THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 406/2024

In the matter between:

GLENCORE OPERATIONS SA (PTY) LTD	**FIRST APPELLANT**
ARM COAL (PTY) LTD	**SECOND APPELLANT**
GOEDGEVONDEN JOINT VENTURE	**THIRD APPELLANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**FIRST RESPONDENT**
ANAND KHELAWON N.O	**SECOND RESPONDENT**

Neutral citation: *Glencore Operations SA (Pty) Ltd and Others v Commissioner for South African Inland Revenue and Another* (406/2024) [2026] ZASCA 47 (9 April 2026)

Coram: MOLEMELA P, KATHREE-SETILOANE and KOEN JJA, PHATSHOANE and NORMAN AJJA

Heard: 12 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date and time for the hand-down of the judgment is deemed to be 11h00 on 9 April 2026.

Summary: Revenue – Customs and Excise Act 91 of 1964 (the Act) – diesel fuel concession – entitlement to a refund of diesel fuel levy used for primary production in mining – interpretation and ambit of Note 6(f)(ii)(*cc*) of rebate item 670.04 in Part 3 of Schedule 6 to the Act – claim by entity engaged in mining activities for diesel rebates – claim disallowed by Commissioner on grounds that the taxpayer was not 'a person in possession of the necessary authorisation' within ambit of Note 6(f)(ii)(*cc*) – decision of the high court confirming the Commissioner's determination and holding that taxpayer not entitled to a refund of diesel fuel levy for the relevant period reversed on appeal.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Collis J, sitting as a court of first instance):

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the high court is set aside and in its place is substituted the following:

   '1 The applicants' appeal against the determination of the National Appeal Committee is upheld.

   2 The determination of the National Appeal Committee is set aside.

   3 It is declared that the third applicant, the Goedgevonden Joint Venture, complied with Note 6(f)(ii)(*cc*) of Part 3 of Schedule 6 to the Customs and Excise Act 91 of 1964.

   4 The first respondent, the Commissioner for the South African Revenue Service, is ordered to pay the applicants' costs, including those consequent upon the employment of two counsel.

JUDGMENT

Molemela P (Kathree-Setiloane and Koen JJA, and Phatshoane and Norman AJJA concurring)

Introduction

[1] This appeal concerns a joint venture's eligibility for diesel rebates under s 75(1A)[1] of the Customs and Excise Act 91 of 1964 (CEA). The central issue is the interpretation of Note 6(f)(ii)(*cc*) in rebate item 670.04 (Note 6(f)), which provides that only mining activities conducted by individuals with mining authorisation under the Mining and

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[1] Section 75 of the Customs and Excise Act 91 of 1964 generally governs rebates, drawbacks, and refunds, with section 75(1A) specifically addressing diesel refund schemes.

Petroleum Resources Development Act 28 of 2002 (MPRDA) qualify for refunds. Rebate item 670.04 provides for such a rebate in respect of distillate fuel (in common parlance diesel) purchased for and used 'for the purposes specified in, and subject to compliance with Note 6'. Note 6 forms part of the notes that introduced Part 3 of Schedule 6.

Background facts

[2] The first and second appellants, Glencore Operations SA (Pty) Ltd (Glencore) and ARM Coal (Pty) Ltd (ARM), are mining companies duly registered in terms of the Companies Act 71 of 2008. In 2006, the two companies concluded a Joint Venture Agreement (JV agreement) in terms of which the third appellant, a joint venture, Goedgevonden Joint Venture (the JV), was formed for the purpose of mining coal on properties situated in the district of Witbank (now known as Emalahleni) in Mpumalanga. Glencore holds a 49% interest and ARM a 51% interest in the JV. The JV agreement is consistent with s 2(d) and (f) and s 12 of the MPRDA. The JV is, in terms of s 51(1) of the Value-Added Tax Act 89 of 1991 (VAT Act), deemed to carry on an enterprise separate from its members, Glencore and ARM, and therefore liable to be registered as a VAT vendor. The JV is therefore registered as a vendor for value-added tax (VAT) purposes, also as a 'user' for diesel refund purposes under the CEA, in accordance with Note 6(f) of Schedule 6 to the CEA. The three entities are jointly referred to as 'the appellants'.[2]

[3] In 2008, a mining right was issued to Glencore under the MPRDA, subject to the condition that Glencore would exercise the right jointly with ARM in accordance with the JV agreement. Glencore and ARM then started their joint mining activities in accordance with the JV agreement. The JV used diesel in its coal mining operations and paid fuel levies on diesel under the CEA. The JV was also registered as a VAT vendor at the relevant time.

[4] In terms of s 47(1)[3] of the CEA, among the duties levied on goods in accordance with Schedule 1 to that Act is the 'fuel levy'. Distillate fuel constitutes goods on which the

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[2] The three entities are Glencore Operations SA (Pty) Ltd, ARM Coal (Pty) Ltd, and Goedgevonden Joint Venture.

[3] Section 47(1) of the Customs and Excise Act provides:

two levies are imposed by Parts 5A and 5B of Schedule 1 to the CEA. Diesel utilised in the mining industry is subject to fuel levies. The fuel levy is aimed at raising revenue for the state. The government later introduced a distillate fuel concession to grant a financial indulgence across a range of industries, including mining. Clearly, it was an initiative designed to promote growth within various sectors, and provide financial relief to companies involved in specific forms of primary production.[4] It bears noting that this concession is subject to strict adherence to an administrative framework designed to minimise fraud while also ensuring that the scheme remains financially viable from the perspective of the national budget and its broader fiscal objectives. To be eligible for this concession and a refund of levies on distillate fuel, the claimant must be registered as a vendor under s 23 of the VAT Act and complete the diesel refund part of the VAT return form when seeking a refund of the fuel levy.

[5] In terms of s 75(1A) of the CEA, 'users'[5] can claim a refund of the levies if the fuel is used in accordance with s 75 of the Act and complies with Note 6(f) in Part 3 of Schedule 6 of the Act. In essence, Note 6(f) defines who may claim fuel levies, for what uses, and under what conditions. Section 47(9)(a)(i)*(bb)* of the Act empowers the first respondent, the Commissioner of the South African Inland Revenue Service (SARS) to determine whether the fuel has been used in compliance with the requirements of the said rebate item. One of the requirements for a refund, which is set out in Note 6(f), is that the mining activities which qualify for the refund be carried on 'by the person in

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'Subject to the provisions of this Act, duty shall be paid for the benefit of the National Revenue Fund on all imported goods, all excisable goods, all surcharge goods, all environmental levy goods, all fuel levy goods and all Road Accident Fund levy goods in accordance with the provisions of Schedule 1 at the time of entry for home consumption of such goods: Provided that the Commissioner may condone any underpayment of such duty where the amount of such underpayment in the case of-

(a) goods imported by post is less than fifty cents;
(b) goods imported in any other manner is less than five rand; or
(c) excisable goods is less than two rand.'

