REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

HELD AT CAPE TOWN, WESTERN CAPE

CASE NO: IT45710

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

..... **29 November 2022**
SIGNATURE DATE

In the matter between:

Taxpayer B Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT DELIVERED ON 29 NOVEMBER 2022

VAN ZYL AJ:

Introduction

[1] The Court is sitting as a Tax Court as established in Chapter 9, Part D, of the Tax Administration Act 28 of 2001 ("the TAA"). The applicant is a registered taxpayer whilst the respondent is *inter alia* responsible for administering the provisions of the Income Tax Act 58 of 1962 ("the ITA"), the TAA, and other taxation legislation applicable to these proceedings.

[2] This is an interlocutory application in terms of section 117(3) of the TAA, read with Tax Court rule 51(2). The applicant seeks an order directing that it is entitled to rely on a new ground of appeal in its statement filed in terms of Tax Court rule 32, promulgated under section 103 of the TAA as GN 550 in *Government Gazette* 37819 of 11 July 2014. That statement is the only pleading filed by a taxpayer in a Tax Court appeal (of which the present proceedings form part). It is filed after the respondent ("the Commissioner") has filed a Rule 31 Statement of Grounds of Assessment.

[3] Rule 32 forms part of the dispute resolution procedure set out in the TAA, and governs when a taxpayer's rule 32 statement must be filed and what it must and may not contain. It provides as follows:

> "**Statement of grounds of appeal**
>
> (1) The appellant must deliver to SARS a statement of grounds of appeal within 45 days after delivery of—
>
> (*a*) the required documents by SARS, where the appellant was requested to make discovery under rule 36(1); or
>
> (*b*) the statement by SARS under rule 31.
>
> (2) The statement must set out clearly and concisely—
>
> (*a*) The grounds upon which the appellant appeals;
>
> (*b*) Which of the facts or the legal grounds in the statement under rule 31 are admitted and which of those facts or legal grounds are opposed; and
>
> (*c*) The material facts and the legal grounds upon which the appellant relies for the appeal and opposing the facts or legal grounds in the statement under rule 31.
>
> (3) <u>The appellant may not include in the statement a ground of appeal that constitutes a new ground of objection against a part or amount of the disputed assessment not objected to under rule 7</u>."

[Emphasis supplied.]

[4] The relevant portion of rule 7, referred to in rule 32(3), provides as follows:

"**Objection against assessment**

(1) A taxpayer who may object to an assessment under section 104 of the Act, must deliver a notice of objection …

(2) A taxpayer who lodges an objection to an assessment must—

(*a*) complete the prescribed form in full;

(*b*) specify the grounds of the objection in detail including—

(i) the part or specific amount of the disputed assessment objected to;
(ii) which of the grounds of assessment are disputed; and
(iii) the documents required to substantiate the grounds of objection that the taxpayer has not previously delivered to SARS for purposes of the disputed assessment; …"

[Emphasis supplied.]

[5] Rule 10 regulates the filing of notices of appeal against assessments, where an objection has been unsuccessful. For present purposes the following portions are relevant:

"Appeal against assessment

(1) A taxpayer who wishes to appeal against the assessment to the tax board or tax court under section 107 of the Act must deliver a notice of appeal in the prescribed form and manner …

…

(2) A notice of appeal must—

(a) be made in the prescribed form;

(b) specify in detail—

(i) in respect of which grounds of the objection referred to in rule 7 the taxpayer is appealing;
(ii) the grounds for disputing the basis of the decision to disallow the objection referred to in section 106(5); and
(iii) any new ground on which the taxpayer is appealing;

…

(3) The taxpayer <u>may not appeal on a ground that constitutes a new objection against a part or amount of the disputed assessment not objected to under rule 7</u>.

… "

[Emphasis added.]

[6] The relevant ground of appeal in the present matter is "new" because the applicant had not previously relied in either its objection or its notice of appeal. Both of those documents were filed in accordance with the procedure set out in Chapter 9 of the TAA, that is, the procedure leading up to the dispute being referred to the Tax Court for determination.

[7] The applicant submits, in brief, that it is entitled to rely on the new ground of appeal on the basis, *inter alia*, that:

> [7.1] It is expressly permitted to do so in terms of Tax Court rule 32(3); and
>
> [7.2] The Commissioner is expressly afforded an opportunity to reply – as he has done – to any such new ground of appeal included in the applicant's rule 32 statement in terms of Tax Court rule 33(2) which provides that "[the Commissioner's] reply to the statement of grounds of appeal must set out a clear and concise reply to any new grounds, material facts or applicable law set out in the statement".

[8] The applicant contends that the new ground of appeal relates to "a part or amount of the disputed assessment" against which it had objected as contemplated in rule 32(3). The new ground is raised in the alternative to the original ground.

[9] The Commissioner argues to the contrary. The dispute between the parties is thus whether the new ground may be relied upon by the applicant on the provisions of rule 32(3), or whether it falls beyond the scope of the type of new ground contemplated in the sub-rule. As Tax Court appeals are conducted in trial format, it is in the interests of both parties involved that the applicant's entitlement to rely on the new ground be determined at the outset so that they may prepare their cases accordingly.

The background leading up to the appeal

[10] In terms of the relevant legislation, taxpayers' income tax liability is levied with reference to "taxable income", which is calculated as follows: gross income less exempt income less deductions and allowances equals taxable income. These concepts are defined in detail in the ITA but it is not necessary for present purposes to dwell on the definitions. I shall return to the issue of "gross income" in the course of the discussion further below. The assessment by the Commissioner of what constitutes the applicant's taxable income has given rise to these proceedings.

[11] It is apposite to set out, briefly, the factual background to this matter, and to point out the difference between the grounds of objection and appeal that the applicant has relied on previously, and the new ground.

[12] The following facts are common cause.

[13] The applicant listed an amount of gross income of R320 846 361.00 for the 2018 tax year in its tax return for that period, thereby declaring that this amount of gross income had been received by or had accrued to it for the 2018 tax year. Its Annual Financial Statements ("AFS") for the 2018 year disclose gross income in the amount of R320 846 361.00. The applicant's income tax assessments for the 2018 tax year reflect a gross income in the same amount. This amount is reflected in all assessments up to and including the reduced assessment referred to below, issued after the partial allowance of the applicant's objection.

