REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA
(HELD AT MEGAWATT PARK)

Case No.: **IT 45776**

(1)	REPORTABLE: **YES** / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
29/11/2024 DATE	SIGNATURE

In the matter between:

TAXPAYER ARROW Applicant

and

THE COMMISSIONER FOR THE
FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

J U D G M E N T

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on CaseLines. The date of hand down shall be deemed to be 29 November 2024.

HASKINS AJ

[1] This is an appeal by the taxpayer, Arrow, against the respondent, the Commissioner for the South African Revenue Service ("SARS") decision to raise an additional assessment against him in respect of the 2011 tax year.

[2] In terms of the assessment, SARS found that the right to the SHS Trust settlement amount of R632 640 138 accrued to the taxpayer during the 2011 year of assessment and constituted part of the taxpayer's gross income for the purposes of the Income Tax Act 58 of 1962 (the ITA). The accrual was deemed to be an unconditional right acquired on 15 September 2010 or 1 October 2010. In the alternative, the taxpayer is found to be liable for income tax on the application of substance over form or on the application of the general anti-avoidance rules.

[3] The taxpayer brought the present application in terms of section 92 of the Tax Administration Act[1] (the TAA) wherein the taxpayer seeks the following relief:

a. The taxpayer's interest in the 2010 scheme was exempt from tax in terms of section 8C read with section 10(1)(*n*D) of the ITA.

b. In the event that section 8C does not apply, then there was no accrual of any unconditional right on 15 September 2010, alternatively 1 October 2010.

c. In the event that a right accrued to the taxpayer, then such right was worth no more than R218 million.

d. SARS failed to make out a case for the application of substance over form or under the General Anti-Avoidance Rules (GAAR provisions).

e. That penalties and interest be remitted.

f. That the 2011 additional assessment be set aside and the tax appeal upheld with costs, including the costs of two counsel together with the qualifying fees of Professor E.

[4] A further issue to be decided is whether SARS is precluded from raising an additional assessment after the expiry of the statutory period in section 99(1) of the TAA. Associated with this is the taxpayer's claim that the delay of four years after the commencement of the audit and eight years after the date of the original assessment was inordinate and, having

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1 Act 28 of 2011, as amended.

regard to section 33 of the Constitution, unjustifiably violated his right to lawful, reasonable and procedurally fair action by SARS.

[5] Before addressing the merits of the appeal, I first deal with the issues of prescription and delay.

Prescription and Delay

[6] The taxpayer filed his 2011 tax return on 13 November 2011.

[7] Under the heading “Amounts Considered Non-Taxable”, the taxpayer indicated that the R254 650 837 he received from the SHS Trust was “Exempt Dividends”.

[8] Upon receipt of the tax return, SARS issued an original assessment for the 2011 tax year on 13 November 2011 and on 28 January 2012, SARS notified the taxpayer that his tax return was selected for audit and advised the taxpayer to gather copies of supporting documentation as it will be required as part of the audit.

[9] On 14 March 2012, SARS requested information from the taxpayer. This was only in relation to interest received in the 2011 tax year and an explanation for the overpayment of provisional tax. The taxpayer responded to these queries on 20 March 2012.

[10] According to SARS system, the audit initiated on 28 January 2012 was closed on 24 April 2012. SARS did not tax the dividends. No audit finalisation Letter is available on the SARS system and no Letter was issued to the taxpayer as contemplated in section 42(2)(*a*) of the TAA. The taxpayer contends that this is contrary to SARS’s internal procedures.

[11] On 5 July 2012, the taxpayer submitted his 2012 tax return. The taxpayer declared the R390 091 944 dividends awarded to him by the SHS Trust as exempt dividends.

[12] Upon receipt of the tax return SARS issued an original assessment for the 2012 tax year. SARS did not tax the dividends.

[13] SARS requested information on 16 May 2013 from the taxpayer and on 12 September 2013 from the SHS Trust.

a. On 18 June 2013, the taxpayer furnished SARS with two schedules setting out details of assets and liabilities, and details of dividend income.

   i. The taxpayer noted the following in his response:

> "In preparing the dividend schedule, I realised that I had inadvertently omitted from previously submitted tax returns some dividend receipts for the years 2009-2011. The details of these omissions are shown on the schedule. Your letter did not request any supporting documentation, so none has been submitted."

ii. The taxpayer provided a dividend income schedule in respect of dividends received from The D Bank AG, RB Holdings Trust and HS Trust for the 2011 and 2012 tax years:

Sources	2011	2012	Notes
(RBHST)received amount date	 1 299 130 03-May-10		RBHST is a full discretionary, non-vesting trust. Taxpayer held no shares and had/has no claim to trust assets.
SHS Trust (HSST) accrued but not received amount date received amount date	 101 344 835 Dec-10 150 867 335 Dec-10	 152 477 832 Nov-11 228 716 747 Aug-11	HSST is a full discretionary, non-vesting trust. Taxpayer held no shares and had/has no claim to trust assets.
The D Bank AG Dividend received (ZAR)	 22 092	 23 319	Acquired by virtue of employment prior to 2004 The D Bank dividends for 2009-2011 omitted from ITR12

b. On 2 October 2013, the SHS Trust informed SARS that the Trust was formed on 1 October 2010, the nature of the trust, its income received (R485 666 137 in 2011 and R740 385 937 in 2012) and its distributions made (R485 416 137 in 2011 and R739 341 202 in 2012).

[14] On 25 March 2014, the taxpayer received two letters from SARS notifying him that he would be subjected to audits, one for the period 2012 and the other for the 2008 to 2012 tax years. Nothing came of these audits.

[15] SARS was required to issue an additional assessment by 13 November 2014. This would have been within the three-year prescription period for the 2011 tax year.

[16] Instead, and subsequent to the appointment of Mr M as auditor in mid-November 2014, SARS notified the taxpayer of a second audit on 17 June 2015. In its notification letter, SARS requested, *inter alia*, the following information from the taxpayer:

> "3. I note from your 2011 and 2012 income tax returns that you declared exempt dividends of R254,650,837 and R390,091,944 respectively. Furnish me with a detailed breakdown of the dividends received by or accrued to you and specify the particulars of the entities from whom the dividends were derived.
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> 4. Explain the exact flow of the dividends from the companies who initially declared the dividend and the subsequent movement thereof until it was ultimately distributed to you. In other words, I suspect that the bulk of the dividends might have been derived from distributions you received from the SHS Trust ('Trust'), but I require you to illustrate the flow of the dividends from the particular company who declared the dividend and how it finally arrived in your hands.
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> …
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> 9. I noted in an article titled 'Anger over RB Holding's R1.5bn incentive' (Written by Times Live and published by the legal Resource Center on 18 August 2014) that '… RB Holdings is tight lipped on an alleged R1.5bn golden handshake given to its former CEO, Taxpayer Arrow, and his executive team…'. Did you receive the alleged 'golden handshake'? If so, furnish me with the details thereof, as well as supporting documents. Is there any connection between the alleged 'golden handshake' and dividends received by you from RB Holdings and its subsidiaries."

[17] On 15 July 2015, the taxpayer furnished SARS *inter alia*, the following information:

a. By virtue of the resolution adopted on 21 December 2010, the SHS Trust awarded gross dividends in an amount of R251 575 059 to the taxpayer. R150 867 335 was paid in December 2010 and the balance of R100 707 724 plus interest of R637 112 was paid in August 2012.

b. During 2011, the trustees of the SHS Trust and RB Holdings agreed that the Trust would be terminated and each of the six Portfolio Companies would pay a final dividend in respect of participating preference shares.

c. On 18 November 2012 and pursuant to a resolution, the trustees of the SHS Trust awarded the taxpayer an amount of R381 194 579 out of the dividends, which were paid in two parts; R228 716 747 was paid in December 2011 and R152 477 832 in July 2012.

d. That the taxpayer was employed by RB Finance from April 2004 to December 2005 and RB Services from January 2006 to June 2012. RB Finance and RB Services are wholly owned subsidiaries of RB Holdings.

e. In response to the question under paragraph 9 of SARS's letter, the taxpayer stated that "I did not receive any golden handshake from RBH. I have seen the article to which you refer, which was published over two years after my departure from RBH. I was not interviewed by the reporter and do not know where he obtained his information".

[18] On 17 and 20 July 2015, the taxpayer confirms the information provided and furnishes SARS with supporting documents referred to in his letter of 15 July 2015.

[19] On 19 January 2016, SARS requested information from RB Holdings.