[4] *Commissioner for the South African Revenue Service v Glencore Operations SA (Pty) Ltd* [2021] ZASCA 111; 2021 JDR 1806 (SCA), paras 7 and 58.

[5] Section 75(1A)(b)(ii) of the Customs and Excise Act states:
(1A) Notwithstanding anything to the contrary contained in this Act or any other law-
[…]
(b) such refunds shall be granted to any person who-
(ii) is registered, in addition to any other registration required under this Act, for value-added tax purposes under the provisions of the Value-Added Tax Act, 1991 (Act 89 of 1991), and for diesel refund purposes on compliance with the requirements determined by the Commissioner for the purposes of this Act and the Value-Added Tax Act.

possession of the necessary authorisation granted or ceded in terms of the [MPRDA].' It is common ground that the fuel used by the JV in its mining activities is subject to this levy. Section 75(1C) permits SARS to investigate any application for a refund and to recover any refund already paid.

[6] In this matter, SARS conducted an audit of the JV's diesel refund claims covering the period from June 2012 to September 2014. Following that audit, on 6 March 2015, SARS issued a determination in terms of s 47(9)(a) of the CEA disallowing part of the refunds. SARS sought to recover the amount it had paid to the JV, in accordance with the provisions of the CEA, as diesel refunds for the period June 2012 to September 2014. SARS determined that the amount the JV was to pay back to it was R5 099 995.21, comprising R4 584 824.96 plus interest of R515 170.25.

[7] Pursuant to SARS's demand that the JV return the refunds with interest, the JV repaid the refund amount and lodged an internal administrative appeal with the Internal Administrative Appeals Committee (IAAC) against this determination. The internal administrative appeal was initially handled by the Regional Appeal Committee (RAC), which, in terms of s 77B read with rule 77H11(2)(b)(*i*) of the CEA, is bestowed with powers to entertain appeals for refunds below R10 million. During the appeal process, however, several years after the issuance of the determination, the issue of compliance with Note 6(f) (the mining right requirement) was raised for the first time. The RAC requested further information from the appellants, and they obliged. In the intervening period, SARS decided to audit the fuel refunds for the period from November 2015 to May 2017.

[8] Thereafter, believing that its decision on the determination would extend beyond its monetary jurisdiction, the RAC referred the matter to the National Appeal Committee (NAC), a committee empowered to hear appeals for amounts above the RAC's threshold of R10 million. The JV made representations to the NAC. The NAC sought further information from the JV, which the JV subsequently furnished. The JV was allowed to make further submissions.

[9] In a letter dated 27 January 2019, SARS communicated its intention to assess and disallow refunds. On 30 January 2019, the NAC sent a letter setting out its prima facie findings. The JV then made representations. By the time the NAC took its decision on 15 May 2019, a period of four years had elapsed since the date of SARS's first audit. On 13 June 2019, the NAC determined that the JV was not entitled to any fuel levy refunds because it did not have a valid mining right in its name. The NAC's salient finding was couched as follows:

'Goedgevonden JV is a joint venture and does not have a valid mining right in its name. The mining right is held by one of the JV Partner's Glencore and not in the name of the Joint Venture which is a contravention of Note 6(f)(ii)(cc) of Schedule 6 Part 3 of the Act.

[10] Pursuant to this finding, the NAC increased the amount of the disallowed refunds. It ordered the recoupment of R82 984 080 in diesel refunds covering the audit period from June 2012 to September 2014. The remaining decisions mirrored SARS's overall determination. Aggrieved by the decision rendered by the NAC the appellants appealed the NAC's decision to the Gauteng Division of the High Court in Pretoria (the high court). It sought an order declaring the determination invalid, alternatively reviewing and setting it aside, and substituting it with one allowing the refund claims.[6]

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[6] As per the Notice of Motion, the appellants sought the following relief in the high court:

'1. That the Applicants' appeal against the determination contained in Annexure FA2 to the founding affidavit and against the confirmation of the determination by the SARS Internal Excise Appeal Committee as contained in Annexure FA3 to the founding affidavit, be upheld.

2.

2.1. That the decision in paragraphs 6.2 and 6.4.3 of the determination in Annexure FA2 be set aside and replaced with a decision that the diesel utilised in the activities as described in paragraph 4.4 of Annexure FA6 to the founding affidavit qualifies for the diesel refund;

2.2. That the findings by the Internal Excise Appeal Committee in paragraphs 2(i) and 2(ii) of Annexure FA3 be set aside and be replaced with the following findings respectively:

> 2.2.1. That the Third Applicant has not contravened Note 6(f)(ii)(cc) of Schedule 6 of Part 3 of the Customs and Excise Act, 91 of 1964 (*the Act*) and that the Third Applicant is not disentitled from receiving the diesel refund by virtue of the fact that it does not have a valid mining right in its name;
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> 2.2.2. That the diesel utilised in the activities as described in paragraph 4.4 of Annexure FA6 to the founding affidavit qualifies for the diesel refund.

3. In the alternative to the relief sought in prayers 1 and 2 above in relation to the decision of the Internal Excise Appeal Committee, that the decision of the said Committee as contained in Annexure FA3 to the Founding Affidavit be reviewed and set aside.

In the high court

[11] The appellants attacked the determination issued by SARS, the RAC's referral of the matter to the NAC, and the NAC's decision to uphold SARS's determination. They challenged the NAC's decision to recover R82 984 080 in diesel refunds from the JV, arguing that it exceeded the NAC's authority. In addition to impugning the internal appeal processes, the appellants also sought to review and set aside the decision taken by the NAC. They asserted that the NAC's decision was time-barred and that the four-year delay rendered it invalid.

[12] On the merits, the appellants contended that the JV's reliance on Glencore's mining rights constituted compliance with Note 6(f) in Part 3 of Schedule 6 to the CEA. In the alternative, they argued that SARS's decision that there was non-compliance with Note 6(f) was not dispositive of the case, as Note 5 in Part 3 of Schedule 6 to the CEA gives SARS a discretion to pay the refunds to a third party on good grounds shown. Consequently, they sought a declaration that the decision was unlawful in its entirety.

