, constitutes a material misdirection.

[58] Considering the above, we find that the Tax Court erred in its conclusion. The purported introduction of a claim for MNE Synergies was ultra vires the provisions of section 31(2) of the IT Act and fell to be rejected. Furthermore, the Respondent attempted to fundamentally alter the factual basis of its case by introducing three new benchmarking studies in its amended Rule 31(3) statement. This was procedurally irregular and should not have been countenanced by the Tax Court. The dispute ought to have been determined on the facts as they stood in the Rule 31 statement, or, if the Respondent sought to change its case, it should have been required to do so properly and at a much earlier stage, with due regard to the prejudice to the Appellant.

Rule 32 (3) appeal

[59] The Appellant further appealed against the decision of the Tax Court in refusing its amendment to introduce two issues out of five it had brought in

terms of Rule 32 (3). In essence those two issues were: firstly, the failure by the Respondent to take into account the two amounts of R27 million and R49 m totaling to R77 million in computing the Appellant 's earnings before interest and tax (EBIT), thus resulting in the assessment of R114 *157,077.00* million. According to the Appellant, had these amounts been included, the Appellant's profitability would be higher, its position on the FCMU benchmark range would change, and the transfer pricing adjustment would be materially reduced. These amounts form the composition of the R114 *157,077.00* million assessment. They are not additional and neither separable from the objected amount.

[60] Secondly, the Appellant wanted to introduce the compensation it received for holding PGMS, for OEMS in the form surcharge levies. By introduction of the compensation through the levies, it was bringing a new ground an exercise which is not prohibited by Rule 32 (3).

[61] The Tax Court refused the amendment on the basis that the contention was raised for the first time on appeal and was not foreshadowed in the taxpayer's notice of objection.

[62] Rule 32 (3) provides that *"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".*

[63] Rule 7 (2) (b) is relevant for the purposes of this appeal, and it provides that:

"A taxpayer who lodges an objection to an assessment must (b) set out the grounds of the objection in detail including— (i) specifying the part or specific amount of the disputed assessment objected to; (ii) specifying which of the grounds of assessment are disputed; and (iii) submitting the documents required to substantiate the grounds of objection that the taxpayer has not previously delivered to the Respondent for purposes of the disputed assessment; .."

[64] What were the grounds advanced in the objection? The following extracts from the objection are relevant:

"The prices at which the Appellant purchased the PGMs from BASF Zug were equal to the arm's length prices, as referred to in section 31(2) "The prices at which the Appellant sold the PGMs to the OEMs [its customers] were equal to the prices for which the Appellant purchased the PGMs from BASF Zug. In addition, the Appellant was compensated by the OEMs for the use of its working capital to make payment to BASF- Zug, including interest on (sic) such capital.

*The Appellant denies that the Relevant Purchases [the purchases of PGMs from BASF Zug] were at prices which were not the arm's length prices for such supplies. BASF SA denies tha****t the amount determined by SARS, as referred to in paragraph 10.3 above [a reference to the R114,157,077.00]*** *as determined by the TNMM method with a FCMU, i.e.: the methodology used by SARS], represented arm's length prices for the Relevant Purchases,"* [added emphasis].

The Appellant accordingly denies that the Commissioner was entitled to adjust the consideration in respect of the Relevant Purchases in terms of section 31(1) by the amount of the purported adjustment, or at all.

"On the contrary, the Commissioner (or SARS on his behalf) ... purported to determine the EBIT of the alleged comparable companies from the manufacture and distribution of self- manufactured catalysts and to determine the EBIT of BASF SA relating to the sale or manufacture and sale of catalysts on the basis of the median or the interquartile range achieved by such companies.

In light of what is stated above, it is not necessary for BASF SA to traverse each and every allegation made by SARS in the Audit Findings Letter, the Assessment Letter and the Reasons Letter. The failure to deny any of the allegations made by SARS in these letters must not be construed as an admission of the correctness thereof. BASF will deal in due course with such allegations to the extent necessary or relevant."

[65] What are the grounds advanced in the amendment of the Rule 32 notice in the appeal?

*"…. the Appellant seeks the Respondent's consent to amend its Rule 32 statement in the following respects: 1. By adding the following sentence to the end of paragraph 12: *Moreover, the sales of PGMs by the Appellant occurred at prices agreed to by the OEMs to whom the PGMs were supplied.*

By inserting the following in paragraph 13 thereof after "The market prices of PGMs": "and the prices agreed to by the OEMs to which the PGMs were supplied" 3. By amending paragraph 15.1 thereof to read as follows:

The Respondent incorrectly calculated the FCMU of the Appellant's catalyst division. In particular, and without derogating from the generality of that allegation, the Respondent failed to:

include income of R27,342,842.00, such amount representing trade financing surcharges the Appellant levied on its customers in respect of certain PGMs used in the manufacture of automotive catalysts by the Appellant's catalyst division, and the net amounts charged to customers pursuant to the monthly reconciliation of actual and contracted PGM prices; and include income of R49,231,289, such amount comprising:

R4,936,177 relating to the proceeds of sale of completed catalysts not manufactured by the Appellant; R33,760,954.00 relating to net foreign exchange differences in favour of the Appellant in respect of the sale of catalysts from its manufacturing business; R5,738,024.00 relating to income received due to price corrections to products-supplied to an OEM (Ford); and R4,796,134.00 relating to the reversal of a provision for a "productivity" price reduction to be made to an OEM, which provision was made in the 2010 tax year.

