REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: IT 45628

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
……..	**17 August 2022**
SIGNATURE	DATE

In the matter between:

Mr Taxpayer Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on CaseLines electronic platform. The date for hand-down is deemed to be 17 August 2022.

Summary: Appeal against tax assessment by SARS. The issue for determination is whether section 1(*c*B) finds application to the restraint of trade agreement concluded between the Appellant and the company. Whether there is a causal link between the restraint of trade and the previous employment of the Appellant and his previous directorship of the company. The Appellant contending that the amount of R60 million he received from the company not causally connected to his employment or directorship but rather connected to

the sale of the shares and therefore the amount received is not gross income in terms of the Income Tax Act.

J U D G M E N T

MOLAHLEHI J (Mrs Christene Fourie and Mrs Anna Teichert)

Introduction

[1] It is apposite to commence this judgment by extending my sincere gratitude and appreciation to the members of this court, Mrs Christene Fourie and Mrs Anna Teichert, for their invaluable contribution and assistance in issues that involved their respective fields of expertise. Both concur with this judgment as far as the common cause facts are concerned as the issues of interpretation of the law fall exclusively within the domain of the presiding Judge.

[2] The central issue in this matter is whether the provision of section 1(*c*B) of Income Tax Act (ITA) finds application to the restraint of trade agreement concluded between, the appellant, Mr Taxpayer and Holdings. Put another way, the issue is whether the amount of R60 million paid to Mr Taxpayer as consideration for the restraint of trade should be treated as capital or income.

[3] This matter, initially, involved two separate appeals, which were by agreement between the parties set down together for the hearing. The dispute in both appeals concerned two separate additional assessments issued against the appellant, Mr Taxpayer, by the South African Revenue Service (SARS) in 2016 (the year of assessment).

[4] The first appeal relates to the assessment by SARS of the payment of R60 million by Holdings to Mr Taxpayer. According to Mr Taxpayer, the initial assessment was that the amount was treated as capital gains tax, and after that, the amount was treated as income for the additional evaluation.

[5] The second appeal relates to the amount of R160 million which the Trust paid to Mr Taxpayer. This payment was made after the Trust received payment for the purchase of shares from Holdings.

[6] At the beginning of the trial, SARS withdrew its opposition to the second additional assessment appeal. This means that it accepted the merits of that appeal. This assessment which involved the consideration of the tax on a distribution payment in the amount of R160 million received by AB Trust was made on 13 November 2018 as the net proceeds from the sale of its shares held in Holdings.

[7] SARS having withdrawn the second appeal, it means that that matter is no longer before this court for consideration. The judgment accordingly confines itself to the argument pursued during the hearing and ignores those that have been abandoned. The only issue that remains for determination by this court in as far as the second appeal is concerned, is about the costs of that appeal.

The issues

[8] The issue for determination following the abandonment of the opposition to the second appeal by SARS is whether the R60 million received by Mr Taxpayer from Holdings was a payment in consideration of a restraint of trade falling within the definition of "gross income" as envisaged in section 1(*c*B) of the ITA. There are further two issues for consideration, namely:

(a) Whether the facts on which SARS relies to raise an understatement penalty at the rate of 10% in terms of sections 221 to 223 of the TAA are reasonable.

(b) Whether Mr Taxpayer is liable for the statutory interest on the underpayment of tax in the 2016 year of assessment.

[9] The trial in this matter was set down from 23 May 2022 to 27 May 2022. The appellant called three witnesses to testify on his behalf. SARS called one witness who was responsible for raising the appellant's assessment.

Background facts

[10] The background facts in this matter are generally common cause. It is common cause that the long-term relationship between Mr Taxpayer and Mr A broke down, resulting in various disputes and conflicts between the parties. The main dispute concerned the value of the share held by the Trust in Holdings. Mr Taxpayer representing the Trust instituted action proceedings against Holdings regarding the value of the shares. The dispute was resolved by agreement on the day of the hearing. The parties entered into a share-buy repurchase agreement in terms of which the shares of the Trust were sold to Holdings. The share-buy purchase agreement was subject to a suspensive condition which, amongst others, required the conclusion of a restraint of trade agreement with Mr Taxpayer before it could become effective. Upon the

conclusion of the agreement, Holdings paid Taxpayer the sum of R60 million in consideration of the restraint of trade.