[13] Several issues arose for determination in the high court. It had to consider: (a) whether the JV was entitled to the diesel refund in terms of s 75(1A)*(b)* of the CEA (ie whether it complied with the mining authorisation requirements such as to fulfil the definition of a 'person' in possession of a mining right granted or ceded as envisaged in the MPRDA), read with the provisions outlined in Note 6(f) of Part 3 of Schedule 6 to the CEA; (b) whether SARS failed to exercise the discretion enunciated in Note 5 of Part 3 of

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4. In the alternative to prayer 3 above, that the following decisions in Annexure FA3 be reviewed and set aside:
4.1. The decision in paragraph 2(i) thereof that the Third Applicant is disentitled from claiming the diesel refunds as it does not have a valid mining right in its name;
4.2. In the alternative to prayer 4.1 above, that the failure or refusal to exercise the discretion provided for in note 5 to Part 3 in Schedule 6 to the Act be reviewed and set aside;
4.3. The decision in paragraph 2(ii) of Annexure FA3 that the Third Applicant is not entitled to the diesel refund in respect of what was considered to be crushing and screening activities;
4.4. The decision in paragraph 4 of Annexure FA3 to recoup the amount of R82,984,080.00, with interest, from the Third Applicant.
5. That the First Respondent be ordered to pay the costs of this application.
6. Further and/or alternative relief.'

Schedule 6 to CEA; (c) whether the RAC acted ultra vires when it referred the matter to the NAC; (d) whether the NAC had the jurisdiction and authority to entertain the referral from RAC; and if so, whether the NAC was entitled to decide the matter after an undue delay of 4 years; and (e) whether it was empowered to make a new determination by increasing the amount to be repaid from R5 099 995.21 to R82 984 080.

[14] Following an analysis of s 47(9)(e) of the CEA, the high court concluded that the appeal process envisaged under that provision constituted a 'wide appeal'. In reaching that conclusion, it considered eight factors, namely (a) the consideration of the initial hearing, (b) the record-keeping, (c) the reasons for the decision, (d) the impact of the decision, (e) the involvement of experts, (f) the limits of evidence, (g) the grounds of appeal, and (h) the scope of corrective powers. The high court reasoned that, because the appeal was in a wide sense, the NAC was allowed to consider the matter afresh, was empowered to ensure the correct application of the law even if this introduced a new ground not explicitly detailed in the original letter of demand, and therefore did not act ultra vires when it made a new determination which stated that the JV was disentitled to funds because it lacked a valid mining right.

[15] The high court held that the contention that SARS, as distinct from the NAC, failed to exercise a discretion in favour of the JV to allow a rebate deviating from the norm laid down in Note 5(c) was without merit. It concluded that SARS's discretion does not arise unless the claimant is first legally recognised as a registered user that is considered to be entitled to the refund in question. The high court reasoned that the JV was not entitled to diesel refunds because it did not hold the relevant mining right, as it was issued to Glencore. From the high court's perspective, the JV had failed the threshold requirement of holding the necessary mining rights. The high court therefore upheld the NAC's decision to increase the amount of diesel refund payable to SARS and dismissed the application.

[16] Regarding the appellants' invocation of a PAJA review on the basis that the NAC's four-year delay in deciding the appeal was a breach of constitutional duties and a PAJA violation that rendered the decision ultra vires and invalid, the high court acknowledged

the delay but stated that the CEA does not stipulate a specific time limit to act. Relying on *Cell C v SARS*,[7] a judgment in which it was held that the court lacked jurisdiction to review a SARS tariff determination because the CEA provides a wide appeal remedy, the high court held that the availability of the wide appeal remedy rendered a PAJA review inappropriate. Dissatisfied with the high court's decision, the appellants sought leave to appeal, but the high court dismissed that application. The matter is before us with leave of this Court.

Before this Court

Issues to be decided

[17] The same issues raised in the high court fall to be decided in this Court. And the same submissions made in the high court were relied upon on appeal. However, during the hearing of the appeal, both counsel, having acknowledged that the high court's decision to also deal with the grounds of review was not erroneous, agreed that the appellants' grounds of appeal can be accommodated and disposed of under the rubric of a statutory appeal and that a review does not arise in this matter.

The parties' submissions

The appellants' submissions

[18] The salient aspects of the appellants' arguments are set out hereunder. The appellants asserted that SARS incorrectly interpreted the mining authorisation requirement set out in Note 6(f), which requires mining activities to be conducted by a person 'in possession of the necessary authorisation' under the MPRDA. The appellants contended that this does not require the diesel refund claimant to be the registered holder of the mining right. They emphasised that although the mining right was registered in Glencore's name, it authorised mining only through the JV, making the JV the substantive or beneficial holder of the authorisation. They argued that a purposive interpretation showed the Note 6(f) requirement was met, as the JV was lawfully authorised to conduct mining.

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[7] *Cell C Pty (Ltd) v Commissioner, South African Revenue Services* [2022] ZAGPPHC 152; 2022 (4) SA 183 (GP); 84 SATC 369.

[19] The appellants postulated that, even if the JV did not strictly comply with Note 6(f), SARS had discretion under Note 5 of Schedule 6 to allow refunds to be paid to a third party on good cause shown. They maintained that they had formally requested SARS to exercise that discretion, but it had failed to consider or decide the request, which was unlawful and reviewable under PAJA.

[20] The appellants asserted that the original determination concerned an amount of R5 099 995.21, which fell within the RAC's jurisdiction. The NAC's decision to consider compliance with mining rights and the consequent increase in the quantum to R82 984 080 raised new issues. According to the appellants, the NAC lacked jurisdiction to hear the appeal, lacked the power to increase the amount demanded, and acted beyond its statutory authority, thereby rendering its decision ultra vires. The appellants sought an order setting aside the NAC's decision; declaring that they complied with Note 6(f); alternatively, a remittal to SARS for a proper exercise of its discretion. They sought an order of costs, including the costs attendant on the appointment of two counsel.

SARS'S submissions

[21] The thrust of SARS's assertions was that the wording of Note 6(f) is clear and unambiguous in restricting refunds to the holder or cessionary of a mining right. Expounding on this contention, SARS's counsel submitted that a purposive interpretation must remain faithful to the text. The refund scheme was deliberately restrictive, limited to those meeting all statutory requirements, and the limitation is rational and constitutionally permissible as part of a fiscally targeted refund scheme. That being so, expanding eligibility beyond holders or cessionaries would constitute impermissible redrafting, so it was contended. SARS maintained that the reference to the JV agreement in the mining right granted to the JV did not equate the JV with a holder of the mining right; Glencore remained the sole holder of that right.

[22] SARS further contended that the concept of 'beneficial holder' has no relevance under the MPRDA or Note 6(f), as they recognise only formal holders or cessionaries. SARS agrees with the high court's finding that, because the JV was not entitled to refunds, the discretion envisaged in Note 5 did not arise. Regarding the increase in the collective

amount to R82 984 080 at the NAC stage, SARS maintained that the NAC had acted within its jurisdiction and powers. It submitted that the high court rightly rejected the appellants' arguments and dismissed the application. SARS submitted that the appropriate order is one dismissing the appeal with costs.