By adding the following new paragraph 30.7 "Moreover and in any event, the prices paid by the Appellant for the supply of PGMs to it were the same prices agreed to by the OEMs to whom the PGMs were supplied and the

price agreed, by the OEMs therefore also represented a CUP against which to compare the Affected Supplies.

By inserting the following in paragraph 31.2.4 after "on any given day": and the prices agreed to by the OEMs for the supply of PGMs to them

By inserting the following at the end of paragraph: and is in any event compensated for through a surcharge to the OEM or an agreed entitlement to retain a certain quantity of PGMs from the pool of PGMs held by the Appellant for the OEM". By inserting the following in paragraph after "the market price or PGR", including the price actually negotiated with the OEMs to wherein." PGMs were supplied,"

[66] Regarding the compensation for holding PGMS on behalf of OEMS, the Appellant in the grounds of objection mentioned: "*BASF SA was compensated by the OEMs for the use of its working capital to make payment to BASF- Zug, including interest on (sic) such capital*".

[67] The amendment sought to expand on the method used (being surcharges and that the prices were agreed upon between the parties). The Tax Court's conclusion in paragraph 32 is as follows:

"This too is a novel claim. It was not raised in the rule 7 objection statement, and there is no other allegation or averment in the rule 7 statement to which it could be connected. It is entirely a new case."

[68] With respect the Appellant made it clear in the objection that it was compensated by OEMS. There is clearly a connection between what BASF SA sought to introduce in Rule 32 (3) and what is contained in the objection.

[69] With regards to the amount of R77 Million, the Tax Court in paragraph 31 held: *"…..This averment was not made at all in the rule 7 objection statement. All that was said there was that the Commissioner incorrectly calculated the FCMU of BASF's catalyst division."*

Discussion

[70] It seems as if the Tax Court wanted to see the amount of R77 Million mentioned separately from the amount of R114 *157,077.00* Million. The amount of R77 million is linked to the incorrect calculation of the FCMU. It

has always been BASF SA's case that the prices were at arm's length, thus one had to apply the TNMM method which comprised the calculation of FCMU.

[71] Properly understood the identification of the amount or part of the assessment disputed is entirely separate from the grounds advanced in support of the dispute. A taxpayer who has objected to the whole of an adjustment is not confined to the grounds set out in its notice of objection; it may advance new or alternative grounds in its Rule 32 statement or thereafter, provided it does not thereby seek to dispute an amount or part previously uncontested. Herein, the amount has been identified as R114 *157,077.00* Million, but Rule 32 (3) permits a new ground supporting the challenge of the correctness of that amount. It does not have to be the exact words mentioned in the objection, of importance is that the argument/ ground is linked to the disputed assessment.

[72] The question is whether the amendment the appellant sought to introduce concerned a part of the assessment the appellant had previously objected to. The appellant had objected to the entire transfer pricing adjustment of R114,157,077 and to the interest levied. The proposed amendment concerns errors in the calculation of the quantum of that very adjustment. The adjustment was wholly disputed; the amendment does not seek to challenge any part or amount that was acquiesced to in the objection.

[73] The taxpayer's right to raise new grounds of appeal is circumscribed not by the novelty of the ground, but by whether the ground constitutes an objection to a part or amount of the assessment that was not objected to in terms of Rule 7. This was the explicit holding of the Court in *ITC 1912*[7],. It

[7] ITC 1912 80 SATC para 10.

was held that the only restriction on new grounds of appeal to be raised by a taxpayer in its Rule 32 statement is where they constitute an objection to parts or amounts of the assessment not objected to in the taxpayer's notice of objection. The identification of what amount was objected to is entirely separate from the grounds for the objection.

[74] A taxpayer who has objected to the whole of an adjustment is not confined to the grounds set out in its notice of objection; it may advance new or alternative grounds in its Rule 32 statement or thereafter, provided it does not thereby seek to dispute an amount or part previously uncontested. In essence the Appellant ‘s argument is understood to be this: If the Respondent had reflected on the two amounts, its profitability would not have been at the level envisaged by the Respondent therefore influencing the amount of assessment, R114 *157,077.00* Million. The Respondent would not have arrived at that amount of assessment.