[14] The applicant claimed an amount of R73 215 161.00 in expense deductions for the 2018 tax year as per this ITR14 return. The deduction amount of R73 215 161.00 claimed includes an amount of R11 072 237.00 ("the disputed amount") that relates to the distribution of profits paid to a related party referred to in the AFS as the Taxpayer B Partnership "the BECP". The BECP is not a taxpayer.

[15] The applicant bore the burden in terms of section 102(1)(*b*) of the TAA of proving that the amount of R11 072 237.00 paid as a profit distribution to the BECP was an allowable deduction meeting the requirements of section 11(*a*), read with section 23(*g*), of the ITA.

[16] The Commissioner undertook an audit of the applicant's income tax affairs for the 2016 to 2018 tax years, and informed the applicant on 2 March 2019 that it (the applicant) was afforded the opportunity to submit a revised ITR14 return if there were errors present. The applicant did not allege any errors in the ITR14 return, which declared that gross income in the amount of R320 846 361.00 was received or accrued in the 2018 tax year.

[17] An additional assessment was issued subsequent to the finalisation of the audit and the engagements between the parties during the audit. The additional assessment, dated 25 March 2020, did not implement any adjustment to the applicant's assessed gross income amount of R320 846 361.00. It was issued in relation to its 2018 year of assessment. The Commissioner disallowed the deduction of the R11 072 237.00 paid as a profit distribution to the BECP on the basis that the applicant had failed to discharge the burden of proving that the amount is an allowable deduction in terms of section 11(*a*) of the ITA, read with section 23(*g*).

[18] The applicant objected to the additional assessment as contemplated in section 104 of the TAA on 23 June 2020. The objection was to the effect that the Commissioner had erred in adding back the disputed amount, because such disputed amount met the requirements of the General Deduction Formula (i.e., section 11(*a*) read with section 23(*g*) of the ITA) and therefore qualified as a valid deduction from the applicant's taxable income ("the deduction ground").

[19] The applicant submits that the objection was against the whole of the additional assessment and dealt expressly with the adding-back of the disputed amount. The Commissioner submits, in contrast, that the applicant did not specifically object to the gross income amount of the assessment and did not allege that the gross income amount included as part of the disputed assessment was incorrect. I refer to the grounds of objection again in the course of the discussion below but it appears from the letter of objection that the Commissioner's submission is correct. The objection was against the assessment in the sense that the applicant objected to certain aspects of the assessment on the basis of the delineated grounds set out in the objection letter. None of those grounds attacked the gross income amount.

[20] Although the objection was partially allowed by the Commissioner, resulting in a reduced assessment raised on 29 September 2020, the applicant's objection pertaining to the exclusion of the disputed amount from its taxable income was disallowed. The reasons for the disallowance thereof, in particular in relation to the disputed amount, were detailed in a letter dated 28 September 2020 from the Commissioner.

[21] On 9 November 2020 the applicant filed a notice of appeal, as contemplated in section 107 of the TAA, against the disallowance of the objection. The appeal did not allege that the gross income amount included as part of the disputed assessment was incorrect. The notice of appeal indicates that the appeal is lodged against the disputed assessment on the basis of one ground, namely the deduction ground in respect of the disputed amount.

[22] The Commissioner filed his rule 31 statement on 31 August 2021, after which the applicant filed its rule 32 statement on 20 November 2021. The applicant indicated in the rule 32 statement that it relied on a ground of appeal not previously relied upon in its objection and notice of appeal (that is, the new ground of appeal).

[23] The new ground of appeal is to the effect that the disputed amount neither accrued to nor was it received by the applicant as contemplated in the definition of "gross income" in section 1 of the ITA because it was neither a receipt by nor an accrual to the applicant on its own behalf or for its own benefit (the new ground of appeal is therefore also referred to in the papers as "the receipt/accrual ground").

[24] The Commissioner elected to file a statement in terms of rule 33 (which is a reply to the rule 32 statement) on 17 February 2022. In its statement, the Commissioner takes issue with the applicant's reliance on the new ground of appeal on the basis that the applicant is prohibited from doing so in terms of Tax Court rule 32(3) which, as stated above, states that "[t]he appellant may not include in the [rule 32] statement a ground of appeal that constitutes a new ground of objection against a part or amount of the disputed assessment not objected to under rule 7".

[25] The applicant does not deny that it did not object to the gross income amount which forms part of the disputed assessment. It explains that the deduction ground and the receipt/accrual ground both contend that the disputed amount should be excluded from the applicant's taxable income and therefore the new ground relates to an amount already previously objected to. The distinction between the two grounds is that:

[25.1] the deduction ground argues that the disputed amount falls to be excluded from taxable income as a deduction, while

[25.2] the receipt/accrual ground argues that the disputed amount should not have been included in the applicant's gross income at all and thus falls to be excluded from the taxable income on this basis.

[26] The proper interpretation of Tax Court rule 32(3) is thus central to the dispute. The applicant contends that the rule expressly caters for and allows the introduction of new grounds of appeal, and that the new ground that it relies upon falls within the ambit of the rule in that it does not constitute a new ground of objection against a part or amount of the disputed assessment not previously objected to. In other words, the new ground of appeal is directed at a part or amount of the disputed assessment against which the applicant did object, that is, the inclusion of the disputed amount in the applicant's taxable income.

[27] The Commissioner's position is that the new ground attempted to be introduced is against the gross income amount of the disputed assessment, and the applicant therefore needs to prove that it has objected to the gross income amount of the disputed assessment for the new ground to be permissible.

The development of the Tax Court Rules over the years

[28] The applicant referred to the development of the Tax Court rules as they relate to pleadings filed by parties to Tax Court appeals so as to demonstrate the approach to the admission of a new ground of appeal in the taxpayer's pleadings. The applicant argues that such approach has never been unduly technical or rigid, even when the relevant rules contained a stricter test in this regard than the present rule 32 does. The Commissioner does not deny the approach taken in the course of the development of the rules, but contends that such development has not resulted in the leeway on which the applicant relies.

[29] The parties are agreed that the progression of the rules displays three consecutive stages, namely (1) the No Rules period; (2) the Previous Rules period; and (3) the New Rules period (I use the parties' nomenclature).