[20] RB Holdings furnished SARS with the information on 31 March 2016. In response to SARS's questions on the 'golden handshake', RB Holdings states the following:

"1.1 It is our understanding that the reference to an 'alleged golden handshake' by SARS is obtained from a Times Live newspaper article which is not based on factual statements or representations made by RBH, but rather allegations made by the author of the article. Accordingly, RBH cannot respond in this regard.

1.2 In order to be able to respond to SARS we request SARS to:

1.2.1 clearly indicate the actual, specific transaction occurring between 2011 and 2012 which SARS requires information on; and

1.2.2 indicate the taxpayer who is the subject of this request.

Upon the receipt of such clearer request, RBH will then be able to reassess its ability to respond to the above query."

[21] On 14 September 2017, SARS requested additional information from RB Holdings. This information related specifically to RB Holdings and its obligations to the SHS Trust in the amount of R738 million.

[22] On 14 November 2017, RB Holdings furnished SARS with responses thereto.

[23] On 19 November 2018 SARS issued a Letter of Findings and notice in terms of section80J of the ITA. On 15 May 2019 the taxpayer provided SARS with his response to the Letter of Findings.

[24] SARS issued the taxpayer with its additional assessment for the 2011 tax year on 20 September 2019.

[25] It is not disputed that the audit process took almost four years before SARS raised the additional assessment and that the additional assessment was raised only eight years after the date of the original assessment.

[26] Over this period, the taxpayer raised two complaints on 10 June 2014 and 15 November 2015 about the delay. These complaints were met with progress reports from Mr M on 16 November 2015, 19 February 2016, 16 September 2016, 30 November 2016, 2 June 2017, 31 August 2017, 5 December 2017, 28 February 2018, and 31 May 2018.

SARS's case

[27] SARS says the taxpayer did not disclose the full R632 640 138 amount he was entitled to or that the amount arose out of the settlement agreement set out in the RB Holdings letter dated 15 September 2010, despite the taxpayer having had various opportunities to place this information before SARS.

[28] SARS listed the following instances it submitted were those opportunities:

a. SARS gave the taxpayer an open invitation to submit documentation he deemed relevant in response to SARS 14 November 2011 notice.

b. SARS's advice in its letter dated 28 January 2012 to the taxpayer to gather supporting documentation in relation to his tax return.

c. The correspondence between SARS and the taxpayer in March 2012 allowed the taxpayer another opportunity to make disclosures regarding the origin of the R254 million dividends.

d. The taxpayer for the first time mentions exempt dividends from the SHS Trust in an undated e-mail during 2012 but fails to mention the existence of the settlement agreement.

e. In an e-mail dated 14 May 2012, the taxpayer explained that the bulk of his investments were generated dividend income but did not mention that it was made through the SHS Trust.

f. On 16 May 2013 SARS requested information for the 2009 to 2012 period and specifically asked for dividend income for that period, including supporting schedules indicating the entity from whom the dividend was received, the number of shares held, and the amount received.

g. On 18 June 2013, despite the taxpayer disclosing that the dividends from The D Bank were acquired by virtue of employment prior to 2004, the taxpayer only disclosed that he had no claim or shares in the SHS Trust assets and that the Trust was a fully discretionary, non-vesting Trust.

h. On 25 March 2014 SARS issued letters of audit for the 2008 to 2012 tax years.

i. On 17 June 2015 SARS requested information from the taxpayer regarding a detailed breakdown of all exempt dividends received or accruing to him, an explanation of the flow of the dividends received and when the dividends were due and payable. SARS's letter expressly questions the taxpayers right to the amounts, when the right or entitlement vested, and whether there was a link between the exempt dividends and the alleged golden handshake.

j. On 15 July 2015 the taxpayer's response to the golden handshake question was a bare denial.

[29] SARS contended that the delay was due to the taxpayer's misrepresentation or non-disclosure of material facts for two reasons. First, the taxpayer misrepresented that the amount constituted exempt dividends, and second, the taxpayer did not disclose that the settlement right and or the amount accrued was as a consequence of the settlement agreement.

[30] Consequently, SARS submitted that the taxpayer did not provide a "full and true tax return" in that the taxpayer repeatedly failed to fully disclose the material facts after filing his 2011 tax return. SARS further contended that a "full and true tax return" would have disclosed that the amounts received arose from his employment and not simply that the amount was exempt dividends without any disclosure of the employment relationship.

[31] In response to the taxpayer's reliance on the Advocate M. Seligson SC Opinion ("Seligson SC Opinion") on the nature of the amounts, SARS contends that the Opinion was, at best guarded, ambiguous and qualified advice. In support of this contention, the Court was referred to the following passage of the Opinion:

> "For the purposes of this opinion, and in expressing these views, I have assumed that the HSST [the High Trust] deed genuinely reflects the intention of the parties and that it is truly contemplated that the net dividends will not automatically be passed through to the beneficiaries, given the discretionary nature of the HSST [the High Trust]. In other words, <u>I assume that the real substance and purpose of the trust structure has a sound commercial basis and that there is no commitment or understanding that the dividends will in fact invariably be paid to the beneficiaries, notwithstanding the discretion vested in the trustees. That is to say it is accepted that there may well be times that the Trustees exercise their discretion by deciding not to pay all or some of the dividends received to the beneficiaries but to invest the funds instead.</u> In short, my opinion is grounded on the HSST [the High Trust] structure having a legitimate commercial purpose, not being simulated and not being motivated simply by the considerations of tax avoidance. If this assumption is not correct, the structure may be open to attack …"

Taxpayer's case

[32] The taxpayer submitted that what was asked of him in the tax return was to disclose amounts he considered to be non-taxable. By making the disclosure - his considered and honest opinion that the amounts received from the SHS Trust were not taxable because it was tax exempt dividends - the taxpayer's disclosure was not a misrepresentation or a non-disclosure of a material fact.

[33] Counsel for the taxpayer submitted that the taxpayer's opinion was supported by the Seligson SC Opinion. In this regard, Counsel relied on and referred to the conclusion of the Opinion:

> "When the amounts of the dividends were vested in and paid to the beneficiaries by the HSST in December 2010, they would have retained their character as dividends received by or accrued to the beneficiaries. As such, these amounts would form part of the gross income of the beneficiaries in the relevant tax year but be exempt from normal tax in terms of the applicable version of section 10(1)(*k*) of the ITA, being dividends and not falling into the categories of dividends excluded from the exemption by sub-paragraphs (*aa*) and (*cc*) of that provision."

[34] The taxpayer further submitted that SARS failed to establish the requirements contained in section 99(2) of the TAA. In this regard, it is contended that:

a. The taxpayer genuinely believed that the amount was a tax-exempt dividend and that the tax return was manifestly honest.

b. The taxpayer did not make any misrepresentation or non-disclosure of material facts.

c. Even if the taxpayer made a misrepresentation or non-disclosure of material facts, it was not the cause of SARS's failure to issue the additional assessment within the prescribed three-year period. This is so because SARS did not make any further requests for information from the taxpayer after June 2015 and received all information requested by RB Holdings by 31 March 2016.

[35] The taxpayer also submitted that SARS failed to demonstrate that there was a justification for its delay in issuing the additional assessment, that SARS only had itself to blame for the almost eight-year delay, and that the delay constitutes a serious breach of SARS's constitutional duty to treat the taxpayer in a manner that is reasonable and procedurally fair, even in circumstances with the immunity afforded to him in terms of section 99(1) of the TAA is displaced.

SARS's response

[36] In response hereto, SARS submitted:

a. The taxpayer has not brought a review challenge to the constitutionality of the tax legislation or a review under Promotion of Administrative Justice Act 3 of 2000 (PAJA) on one or more of the grounds specified in section 6 thereof. Instead, the taxpayer purports to rely directly on section 33 of the Constitution.

b. Section 169 of the Constitution and PAJA expressly provide for judicial reviews to be undertaken by the Constitutional Court or the High Court or a court of similar status to the High Court.

c. The Tax Court is not such a court because its jurisdiction is circumscribed by the TAA, namely, that the Tax Court is a creature of statute without inherent jurisdiction as the High Court.

d. The taxpayer's challenge on grounds of delay and administrative fairness cannot be determined by this Court.

e. The delay was caused by the taxpayers' own failure to fully disclose the material facts.

f. The tax appeal is complex, and the documentation was voluminous. Obtaining the documents, analyzing the facts and the tax issues justifiably took time.