[11] Clause 2.3 of the agreement provides:

> "Taxpayer is a trustee and beneficiary of the AB Trust and is an erstwhile director and key employee of the Company, Nama, Holdings Resources and various other subsidiaries of this company. It is recorded that Taxpayer
>
> (i) ceased to be an employee of such companies on or about October 2010 and
>
> (ii) ceased to be a director of such companies on or about June 2011."

[12] Clause 2.5 of the agreement records the undertaking by Mr Taxpayer not to compete with companies which are subsidiaries of Holdings for a period of five years.

[13] Clause 3.1 of the agreement provides as follows:

> "Taxpayer acknowledges that during the course of the AB Trust's shareholding in the Company, Taxpayer was a director and key employee of the Company, Nama, Holdings Resources and various subsidiaries of the company, and has been exposed and has had access to, and has learnt of certain Confidential Information."

[14] Furthermore, clause 4.1.7.1 provides that Holdings was to pay Mr Taxpayer the sum of R60 million "in settlement of the consideration payable in terms of the Restraint Agreement".

[15] After receipt of the payment, Mr Taxpayer declared the amount as capital gain and accordingly paid the amount of R8 million towards capital gains tax. This he did after receiving the purported directive from SARS.

[16] SARS did not agree with the categorisation of the payment as capital gain and accordingly adjusted it as an income falling within the definition of section 1(*c*B) of the Income Tax Act (ITA).

[17] Aggrieved by the decision of assessing the payment as gross income, Mr Taxpayer filed a letter of objection and listed the following as grounds of objection:

> "2.1 There is no valid assessment the "finalisation" letter is not an assessment as defined.
>
> 2.2 Our client has not been afforded fair administrative action in the raising of the purported tax liability.
>
> 2.3 The assessment for the 2016 year of assessment has become prescribed by lapse of time.
>
> 2.4 The correct amount of tax due, payable in the 2016 year of assessment was paid in June 2016.
>
> 2.5 There is no basis for the imposition of understatement penalty and interest."

[18] It is further stated in the letter that the amount received from Holdings was for a restraint of trade. SARS disallowed the objection and aggrieved by this decision, Mr Taxpayer filed the appeal.

The appellant's version

[19] The first witness called by the appellant was Mr C, a former employee of SARS. His testimony related in the main to the document dated 11 June 2015 and titled, **"DIRECTIVE (ACCOUNT ADMIN)"**, which the appellant contends is a tax directive issued to him by SARS. The essence of this document was to confirm that SARS had received certain documents which revealed that Mr Taxpayer had received the amount of R60 million and categorised it as capital in nature. The amount to be paid as capital gains tax in the document is reflected as R8 million.

[20] Mr C initially denied having signed the document. He accepted that he did not have the authority to work in matters related to capital tax and that if he had issued the tax directive, he would have done so under the directive of some senior official. He conceded under cross-examination that the document was not a tax assessment.

[21] The second witness for the appellant was Mr N, a chartered accountant registered as a tax consultant with twenty-seven years of experience. He testified how the appellant approached him with the document referred to above and sought advice on what he should do. He advised him to pay the amount of R8 million to SARS which was reflected as capital gains in the said document.

[22] Mr N indicated during cross-examination that he could not tell whether the amount of R60 million received by the appellant constituted a capital gain or revenue. He also conceded that the document did not refer to the restraint of trade agreement.

[23] The third witness was the appellant, Mr Taxpayer, who testified how he met with Mr A while conducting research for his Master's degree in chemical engineering. They formed a successful business of processing mining by-products containing gold, silver and other metals.

[24] Mr Taxpayer testified that he was the inventor and originator of the technology upon which the business of Holdings operated and gave it a competitive advantage.

[25] Initially, both Mr Taxpayer and Mr A were directors of Holdings. Their relationship as employees of the company was formalised in March 2009. The letter of appointment of Mr Taxpayer, as an employee, in paragraph 23 provides for a restraint of trade covenant for twelve months after termination of employment.

[26] Mr Taxpayer testified further that his relationship with Mr A broke down, resulting in him stopping to work for Holdings in 2010. He, however, remained a director and kept an office at Holdings. He was removed as a director in 2011.