[30] During the first period, the No Rules period, there were no promulgated Tax Court Rules. The provisions relevant to the manner in which Tax Court appeals were to be dealt with were all contained in the ITA itself.

[31] The relevant characteristic of this period was section 83(7)(*b*) or (*c*) of the ITA (or its earlier equivalents) which provided that the taxpayer was limited to the grounds stated in its notice of objection. The provisions of section 83(7)(*b*) or (*c*) of the ITA were regarded as unfair because the Commissioner was free to change the grounds on which he relied, even during the proceedings before the Tax Court, whereas the taxpayer was limited to the grounds stated in its notice of objection. This facilitated litigation by ambush, and section 83(7) was repealed in 1989.

[32] The applicant points out that, even during this austere dispensation, the courts adopted a realistic and pragmatic approach in determining whether the grounds raised in a taxpayer's objection covered the points sought to be argued on appeal. For example, in *Matla Coal Ltd v Commissioner for Inland Revenue* 1987 (1) SA 108 (A), the Court held as follows at 125H:

> "It is naturally important that the provisions of s 83(7)(*b*) be adhered to, for otherwise the Commissioner may be prejudiced by an appellant shifting the grounds of his objection to the assessment in issue. At the same time, I do not think that in interpreting and applying s 83(7)(*b*) the court should be unduly technical or rigid in its approach. It should look at the substance of the objection and the issue as to whether it covers the point which the appellant wishes to advance on appeal must be adjudged on the particular facts of the case."

[33] During the second period, the Previous Rules period, the "previous rules" as defined in rule 65 of the new Rules (that is, the current Tax Court Rules) which were the rules promulgated in 2003 in terms of section 107A of the ITA, were in force. Section 107A was enacted in 2001 and repealed by section 271 of the TAA. The previous rules were repealed by section 269(1) of the TAA with effect from the date of commencement of the new Rules on 11 July 2014.

[34] The previous rules embodied a more "progressive" system of pleadings as they made provision, in the then rule 13, for the amendment of the relevant statements. The then rules 10 and 11 were the predecessors of the current rules 31 and 32. Although the dispensation under the Previous Rules period was less stringent than that which applied under the No Rules period (because rule 13 permitted amendments), rules 10 and 11 still contained no provisions such as those now contained in rule 31(3) and rule 32(3) which expressly afford both parties some leeway to expand on their positions as articulated during the objection and appeal procedures when filing their statements in the Tax Court.

[35] In *ITC 1843* 72 SATC 229 (delivered in 2010 while the previous rules were in force) the taxpayer objected to the inclusion by the Commissioner of new grounds in its rule 10 statement of the grounds of objection, on the ground that this burdened the taxpayer with an unfair disadvantage. The Court held as follows at paragraph [22]:

> "I cannot agree with this contention nor is the taxpayer at a disadvantage if the Rule 10 statement incorporates additional or different grounds. First of all, it cuts both ways. Both SARS and the taxpayer will be entitled to add additional grounds or additional defences in their statements. No disadvantage flows from the aforesaid interpretation, because each party will have an opportunity by adding new or different arguments and therefore be in a position to state his case better or more fully than the case set out in the preceding correspondence."

[36] The Court concluded as follows in paragraphs [35] and [36]:

> "My conclusion means that the Commissioner is entitled to add new grounds to its Rule 10 statement different to that contained in the preceding correspondence. The taxpayer will have a second bite to the cherry when it comes to the final appeal hearing. It is in that hearing that the rules of natural justice (audi alteram partem) will be satisfied. The taxpayer is not in this interlocutory application required to finally or once and for all respond to any new grounds raised by the Commissioner in his Rule 10 statement.
>
> In the subsequent appeal hearing any new ground will be properly ventilated. The taxpayer will be entitled to lead evidence to counter whatever new grounds have been raised by the Commissioner in the Rule 10 statement. The taxpayer will also be entitled to call for further discovery of documentation if needs be to counter any such new ground. There are therefore many built-in structures in the rules to protect the taxpayer from the very mischief … referred to in argument."

[37] In *HR Computek (Pty) Ltd v CSARS* [2012] ZASCA 178, 75 SATC 104 (SCA), a case decided during the second period, the taxpayer was the subject of a value-added tax audit pursuant to which an assessment was raised against it. The assessment was comprised of a capital amount, being the output tax not accounted for, as well as additional tax, penalties and interest thereon. The taxpayer objected only against the penalty, additional tax and interest (and thus not against the capital amount). This position was persisted with in the taxpayer's notice of appeal to the Tax Court. When the taxpayer filed its rule 11 statement (the equivalent of the present rule 32 statement) it sought for the first time to challenge the capital amount of the assessment. The Commissioner took issue with this. The dispute whether the taxpayer could challenge the capital amount of the assessment for the first time in its rule 11 statement was argued on a preliminary basis before the trial on the main issues commenced.

[38] The Supreme Court of Appeal held at para [12] of the judgment that the taxpayer, not having raised an objection to the capital amount of the assessment in its notice of objection, was precluded from raising it on appeal to the Tax Court as it effectively amounted to a new objection directed at an individual assessment amount that had not previously been objected to.

[39] The third period commenced when the New Rules were promulgated on 11 July 2014, and contain novel rules such as rule 31(3) which is applicable to the Commissioner, rule 32(3) which is applicable to the taxpayer, and rule 33, which for the first time affords the Commissioner a right of reply to the taxpayer's rule 32 statement of grounds of appeal.

[40] Rule 31(3) provides that the Commissioner may not include in the rule 31 statement "a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment".

[41] It is worth repeating that rule 32(3), which lies at the heart of this matter, provides as far as the taxpayer is concerned that an appellant "*may not include in the statement a ground of appeal that constitutes a new ground of objection against a part or amount of the disputed assessment not objected to under rule 7*".

[42] The applicant points out that rule 33(2) in turn provides in relation to the Commissioner that the "reply to the statement of grounds of appeal must set out a clear and concise reply to any new grounds, material facts or applicable law set out in the statement". Rule 33(2) thus clearly countenances "new grounds" being included in a rule 32 statement. The applicant submits that the changes that are evident from the No Rules period through to the Previous Rules period and into the New Rules period indicate greater flexibility rather than the rigidity formerly in operation. The inclusion of new grounds by both parties is now permitted within the boundaries indicated by rules 31(3) and 32(3) respectively. That is of course so – it is common cause between the parties - but the question remains whether the applicant's new ground falls within the ambit of rule 32(3).