[37] SARS referred the court to various decisions on the issue of delay:

a. First, *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA): The SCA sets out three requirements the Court should consider in determining whether or not the inordinate or unreasonable delay warrants a dismissal or set aside of SARS additional assessment. The first requirement is a determination on whether there was a delay in the prosecution of the action, the second requirement requires that such a delay must be inexcusable, and final requirement requires the defendant to be seriously prejudiced by the delay. The SCA also pointed out that regard to the reasons should be considered in respect of the defendants' inactivity and failure to avail itself of remedies which it might reasonably have been expected to do in order to bring the action expeditiously to trial.

b. Second, *Berrange N.O. and Others v Vorster and Others* [2016] ZAGPPHC 1105: The Court dismissed the action on the basis that no fair trial could take place where one party is precluded by the other party's admitted gross inaction for presenting all relevant documents and evidence because, over the 15 years, documents had been destroyed and were no longer available, important witnesses have passed on and the defendants were elderly and some in ill-health.

c. Finally, *Mostert v Sable Group Holdings (Pty) Ltd* 2021 JDR 3011 (GJ): The Court stated that the dismissal is draconian in its effect as it limits the right to have the dispute finally resolved by a court of law and such a dismissal should not be made lightly.

Applicable Law

[38] As stated in *CSARS v Brummeria Renaissance (Pty) Ltd* 69 SATC 205 (SCA) at paragraph 26, it is in the public interest for disputes to come to an end. Once an original assessment has been issued, SARS therefore has a limited period to raise an additional assessment.

[39] As a general proposition, the Full Bench in *Poulter v CSARS* [2024] 2 All SA 876 (WCC) at paragraph 28 recently considered the issue of jurisdiction when finding that the Tax Court is not a Superior Court jurisdictionally, but functions as an administrative tribunal – whose judgments are "*effective only in respect of the individual cases in which they are given, and not generally*". Drawing on the English House of Lords decision in *Society of Medical Officers of Health v Hope (Valuation Officer)*, the following was stated at paragraph 29:

> "In Hope's case, the House of Lords held that decisions by the valuations court on appeal from rating determinations by the valuation officer did not create an *estoppel per rem judicatam* in respect of any subsequent rating determination by the officer on the same facts. Observing that the position of the valuation court under the applicable rating legislation was closely analogous with the system of annual personal taxation, Lord Radcliffe addressed the issue as follows:
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>> 'One consideration is that the jurisdiction of the tribunal to which the decision belongs by the administrative scheme [in this case, the Tax Court] is a limited one. It is limited in the sense that its function begins and ends with that of deciding what is to be the assessment of a person for a defined and terminable period. 'The assessment seems inherently to be of a passing nature.' For the purpose of arriving at its decision, the tribunal may well have to take account of, and form its own opinion, on questions of general law; it may even have necessarily to consider one or more of such questions: but in either case the view adopted with regard to them is incidental to its only direct function, that of fixing the assessment. For that limited purpose it is a court with a jurisdiction competent to produce a final decision between the parties before it: but it is not a court of competent jurisdiction to decide general questions of law with that finality which is needed to set up the *estoppel per rem judicatam* that arises in certain contexts from legal judgments.' "

[40] This indicates that the Tax Court may well be called upon to form an opinion on questions of general law, but only in circumstances where a) it is necessary for purposes of arriving at its decision and b) the view adopted with regard to the law is incidental to its direct function: "fixing the assessment".

[41] Mothle J appears to have been prepared to accept this responsibility, specifically in relation to delays by SARS beyond the prescriptive period contemplated in section 99(1) of the ITA.[2] In *Ackermans Limited v Commissioner for the South African Revenue Service*

[2] Section 99(1)(*a*) of the TAA reads as follows:
Period of limitations for issuance of assessments.—(1) An Assessment may not be made in terms of this Chapter—
(*a*) Three years after the date of assessment of an original assessment by SARS.

Unreported Case No. 16408/2013 (20 February 2015) at paragraph 27 the following apposite findings were made:

> "It is indeed imperative that all Constitutional obligations executed by organs of State in the exercise of public power, must be performed diligently and without delay. An unreasonable delay will result in a procedurally unfair administrative action, which is a reviewable conduct in terms of section 6 of PAJA. The decision to raise Additional Assessments is an administrative action which is an exercise of public power and it falls within section 237 of the Constitution."

[42] And later at paragraph 35:

> "There is clearly a dispute of fact on this part of the evidence, which is relevant in deciding whether, apart from other explanations, the delay in raising Additional Assessments falls or does not fall within the proviso in subsection (1)(*c*)(i) of section 79 [the predecessor to section 99(2)]. If it is concluded on the resolution of the disputed facts, that there was misrepresentation or non-disclosure of material facts on the part of Ackermans, the delay by SA (sic) will be covered by the proviso in paragraph (*aa*) and will thus be reasonable. If, however, it is found that there were no misrepresentations and that there was a disclosure of the material facts, the delay from 2006 to 2012 when additional assessments were raised, would constitute an unreasonable delay in contravention of i (sic) section 79(1)(*c*)(i)…"

[43] In simple terms, the judgment establishes the position as follows: if SARS were to delay in instituting proceedings against the taxpayer beyond the prescriptive period but one of the grounds contemplated in section 99(2)[3] was factually present, then the delay would be considered reasonable. On the other hand, and only if, one of the section 99(2) grounds are not present, then the taxpayer's administrative justice rights would be triggered and, in circumstances where the assessment is brought by SARS beyond the prescriptive period, would be deemed an unreasonable delay.

[44] This then leads us to the question of how the Tax Court ought to go about establishing the factual presence of the grounds contemplated in section 99(2) of the TAA.

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3 In section 99(2)(*a*) of the TAA, the following appears:

(2) Subsection (1) does not apply to the extent that—

(a) in the case of an assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to—

(i) fraud;

(ii) misrepresentation; or

(iii) non-disclosure of material facts …

[45] This issue was considered by the Court in *Wingate-Pearse v Commissioner for the South African Revenue Service* 2019 (6) SA 196 (GJ) where the following was held at paragraph 61:

> "Although the words 'is satisfied' used . . . in s92 read with s99(1) and (2) of the Tax Administration Act - confer a subjective discretion on SARS, I accept that the discretion is not unfettered, and an objective approach must be adopted to that subjective discretion. SARS, therefore, must show that its subjective satisfaction was based on reasonable grounds. The raising of an additional assessment in the case of income tax, as was said by Ponnan JA in Commissioner, South African Revenue Service v Pretoria East Motors (Pty) Ltd 2014 (5) SA 231 (SCA), para 11, 'must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified'. But, given the wording of . . . s92 of the Tax Administration Act, and the subjective nature of the discretion conferred on SARS, the scope for judicial review is limited."

[46] Finally, the Court in *CSARS v Spur Group* [2021] ZASCA 145 at paragraph 53 held that SARS bears the onus to show that the non-assessment within the requisite three-year period was the result of the misrepresentation or non-disclosure.

[47] The Court in *ITC 1929* 82 SATC 264 at paragraph 21 provides guidance in making the determination by asking the question: what caused SARS not to assess the full amount of tax chargeable? The Court suggests two possible answers, namely, (i) if it came about because of the material non-disclosure, then the additional assessment after the three-year period is competent, or (ii) if for other reasons such as the neglect by SARS or some conduct of the taxpayer not amounting to misconduct, then the additional assessment after the three-year period is not competent and cannot be made.

Analysis

[48] In interrogating the taxpayer's compliance, SARS correctly referred to and relied on section 25(2) of the TAA that places a duty on every taxpayer to submit a tax return which is a full and true return.

[49] It appears that the taxpayer neglected to disclose that the dividend from the SHS Trust was received by virtue of his employment, a fact openly declared regarding the The D Bank dividends. In his responses to requests for information, the taxpayer was notably cryptic, failing to make the clear connection between the dividends received and his employment relationship, or that the receipt was as a result of a settlement agreement with his employer. This connection was not apparent to SARS, who were unaware of the knowledge held by the taxpayer. Consequently, it was difficult for SARS to make the appropriate connection.

[50] I concur with SARS stance that the taxpayer had multiple opportunities to disclose this pertinent information. Instead, SARS had to uncover this information through a Times Live article and following several requests for information from RB Holdings and the SHS Trust. It is evident from the information request dated 17 September 2017, that SARS only then understood the relationship.