[27] Following his removal as a director, Mr Taxpayer instituted litigation through the AB Trust “to obtain a value of what I would have built over the years”. The matter was set down for hearing towards the end of 2015. It is apparent that at the hearing of the matter, Mr A made a settlement proposal to Mr Taxpayer. Following the proposal, a settlement was concluded between the parties, the essence of which, as alluded to earlier, was that Holdings would pay AB Trust the amount of R160 million and R60 million to Mr Taxpayer in consideration of the restraint of the trade agreement. This means that two separate settlement agreements were concluded between the parties.

[28] The first agreement to purchase the shares was between Holdings and AB Trust. The agreement was subject to the suspensive conditions, which required Holdings to obtain a written guarantee in favour of AB Trust for the repurchase of the shares in the sum of R160 million. The second agreement was about the payment of R60 million to Mr Taxpayer in consideration of the restraint of trade.

[29] Clause 4.1.10 of the agreement provides that a restraint agreement should be concluded on the date of the signature of the repurchase of the shares agreement.

[30] The second agreement is the restraint of trade agreement which was concluded between Holdings, Nama Copper Resources Proprietary Limited and Mr Taxpayer.

[31] After receiving the payment from Holdings, Mr Taxpayer approached SARS at its Edenvale office regarding his tax affairs. He was advised to take the documents relating to his payment to SARS's office at Megawatt Park. He proceeded to Megawatt Park and handed over the letter (not dated), which reads as follows:

> **“Re: Mr Taxpayer Tax No 1561147842**
>
> Dear sir
>
> I hereby request that you provide me with an assessment for tax due to the fact that I and Trust have recently sold our interest in a group of companies, as part of a legal settlement of a court case.
>
> I enclose the following documents for your consideration.
>
> 1. Schedule of legal Expenses
> 2. Holdings S114(3) Independent Experts Report Share Valuation Certificate,
> 3. Share Purchase Agreement,
> 4. Restraint Agreement.

I also request that you consider my legal expenses. I was employed by Holdings (Pty) Ltd, and my employment ceased in about October 2010.

As part of my employment contract, I had a restraint of trade which lasted 1year.

I was involved in legal proceedings against many companies and people (as shown in the above documents), starting from about February 2011 and lasting until April this year. In all that time, I was not employed at all, did not get a salary, and spent considerable sums of money in legal and expert fees to try and recover the value of the shares I was placed in a very stressful situation by this, and by January 2015 my access to resources was almost completely finished. I was effectively forced to enter into these sale agreements, because of the likelihood that I would not be able to continue financially with the full legal proceedings.

Please could you also consider whether these legal expenses I have been forced to incur, are deductible."

SARS's case

[32] SARS called one witness, Mr E, to testify in its favour. He is employed as an operational specialist audit by SARS. He testified about the process he followed upon receipt of the request from the compliance department that he should audit Mr Taxpayer's tax return. He addressed a letter to him on 11 January 2018, the essence of which was to request Mr Taxpayer to provide relevant information relating to the Capital Gains Tax 2016, as reflected in his tax return.

[33] Mr N, responded in the letter dated 14 March 2018 on behalf of Mr Taxpayer and stated, amongst others, the following:

"The capital gain arose from a restraint of trade payment received by the taxpayer. . . On receipt of the payment, the taxpayer obtained a directive from SARS confirming the transaction was capital in nature."

[34] On 21 June 2018, SARS addressed a letter to Mr Taxpayer, informing him that SARS noted that he received payment in the sum of R60 million in consideration for the restraint of the trade agreement. The letter further, in paragraphs 1.1.6 and 1.1.7, stated the following:

"1.1.6 SARS noted that during the 2018 year of assessment, the taxpayer received an amount of R60 000 000 for restraint of trade and declared a Capital Gains of R60 000 000 on which, the taxpayer obtained directive with calculations of the amount payable immediately of R8 000 000 (R60 000 000 × 33.33% than R20 000 000 × marginal rate of 40% applicable to the taxpayer)

1.1.7 The directive provided by the taxpayer could not be verified by SARS."

The appellant's case

[35] The appellant's case is that he is entitled to have the R60 million paid to him in consideration of the restraint of trade agreement assessed as capital gains taxes. On his behalf, it was contended that the restraint was not imposed as a result of the applicant's employment but rather to protect the shares of Holdings.