Applicable law

[23] The relevant legal framework is as set out hereunder. Section 75(1A) of the CEA provides for the refund of specified levies paid on distillate fuel used for qualifying purposes, subject to the requirements set out in Schedule 6. It reads as follows:

'(1A) Notwithstanding anything to the contrary contained in this Act or any other law-

(*a*) (i) a refund of the fuel levy leviable on distillate fuel in terms of Part 5A of Schedule 1; and

(ii) a refund of the Road Accident Fund levy leviable on distillate fuel in terms of Part 5B of Schedule 1; or

(iii) only a refund of such Road Accident Fund levy,

shall be granted in accordance with the provisions of this section and of item 670.04 of Schedule 6 to the extent stated in that item;

(*b*) such refunds shall be granted to any person who-

(i) has purchased and used such fuel in accordance with the provisions of this section and the said item of Schedule 6; and

(ii) is registered, in addition to any other registration required under this Act, for value-added tax purposes under the provisions of the Value-Added Tax Act, 1991 (Act 89 of 1991), and for diesel refund purposes on compliance with the requirements determined by the Commissioner for the purposes of this Act and the Value-Added Tax Act;

(*c*) the Commissioner may withdraw money from the National Revenue Fund for refunding the amount of such Road Accident Fund levy as if it were a fuel levy leviable and paid under this Act and refundable in terms of the said item of Schedule 6;

(*d*) the Commissioner may-

(i) pay any such refund upon receipt of a duly completed return from any person who has purchased distillate fuel for use as contemplated in the said item of Schedule 6;

(ii) pay any such refund by means of the system in operation for refunding value-added tax; and

(iii) for the purposes of payment, set off any amount refundable to any person in terms of the provisions of this section and the said items against any amount of value-added tax payable by such person;

(*e*) any such payment or set-off by the Commissioner shall be deemed to be a provisional refund for the purpose of this section and the said item of Schedule 6 subject to the production of proof by the user referred to in subsection (1C) (b) at such time and in such form as the Commissioner may determine that the distillate fuel has been-

(i) purchased as claimed on the application for a diesel refund; and

(ii) used in accordance with the provisions of this section and the said item of Schedule 6;

(*f*) the provisions of the Value-Added Tax Act, 1991 (Act 89 of 1991), shall mutatis mutandis apply in respect of the payment of interest on any amount of fuel levy or Road Accident Fund levy which is being recovered as it is in excess of the amount due or is not duly refundable.'

[24] Note 6 of Part 3 of Schedule 6 regulates entitlement to refunds in respect of mining activities. The text of Note 6 has been amended from time to time. The one applicable to this case states as follows:

'(ii) The mining activities which qualify for a refund of levies must be carried on –

(cc) by the person in possession of the necessary authorisation granted or ceded in terms of the Mineral and Petroleum Resources Development Act, 2002.'

[25] Section 23 of the MPRDA provides:

'Granting and duration of mining right

(1) Subject to subsection (4), the Minister must grant a mining right if–

(*a*) the mineral can be mined optimally in accordance with the mining work programme;

(*b*) the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;

(*c*) the financing plan is compatible with the intended mining operation and the duration thereof;

(*d*) the mining will not result in unacceptable pollution, ecological degradation or damage to the environment;

(*e*) the applicant has provided financially and otherwise for the prescribed social and labour plan;

(*f*) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act 29 of 1996);

(*g*) the applicant is not in contravention of any provision of this Act; and

(*h*) the granting of such right will further the objects referred to in section 2(*d*) and (*f*) and the accordance with the charter contemplated in section 100 and the prescribed social and labour plan.

(2) The Minister may, having regard to the nature of the mineral in question, take into consideration the provisions of section 26.
(2A) If the application relates to the land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.
(3) The Minister must, within 60 days of receipt of the application from the Regional Manager, refuse to grant a mining right if the application does not meet the requirements referred to in subsection (1).
(4) If the Minister refuses to grant a mining right, the Minister must, within 30 days of the decision, in writing notify the applicant of the decision and the reasons.
(5) A mining right granted in terms of subsection (1) comes into effect on the effective date.
(6) A mining right is subject to this Act, any relevant law, *the terms and conditions stated in the right* and the prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed 30 years.' (My emphasis).

[26] The IAAC was created as an internal appeal committee by the introduction of Chapter XA into the CEA on 4 June 2007 (Section 77A to 77HA). Section 77H empowers SARS to promulgate rules for the conduct of such appeals. He did so and promulgated rules 77H.01 to 77H.14. Rule 77H.11(4)(*d*) reads as follows:
'The Customs and Excise National Appeal Committee must consider and decide appeals in relation to any decision involving –
(*a*) a matter relating to licensing, registration, or accreditation;
(*b*) a determination of the tariff value or origin of goods, taken at the Head Office level;
(*c*) a decision taken at the Branch Office level –
(i) by a person in charge of a Branch Office; or
(ii) in respect of which the amount to which the appeal relates is more than R10 000 000, in the case of an appeal in respect of which it is possible to quantify an amount; and
(*d*) any matter other than those listed in subparagraph (*a*) to (*c*), as the Commissioner may direct.'

Discussion

[27] Before us, counsel agreed that the crux of this appeal is whether the JV is entitled to a rebate of the fuel levy pursuant to the provisions of s 75(1A) read with Note 6(f) in Part 3 of Schedule 6. Therefore, the interpretation of the expression 'the person in possession of the necessary authorisation' in the aforesaid Note lies at the heart of this

appeal. Counsel also agreed that the three grounds of appeal may be dealt with under the rubric of statutory appeal, and that a review does not arise in this matter. As part of a unitary interpretive exercise, the Notarial Deed granting the mining rights, (notarial deed) executed on behalf of the Minister of Mineral and Petroleum Resources (Minister of Mineral Resources) and the JV agreement are essential to the interpretive context of Note 6(f). I deem it necessary to preface my discussion regarding the application of legal principles to the facts of this case by quoting verbatim from parts of the judgment of the high court. It, inter alia, stated as follows at paragraphs 121 to 128:

'In addition, clauses 1.2.4.17, 30, and 33 contain definitions of the 'Goedgevonden Business', the 'Joint Venture Business', and the 'Joint Venture Property', which includes the 'old order mining right'. It is trite law that all old order mining rights lapsed on 30 April 2005, which is one year after the MPRDA came into effect.