[51] Under these circumstances, in order for SARS to undertake further investigations, it is fundamentally reliant on the completeness and honesty of the information provided by the taxpayer. Thus, it is incumbent upon the taxpayer to ensure not only the veracity of his declarations but also their comprehensiveness and transparency.

[52] This critical aspect of full and candid disclosure was, regrettably, deficient in this case. Had SARS been fully informed of the material facts at the time the taxpayer submitted his returns or in response to their requests for information, the audit process would not have been as prolonged.

[53] It is clear that the taxpayer failed to make the necessary disclosure—similar to the disclosure made regarding The D Bank dividends—or to provide relevant information to SARS indicating that the dividends were linked to a settlement agreement with his employer. As such, the taxpayer is culpable of non-disclosure of a material fact.

[54] Despite this finding, SARS's conduct over the nearly eight-year period warrants some criticism. SARS had an obligation to inform the taxpayer upon the conclusion of the initial audit and to provide regular progress reports, rather than offering updates solely in response to the taxpayer’s complaints. Furthermore, SARS should have adhered to its own timelines.

[55] Nonetheless, the tax appeal involves significant legal issues and a considerable taxable amount. Therefore, the issue of prejudice must be considered, as setting aside the additional assessment would be an excessively severe measure.

[56] While SARS argues that the taxpayer has not demonstrated any prejudice, the taxpayer contends that he did not have a signed copy of the alleged second Umbrella Agreement, and did not possess a complete set of documents during the appeal. Additionally, two of his witnesses were unable to recall certain information due to the passage of time.

[57] However, I am not convinced that the taxpayer suffered any prejudice. Most importantly, the taxpayer was able to adequately present his case.

[58] In any event, the Tax Court is not considered a court of similar status to the High Court and, as such, does not possess the jurisdiction to review the impact or validity of delays under

section 33 of the Constitution. Even if this Court were vested with such jurisdiction, there would be no justification for setting aside the additional assessment for the following reasons:

a. The delay in prosecution can be attributed to the lack of information provided. SARS was compelled to search for the necessary information. Although SARS could have exercised greater diligence and expediency in its investigations. Nevertheless, the taxpayer did not suffer any substantial prejudice as a result.

b. The taxpayer had access to important information; no documents were destroyed or rendered unavailable, and all witnesses remained accessible. Furthermore, the taxpayer was aware, as early as January 2012, of the importance of gathering copies of supporting documents, given that the 2011 tax return was under audit.

c. A finding of non-disclosure of a material fact would mean that the delay, irrespective of how long the delay is, reasonable.

d. Lastly, if my conclusions on the aforementioned points are incorrect, setting aside the additional assessment would be an exceedingly severe measure. Such an action would unduly impede the finalisation of the appeal.

[59] Accordingly, I find that SARS was entitled to raise the additional assessment after the expiry of the three-year period. I decline to set aside the appeal on the ground that the additional assessment was raised after an almost eight-year delay.

[60] Now turning to the merits of the appeal.

Background Facts

[61] The appeal arises from the following circumstances.

[62] The taxpayer was recruited from The D Bank by the RB Nation for his expertise in finance and on 1 April 2004 he was appointed as the Chief Executive Officer (CEO) of RB Finance. However, the RB Nation was not able to match the high salaries and bonus packages paid for his financial expertise. The taxpayer agreed to accept a relatively low salary, in exchange for a right to participate in the equity and the employment contract included a basic salary of R100 000 per month and the promise of equity instruments (A Shares) that would entitle the taxpayer to participate in the asset growth of RB Finance.

[63] Clause 2.3 of the employment agreement provided that:

> "As the sole founder of the business, RBN will be entitled to 100% of any return on investment generated up to an accepted weighted average cost of capital hurdle rate.[4] … The A Shares awarded to you and other executives will in total be entitled to 25% of the total investment return generated by RBF in excess of the hurdle rate. The number of A Shares may vary from time to time at the discretion of the RBF Board, but for the first three years of your employment, you will be entitled to no less than 50% of the A Shares an issue over the period".

[64] On 1 January 2006 and prior to the implementation of the equity participation scheme, RB Finance merged with RB Resources forming RB Holdings. The A Shares were not issued. The taxpayer became the CEO of RB Holdings. In this capacity, the taxpayer was a member of the RB Holdings executive incentive scheme, which was established in 2006.

<u>The 2006 scheme</u>

[65] The 2006 scheme was established by three constitutional documents:

a. The Umbrella Agreement dated 24 March 2006.

b. The Deferred Share Article.

c. The RB Deferred Share Trust of 20 April 2006:

[66] The Trustees were the taxpayer, Mr Willor and Mr B.

[67] The key principles of the 2006 scheme were:

a. RB Holdings owned several subsidiaries referred to as the Portfolio Companies, each of which owned shares in a single investee company referred to as Portfolio Investments.

b. The Portfolio Companies issued Deferred Shares to the RB Deferred Share Trust.

c. The rights attached to the Deferred Shares were set out in a Deferred Share Article included in the articles of association of the respective Portfolio Companies.

d. The Deferred Shares entitled the RB Deferred Share Trust to 25% of the growth in the value of the Portfolio Investments over an agreed hurdle rate. This was

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4 The hurdle rate was agreed between the parties and determined objectively with reference to market related interest rates.

consistent with the profit share formula as per the original contract of employment.

e. On request, the beneficiaries of the RB Deferred Share Trust were broadened to also include non-executives within the broader RB Nation group. The idea was to split the 25% share between the executives (85%) and non-executives (15%), effectively diluting the executives' 25% share.

f. The RB Deferred Share Trust was entitled to require each Portfolio Company to repurchase its Deferred Shares on certain terms and conditions or after 7 years. RB Deferred Share Trust could not freely dispose of the shares. It was only entitled to dispose of them to the relevant Portfolio Company. This commitment is recorded in clause 2.7 wherein it states that RB Holdings to establish the Deferred Share Trust and to facilitate the executives and nonexecutives participants carried interest participation. The Umbrella Agreement defines the Deferred Share Trust was defined as a bewind Trust in clause 1.2.2.10.[5]

g. The Deferred Share Trust was annexure B to the Umbrella Agreement.

h. The Umbrella Agreement contained a commitment to give effect to the employment contract. Clause 2.3 and 2.6 of the Preamble record the objective of the Trust. The holdings executive employees have been recruited on the understanding that they will accept relatively low basic salaries and capped cash bonuses in exchange for a 25% carried interest participation in the growth in value of the Portfolio Companies and that the Deferred Shares will pay the Deferred Dividends which shall be equivalent to the carried interest participation to which the unit holders are entitled. Clause 3.1.2 provides that the benefits derived by the RB Deferred Share Trust from a portfolio investment shall vest in the executives and clause 3.5 state that unit holders shall be entitled to the distribution of the Trust income as soon as practically possible after it has been received by the trustees. This is similar to clause 21.1 which states that all Trust income received or accrued by the trustees on behalf of the

[5] A bewind trust is described in SARS's External Comprehensive Guide to Income Tax Return for Trusts as "A founder transfers ownership of assets or property to beneficiaries of the Trust. The assets remain the property of the beneficiaries, but it is administered by the trustees (i.e., trustees are given control over the property). This type of Trust can be formed by agreement during someone's lifetime.

unit holders shall accrue and vest immediately in the unit holders in the unit holder's participation ratio.

[68] The terms of the incentive scheme were substantially revised in 2007 and in 2010.

The 2007 scheme

[69] The 2006 scheme was replaced by a revised scheme in 2007.

[70] The name of the Deferred Share Trust was changed to the RB Holdings Share Trust and the existing deed was replaced with a new Trust deed.

[71] The trustees were the taxpayer, Mr B and Mr Willor.