[75] The Respondent’s reliance on *Baseline Civil Contractors (Pty) Ltd v The Commissioner for the South African Revenue Service (Baseline)*[8] (to which we were referred after the hearing without objection), does not avail it. There, the taxpayer sought to raise a new ground of appeal in the alternative, which introduced a receipt/accrual ground, whereas it had earlier declared the relevant amount as part of its gross income and claimed it as an expenditure. The Tax Court found that the new ground constituted an entirely new case on appeal, aimed at the reduction of an amount not previously objected to. Both the Full Court and the Supreme Court of Appeal endorsed the finding that the new ground was impermissible and amounted to a new objection which was not previously raised as it constituted a new factual or legal basis pertaining to a different portion or amount of the disputed assessment which had not been previously objected to.

[76] In the present instance, the new ground relied on constituted a new reason or argument on appeal, rather than a new objection, raising a new case.

[8] (893/2024) [2026] ZASCA 20 (24 February 2026)

Baseline is thus factually distinguishable. In any event, applying the principles set out in *Baseline,* as the Appellant advances a new argument or different legal approach to attack the same part or amount that was already objected to, this is permissible as long as the new argument does not change the substance of the original objection. The Court concludes that it does not and that it is not directed at an issue not covered or foreshadowed in the appellant's initial objection and the notice of appeal. It covers, in substance, the objection against the s 31(2) transfer pricing adjustment.

[77] In *Matla Coal Ltd v Commissioner for Inland Revenue*[9], it was held that where a taxpayer had objected to the disallowance of a capital loss in its entirety, it was entitled to plead a wholly new basis for recognition of that loss. The fact that the new ground was not mentioned in the objection was of no consequence.

[78] In *Capitec Bank Ltd v Commissioner for the South African Revenue Service*[10] the Court reaffirmed this principle. The taxpayer had objected to the full disallowance of a deduction. Although it had not pleaded an alternative entitlement to an apportionment, the Court held that such an alternative was permissible:

"[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 or amount not previously objected to."

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[9] 1987 (1) SA 108 A

[10] [2024] ZACC 1; 2024 (7) BCLR 841 (CC); 2024 (4) SA 361 (CC); 84 SATC 369 (12 April 2024)

[79] It follows that an analysis of whether a ground is “novel” or “differs radically” from the grounds of objection is legally irrelevant. The only relevant inquiry is whether the part or amount of the assessment to which the new ground relates was placed in dispute in the objection.

[80] The Tax Court erred in treating as fatal the fact that the calculation errors were not mentioned in the notice of objection. In so doing, it conflated the *ground* of objection with the *subject matter* of the objection. The former may be supplemented or refined; the latter defines the scope of the dispute and is fixed by the objection. Since the subject matter (the full adjustment) was disputed, the taxpayer is at liberty to advance any legal or factual basis for its reduction or discharge.

[81] Accordingly, the Appellant is not precluded from pleading that the Respondent ’s calculation of its EBIT was erroneous, or that specific amounts ought to have been included. Such contentions go to the quantum of the adjustment already in dispute [onset from the objection] and are properly raised on appeal. The EBIT amounts form the composition of the objected amount of assessment. They are not additional and neither separable from the objected amount, however the Appellant seeks to introduce new computation which is not barred.

[82] In conclusion, for the reasons advanced the Tax Court erred in granting the Respondent the amendment which novated the respondent’ grounds of assessment and rejecting the amendments sought by the Appellant which were overshadowed in the notice of objection. This court is at large to interfere with the Tax Court’s decision. The appellant’s appeal should succeed in entirety.

[83] Costs follow the result. Considering the complexities involved, costs on scale C and the employment of two counsel was justified. That was not in dispute between the parties. In the result the following order is granted:

ORDER

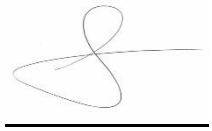
1 The appeal is upheld with costs on Scale C, including the costs of two counsel.

2. The order of the Tax Court is substituted as follows:

2.1. The Respondent is refused leave to amend its Rule 31 statement of grounds of assessment, specifically to make those additions and deletions which comprise the proposed amendments in the proposed Rule 31 statement, which was served on the Appellant on 2 February 2023.

2.2. The Appellant is granted leave to amend its Rule 32 as stated in paragraphs 3 and 6 of its notice in terms of Rule 35.

2.3. The Respondent is ordered to pay the costs on Scale C, including costs of two counsels.



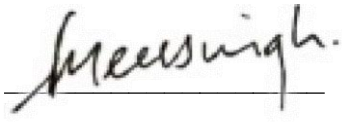
N.P. MALI

JUDGE OF THE HIGH COURT,
GAUTENG DIVISION,
JOHANNESBURG

I agree,

pp

F. DIPPENAAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG



S. MEERSINGH
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

For the Appellant:

MW Janisch SC

A H Morrissey

Briefed by: Bowman Gilfillan Inc.

For the Respondent:

A Sholto-Douglas SC

K Reynolds

Briefed by: Cliffe Dekker Hofmeyer Inc.

Heard: **8 OCTOBER 2025**

Delivered: **13 March 2026**