Clause 2.3.1 further records that [Glencore] would hold 49% and ARM 51% of the 'Goedgevonden business' and clause 2.5.2 records that the parties intend that the JV would bring about a relationship of co-ownership of the JV assets. These recordals, this Court agrees, are nothing but mere recordals of the alienation by [Glencore] of the majority share in the mining right, an act which requires Ministerial consent in writing, and further registration in the Mineral and Petroleum Titles Registration Office.

None of these recordals takes the matter any further, or records that Ministerial consent has been granted for the alienation of [Glencore]'s 51% share in the mining right. The disposal of a controlling interest in a mining right requires ministerial consent for it to be valid. In the absence of such Ministerial consent, the JV was not a holder of a mining right, and it must therefore follow that SARS was not obliged to pay the diesel refund to the JV. To hold otherwise would constitute a proverbial cross of the divide between interpretation and legislation, the latter falling outside of the purview of this court's functions.

A further argument advanced by the Applicants is that the transaction is one in which the mining right is held by the Joint Venture in substance, if not in form. This argument, however, cannot succeed where the formalities of written consent and registration is required: in substance, the joint venture agreement is an agreement by which [Glencore] alienated 52% of its share in the mining right to ARM. Such a transaction, in order to be valid, requires Ministerial consent. It is common cause that this was not complied with. Furthermore, the fact that [Glencore] is obliged

to comply with the joint venture agreement does not convert the Joint Venture into the holder of the Mining Right. For the reasons referred to above, this Court concludes that the JV did not comply with Note 6(f)(ii)(cc).

On the argument that the IAAC failed to exercise discretion in terms of Note 5(c), quoted in para 109 above, the exercise of the discretion is, firstly, dependent on good cause shown. Bearing in mind that the decision sought to be reviewed is a decision of the IAAC in relation to a refund claim for the period June 2012 to September 2014, it must be emphasised that the request to exercise a discretion was not addressed to the IAAC but to the Commissioner, and not in respect of the same period, but in respect of a different period under audit, namely November 2015 to May 2017.

The request to exercise discretion was made only on 13 February 2019, after the decision appealed against had already been made. It was never raised as a ground of appeal to the IAAC.

This Court in *Graspan* held that the discretion in terms of Note 5 does not arise:

> "[69] Note 5 envisages an instance where any refund due to a user is to be paid to another person, other than the user, on good cause shown. It follows that, for the Commissioner to be called upon to exercise his discretion under Note 5, the registered user should have been entitled to the refund. In the present instance, this was not the position. The applicant was not entitled to a refund as it was not the holder of a mining right as from 15 August 2013. As such, it follows that no reliance can be placed on the Commissioner to have exercised his discretion in terms of Note 5."

This view adopted in *Graspan* was quoted with approval in *Glencore*, and to date the *Graspan* decision has not been set aside on appeal.'

[28] From the above passage and the general tenor of the judgment of the high court, it is clear that this case turns on the interpretation and application of Note 6(f). The provisions of the JV are key for a purposive interpretation of that provision. Before delving into the correct approach to interpretation, it is important to consider the provisions of the

JV agreement and two judgments relied upon by the court, namely *Graspan*[8] and *Glencore SCA*,[9] albeit for the purpose of highlighting the distinguishing factors.

[29] As mentioned before, the mining right is registered in the name of Glencore, not the JV. Glencore and ARM are empowerment partners. The mining right was issued to Glencore (then Xstrata SA). Still, it incorporated a JV agreement that made it clear that Glencore was authorised to exercise its mining rights only together with ARM, in accordance with their JV agreement. Crucially, clause 17 of the notarial deed executed on behalf of the Minister of Mineral Resources provides as follows:

'In the furthering of the objects of [the MPRDA, Glencore] is bound by the provisions of an agreement or arrangement dated 27 February 2006 [the JV agreement] entered into between Holder/empowering partner [Glencore] and ARM Coal (Pty) Limited (the empowerment partner) which agreement or arrangement *was taken into consideration for purposes of compliance with the requirements of the Act* and Broad Based Economic Empowerment Charter developed in terms of the Act *and such agreement shall form part of this right'*. (My emphasis).

The mining rights were granted to Glencore on the condition that Glencore and ARM jointly exploit the minerals. It is worth noting that clause 17 is buttressed by clause 13.1.2, which records that the Minister of Mineral Resources took the JV agreement into account when granting the mining right. Moreover, the Minister reserved the right to cancel or suspend the mining right, as contemplated in s 47 of the MPRDA, if Glencore failed to honour the JV agreement. Another weighty factor is the uncontroverted fact that the Minister had previously declined to grant the lease to Glencore if no JV agreement was concluded.

The significance of the JV agreements forming part of the mining right

[30] It was clearly spelled out in the JV agreement that, although Glencore contributed the mining rights to the joint venture, those rights were an asset held by the joint venture, ie, Glencore and ARM own them as co-owners. Clause 1.2.4.17 of the JV agreement

[8] *Graspan Colliery SA (Pty) Ltd v The Commissioner for the South African Revenue Service* [2020] ZAGPPHC 560; 83 SATC 10; 2020 JDR 2168 (GP) (*Graspan*).
[9] *Commissioner for the South African Revenue Service v Glencore Operations SA (Pty) Ltd* [2021] ZASCA 111; 2021 JDR 1806 (SCA) (*Glencore SCA*).

defines the Goedgevonden business to include the mining right. Clause 1.2.4.30 defines the joint venture assets to include the Goedgevonden business. Clause 1.2.4.33 defines the joint venture property to include the remaining right.

[31] Clause 2.3.1 recorded that Glencore would hold 49% and ARM 51% in the JV, which would acquire the Goedgevonden business from Glencore. Clause 2.5.2 records that the parties intend the JV to constitute a relationship of co-ownership between them and for the joint venture assets and the joint venture obligations to be dealt with subject to the terms and conditions of that agreement. Clause 4.2.1 stipulated that the joint venture would acquire the Goedgevonden business. Clause 5.1 recorded that the purpose of the joint venture was to carry on the business of mining coal in and on the Goedgevonden mining area. A sensible interpretation of the JV agreement reveals that, although the mining right was issued to Glencore, both Glencore and ARM were authorised to exercise the mining right jointly in accordance with their JV agreement.

[32] What can be gleaned from the above-mentioned provisions of the JV agreement and clause 17 of the notarial deed is that the joint venture structure was an integral component of the mechanism approved by the Minister of Mineral Resources for the lawful exploitation of mineral resources. Of significance in this regard is that section 23(6) of the MPRDA clearly stipulates that a mining right is 'subject to [the MPRDA], any relevant law, the terms and conditions stated in the right and the prescribed terms and conditions... .' This means that the mining right granted to the JV is subject to the terms and conditions of the JV agreement. Clearly, the mining right in issue was not a bilateral statutory concession granted solely to Glencore. Rather, by its own terms, as recorded in the notarial deed, the mining right is defined to include the JV agreement. Put differently, the JV agreement was expressly taken into account by the Minister of Mineral Resources in granting the right.