[72] The key principles of the 2007 scheme were:

a. The RB Holdings Share Trust was described by the RB Holdings Board in its 3 February 2011 meeting as a hybrid scheme, consisting of a deferred share scheme and a combination of preference and equity shares held by the nominee. The terms of the Trust deed also provide for two types of shares, the nominee shares and trust shares. The executives retained the right they had held under the RB Deferred Share Trust by way of the nominee shares:

    i. the proceeds were still to be split in the ratio 75% : 25%; and

    ii. once a 25% payment was received by RB Holdings Share Trust then a further split of 75% (to nominee shares) and 25% (to trust shares) became operative. As a result, 25% is allocated to the discretionary side the trust, the trust shares and 75% to vesting side of the trust, the nominee shares.

b. Clause 7 of the Trust deed is headed "Trustees to act as nominee":

    i. clause 7.2 required the trustees to hold the nominee shares in the name of the trustees as agents for the beneficial owners and not as principal; and

    ii. clause 7.3 require the trustees to pay all distributions directly to the beneficial owners immediately upon receipt, without deduction or set off whatsoever and to act in accordance with the instructions of the beneficial owners' subject only to the provisions of appendix 2.

c. The RB Holdings Share Trust deed recognised two kinds of B Preference Shares. "Trust Shares" held by the Trustees as beneficial owners and "Nominee Shares" held by the Trustees as nominees on behalf of beneficiaries as beneficial owners.

d. The rights attached to the B Preference Shares were set out in Article 33 of the articles of association of the Portfolio Companies. Dividends payable to the B Preference Shares were equal to 25% of the growth of the Portfolio Companies' investments over an agreed hurdle rate.

e. The RB Holdings Trust was entitled to require each Portfolio Company to buy back the B Preference Shares on a "Notice Event", subject to the overriding restriction that no Notice Event would occur during any Lock-in Period and/or within five years of the issue of the B Preference Shares.

f. The trustees (taxpayer was one of the trustees) (in consultation with the CEO of RB Holdings – the taxpayer), had a discretion to make distributions of income to the beneficiaries (taxpayer was one of the beneficiaries) from time to time, subject to such conditions as they may determine.

<u>Pre- 2010 scheme</u>

[73] Due to new non-executive appointments and tension within RB Holdings during 2009, the taxpayer and other executives accepted that they needed to negotiate a revised scheme.

[74] In June 2009, RB Holdings appointed BG to advise whether the RB Holdings had any legal obligations towards the employee beneficiaries of the RB Holdings Share Trust or whether RB Holdings could decline to honour these obligations.

[75] During August 2009, as part of the process to re-examine the executive remuneration policies of RB Holdings and more specifically the elements of RB Holdings Share Trust, Mr J (one of the executives) prepared a note which was discussed and agreed to with the taxpayer. The note records the following:

a. The value of the units in the scheme was circa R1.8 billion (and has been as high as R7 billion).

b. The taxpayer and Mr J, as founding partners in RB Holdings, held the significant majority of the units and this was problematic. Currently 16% of the units allocated vested with the taxpayer and Mr J, 4% with the balance of the

RB Holdings employees and 5% within units allocated to the Chairman's discretion.

c. The RB Holdings Share Trust created a legal obligation and entitlement to the unit holders resulting in a position that the Trust cannot be changed without the consent of the beneficiaries.

d. Mr J proposed that the current level of 25% of the profits above the hurdle rate for executives be reduced to about 7.1% and RB Holdings would exit the existing obligations which would be extinguished through an equitable settlement. This meant that the current obligation to the taxpayer and Mr J would be compromised to about R1bn.

<u>The 2010 scheme</u>

[76] Mr Willor was tasked by the non-executive directors to propose a new equity participation model. Mr Willor received input from the taxpayer and others.

[77] On 1 June 2010 Mr Willor made his presentation to the RB Holdings Board. In short, Mr Willor proposed that:

a. Five employees were to receive cash settlements and were no longer to participate as beneficiaries of the RB Holdings Share Trust.

b. Specific preference shares in six Portfolio Companies be allocated to each of the executive beneficiaries and the Chairmans discretion.

c. Mr Willor estimated the approximate value of the shares at R1.176 billion, representing a discount on the current actual liability in the sum of approximately R2.5 billion.

d. Mr Willor effectively proposed that the profit share formula be replaced with a much more limited number of investments allocated to the executive beneficiaries, using the RB Holdings Share Trust as vehicle. The RB Holdings Share Trust was to serve purely to flow payments to settlement beneficiaries.

e. The Preference Shares remained subject to the seven-year, long stop liquidity right.

(the Willor proposal)

[78] The Willor proposal was incorporated into the "Defeasance Note" and the need for the settlement was recorded as:

> "RBST was established to provide RBF and the RBH employees with a 25% participation in the RBH portfolio performance above an agreed hurdle rate of return. Given the very strong performance of this portfolio (+30% annual compound return) since inception, the RBST currently represents a liability to RBH in existing percent of the RBH equity value. In order to manage and limit this liability, the RBH Board has made an offer to RBH that would settle this liability at a substantial discount to the current liability."

[79] The settlement provided that the allocated shares in the six Portfolio Companies would be sold by RB Holdings once the restrictions expired or by the time the long stop liquidity right arrived, to ensure the necessary liquidity to pay their executives.

[80] The nonexecutive participants would receive an immediate cash settlement, which was subject to income tax. The executives and nonexecutives accrued rights under the settlement agreement.

[81] On 7 June 2010, the RB Holdings Board was presented with the settlement and resolved to approve it, subject to the process they discussed, which was to be concluded by 31 July 2010.

[82] As part of that process, the RB Holdings Board instructed the taxpayer to contact each beneficiary individually to explain the terms of the settlement and to ensure that they agreed. Once agreement was reached, then the process would progress to the adoption of a special resolution.

[83] On 13 July 2010 the RB Holdings Board approved the "Defeasance Note":

> "The RBST was established to provide RBF and RBH employees with participation in the RBH portfolio performance above an agreed hurdle rate of return. An offer has been made by the RBH Board to RBST to settle the liability which arises from the RBST. The terms of the offer are stated in the attached document."

[84] Mr Willor's proposed amending the RB Holdings Share Trust Deed to give effect to the proposal. However, at some stage thereafter, Dbwarf suggested that a new trust, the SHS Trust be formed and used instead of amending the existing RB Holdings Share Trust.

[85] The revised scheme was implemented by way of:

a. Letters issued by the Employer signed by the executives.

b. The High Street Trust Deed registered on 1 October 2010.

c. A Subscription Agreement dated 15 October 2010.

d. Put and Security Agreements dated 15 October 2010.

e. A new Article 32.

[86] The key principles of the 2010 scheme were:

a. The Participating Preference Shares were issued to the SHS Trust.

b. The SHS Trust was not entitled to dispose of a Participating Preference Shares, except to the Company, or to the beneficiaries of the Trust.

c. The rights attached to the Participating Preference Shares were set out in a new Article 32 incorporated in the articles of association of the Participating Portfolio Companies.

d. The trust shares were divided into Investment Classes and a Beneficiary Group was created for each Investment Class. In terms of Appendix 1, the taxpayer was the only member of Investment classes A1 to A5. The taxpayer and Mr J were members of Investment Class A6 for MOGS. Other beneficiaries were members of investment classes B, C, D and E.

e. The SHS Trust held Participating Preference Shares in subsidiaries of RB Holdings and earned dividends on the Participating Preference Shares.

[87] On 15 September 2010, the taxpayer signed a Settlement Letter by RB Services (as his employer) in which it is noted that the taxpayer was entitled to participate in an executive incentive scheme designed to reward his performance as an employee of RB Services and executive of the RB Holdings Group. This entitlement stemmed from the letter of employment dated 1 April 2004. The following parts of the Settlement Letter are important:

> "However, what is referred to in the letter as the "RBH Share Trust" has proved to be an unsuitable vehicle for this purpose. Therefore, pursuant to the obligation of RBMS and the RBH Group to establish and administer an executive incentive scheme, the RBH Group is in the process of forming a new trust to be named the High Street Trust ("Trust"), of which you will be a beneficiary. The Trust will be allotted a number of participating equity shares ("PES") in the number of participating portfolio companies ("PPCs") within the RBH Group. As the beneficiary, you will be entitled, subject to:
>
> (i) the terms of the deed of the Trust; and

(ii) the exercise by the trustees of the trust of the unfettered discretion to distribute trust capital or trust income to you, to participate and dividends and other distributions received by the Trustees as holder of the PES, including the proceeds of the sale of any investments by the PPCs.

As the Trust is the discretionary and not a vesting Trust, you should note that you will have no entitlement to participate in any distribution of the Trust Fund of the Trust until such time as the Trustees have exercised their discretion in your favour, as has been the case with the RBH Share Trust.

As a condition to you being a beneficiary of the Trust, you must confirm by your signature below that:

1. You accept that the formation of the Trust with you as one of the beneficiaries is a discharge of your entitlement to participate in the RBH Share Trust as contained in your letter of employment, and is in full and final settlement of any claims which you may have against the RBH Group arising from the obligation undertaken by the RBH Group in your letter of employment, and elsewhere, to provide for your participation in that executive share incentive scheme;
2. You irrevocably agree and consent to the amendment of the Trustee of the RBH Share Trust to remove you as a beneficiary of that Trust and that you will sign any document or documents required to affect such amendment."