[36] In further support of the contention that the restraint agreement was concluded to protect the shares in Holdings, the applicant's Counsel argued that the agreement expressly provided its objective as fulfilling the assistance of the suspensive condition provided for in the share purchase agreement.

[37] The other proposition made in support of the contention that payment of the amount in question was capital and not income, is that Holdings terminated Mr Taxpayer's employment four and half years earlier. The other restraint of the trade agreement, which was in the appellant's employment contract, expired some three and half years earlier. The restraint covenant was in the employment contract for a period of twelve months and expired in October 2011.

[38] The essence of the share purchase agreement, according to Mr Taxpayer, was to end the relationship between Holdings and Mr A on the one hand and him on the other. The purpose of the restraint of trade agreement was to protect the proprietary interest of Holdings once the relationship was terminated.

[39] The other point emphasised on behalf of Mr Taxpayer was that there was no direct causal connection between his employment or holding of office as a director at Holdings and the restraint of the trade agreement.

The case of the SARS

[40] SARS contended that because the applicant is a former employee and director of Holdings, the restraint agreement was by virtue of or in respect of his employment and holding of an office at Holdings. It is on this basis that it contended that the amount paid to him was the gross income envisaged in section 1(*c*B) of ITA.

Legal principles and analysis

[41] Before dealing with whether section 1(*c*B) of ITA finds application in the circumstances of this case, it seems apposite to discuss briefly some broad principles dealing with the restraint of trade contracts.

[42] A restraint of trade can in general take two forms, namely, a restraint of trade between an employer and employee and a buyer and seller of a business. In both instances the restraint of trade seek to prevent an employee or the seller from performing similar business activities as those of the employer or the buyer.

[43] A restraint of trade covenant is often used in an employment contract. It is operative even beyond the existence of the employment contract. In other words, it is enforceable even after the termination of the employment contract. The consequence of such a contract is that the employee's freedom to contract and the right to engage in his or her trade or career is constraint upon termination of the employment contract. Put in another way, it is a contract that restricts an employee from engaging in employment or a career that would compete with the former employer's business, and this is generally limited to a specific time period and geographic area. It is generally accepted that a contract in restraint of trade is enforceable unless it has been shown that it is contrary to public policy.[1] It may be unenforceable where it has been shown that it unreasonably restricts the employee from utilising his or her own skill, knowledge and experience.[2] Another aspect concerning the enforceability of a restraint of trade is that it has to be shown that its purpose is to protect the propriety interest of the employer.[3]

[44] It is trite that a share is a property in which an employer may have a proprietary interest which may deserve protection under the common law. In other words, it is an asset in the hands of the employer.[4]

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1 *See J Louw and Co (Pty) Ltd v Richter* 1987 (2) SA 237 (N) and *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (SCA) 898A-B.

2 *Northern Office Micro Computers (Pty) Ltd v Rosenstein* 1981 (4) SA 123 (C).

3 *Automotive Tooling Systems v Wilkens [2006]* SCA 128 (RSA).

4 In *Massmart Holdings v The Commissioner for the South African Revenue Services*, [2021] ZASCA 27 (26 March 2021) the court held that:

> "[13] An 'asset', according to paragraph 1 of the Eighth Schedule, includes:
>
> '(a) property of whatever nature, whether movable or immovable, corporeal or incorporeal, excluding any currency, but including any coin made mainly from gold or platinum; and
>
> (b) a right or interest of whatever nature to or in such property."

And in In *BNS Nominees (RF) (Proprietary) Limited Breede Coalition (Proprietary) Limited*, Unpublished judgment under case number 5643/2020 Western Cape Division, delivered on 3 December 2021. In paragraph 5 the court was called upon to consider the fair value of the applicant's shares and confirmed that shares are part of the assets of the company.

[45] The purpose of the restraint of trade covenant in an employment relationship was described by the then Appellate Division in *Reeves v Mansfield Insurance Brokers CC,*[5] in the following terms:

> "The legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint accordingly remains effective for a specified period (which must be reasonable) after the employment relationship has come to an end. The need for the protection exists therefore independently of the manner in which the contract of employment is terminated and even if this occurs in consequence of a breach by the employer."

[46] I now turn to deal with the income tax consideration concerning the consequences of the restraint of trade covenant in this matter. It is apposite to point out that even though some suggestion was made during the argument that the skill and knowledge that Mr Taxpayer had at the time of leaving his employment is the one he brought into the company, the validity or enforceability of the agreement was never challenged. It is also important to also point out that the existence of the restraint of trade agreement is common cause. It is in fact Mr Taxpayer who relied on it in categorising the amount of R60 million he received from Holdings as capital.