The proper interpretation of rule 32(3)

[43] What, then, is the proper approach to take under the current Tax Court rules?

[44] The well-known *dictum* in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18] represents the current state of the South African law regarding the interpretation of documents. In the more particularised context of statutory interpretation, the Constitutional Court in *Cool Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC) at para [28] articulated these principles as follows:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
>
> (b) the relevant statutory provision must be properly contextualised; and
>
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."

[45] In interpreting rule 32(3) in the consideration and determination of the dispute, it is thus necessary to consider the content thereof against the backdrop of the principles of statutory interpretation as set out in the case law.

The applicant's contentions

[46] The applicant's case is that the new ground falls within the ambit of the type of new grounds of appeal that are permissible, and it does not constitute "a new ground of objection against a part or amount of the disputed assessment not objected to under rule 7". It says this because the premise of both the new (receipt / accrual) and the old (deduction) ground is that the disputed amount should not have been included in the applicant's taxable income.

[47] Whether this is achieved by excluding the disputed amount from the applicant's gross income at the outset (in terms of the new ground), or whether the disputed amount is subtracted from gross income as a deduction in the calculation of taxable income (in terms of the deduction ground), the effect on taxable income is the same, namely that the disputed amount is excluded from the taxable income. It is only when an amount is included in a taxpayer's taxable income that it results in a tax liability, and any argument to the effect that an assessment raised by the Commissioner has resulted incorrectly in an additional liability on the part of the taxpayer must be to the effect that the amount in question should be excluded from its taxable income.

[48] The applicant submits that, while it is true that there is a distinction between the basis upon which the disputed amount is alleged to fall outside the applicant's taxable income in terms of the deduction ground as opposed to the receipt / accrual ground, the fact remains that the applicant had objected against both the part of the additional assessment that made adjustments to its taxable income and against the treatment of the disputed amount in terms of such adjustments. The new ground accordingly relates to a part and amount of the disputed assessment against which the applicant had objected.

[49] The matter is thus distinguishable from the facts in *HR Computek* where the taxpayer did not object to the capital amount of the assessment (but only to the imposition of additional tax, penalties and interest) and sought to do so for the first time in its pleadings before the Tax Court. *HR Computek* was in any event decided before the current Tax Court rules came into force, when there was no equivalent provision to that contained in rule 32(3).

[50] The applicant places heavy reliance on *ITC 1912* 80 SATC 417, which deals with the interpretation of rule 32(3). In that case, too, the taxpayer included a new ground of appeal in its rule 32 statement, that is, a ground that had been included in neither its rule 7 objection nor its notice of appeal. The taxpayer expressly stated in its rule 32 statement that it was doing so and claimed that the new ground was not prohibited by rule 32(3) because it related to neither a part nor an amount that had not been objected to under rule 7. The Commissioner brought an interlocutory application to strike out the new ground on the basis that it was not permissible in terms of the Tax Court rules, and this formed the subject matter to be decided by the Tax Court at the hearing of the application.

[51] The Court held that the proper interpretation of rule 32(3) lay at the heart of the dispute. The Commissioner contended that it did not permit a new ground of appeal which constituted a new ground of objection that had not been raised previously, whereas the taxpayer maintained that a new ground of objection *per* se was not outlawed under rule 32(3). Accordingly, the first issue was an interpretive one (at para [15] of the judgment].

[52] The next issue was whether, in terms of the interpretive approach adopted by the Court, the taxpayer's new ground of appeal actually constituted an impermissible new objection (at para [16]). A fundamental difficulty with the Commissioner's interpretive approach was that it did not account for the actual wording of rule 32(3), which provided that an appellant taxpayer may not include in its statement "a ground of appeal that constitutes a new ground of objection <u>against a part or amount of the disputed assessment not objected to under rule 7</u>." The contention of the Commissioner failed to ascribe meaning to the underlined words (at paras [20] to [22] of the judgment).

[53] The Court continued that regard also had to be had to the current rules 10(3) and 10(4). The wording of rule 10(3) was substantially the same as that of rule 32(3), yet rule 10(4) expressly provided that, if the taxpayer in a notice of appeal relied on a ground not previously raised in the objection under rule 7, the Commissioner could require the taxpayer, within 15 days after delivery of the notice of appeal, to produce the substantiating documents necessary to decide on the further progress of the appeal. Rules 10(3) and 10(4) would be contradictory unless the former was interpreted to permit new grounds not raised under rule 7 (at paras [23] to [25] of the judgment).

[54] It was thus clear from the scheme of the rules that taxpayers were no longer restricted, on appeal, to their original grounds of objection. Provision was made for new grounds to be advanced in rule 10(4) and in rule 33. The latter rule introduced the innovation that the Commissioner may now file a reply to the taxpayer's rule 32 statement which must deal with new grounds raised. The other innovations in the present rules were rules 31(3) and 32(3), and it was also significant that statements made under rules 31, 32 and 33 could be amended, either by agreement or on application to the Court. This was further evidence of an intention to broaden, rather than to restrict, the ambit of the issues that could be dealt with in the tax appeal process (at para [28] of the judgment).

[55] These changes demonstrated a new flexibility in the tax appeal process and a move away from the rigidity of the previous regime. This development was, moreover, in line with the constitutional right to access to court which guaranteed a fair hearing. Rigidity in the legal process could thwart the fairness of proceedings, and there was no good reason to restrict unduly the ambit of a taxpayer's grounds of appeal. This was particularly so when one had regard to the fact that an appeal to the Tax Court involved a full hearing, with the leading of witnesses, cross-examination and discovery (at para [29] of the judgment).

[56] Rule 32(3) was not aimed at prohibiting the introduction of a new ground of objection not raised under rule 7. Its ambit was more limited: what a taxpayer could not do was to use rule 32 to appeal against a portion of the assessment (either in terms of an amount or a part thereof) not previously objected to under rule 7. A taxpayer could thus raise a new ground in its rule 32 statement, provided that it related to a part or an amount in the assessment that had been placed in dispute by the objection lodged in terms of rule 7. This placed the taxpayer in an equivalent position to the Commissioner who, under rule 31(3), could include a new ground in its statement, provided that it did not amount to a novation of the assessment or require a new assessment (at para [30]).