[88] The Taxpayer acknowledged and agreed that he would derive no further benefit from RB Holdings Share Trust and would become a beneficiary of High Street Trust instead. The other executives signed similar letters. At the time of the Settlement Letter, the SHS Trust had not yet been registered but had been drafted in final form.

[89] On 1 October 2010 RB Holdings founded the High Street Trust. The initial trustees were the taxpayer and Mr F. Shortly thereafter, Mr X was appointed as co-trustee.

[90] The key terms of the SHS Trust deed include:

a. Clause 7.6 provides that there shall be no award or distribution of any portion of the trust fund except to beneficiaries in each beneficiary group in accordance with the trust deed and to pay for authorized expenses and other trust liabilities.

b. Clause 7.7.2 sets out that any allocation in accordance with 7.7.1 shall be distributed to the beneficiary's pro rata to the number of beneficiaries and such beneficiary group, substantially in compliance with the appendices to the trust deed.

c. Clause 7.8.3 which provides that the beneficiaries shall have no vested rights or entitlement to any award and or distribution from the trust and all the trust fund other than as a member of a beneficiary group. No beneficiary shall have any right or entitlement to any award and or distribution from the trust and or the trust fund to a beneficiary group of which that beneficiary is not a member.

d. Clauses 9.13 and 9.14 require the trustees to exercise their power subject always to the restrictions in clauses 7.1, 7.6, 7.7 and 8.8.

[91] In terms of the SHS Trust deed, RB Holdings undertook to procure that the following six Portfolio Companies issue Participating Preference Shares to the SHS Trust.

Portfolio Company	**Underlying Investment (Reference Shares)**
(RB Astrapak)	**(Astrapak)**
(RB Finance)	**(ZICSA)**
(RB Agri)	**(Senwes)**
(RB Resources)	**(Merafe Resources)**
(RB Plat Holdings)	**(RB Plats)**
(RB MOGS)	**(MOGS)**

The 2010 dividends

[92] During 2010, the SHS Trust received dividends from three of the Portfolio Companies totalling R485 666 135.

a. R415 261 761 from RB Plat Holdings.

b. R63 284 418 from RB Finance.

c. R7 119 956 from RB Astrapak.

[93] On 21 December 2010 the SHS Trust made a R251 445 559 payment to the taxpayer, as beneficiary. Only R150 867 335 was immediately paid out to the taxpayer. The balance was initially retained to cover potential employee's tax.

[94] On 3 June 2011 the RB Holdings Board resolved to approve the principles of a new remuneration scheme. The non-executive directors resolved to wind up the SHS Trust and to make cash settlements to the beneficiaries. On 8 June 2011 the taxpayer informed the other two Trustees of the SHS Trust of this decision.

[95] RB Holdings instructed Adv Seligson SC to provide an opinion on the tax consequences of the dividends distributed to the beneficiaries of the SHS Trust. Both Dbwarf and Advocate Seligson SC advised that the dividends declared by the SHS Trust up to 31 December 2010 were exempt from tax. Following the Seligson SC Opinion of May 2011, the Trustees resolved to distribute the balance of the 2010 dividends on 4 August 2011. The taxpayer received a payment of R101 344 835 on 5 August 2011.

[96] On 7 September 2011 the taxpayer was mandated to engage the RB Holdings Board to settle the remaining obligations of the SHS Trust. They resolved to engage Dbwarf to assist with the design of the settlement mechanism. Dbwarf proposed four alternative mechanisms. They endorsed option 4 that "each portfolio company raises debt equal to its obligation to the Trust and pays an accelerated dividend to the Trust".

[97] RB Holdings sold its shares in Astrapak and Senwes to third parties and borrowed an amount of approximately R740 385 937. The combined proceeds were used to capitalise the Portfolio Companies. Each Portfolio Company paid a final dividend to the SHS Trust based on the value of the shares as at 30 June 2011.

[98] In November 2011, the taxpayer received R390 091 944 from the SHS Trust.

[99] The total amount paid to the taxpayer by the SHS Trust was R632 640 138. The taxpayer resigned in March 2012.

Did the taxpayer have an enforceable right to the settlement amount and, if so, what is the value of the right for tax purposes?

[100] SARS raised the additional assessment on the primary ground that the settlement right accrued to the taxpayer during the 2011 tax year and constituted gross income as defined in section 1 of the ITA. According to SARS, the taxpayer acquired an unconditional entitlement to the settlement right by 15 September 2010 when the taxpayer signed the Settlement Letter, alternatively by 1 October 2010 when the taxpayer became a beneficiary to the SHS Trust.

[101] SARS contends that the settlement right was a right to the net income and net proceeds of the relevant Reference Shares as allocated to the taxpayer in an annexure A to

the RB Holdings Board resolution of 13 July 2010. Accordingly, SARS was entitled to assess the amount.

[102] SARS's alternative ground of assessment is that the true intention and substance, rather than the form of the arrangement, was for the settlement right and or the amount to accrue to the taxpayer during the 2011 tax year. Put differently, SARS found, in substance, the taxpayer held an unconditional entitlement to the settlement right and or the amount and that that right, was in substance the right to payment of its value and not a right to exempt dividends.

[103] SARS further alternative ground of assessment is that it was entitled to rely on sections 80A to 80L of the ITA (the General Anti-Avoidance Rules) to disregard the interposition of the Portfolio Companies and the SHS Trust.

[104] The taxpayer contends otherwise and raises a defence that at all relevant times the settlement, the Settlement Letter of 15 September 2010, him becoming a beneficiary of the SHS Trust, his rights were conditional and contingent and that nothing vested in him prior to the payment on 21 December 2010. In the alternative, the taxpayer relies on two exemptions, namely, section 8C read with section 10(1)(*n*D) of the ITA pertaining to the restricted equity instruments and section 10(1)(*k*) of the ITA pertaining to exempt dividends.

[105] I deal with these issues in turn.

SARS's case

[106] SARS makes the following submissions:

a. The taxpayer acquired rights in his contract of employment which were implemented in the Deferred Share Trust structure, retained in the RB Holdings Share Trust structure, which was settled by way of the settlement agreement.

b. The settlement right accrued as soon as the settlement agreement was finally approved on 13 July 2010. The taxpayer therefore acquired the right to receive payment in future. It made no difference that payment would be in the form of dividends yet to be declared and distributed.

c. The settlement was implemented by way of the SHS Trust structure for the proceeds of the Reference Shares allocated to the taxpayer in the settlement would flow through the SHS Trust and be paid to the taxpayer, which is in fact what happened.

d. The taxpayer’s entitlement to realise his pro rata share of the value add was subject to contractual restrictions and the expiry of the lock-in periods, but at all material times the long stop liquidity right ensured that at a future date, his rights could be exercised, and he would be paid.

e. The documents and evidence are clear that payment at the expiry of the lock in period was certain, because the long stop liquidity right was retained. Thus, none of the so-called restrictions prevented the accrual of the settlement right.

f. The settlement right accrued to the taxpayer and constituted gross income as defined in section 1 of the ITA when the settlement agreement was finally approved, as the right was not conditional upon uncertain future events.

g. Based on the Court’s findings in *KWJ investments,* that this Court rejects the taxpayer’s argument that the amount did not accrue because the SHS Trust was a conduit of exempt dividends, which were only declared in the 2012 tax year*.*

h. According to SARS, it correctly assessed the settlement right accrued during the 2011 tax year as part of the taxpayer's gross income for that year. That the full amount accrued must be included in the taxpayer's gross income regardless of the fact that the amount may only be payable in future.

[107] In relation to the valuation of the settlement right, SARS submits:

a. Mr E failed in material respects to adhere to the requirements of expert evidence. Relying on *PriceWaterhouseCoopers v National Potato Co-operative Ltd and another* [2015] 2 All SA 403 (SCA) which dealt with expert witnesses and the experts assistance of providing the Court with an objective and unbiased opinion, in that the court is not bound by the expert witness’s opinion. The relevant part at paragraph 98 reads:

> “Courts in this and other jurisdictions have experienced problems with expert witnesses, sometimes unflatteringly described as ‘hired guns’. In *The Ikarian Reefer* Cresswell J set out certain duties that an expert witness should observe when giving evidence. Pertinent to the evidence of Mr Collett in this case are the following:
>
> > ‘The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation …

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise … An expert witness in the High Court should never assume the role of advocate.

3. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.'