[33] Furthermore, compliance with that agreement is made a condition of the continued validity of the mining right. This has a crucial consequence for the exercise of discretion under Note 5. The JV agreement is not collateral to the mining right; it is constitutive of it. ARM and the JV are legally indispensable participants in Glencore's authorised

exploitation of the mineral resource. Put differently, the Minister of Mineral Resources granted a conditional right, whose lawful exercise is inextricably bound to the joint venture structure.

[34] The incorporation of the JV agreement into the mining right, on its own, is a compelling reason for the good cause requirement. That said, two other factors are equally persuasive. First, the JV purchased diesel and duly paid levies. Second, the diesel on which the levies were paid was used exclusively in lawful mining operations at Goedgevonden under an MPRDA-compliant authorisation. Third, the JV used diesel solely for qualifying, primary production activities in accordance with the mining right. Fourth, SARS registered the JV as a VAT vendor and also as 'user' under the CEA.

[35] Fifth, bearing in mind that the primary purpose of Note 6(f) is to prevent refunds being claimed by persons who are not authorised to mine under the MPRDA, several features in this matter mitigate concerns about regulatory abuse. These include: (a) the Ministerial recognition of the joint venture arrangement through a notarial deed; (b) the clear intent to facilitate mining activities exclusively through the JV structure; (c) the requirement that compliance with the JV agreement is a condition for granting mining rights; and (d) the authority granted to the Minister of Mineral Resources to suspend or cancel the mining right, as outlined in s 47 of the MPRDA, if Glencore fails to uphold the JV agreement. These are significant factors that clearly demonstrate good cause. Allowing SARS to exercise this discretion under Note 5 in these circumstances would not undermine the MPRDA at all. The circumstances are overwhelmingly in favour of a finding that the JV met the requirements of Note 6(f).

[36] I agree with the appellants' submission that although Glencore is the formal registered holder of the mining right that was issued, the mining right in fact authorised both Glencore and ARM to exercise the rights in a joint venture with each other in accordance with their JV agreement. Although it would be incorrect to conclude that the fact that Glencore is obliged to comply with the JV agreement, in and of itself converts the joint venture into the holder of the mining right, it cannot be denied that the mining right was, in substance a right granted to both Glencore and ARM to engage in mining in

joint venture with each other for as long as the JV subsisted. There can be no doubt that, regarding the inquiry into who is authorised to engage in mining operations, the definitive answer is the JV. With that having been said, the appropriate interpretation, in accordance with the substance-over-form principle, is the one that recognises that the primary consideration concerning Note 6(f) is whether the joint venture possesses the necessary authorisation to conduct mining operations. In my view, the JV meets the requirements of Note 6(f), rendering the JV's refund claims legitimate.

[37] Having considered the text, context, and purpose of the JV agreement through the prism of a unitary approach advocated for in a plethora of judgments,[10] I am satisfied that although the registered holder of the mining right was Glencore, the same mining right authorised mining only through the JV, which, in substance, authorised the JV to conduct mining. I agree with the appellant's assertion that a prudent interpretation of Note 6(f) would prioritise coherence among the VAT Act, CEA, and the MPRDA. I therefore agree that interpreting Note 6(f) to exclude the JV as a person eligible for refunds of fuel levies would also undermine the architecture of fiscal legislation.

Exercise of discretion by SARS

[38] Of significance is that the CEA itself, by conferring discretion, expressly contemplates that strict formal compliance may yield to substantive justice. This is done by conferring a discretion on SARS in Note 5 of Part 3 of Schedule 6, which permits payment of a refund to 'any other person' on good cause shown. A finding that the exercise of discretion under Note 5 depends on prior entitlement to the refund renders the discretion conferred by Note 5 nugatory. Moreover, it fails to recognise that the exercise of the discretion can operate to prevent substantive injustice where technical non-compliance is alleged, as was the case here.

[10] See *Jooste NO and Another v Pretorius and Others* [2024] ZASCA 130; [2024] 4 All SA 659 (SCA); 2025 (3) SA 95 (SCA); *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA); 82 SATC 444; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA); *Independent Institute of Education (Pty) Ltd v Kwazulu-Natal Law Society and Others* [2019] ZACC 47; 2020 (2) SA 325 (CC); (2020 (4) BCLR 495 (CC); *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd [*2019] ZACC 12; 2019 (6) BCLR 749 (CC); 2019 (5) SA 29 (CC); *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 132021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC).

[39] The discretion in Note 5 vests in the Commissioner. Where such a request is placed before SARS during an ongoing internal appeal, procedural fairness requires that it be considered and decided by the appropriate functionary. The refusal or failure to consider such a request cannot be justified solely on the basis that it was not addressed to the correct internal structure, particularly where SARS, as an institution, was aware of and seized with the request.

[40] Moreover, characterising the IAAC and SARS as distinct entities does not alter the substantive position. The NAC operates as the national internal administrative appeal committee within the statutory framework. The request for the exercise of discretion was therefore not rendered invalid by the forum in which it was raised, and SARS cannot be insulated from criticism for its failure to exercise the discretion on that basis alone. More importantly, there is no merit in the suggestion that SARS can exercise discretion only when requested to do so. It is indisputable that both the IAAC and SARS considered the JV's internal appeal as 'a wide appeal'. All the representations made on behalf of the JV served before the NAC and SARS. SARS knew exactly what the true nature and substance of the JV's grievance was, or was at least expected to do so.[11] I can find nothing that justifies the assumption that SARS would have believed that the exercise of its discretion was unnecessary because it was not requested.

[41] On the reasoning expressed in the foregoing paragraphs, I disagree with the views expressed by the high court in relation to the issue of the Note 5 discretion, and accordingly also disagree with the remarks and conclusion embodied in the paragraphs of its judgment as quoted in paragraph 27 of this judgment.

[42] The exercise of discretion by a repository of public power ought to consider all relevant material before it. The discretion cannot be exercised only if expressly invoked or upon a specific request to a specific committee. The assertion that the request for the exercise of the Note 5 discretion was directed to the IAAC rather than SARS, and that it

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[11] *Commissioner, South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* [2025] ZACC 3; 2025 (6) BCLR 639 (CC); 2025 (5) SA 617 (CC*),* para 144.

was submitted after a significant delay, implies that the exercise of this discretion is contingent upon a formal application. However, given that such discretion is intended to prevent unjust or irrational outcomes arising from strict adherence to refund formalities, characterising it as dependent solely on a request appears overly restrictive and inconsistent with established principles of administrative law. Consequently, the high court's finding on this is incorrect.