[57] The Commissioner was not prejudiced in this process: it could reply to a new ground contained in the rule 32 statement, and it would have the full armoury of amendment, discovery and the leading of evidence to deal with such ground at the hearing of the appeal (at para [30] of the judgment).

[58] It was common cause that the new ground was in respect of the same amounts and the same parts of the assessments objected to under rule 7, and it was therefore a permissible ground (at para [32]). There was no merit in the Commissioner's submission that insofar as the rules permitted new grounds in a rule 32 statement, this did not extend to new grounds that were in substance not the same as those contained in the objection. There was nothing in the language or the structure of the tax appeal process established under the present rules to suggest that any distinction should be drawn between grounds that were covered in substance in the objection and those that were not. The provisions offered no assistance on where the line should be drawn between these categories, and there was no hint in the language of the provisions that they were ever intended to have this purpose.

[59] Assuming that this was wrong and that there was some merit to the Commissioner's submission, it was necessary to look at the nature of the new ground introduced by the taxpayer (at para [33]). On a proper examination of the grounds, the change in approach adopted in the new grounds essentially involved a re-packaging, for want of a better word, of the legal basis on which the taxpayer now contended that the losses suffered in executing the scheme amounted to capital losses for it. In substance, even with the new grounds, it was the same issue that was before the Court on appeal (at para [36]). The fact that the taxpayer had adopted a different approach to the same issue would not place the Commissioner at an unfair disadvantage. It would have all the tools at its disposal to ensure that the issues were fully ventilated at the appeal hearing. The Commissioner conceded at the hearing that if the application were not successful, there would be no prejudice to it in the appeal. In these circumstances, to uphold the application and strike out the new grounds of appeal from the rule 32 statement would amount to placing form over substance, and would be contrary to the interests of justice (at para [37]). There was thus no substance in the Commissioner's contention that the new grounds included in the rule 32 statement were impermissible and excipiable (at para [38] of the judgment).

[60] The applicant in the present matter submits that the interpretation of rule 32(3) adopted by the Court in *ITC 1912* is correct and consistent with the established, unitary approach to statutory interpretation in terms of which the language of rule 32(3) must be considered in the light of the provisions of the Tax Court rules as a whole and the circumstances attendant upon their coming into existence.

[61] I do not have any quibble with the judgment in *ITC 1912* as far as the general approach to the interpretation of rule 32(3) and the findings upon the facts of that matter are concerned, but I have doubts as to whether it supports the applicant's case given the particular nature of the new ground in the present case. The applicant is relying, I think, on an overly-permissive interpretation. I return to this issue in the course of the discussion of the Commissioner's case.

The Commissioner's contentions

[62] The Commissioner's argument is that what the applicant seeks retrospectively to challenge is the gross income amount of the disputed assessment. The new ground states that the amount of R11 072 237.00 paid as a profit distribution to the BECP was neither a receipt by nor an accrual to the applicant on its own behalf, and also neither a receipt by nor an accrual to the applicant for its own benefit. The applicant thus alleges that the amount of R11 072 237.00 paid as a profit distribution to the BECP did not form part of the applicant's gross income. The foundation of the new ground is therefore an entirely new issue, namely that the gross income amount which is listed in the applicant's declaration and AFS as well as in every assessment issued is incorrect because the deduction amount should never have been included therein. The new ground is therefore an objection raised against the gross income amount of the disputed assessment.

[63] The applicant does not deny that the gross income amount of the disputed assessment was never expressly objected to. It alleges instead that in objecting to the disallowance of the deduction of R11 072 237.00 paid as a profit distribution to the BECP, the applicant has objected to this payment amount, and that this would suffice to incorporate an objection to the gross income amount of the assessment.

[64] The Commissioner's resistance to the new ground as set out in its papers and heads of argument encompasses several aspects but I regard three of them as particularly pertinent, and as the correct approach in determining whether the new ground should be allowed under rule 32(3) on the particular facts of this case.

[65] The first issue raised by the Commissioner relates to the applicant's gross income and the objections made in the course of the assessments. Was the applicant's objection to the disallowance of the deduction amount effectively the same as an objection to the gross income amount? Gross income is defined at section 1 of the ITA as follows:

> **"gross income"**, in relation to any year or period of assessment, means—
>
> (i) 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
>
> (ii) 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, ..."

[66] A determination of a party's gross income for a tax period is therefore founded on establishing the amounts in cash or otherwise that had been received by or had accrued to such party for the benefit of that party in the relevant tax period, excluding capital amounts.

[67] As set out in the recording of the common cause facts, the applicant has declared and consistently reflected in its return and AFS an amount of gross income of R320 846 361.00 for the 2018 tax year. It never deviated from this approach. The applicant's original ground was that the R11 072 237.00 paid as a profit distribution to the BECP is an allowable deduction by virtue of section 11(*a*) read with section 23(*g*) of the ITA. Section 11(*a*) of the ITA states as follows:

"**11. General deductions allowed in determination of taxable income.—**For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived—

(*a*) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature; ..."

[68] Section 23(*g*) of the ITA provides:

"23. Deductions not allowed in determination of taxable income.—*No deductions shall in any case be made in respect of the following matters, namely—*

(g) any moneys, claimed as *a deduction from income derived from trade, to the extent to which such moneys were not laid out or expended for the purposes of trade; …."*

[69] A determination on whether an amount constitutes a valid deduction under sections 11(*a*) and 23(*g*) of the ITA is therefore founded on establishing whether the amount was expended in the production of income for the purposes of trade. It was the applicant's version throughout the audit and the subsequent dispute between the parties that the payment of the profit distribution to the BECP met these requirements.

[70] The applicant never alleged any alternative manner of accounting for this payment. It is thus not correct say, as the applicant does, that the dispute between the parties related to the correct tax treatment to be applied to the amount of R11 072 237.00 paid as a profit distribution to the BECP. The applicant at all relevant times proposed and declared only one manner of tax treatment for this payment, and that was for it to be regarded as a valid deduction amount in terms of sections 11(*a*) and 23(*g*) of the ITA.