These principles echo the point made by Diemont JA in *Stock* that:

'An expert … must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the trial Court was.' "

b. Mr E's approach was incorrect and inconsistent. He ignored material information to which, under *Stepney Investments*, he was duty bound to have regard in order check the reasonableness and correctness of his theoretical valuation:

i. Whilst he considered some information which was only available after the valuation date, he ignored that which was adverse to the taxpayer.

ii. He had no excuse for ignoring the pre-listing statement, which was available prior to the valuation date, which was also adverse to the taxpayer.

iii. He sought to argue the case for the taxpayer and lost his objectivity as an independent expert.

c. On the strength of *Stepney Investments* and *Pentree* the taxpayer's criticism of SARS alleged failure to deliver an expert summary and call an expertise misplaced and no negative inference is warranted because Mr E's evidence was not uncontested. On the contrary it was shown during cross examination to be incorrect and unreliable.

d. The objective facts show Mr E's valuation was a gross understatement of the real value of the Participating Preference Shares and devoid of reasonableness:

e. First, in regard to the RB Platinum shares:

   i. The Pre-listing Statement indicated a price of in the region of R958 780 188 (at 61 rand per share) for the RB Platinum shares. Mr E's valuation of R301.8 million was 31.4% of that.

   ii. The best indication of the real value of the RB Plats Reference Shares was that they in fact traded at R60.50 per share around the listing period. Using this price, the value of the RB Plats Reference Shares was R950 921 334 (R60.50 × 15,717,708). Mr E's valuation of R301.8 million was 31.7% of that.

   iii. The High Trust was paid over R418 million for the disposal of 50.4% of the RB Platinum Reference Shares during November 2010. The price for 100% would have been R836 million (R418 million × 2). Mr E's valuation of R301.8 million was 36% of that.

f. Second, the aggregate of the actual amounts verified by PWC and paid to the SHS Trust was R1 226 billion.

   i. Mr E's valuation of R652 million was 45% of that. Mr E required the comparison to be to the R565 million in paragraph 69 of his report in order to compare "apples with apples".

   ii. The result was that he conceded that his valuation was 53% of the amount of R1.2 billon that was verified by PWC and paid to the SHS Trust. This material disparity was not capable of cogent explanation.

g. Third, the amount actually paid to the taxpayer was R632.6 million. Mr E's valuation of R218 million was 34% of that.

[108] In addition, there were multiple failures in Mr E's approach, which included that:

a. Mr E relied on the values reflected in RB Holding's 2009 Annual Review and ignored the 2010 Annual Report, which was closer to the valuation date than the 2009 Annual Report.

b. Mr E assumed the correctness of the RB Holdings valuation as reflected in the 2009 Annual Report and then applied further discounts to it, without considering and investigating whether the RB Holdings directors' valuation already included discounts, which was probable.

c. The portfolio or 'sum of the parts' discount was inappropriate as RB Holdings intended to retain its strategic stake in all of the Portfolio Companies. RB Holding had no intention of an en mass disposal into the market.

d. The discounts to take into account the alleged disadvantages of a minority position and the restrictions were not appropriate on the facts, in particular, that the long-stop liquidity date served to ensure that the Taxpayer had the security that the Portfolio Companies would redeem the reference shares and distribute the value to the SHS Trust after two years.

[109] SARS submitted that the Court should uphold its assessment of the amount because Mr E's theoretical approach was shown to be flawed, unreasonable and unreliable and that the taxpayer has not discharged the onus of proving that SARS's assessment was incorrect. The assessed amount accords with reality, as it is what RB Holdings actually paid for the settlement right.

[110] Under these circumstances, SARS contended that Mr E's attempts to apply discounts to the taxpayers' rights are irrelevant and the amount to be assessed in the 2011 tax year is the R632 640 138 – the full amount payable.

Taxpayer's case

[111] The taxpayer disagrees with SARS's position and contends:

[112] The rights of the beneficiaries of the SHS Trust were subject to two layers of restrictions:

a. First, the restrictions on the rights of the SHS Trust as holder of the Reference Shares in the Portfolio Companies. These were restrictions on the rights of the trust to receive dividends.

b. Second, the rules of the Trust deed which regulated the distribution of its income. The distribution of the income vested with absolute discretion in the trustees and therefore the beneficiaries did not have any vested rights in the income.

[113] The trustees only became entitled to receive income from a Portfolio Company if and when that Portfolio Company received dividends on its Reference Shares or if it sold all or some of its Reference Shares.

[114] Article 32.7 conferred a limited and conditional right on the trustees to compel a Portfolio Company to sell its Reference Shares. This right was, however, subject to a limited bar and a suspensive condition.

[115] The new article 32 imposed further limited bars of the own on the enforcement of the sale of the Reference Shares. These restrictions meant that, at the time of the settlement, the trustees could seek to enforce the sale of only 14.6% of the Reference Shares by value. The remaining 85.4% of the Reference Shares were immune from any forced sale at the time.

[116] In addition to the limited bar, there was a suspensive condition: that the sale be approved by a shareholder's resolution of the Portfolio Company by a majority of 75% + 1 of the votes. It meant that the trustees could force the adoption of such a resolution but only if they voted all 1 000 of the Reference Shares in support of the resolution.

[117] The trustees had rights, and the beneficiaries could not prescribe to them how to ensure these rights.

[118] Further restrictions were imposed on by the SHS Trust. The beneficiaries were never entitled, as of right, to any distribution of any income or capital of the Trust. The beneficiaries never acquired any vested rights to any of the income or capital of the Trust. That was made clear with reference to various clauses within the Trust deed.

[119] The taxpayer did not hold any unconditional right to any benefit. All his rights were conditional and dependent on decisions made and steps taken by the Portfolio Companies and ultimately by the trustees.

[120] The taxpayer therefore did not have any right to cause any income to flow into the SHS Trust. Even when income flowed into the Trust, the taxpayer had no right to it. It remained entirely up to the trustees, in the exercise of the unfettered discretion, to decide whether to distribute the Trust income.

[121] Consequently, the taxpayer had no rights or accrued to him on 15 September 2010 when he signed the Settlement Letter or on 1 October 2010 when he became a member of the SHS Trust.

[122] The trustees resolved to distribute dividends to the beneficiaries on 21 December 2010 and on 18 November 2011. The taxpayer described how the distributions came about which evidence that the dividends were not preordained.

Substance over Form

SARS's case

[123] SARS submitted that, on the taxpayer's evidence, the objective of the settlement was to reduce the liability of the RB Holdings Share Trust and to cap RB Holdings exposure. Instead of exposure to 18 Portfolio Companies, the objective, which was achieved by the 13 July 2010 resolution provided for the exposure of only 6 Portfolio Companies.

[124] For this reason, SARS contends that there was no commercial reason for the SHS Trust other than to seek to disguise the payments as exempt dividends, and the true intention of the parties was that the executives - who were the only beneficiaries of the Trust - had the right to the net income and the net proceeds from the Preference Shares because the taxpayers' rights in respect of certain Preference Shares were clearly defined and predetermined and were as set out in the appendices 1 and 5 of the SHS Trust Deed.

[125] SARS further contended that the trustees could not make use of income or capital for any purpose other than the payment of the executives in accordance with the predetermined rights in respect of the Preference Shares. And once the SHS Trust had served the aforesaid purpose it was to be deregistered.

[126] SARS also contended that the executives' rights were not dependent upon their continued employment, the achievement of the hurdle rate or any other condition relevant to the executive's performance or the success of their investments. The purpose of the payments was not truly to incentivise but rather to settle the liability in relation to the past. The settlement pertained to the rights the taxpayer and other executives held to 25% of the value add over the period from 1 January 2005 to 31 December 2009. There was no intention to incentivise employees with reference to the investment performance from 1 January 2010 through the SHS Trust. Instead, a new employee share incentive scheme effective from 1 January 2010 was established and it was not operated through SHS Trust.

[127] Finally, SARS contended that the settlement agreement included the term that the RB Holdings Share Trust would exist purely to flow the settlement of the proceeds of the above rights to the beneficiaries. As a consequence, once all the proceeds had been distributed, the RB Holdings Share Trust would serve no purpose and would be deregistered. It was clearly not intended to be the long-term incentive scheme going forward. On 6 October 2011, the

directors of RB Holdings approved the principles of the new remuneration scheme, which was implemented only after the taxpayer had resigned in March 2012.