[43] The purpose of Note 6(f) is to confine refunds to diesel used in lawful mining operations undertaken under valid MPRDA authorisations. In this matter, that purpose was fully achieved. The levies were paid on fuel used for precisely the type of activity that the Legislature intended to support through the refund mechanism. I therefore agree with the appellants' argument that a purposive and contextual interpretation of Note 6(f) is necessary. The undisputed fact that the mining right is exercised exclusively by the JV, as recognised by the mining right, is an important context that requires consideration.

[44] Equally important is the fact that in terms of clause 17 of the Notarial Deed executed on behalf of the Minister of Mineral Resources, the purpose of creating the JV as a structure was to meet the Broad-Based Black Economic Empowerment Charter (B-BBEE Charter) requirements that were applicable at the time. This is more so given the admitted fact that the Minister had previously declined to grant authorisation in the absence of a JV structure. Tellingly, clause 17 of the Notarial Deed executed on behalf of the Minister also provides that Glencore is bound by the JV agreement in furthering the objects of the MPRDA. Both the JV agreement and the Notarial Deed cross-reference the provisions of s 100 of the MPRDA regarding the imperatives of the B-BBEE Charter.[12] The notarial deed acknowledges that the JV agreement was taken into consideration for compliance with the B-BBEE Charter developed under the MPRDA. Significantly, the same clause expressly states that the JV agreement 'shall' form part of the mining right. The argument that the JV was the beneficial holder of the mining right is compelling.

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[12] The objective of the MPRDA is to facilitate meaningful participation of HDSAs in the mining and minerals industry. In particular, section 100(2)(*a*) of the MPRDA mandates the Minister of Mineral Resources to develop a broad-based socio-economic empowerment Charter that would serve as an instrument to effect transformation with specific targets. The Mining Charter of 2002 was subsequently published, and embedded in that Charter is a provision to review progress and determine what further steps, if any, are needed to achieve its objectives.

[45] Furthermore, I agree with the appellants' contention that SARS's interpretation of Note 6(f) is inconsistent with the structure of the VAT Act, which requires joint ventures to register separately; the CEA, which ties diesel refunds to VAT registration; and the MPRDA, which permits certain mining activities to be conducted via joint ventures. The appellants' interpretation avoids absurd or irrational outcomes when the CEA, VAT Act, and MPRDA are read together. The Legislature cannot sensibly be taken to have intended that joint ventures be rendered permanently incapable of receiving diesel refunds. In my view, the refunds were lawfully paid to the JV. It is now apposite to consider the two judgments that the high court relied upon for its decision on the issue of whether the JV fell within the ambit of the person eligible for a refund under Note 6(f) and on the issue of SARS's failure to exercise its discretion.

[46] As is apparent from the passage from the judgment of the high court, SARS placed considerable reliance on the decisions in *Graspan* and *Glencore SCA*, in which claims for diesel refunds failed on the basis that the claimant was not the holder of a mining right as required by Note 6(f). It is therefore necessary to explain why the outcome in the present matter is not inconsistent with those authorities.

[47] The facts of *Graspan* were different from those in this matter. In *Graspan*, the court was concerned with a claimant who, for a defined period, carried on mining activities without holding any mining authorisation. The claimant sought to invoke the SARS's discretion under Note 5 to overcome that substantive defect. The court rejected the contention, holding that Note 5 presupposes a lawful entitlement to a refund and that it cannot be invoked to cure the absence of a mining right or to legitimise mining activities conducted without authorisation. The ratio of *Graspan* is thus directed at cases of substantive unlawfulness, not at cases involving formal or structural disjunctions between the holder of a right and the operational entity.

[48] The present matter is fundamentally different. Here, the mining activities that gave rise to diesel usage were at all times conducted under a valid mining right granted in terms of the MPRDA. There was no hiatus in authorisation and no suggestion of unlawful

mining. The key question is how the authorisation was structured and exercised. Properly understood, therefore, this case does not seek to dilute the principle affirmed in *Graspan* that diesel refunds may not be claimed in respect of unauthorised mining. The present decision holds no more than this: that where the purpose of Note 6(f) – namely, the exclusion of unlawful mining from the refund scheme – is fully satisfied, and where refusal of a refund would arise solely from a formal misalignment between overlapping statutory regimes, the discretion conferred by Note 5 remains operative. To hold otherwise would be to treat that discretion as redundant in precisely the category of case for which it was provided.

[49] In *Glencore SCA*, this Court held that the Goedgevonden Joint Venture was not itself the holder of a mining right and therefore did not meet the requirements of Note 6(f). That conclusion is not disputed for present purposes. What is important, however, is that in *Glencore SCA*, the Court was not called upon to consider the issue of the exercise of SARS's discretion under Note 5 in the context of a mining right that was expressly referenced in a joint venture agreement as a constitutive element of the authorisation. It is an issue that was not considered in that matter because the primary issue for decision in that appeal was whether the mining operations in relation to which diesel refunds claimed by Glencore had been carried on for own primary production in mining.[13] The finding on that specific issue was therefore dispositive of the appeal. In this appeal, the discretion contemplated in Note 5 has been squarely raised for determination.

[50] Crucially, neither *Graspan* nor *Glencore SCA* held that the discretion in Note 5 is incapable of operating where the claimant is not the formal holder of a mining right in circumstances where mining is nonetheless conducted lawfully under an MPRDA-compliant authorisation. The principle established by those cases is that discretion cannot be used to override substantive statutory prohibitions or to excuse unlawful mining.

[13] See para 9 of *Glencore SCA*.

[51] Thus, even if the Court were to hold that the Goedgevonden Joint Venture did not, in a strict or formal sense, satisfy the requirement in Note 6(f) to be 'the person in possession of the necessary authorisation' under the MPRDA, that finding does not exhaust the statutory inquiry. The question, therefore, is whether the nature of the mining right granted to Glencore – specifically its express incorporation of, and legal dependency upon, the joint venture agreement with ARM – constitutes 'good cause' for the exercise of that discretion. It bears emphasising that the discretion under Note 5 is not unfettered. It must be exercised rationally, purposively, and in accordance with the scheme of the Act.

[52] In my view, the circumstances of this case attest to the fact that Note 5 exists because the Legislature foresaw that the 'user' entitled to refunds under the scheme, and the person to whom payment should equitably be made, may not always coincide. At the very least, the Commissioner was obliged to consider whether the uniquely conditioned nature of the mining right constituted good cause. The failure even to engage with this question is antithetical to the statute's design. All things considered, the question of whether good cause exists can only be answered in the affirmative.