[71] The applicant thus never indicated that the payment to BECP did not form part of the applicant's gross income. This would have been relevant in the course of the audit, as it would have afforded the Commissioner the opportunity to scrutinize the transaction further on the basis that it involved amounts previously declared as revenue now being alleged to be the income of a third party instead. That the third party was neither a subject of the audit nor a taxpayer would have justified that scrutiny, as would the fact that the contention is unsupported by any evidence provided by the applicant in the audit or otherwise. The amount paid as a profit distribution to the BECP was therefore from the outset treated as a deduction amount, and was queried by the Commissioner on that basis only.

[72] The exercise to determine an expense amount is to be contrasted with the test for determining gross income set out above. The two processes are distinct. I do not think that it is correct to say that an objection against an expense amount is equivalent to an objection against the gross income amount for the purposes of rule 32(3).

[73] In *Matla Coal Ltd v Commissioner for Inland Revenue*, to which I have referred earlier, the Appellate Division (as it then was) had to determine whether the taxpayer should be confined to the case made out in its objection as contemplated under sections 81(3) and 83(7)(*b*) of the ITA in operation at the time. Section 81(3) of the ITA provided that every objection should specify in detail the grounds upon which it is made. This mirrors the wording of the current rule 7(2)(*b*), and the Court's interpretation of that section is thus relevant to the present matter.

[74] Section 83(7) of the ITA stated as follows at the time:

> "(7) (*a*) Every notice of appeal shall be in writing and shall be lodged with the Commissioner within a period of 30 days after the date of the notice mentioned in section 81(4) or, if the Commissioner has in terms of the provisions of section 106(4) withdrawn the last-mentioned notice and sent it anew, the date of the notice so sent anew, and no such notice of appeal shall be of any force or effect whatsoever unless it is lodged within the said period.
>
> (*a*) At any such appeal the person who made the objection shall be limited to the grounds stated in his notice of objection."

[75] In this regard, the Court held that it "should look at the substance of the objection and the issue as to whether it covers the point which the appellant wishes to advance on appeal must be adjudged on the particular facts of the case". This approach, within the ambit now posed by rule 32(3), must still be valid, because otherwise new grounds would be permissible irrespective of whether they bear any relation to the pleaded case that gave rise to the pending appeal. The applicant does not have a blanket right to introduce new grounds. Its right is limited by rule 32(3). The wording of rule 32(3) (as well as rule 10(3) prescribing the content of a

notice of appeal) clearly indicates that a connection should remain between the amounts previously disputed and thus subject to the disputed assessment, and the new ground. In other words, the taxpayer cannot make out an entirely new case on appeal. This limitation was confirmed by the judgement in *ITC 1912* to which I have referred earlier when setting out the applicant's case: "It is not aimed at prohibiting the introduction of a new ground of objection not raised under TCR 7. The ambit of the prohibition is more limited: what a tax appellant may not do is to use TCR 32(3) to appeal against a portion of the assessment (either in terms of an amount or part) not previously objected to under TCR 7" (see para [30] of the judgment – emphasis added).

[76] The applicant must thus still, as in *Matla Coal*, show on the facts of the case and the substance of the objection that the ground is permissible. In *Matla Coal*, the taxpayer introduced a new ground in relation to the same disputed income amount which it alleged was a capital receipt. The initial objection was that the receipt was capital as it had been received in the course of a restraint agreement. The new ground was that the same amount was still a capital receipt, but on the basis that it related to the sale of coal rights on capital account. The Court held in the appellant's favour. It is clear on the available facts that in *Matla Coal* the new ground related to the same receipt amount and the same treatment of the receipt amount, the only distinction being the basis upon which the receipt amount could be regarded as capital, or the manner in which capital status was to be conferred on a receipt.

[77] The circumstances in *ITC 1912* were similar. I return to these later. In the present matter the new ground essentially relates to a different amount (the gross income amount) of the assessment as compared to that of the objection. The new ground seeks alteration on appeal of that different amount of the assessment, even though it uses the disputed amount of R11 million as the tool to achieve such alteration. Having regard for the substance of the applicant's objection and the facts of the case, it cannot be correct that an objection to the disallowance of an expense amount for failing to meet the requirements of sections 11(*a*) and 23(*g*) of the ITA is equivalent to an objection against the gross income amount of the assessment on the basis that this amount is to be reduced because a portion thereof actually accrued to a non-taxpayer third party.

[78] The Commissioner's second issue goes hand in hand with the first, and relates to the applicant's claim that it had effectively objected to the whole of the disputed assessment, and that there was thus no part or amount of the disputed assessment not objected to under rule 7. The applicant's rule 7 objection (set out in a letter dated 23 June 2020) reads as follows:

> "**GROUNDS OF OBJECTION**: We hereby object to the following adjustment as per the additional assessment received: …"

	Description on assessment letter	**Amount of Adjustment**	**Tax Value**
A	Employment tax incentive included in qross income	**R4 197 000**	**R1 175 160**
B	Property rental	**R300 000**	**R84 000**
C	Profit share distribution	**R11 072 237**	**R3 100 226.36**
D	Understatement penalty		**R310 022.63**
E	Underestimation of provisional tax		**R188 758**
	89*quat*(2) interest		**R293 94.74**

[79] The applicant only objected to these adjustments, which formed part of the disputed assessment. Its gross income amount was not adjusted in any assessment issued to the applicant. It therefore did not object to the gross income amount. If there are any other adjustments included in the disputed assessment in respect of the 2018 tax year that the applicant has not referred to above, then the applicant did not object to the whole of the disputed assessment.

[80] On 25 March 2020 the Commissioner sent the applicant a "Finalisation of Audit" letter that set out adjustments that would be implemented by means of the assessment. In the letter, the Commissioner *inter alia* indicated that a deduction amount of R140 208.00 for accounting fees in the 2018 tax year was found not be a valid expense. That amount was to be disallowed, constituting an adjustment. The Commissioner indicated in addition that it would disallow a deduction amount for private insurance of R49 000 in terms of sections 11(*a*) read with 23(*g*) of the ITA for the same tax year. The amount was disallowed and constituted an adjustment

[81] The applicant did not object to either of those adjustments. It is thus incorrect for the applicant to argue that it objected to the whole of the disputed assessment, and that there was no part or amount of the disputed assessment that was not objected to under rule 7.