[47] Before 2001, payments made in consideration of a restraint of trade contracts were treated as a non-taxable remuneration in terms of ITA. The change to this approach was introduced by the amendment of ITA.[6]

[48] The issue of the payment received by a person in consideration of a restraint of trade agreement is now governed by the provisions of section 1 of ITA, which defines the concept of "gross–income" in relation to the year of assessment as follows:

> "(iii) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or
>
> (iv) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic, during such year or period of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder, namely—
>
> (cB) any amount received by or accrued to any natural person as consideration for any restraint of trade imposed on that person in respect or by virtue of—
>
> (iii) employment or the holding of any office; or

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5 1996 (3) SA. 765 (A) at 772.

6 The amendment was effected in the Income Tax Act 30 of 2000, which amongst others provided the purpose of the amendment as being "to provide for a deduction in respect of restraint of trade payments."

(iv) any past or future employment or the holding of an office."

[49] The section must be understood in the context of the categorisation of the money received by a tax payer in consideration of a restraint of trade agreement. The first consideration in this regard is whether the money was received by a natural person and not a juristic entity.

[50] The other inquiry concerns two related aspects. The first is whether the money is received in respect of or by virtue of his or her employment or holding an office (e.g. as a director). The second inquiry has two levels, namely whether the money received in consideration of a restraint of trade agreement was in respect of or by virtue of the past employment or future employment, this include the holding of an office.

[51] As observed by the Supreme Court of Appeal in *Stevens v Commissioner, South African Revenue Services,*[7] there is no material difference between the expression "in respect of" and by "virtue of." The phrases in the section mean a causal connection between the amount received in consideration of the restraint of trade by the tax payer and his or her employment.

[52] The burden of proof as to whether money paid under the restraint of trade is income rests with the person who received the payment in terms of section 102(1) of ITA.[8]

[53] It is common cause in the present matter that the restraint of trade agreement came into being consequent to the suspensive condition in the purchase and sale of the shares agreement. The purchase and sale agreement was between Holdings and the Trust, and the restraint of trade agreement, on the other hand, is between Holdings and Mr Taxpayer. It is accordingly common cause that the amount paid in consideration of the restraint of trade was paid to a natural person, namely Mr Taxpayer.

[54] Furthermore, there can be no doubt that the restraint of trade was to protect the proprietary interest of Holdings and its subsidiaries by protecting the value of the shares. This was in anticipation of the sale of the shares after the termination of the relationship between the parties.

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7 [2006] SCA 145 (RSA).

8 Section102(1) of ITA provides:

"A taxpayer bears the burden of proving—

(*g*) that an amount, transaction, event or item is exempt or otherwise not taxable;
(*h*) that an amount or item is deductible or may be set off;
(*i*) the rate of tax applicable to a transaction, event, item or class of taxpayer;
(*j*) that an amount qualifies as a reduction of tax payable;
(*k*) that a valuation is correct; or
(*l*) whether a 'decision' that is subject to objection and appeal under a tax Act is incorrect."

[55] As alluded to earlier and to emphasise the point, Mr Taxpayer did not challenge the reasonableness or otherwise of the restraint of the trade agreement. He also did not challenge the need for Holdings to impose the restraint of trade on him to protect the value of the shares to prospective purchasers. He testified that he did not compete with Holdings before the sale of the shares for fear that that would affect the price of the shares negatively. In other words, he accepted that absence of a restraint preventing him competing with Holdings, there would be a risk of the value of the shares diminishing. This is in a sense an acknowledgment on his part that the shares were at a risk of losing their value if he was to compete with Holdings.

[56] In my view, it is clear from the proper reading of clauses 2 and 3 of the restraint of trade agreement that the restraint has a direct link with the employment contract and the position of Mr Taxpayer as a director of Holdings. In this respect, Mr Taxpayer "acquired knowledge and confidential information by virtue of having been a key employee and director of Holdings."

[57] It is further my view that the contention of Mr Taxpayer that the payment he received was "by virtue of the share purchase agreement" is unsustainable. As alluded to earlier, Mr Taxpayer is not a party to the share purchase agreement. Except for what appears to be a *quid pro quo* arising from the suspensive conditions in the share purchase agreement, there is no evidence to show the link between the two agreements.