[53] To recap, I have found that the JV meets the requirements of Note 6(f) and that it was entitled to the refunds. I have also found that on the conspectus of the circumstances of this case, the exercise of a discretion envisaged in Note 5 was triggered notwithstanding the NAC's finding that the JV did not qualify for refund payments within the meaning of Note 6(f). The conclusion on these two issues calls for the upholding of the appeal. It is interesting that, during the exchange with the bench, counsel was asked, as an aside, which entity, on the respondents' proposition, was entitled to claim the fuel refunds from SARS. The response was that no entity was authorised to do so. Taken to its logical conclusion, this hypothesis means that the fiscus would retain levies paid on an activity the Legislature intended to subsidise. It is a theory that negates the rationale for Note 5, and fails to pay due consideration to the incentive the Legislature intended to provide to enterprises through the refund mechanism.

[54] Given the finding in the preceding paragraph, the appeal should be upheld on the basis that the high court erred in finding that the JV was not eligible for refunds. Ordinarily, that ought to be dispositive of the appeal. However, on the authority of *Spilhaus Property Holdings*,[14] this Court must address all issues raised in this appeal. In this regard, it bears reiterating, for the sake of completeness, that SARS's failure to exercise the discretion envisaged in Note 5 offends the principles of administrative law. And this failure to exercise its discretion in the prevailing circumstances constitutes a reviewable irregularity warranting that its decision be set aside.

Jurisdiction of the NAC and the four-year delay

[55] The appellants asserted that the NAC's decision was time-barred and that the excessive delay rendered the decision invalid. The record reveals an ongoing exchange of information and representations at every level, from the SARS audit to the NAC's decision. Although the processes reflect a delay in communication, I am not persuaded that the four-year delay in pronouncing on the NAC's appeal invalidated the decision.

[56] As regards the jurisdiction of the NAC, the starting point is that an appeal committee is a creature of statute and may exercise only those powers expressly or impliedly conferred upon it. Its jurisdiction must therefore be established from the empowering provisions of the CEA and the applicable rules. At the time the internal appeal was lodged and considered, the appeal lay against a determination in which SARS disallowed diesel refunds of R5 099 995.21. That amount fell squarely within the RAC's monetary jurisdiction.

[57] The jurisdiction of the NAC was, at the relevant time, triggered only in defined circumstances, including where the 'collective amount' to which the appeal relates exceeded the prescribed monetary threshold, or where SARS directed that the NAC

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[14] *Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks(Pty) Ltd and Another* [2019] ZACC 16; 2019 (6) BCLR 772 (CC); 2019 (4) SA 406 (CC) paras 44 – 48 (*Spilhaus Property Holdings*). See further *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC), paras 36–37; *King and Others NNO v de Jager and Others* [2021] ZACC 4; 2021 (5) BCLR 449 (CC); 2021 (4) SA 1 (CC), paras 13, 105 – 107.

consider the appeal. On the facts before the NAC at the time of referral, neither of these jurisdictional prerequisites had been satisfied.

[58] The contention that jurisdiction could be established retrospectively on the basis that the amount might increase as a result of the appeal process cannot be sustained. Jurisdiction must exist at the time the appeal is seized by the adjudicative body, and cannot be created by the body's own decision to enlarge the scope or consequences of the appeal. The phrase 'collective amount to which the appeal relates' refers to the amount demanded in the determination under appeal, not to an amount that may later be asserted.

[59] It follows that the NAC did not have jurisdiction to determine the appeal merely because the RAC formed the view that the matter might ultimately involve a greater amount. In the absence of a statutory direction by SARS, the referral to the NAC was not authorised by law.

Introduction of a new ground of disallowance

[60] An internal administrative appeal is directed at the correctness of the determination appealed against. While such an appeal may be wide in the sense that the merits are reconsidered, it remains an appeal against an existing determination and not an opportunity to initiate a fresh assessment on new grounds.

[61] In the present matter, the original determination disallowed refunds on specific substantive grounds unrelated to the holding of a mining right. The issue of compliance with Note 6(f) and the alleged absence of a mining right in the name of the joint venture were not relied on in the original determination. They were raised for the first time during the internal appeal process. It was not directed at evaluating the validity of the original grounds of disallowance, but instead constituted the invocation of an entirely new basis for liability. By so doing, the NAC impermissibly substituted the initial determination with a qualitatively different one founded on a new and unrelated ground.

Increase in the amount demanded

[62] The escalation of the amount demanded from R5 099 995.21 to R82 984 080 was a direct consequence of the newly introduced ground relating to the mining right. That increase did not represent a recalculation of the same disallowance under appeal, but rather the substitution of the original determination with a fundamentally different assessment. The powers of an appeal committee are circumscribed. The applicable statutory and rule-based framework authorises an appeal committee to allow or disallow the appeal, in whole or in part. These powers do not include the authority to increase the taxpayer's liability beyond that reflected in the original determination.

[63] The increase in the amount transformed the appeal process into an assessment process, a function reserved for SARS officials acting under the Act's assessment and determination provisions, subject to the taxpayer's right of objection and appeal. Allowing an appeal committee to increase the assessment would undermine procedural fairness and defeat the structured system of assessments, objections, and appeals envisaged by the Act. Accordingly, the increase in demand to R82 984 080 fell outside the NAC's powers.

[64] For all the reasons set out above, it follows that the appeal must succeed on all issues, and the order of the high court must be set aside. There is no reason why costs should not follow the result. Given the complexity of this matter, the employment of two counsel is justified.

ORDER

[65] In the result, the following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the high court is set aside and in its place is substituted the following:

    '1 The applicants' appeal against the determination of the National Appeal Committee is upheld.

    2 The determination of the National Appeal Committee is set aside.

3 It is declared that the third applicant, the Goedgevonden Joint Venture, complied with Note 6(f)(ii)(*cc*) of Part 3 of Schedule 6 to the Customs and Excise Act 91 of 1964.

4 The first respondent, the Commissioner for the South African Revenue Service, is ordered to pay the applicants' costs, including those consequent upon the employment of two counsel.'

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M B MOLEMELA

PRESIDENT

Appearances

For the appellant:	W Trengrove SC with J P Vorster SC
	E Muller and J Kiarie-Matheri
Instructed by:	MacRobert Incorporated, Pretoria
	Lovius Block Attorneys, Bloemfontein
For the respondents:	P Ellis SC with L Haskins SC
Instructed by:	Ramushu Mashile Twala Inc, Sandton
	Honey Attorneys, Bloemfontein.