[82] The grounds of appeal were similarly delineated in the notice of appeal dated 9 November 2020:

> "**GROUNDS OF APPEAL**: We hereby appeal to the following adjustment as per the additional assessment received: …"

	Description on assessment letter	**Amount of Adjustment**	**Tax Value**
1	Profit share distribution	**R11 072 237**	**R3 100 226.36**
2	Understatement penalty		**R310 022.63**
3	Underestimation of provisional tax		**R188 758**
	89*quat*(2) interest		**R 293 94.74**

[83] Even if the applicant had for the sake of the argument objected to the whole of the disputed assessment, this would not suffice to prove that it had objected to the gross income amount specifically, which was not adjusted in the assessment and which would require specific identification in the objection to satisfy the requirements of rule 7.

[84] In *HR Computek*, to which I have made reference earlier, the issue of new grounds of appeal was addressed in relation to a valuer-added tax ('VAT') dispute. As mentioned, the taxpayer in that case was, subsequent to an audit by the Commissioner, assessed to tax for certain VAT periods in the total sum of R4 040377.28.

[85] The taxpayer objected to the assessment, and indicated in its notice of objection that the total sum of R4 040 377.28 was in dispute. It did however not in its letter of objection contend that the capital VAT amount was objected to, and instead stated that this was not contested. The objection limited the challenges to other amounts of the disputed assessment, as well as to certain procedural matters. This position was maintained through the objection and initial appeal period. It was only upon delivery of the taxpayer's statement of appeal in the Tax Court that it alleged that the capital amount was wrong by asserting that in calculating its VAT liability the Commissioner had included the turnover figures of a related but separate entity of which the taxpayer's member was also the managing member.

[86] Objections at the time (the second period of the Tax Rule regimes discussed earlier) were governed by rule 4 of the old Tax Court rules which mirrors the current rule 7. It stated that the notice of objection must be in a form prescribed by the Commissioner and must "be in writing, specifying in detail the grounds upon which it is made".

[87] The taxpayer's case for seeking to permit the new grounds was that in referring to the globular amount of R4 040 377 as being the "amount of tax in dispute in terms of the assessment" the taxpayer had by necessary implication raised an objection to the capital assessment, which was but one component of that globular sum.

[88] The Supreme Court of Appeal rejected this argument with reference to a definition of "*assessment*" present then in the ITA which, though amended, exists in substantially similar form today in the ITA, read with the TAA. The Court found that the definition does not countenance an objection to a globular amount (at para [10] of the judgment). The Court held (at para [12]) that when the taxpayer alleged the capital amount to be wrong for the first time in its Tax Court statement, it effectively raised a new objection directed at an individual assessed amount that had not previously been objected to.

[89] I think that the same applies to the applicant's case in the present matter in relation to the Commissioner's second issue of dispute. The change implemented by rule 32(3) did not disturb this position. The applicant never contested the gross income amount until it raised the new ground in the rule 32 statement. The Court in *HR Computek* confirmed that a globular objection to a full assessment amount does not by implication constitute an objection to every amount of the assessment. Thus, even if the applicant had objected to the whole of the disputed assessment, its failure to specify the objection to the gross income amount in detail in the letter of objection means that it is precluded at this stage from raising the new ground challenging this amount in the rule 32 statement.

[90] The Commissioner's third issue relates to the applicant's claim that the new ground and the original ground would achieve the same result, if upheld. The Commissioner submits that this is not the case. In any event, rule 32 does not permit new grounds on the basis that the eventual outcome sought by the new ground corresponds with the outcome sought in the original grounds. New grounds are only permissible if they are against a part or amount of the disputed assessment that had been objected to under rule 7.

[91] As set out above, the original ground seeks as its outcome the allowance of a deduction amount of R11 072 237.00 paid as a profit distribution to the BECP. This outcome would be achieved by an upward alteration of the total deductions allowed in respect of the disputed assessment, on the basis that the Commissioner erred in the disallowance of the expense.

[92] The new ground, on the other hand, seeks an alteration of the gross income amount of the disputed assessment downward so as to reduce the applicant's income tax liability. The new ground would achieve this by shifting a portion of the applicant's declared gross income to a third party.

[93] The Commissioner's conduct in the course of the assessment cannot be impugned to justify that alteration of the gross income amount in the manner sought through the new ground (because it had not previously been considered and assessed), and the applicant makes no case in this respect. The outcomes sought, properly considered, are thus not similar. That the final desired result, being the reduction of the applicant's income tax liability, is similar is unsurprising but also immaterial, as this is a tax appeal where the applicant is disputing its income tax liability as assessed.

[94] I return to *ITC 1912*. In that case the Court allowed the new grounds for, *inter alia,* the following reason (see para [36] of the judgment):

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

[Emphasis added.]

[95] The Court in *ITC 1912* therefore permitted a new ground as the same issue was before the Court on appeal as was the subject of the objection under rule 7, namely whether the capital losses arising from the employee share option scheme could be claimed by the taxpayer as capital losses which were deductible for capital gains tax purposes. This equates to a different approach to the same issue, that issue being the validity of the claim for capital losses. This would result in the same outcome, namely the allowance of the amount of capital loss claimed in relation to the employee share option scheme.

[96] This mirrors the approach in *Matla Coal*, where on appeal a different approach was taken to the same issue of the capital status of a receipt. This would result in the same outcome, namely confirmation that the receipt was capital in nature.

[97] Again, this is not the case in the present matter. The issue in the original ground is the validity of a deduction amount in view of the requirements of sections 11(*a*) and 23(*g*) of the ITA. The outcome sought is the reversal of the Commissioner's disallowance of the deduction so as to lower the applicant's taxable income. The issue in the new ground is the correctness of the declared and previously unchallenged gross income amount of the disputed assessment. The outcome sought is an order that the gross income amount is different

because the disputed amount never formed part thereof - thus affecting the applicant's taxable income.

[98] The fact that the outcome may be the same is in any event not sufficient to render the new ground permissible under rule 32(3). In the unreported Tax Court judgment in *PM v Commissioner for the South African Revenue Service* (Tax Court case 13796 (6 September 2019)) ("*ITC 13796*"), a taxpayer initially alleged that certain payments he received were capital amounts in the form of loans, and therefore were not gross income amounts to be included in any assessment. The taxpayer sought to introduce a new ground on appeal, alleging that the amounts were received while he was an insolvent. Accordingly, those amounts – which the Commissioner regarded as his gross income - had not accrued to him, but to the trustee of his insolvent estate in terms of the provisions of the Insolvency Act 24 of 1936. They could thus not form part of the taxpayer's gross income.