[58] In my view, it is clear when applying facts in this case to section 1(*c*B) of ITA that Mr-Taxpayer receive the payment of R60 million from Holdings in his personal capacity. The payment was in consideration of a restraint of trade imposed on Mr Taxpayer. The restraint of trade was imposed on him by virtue of his employment, thus bringing the restraint of trade within the sphere of section 1(*c*B)(iii) of ITA.

[59] Mr Taxpayer objected to the imposition of the penalty by SARS concerning his declaration of the R60 million received from Holdings as capital gain tax. The appellant suggested that the restraint in this matter could not be by virtue “of employment or the holding of an office considering the period when the restraint covenant was concluded and the termination of agreement. Even if this argument was, in the circumstances of this case to be accepted, the contention of Mr Taxpayer could still not be sustainable. The contention would still fail having regard to the provision of section 1(*c*B)(iv). The restraint of trade was concluded with Mr Taxpayer as a former (past) employee and former director of Holdings.

Penalty for understatement

[60] Mr Taxpayer contended that there was no basis for the imposition of the understatement penalty because he complied with the directive issued by SARS on 11 June 2015.

[61] SARS contends that Mr Taxpayer incorrectly declared the consideration for the restraint of trade as capital in nature and thus paid the amount of R8 million as capital gains tax. In this regard, SARS contended that the amount paid to Mr Taxpayer based on the consideration of the restraint of trade was subject to the ordinary income tax in terms of ITA. In other words, it is gross income in the hands of Mr Taxpayer.

[62] The issue of the understatement in this matter arises from the amount of the R60 million received from Holdings by Mr Taxpayer who as alluded to earlier declare the amount in his tax return as a capital gain tax. SARS in its assessment, treated the amount as gross income and thus regarded its declaration as capital in the appellant's tax return to be an understatement.

[63] Understatement is defined in section 221 of the Tax Administration Act No. 28 of 2011 (TAA) as follows:

> "*(a*) a default in rendering a return;
>
> (*b*) an omission from a return;
>
> (*c*) an incorrect statement in a return;
>
> (*d*) if no return is required, the failure to pay the correct amount for tax; or
>
> (*e*) an impermissible avoidance arrangement."

[64] It is trite that an understatement will trigger a penalty contemplated in section 222 of the TAA. Section 222, provides that:

> "In the event of an understatement by a taxpayer, the taxpayer must pay, in addition to the tax payable for the relevant tax period, an understatement penalty determined under subsection (2) unless the unless the understatement resulted from a *bona fide* inadvertent error."

[65] The appellant contended that SARS was not entitled to impose the penalty. In terms of section 102(2) of the TAA the onus of showing that the imposition and understatement penalty was justified rests with SARS.

[66] The case of the appellant is not that the understatement occurred consequent a *bona fide* inadvertent error but rather that it acted on the directive issued by the SARS. Based on the facts and the circumstances of this case I find the appellant's proposition unsustainable for the reasons set out below.

[67] In my view, the appellant misrepresented to SARS the true state of affairs concerning the restraint of trade and its relation to the amount received. The document he relies on is not an assessment and was issued based on what he told SARS in his letter. In his letter, he represented that the "restraint lasted for a year." This is the first restraint of the trade agreement, which took effect immediately after he left his employment. The restraint of trade agreement in issue is for five years and came into existence more than three years after the expiry of the first restraint of trade.

[68] The document that the appellant relied on as to why he declared the R60 million as capital tax in his tax return is suspicious. Even though the document is on the logo of SARS, its validity is placed in serious doubt by the evidence of the appellant's witness, Mr C, who is the person who signed the document. He initially denied having signed the document. He denied his involvement in the issuing of the document and testified further that if he did, he would have done it under supervision. And more importantly, he testified that he knew nothing about capital gains tax and was never trained on how it works. He also testified that the document was *prima facie* not a tax directive.

[69] It is important to note that Mr Taxpayer in preparing his tax return was assisted by a tax consultant of twenty-seven years' experience, Mr N.

[70] Mr C further testified that he did not have access to the system used for issuing such documents. The duty to render full and accurate disclosure in the tax return is on the taxpayer.