[99] The taxpayer indicated in the subsequent proceedings on the permissibility of the new ground that although the ground relating to the amounts of gross income having accrued to a different party was not specifically raised in the objection under rule 7 that preceded the appeal, the issue of the insolvency was mentioned in the prior engagements with the Commissioner. The taxpayer claimed that these tangential references would suffice to render the new ground permissible.

[100] The taxpayer in *ITC 13796* therefore sought the same outcome, but based on a new ground that the amounts in question had accrued to a different party. The taxpayer's assessed gross income was therefore being placed in the hands of another by virtue of the proposed new ground.

[101] The Court agreed (at para [17] of its judgment) with the reasoning in *ITC 1912*, particularly the discussion in relation to a taxpayer's entitlement to raise a new ground of objection in the rule 32 statement, provided that it relates to a part or an amount in the assessment that was placed in dispute by the objection under rule 7. It excluded the new ground despite the result sought being the same as upon the original ground. The Court did not find that the new ground relating to the accrual of gross income to a different party related to a part or an amount in the assessment that was placed in dispute by the objection stated under rule 7. The Court further stated that any reference to the taxpayer's insolvency history was oblique.

[102] Neither *ITC 13796* nor *ITC 1912* supports the notion that if a new ground achieves the same result as the original ground, then the new ground is permissible. The applicant's case is therefore not supported by *ITC 1912* (and also not by *Matla Coal* under the No Rules period discussed above) where the same amounts were challenged seeking the same outcome on the same legal submissions in the original and the new grounds, the distinction being only the bases on which the consistent designation of a transaction was justified.

[103] In all of these circumstances, I find that the new ground does not fall within the ambit allowed by rule 32(3) for introduction at this stage. This is because, for the reasons set out above in the course of the discussion of the Commissioner's case, the new ground, properly considered, constitutes an entirely new case on appeal, aimed at the reduction of an amount to previously objected against, namely the applicant's gross income. The new ground is not merely a "re-packaging" of the legal basis upon which the applicant wishes to have the disputed amount disregarded for the purposes of the determination of its income tax liability.

[104] This approach adheres to the ordinary meaning of the words of rule 32(3) and does not give rise to an absurdity. It further contextualises the provisions of rule 32(3) against the background to the development of the rules in that it does not cater for an over-wide interpretation that would allow an entirely new case to be dealt with on appeal – a situation that has not been contemplated in the course of the relevant history of the rules. With reference to *ITC 1912*, proper regard should be had to the limitation that a taxpayer may not use rule 32(3) to appeal against a portion of the assessment (whether in relation to an amount or part thereof) not previously objected to.

[105] I acknowledge that a Tax Court is a court of revision, and not a court of appeal in the ordinary sense. It is however not free from restrictions. It does not have an inherent jurisdiction. In *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service* 2020 (2) SA 19 (SCA) the Supreme Court of Appeal described the Tax Court's position as follows:

> "[52] The point of departure should always be that a Tax Court is a court of revision and 'not a court of appeal in the ordinary sense'. The legislature 'intended that there could be a re-hearing of the whole matter by the Special Court and that the court could substitute its own decision for that of the Commissioner', if justified on the evidence before it. A Tax Court accordingly rehears the issues before it and decides afresh whether an estimated assessment is reasonable. It is not bound by what the Commissioner found. In rehearing the case it can either uphold the opinion of Sars or overrule it and substitute it with its own opinion. The powers of the Tax Court and its functions are unique. It places itself in the shoes of the functionary and re-evaluates the facts and circumstances of the subject-matter on which the assessments were based. By its very nature an estimated assessment is subject to change based on an evaluation of the evidence and any information that becomes available. What is important is that the methodology used and the assumptions on the strength of which the estimated estimates were made should remain the same, otherwise the conclusions reached by the Tax Court might not

> be procedurally fair. The Tax Court must place itself in the shoes of the functionary to determine whether the methodology followed and the assumptions on which the estimated assessment are based are reasonable and produce a reasonable result.
>
> [53] Being a court of revision does not mean that a Tax Court is free of restrictions. It too must observe an administratively fair process. That will entail, inter alia, that the dispute must be resolved on the issues raised by the parties and the enquiry confined to the facts placed before court. In this regard the pleadings are important and the parties will be kept to their pleadings, where any departure from the pleadings would cause prejudice or prevent a full enquiry. But within those limits a Tax Court has a wide discretion, for pleadings are made for the court and not the court for pleadings. Where a party has had every facility to place all the facts before the Tax Court and the investigation into all the circumstances has been thorough, then there is no justification to interfere simply because the pleadings had not been as explicit as they might have been."

[Emphasis added.]

[106] Whilst the Tax Court has a wide discretion within these limitations, such discretion does not stretch to allowing the introduction of a new ground that does not fall within the ambit of rule 32(3), even if no new factual evidence would have to be placed before the court hearing the merits of the appeal in due course.

Costs

[107] I am at liberty to make a costs order in this matter by virtue of section 130(3)(*b*) of the TAA and Tax Court rule 50(5)(*a*). The former provides that the Tax Court may make an order as to costs provided for in the Tax Court rules in an interlocutory application or an application in a procedural matter referred to in section 117(3) of the TAA, and the latter provides that the Tax Court may make "*any other order it deems fit, including an order as to costs*".

[108] The Commissioner was the successful party in the litigation and I can see no reason for deviating from the general principle that costs follow the result: see the following remarks in *ITC 1876* 77 SATC 175 at para [46]:

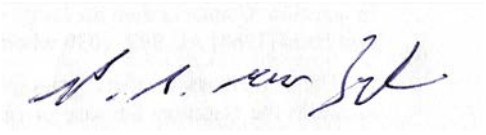
> "Although, when it comes to the substance of the tax dispute, costs are generally not awarded unless there has been a frivolous use of power or an unreasonable basis of opposition, in interlocutory matters it is my experience that costs have generally followed the result, unless it would appear unjust to order costs on that basis."

[109] I do not regard the grant of a costs order in the present matter as unjust.

Order

[110] In all of these circumstances, I make the following order:

The application is dismissed, with costs.



P. S. VAN ZYL
Acting judge of the High Court