[71] In my view, the conduct of Mr Taxpayer is not a *bona fide* error which could excuse him for his understatement. The understatement by Mr Taxpayer is substantial and evidently prejudiced SARS.

[72] The proposition by Mr Taxpayer that approaching SARS with the documents concerning the payment of the R60 million amounted to "Voluntary Disclosure" is also unsustainable.

[73] The requirements of voluntary disclosure are governed by section 227 of the TAA. To satisfy the requirements, the disclosure must:

a) be voluntary;

b) involve a default which has not occurred within five years of the disclosure of a similar default by the applicant or a person referred to in section 226(3);

c) be full and complete in all material respects;

d) involve a behaviour referred to in column 2 of the understatement penalty percentage table in section 223;

e) not result in a refund due by SARS; and

f) be made in the prescribed form and manner."

[74] The onus rest on the person claiming to have made the disclosure in terms of section 227 of TAA to show on the balance of the probabilities that he or she has complied with the requirements. Mr Taxpayer in the present matter has failed to meet the threshold. The approach he made to SARS was to request an assessment because "him and a Trust have recently sold our interest in a group of companies as part of a legal settlement." He further sought advice as to whether the legal expenses he incurred in litigating against Holdings were deductible.

[75] As far as interest is concerned, Mr Taxpayer has not made out a case for remittal or that the provisions of section 89*quat*(3) of the ITA SARS ought not to have directed the interest payment.[9]

The costs – second appeal

[76] The appellant contended that he is entitled to the costs for the second appeal because the opposition by SARS was unreasonable and further that it persisted with that attitude of opposing the appeal until the last moment. SARS conceded the merits of the second appeal concerning the R160 million paid to the Trust and whatever was due to Mr Taxpayer distributed to him on 13 May 2022.

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[9] Section 89*quat*(3) of the Income Tax Act at the relevant time (for the 2016 year of assessment) stated as follows: “Where the Commissioner having regard to the circumstances of the case is satisfied that the interest payable in terms of subsection (2) is as a result of circumstances beyond the control of the taxpayer, the Commissioner may direct that interest shall not be paid in whole or in part by the taxpayer.”

[77] The issue of costs in matters of this nature is governed by section 130 of the TAA which gives the court the discretion to grant costs if:

(a) the assessment or the decision made by SARS is unreasonable,

(b) appellant's grounds of appeal are held to be unreasonable.

[78] I agree with Holding's Counsel that the explanation for withdrawing the opposition to the appeal on 13 May 2022 is unsatisfactory and unreasonable. At that stage, the matter was already set down by the registrar for hearing on 23 May 2022. This was not the first time that the matter was allocated a date for a hearing by the registrar. The matter was set down for hearing on two previous occasions but had to be postponed.

[79] The SARS's Counsel explained that the reason for the withdrawal of the opposition to the appeal was taken after SARS "had properly considered the matter."

[80] The reasonableness or otherwise of the decision of SARS has to be weighed in the context where the appellant filed his objection to the second assessment on 22 January 2019. SARS provided the reasons for its decision only after the appellant had approached the Tax Court and obtained an order compelling it to provide the reasons.

[81] SARS persisted with its opposition to the appeal for more than eighteen months and only conceded that there was no basis for opposing the appeal a few days before the hearing on the basis that "it is only now" that it had the opportunity to consider the merits of the appeal.

[82] From the reading of the papers, it is quite clear that the decision to oppose the appeal was unreasonable and accordingly placed the appellant out of pocket. The stance taken by SARS in opposing the appeal is conduct that this court should not countenance. In my view, the conduct of SARS as described above is unconscionable.

[83] I agree with Holdings Holding's Counsel that the appropriate costs order in the second appeal has to be punitive.

[84] In light of the above I find that the appellant in this appeal has failed to show that money paid under the restraint of trade is not income but capital. In other words, he has failed to show that the provisions of section 1(*c*B) does not apply to the facts and circumstances of his case. Accordingly, the appeal stands to fail.

Order

[85] In the premises the following order is made:

1. The appeal is dismissed with costs.

2. The Respondent is to pay the costs of the second appeal on attorney and client scale.

E MOLAHLEHI J
Judge of the High Court of South Africa,
Gauteng Local Division, Johannesburg.

I agree

Mrs Christene Fourie

I agree

Mrs Anna Teichert