Taxpayer's case

[128] The taxpayer contended otherwise and made the following submissions:

a. The restructuring after the settlement agreement by way of a new vehicle, namely, the SHS Trust had a number of commercial motivations including aligning the RB Holdings shareholders interest with that of the executive team, ensuring that there was no mismatch of cash flows between RB Holdings receipts and payments made to the SHS Trust. In addition, the restructuring clarified the beneficiary's exposure to a defined portfolio of underlying investments, protected RB Holdings core asset from future dilution by removing it from the portfolio of underlying investments and enforced existing contractual obligations to investment partners. Finally, the restructuring retained a stable executive team during what was an operational transition in the business from an owner manager model to a more traditional corporate employee model.

b. The taxpayer, together with his four other witnesses (Mr Willor, Mr V, Mr F and Mr X), testified to the integrity of the transactions and that the 2010 scheme was a genuine transaction designed and implemented for good and proper business reasons unrelated to tax:

  i. A bundle of contingent rights under the 2007 scheme was exchanged for another bundle of contingent rights in 2010 that had limited six Portfolio Companies with half the value. The idea was to cap the potential liability created by the 2007 scheme, while continuing the equity participation in a different form.

  ii. The nonexecutive directors wanted to reduce the value of the scheme allowing for a staggered sale of shares, whilst migrating to a restructured remuneration model. As part of the restructuring, Implats was removed from the scheme.

  iii. The executives wanted to continue with the scheme to give them an upside, in exchange for the substantial financial reduction. The nonexecutives wanted the profit share formula, and the employment related forfeiture provisions removed.

iv. There was no agreement at the time of the settlement letter or some time thereafter that the executives would be paid out of a fixed amount of about R1.2 billion.

v. There was never a suggestion that the estimated values mentioned in the Willor presentation were guaranteed because no proper evaluation done.

vi. It was important to ensure that there was not a huge cash outflow for RB Holdings.

vii. The absence of a profit formula for the 2010 scheme did not mean that the scheme was not an equity participation scheme. An increase in the value of the underlying investments would have increased the future benefits for the beneficiaries. The executives had very specific plans for at least four of the six Portfolio Companies.

viii. It was important for the taxpayer to have an equity interest not only in the past but also going forward.

ix. At the time of the implementation of the 2010 scheme he had no intention of leaving RB Holdings and intended to remain CEO and do whatever he could to enhance the value of the investments.

x. The trustees of the SHS Trust never took any instructions from the beneficiaries and the taxpayer was not in a position to effectively control the decisions of the trustees.

xi. The words "*Trust serves purely to flow payments to settle beneficiaries*" used in the Willor presentation did not mean that the Trust would merely be a channel for cash paid to beneficiaries. They still had to be a new venture to buy back the shares and there were hurdles that had to be cleared before there could be a buy back.

xii. Everybody knew that the amount "current actual liability of R2.5bn" was not even payable to the Trust.

xiii. The original instruction from RB Holdings was to implement the Board resolution of 13 July 2010 read with the Defeasance Note. RB Holdings instructed Mr V to ensure that no vested rights were to be granted to the beneficiaries of the SHS Trust, which upset the beneficiaries. The beneficiaries were not able to force a sale of the underlying investments at inappropriate time as they would be in breach of a lock in.

xiv. The proposal to use the SHS Trust was made by Dbwarf and the Trust was a true discretionary trust.

[129] Relying on Commissioner, *SARS v Reunert Ltd* 2017 JDR 1868 (SCA) at paragraph 30 and *Sasol Oil (Pty) Ltd v Commissioner, SARS* 2018 JDR 1953 (SCA) at paragraphs 79 and 80, the taxpayer submits that his evidence and the evidence of his witnesses, that the transactions were genuine and had a legitimate purpose, must be accepted in circumstances where SARS did not dispute the credibility of the evidence.

General Anti-Avoidance Rules

SARS's case

[130] SARS submitted:

a. Defines the arrangement as the payment of dividends to the SHS Trust by the Portfolio Companies, and the SHS Trust making payment of dividends to the executives, including the taxpayer. According to SARS, the arrangement included the settlement letter, the SHS Trust and the PPS Share Subscription Agreement. The settlement provided that the allocated shares in the six Portfolio Companies called the affected shares would be sold by RB Holdings once the restrictions expired or by the time the longstop liquidity right arrived, to ensure the necessary liquidity to pay the executives.

b. Although the nonexecutive participants would receive an immediate cash settlement which was subject to income tax, the taxpayer and Mr Willor during cross-examination could not provide an answer that justified the distinction between the tax treatment of the nonexecutives paid in cash and the executives paid by way of allocations of affected shares.

c. SARS says that, in truth, there was no basis for the distinction and that the executives and nonexecutives both accrued rights under the settlement agreement to be paid. The fact that the executive's payments were to be delayed pending the sale by RB Holdings of the allocated shares to raise the liquidity with which to make the payments, and to ensure that the retention of the executive team in the meantime, made no difference with the tax consequences.

d. The taxpayer's liability to tax was avoided or reduced, instead of receiving payment for the settlement which was taxable. The taxpayer accrued rights as a beneficiary of the SHS Trust to payment in the form of exempt dividends. Applying the "but for test" the taxpayer would have been liable to tax but for the settlement letter, but for the SHS Trust, and but for the PPS Share Subscription Agreement. Consequently, the arrangement resulted in a tax benefit. It follows that there was an avoidance arrangement.

e. The settlement agreement specifically contemplated that the settlement payments would be made by the RB Holdings Share Trust which would thereafter be liquidated or "defeased".

f. It would have been normal for the RB Holdings Share Trust to have paid the executives pursuant to the settlement as it did for the nonexecutives without interposing the SHS Trust and seeking to recharacterize the settlement as a share incentive scheme and the payment as an exempt dividend.

g. The arrangement resulted in a significant tax benefit for the taxpayer but did not have a significant effect upon either the business risks or the net cash flows of the taxpayer as contemplated in section 80C(1) of the ITA. This was because the taxpayer's rights in respect of certain reference shares were clearly defined and predetermined, the taxpayer was entitled to the value of the net income and net proceeds of the reference shares allocated to him, and the taxpayer had the right to cause the sale of the reference shares allocated to him and to the net proceeds upon such sale.

h. The Portfolio Companies, the SHS Trust and the beneficiaries were accommodating or tax in different parties as defined in section 80E of the ITA because the amounts received by the Portfolio Companies, the SHS Trust and the beneficiaries were not subject to normal tax and as a direct result of the Portfolio Companies and the SHS Trust's participation in the arrangement, an amount that would have been included in the taxable income of the beneficiaries was exempt from normal tax.

i. Finally, SARS contended that the Portfolio Companies, the SHS Trust and the beneficiaries were also connected persons.

j. Under these circumstances the Commissioner was entitled to disregard the interposition of the Portfolio Companies and the SHS Trust and or treat them as one and the same person, as the beneficiaries / executives and or treat the impermissible avoidance arrangement as if it had not been entered into or carried out.

Taxpayer's case

[131] The taxpayer contends that there was no need for RB Holdings to establish the SHS Trust to obtain a tax benefit because tax exempt dividends had been distributed to the beneficiaries by RB Holdings Share Trust since 2008. A cash settlement was not feasible for RB Holdings for payment of the settlement amount he received and would not have created the same commercial results. Even if the arrangement resulted in a tax benefit, the sole or main purpose of the 2010 scheme was not to obtain a tax benefit but rather to cap the potential liability created by the 2007 scheme while continuing the equity participation in a different form.

[132] The taxpayer further contended that the SHS Trust was a runoff of the existing scheme in time to be replaced by a new long term incentive scheme. Both Mr Willor and Mr V testified that it was not tax driven.

[133] In support of the above contentions, the taxpayer submits that it was normal for the SHS Trust to be interposed in the following circumstances:

a. RB Holdings reduced the existing 2007 scheme but without affording the executives vested rights to the shares.

b. The SHS Trust was used on the advice of Dbwarf.

c. The idea was to ultimately phase out the existing scheme through the staggered sale of shares.

d. In exchange for the reduction of the shares subject to the scheme, the executives negotiated for the removal of the hurdle rate and employment related forfeiture provisions.

e. Although it would not have made sense to offer the scheme to a new employee on one October 2010, it made sense in the circumstances as the executives had been involved in the business since 2004.

f. The long stop date had been seven years under the 2006 scheme, five years under the 2007 scheme and under the 2010 scheme, the state was kept the same.

g. The features of the 2010 scheme were normal, viewed against the background of the 2007 scheme and the initiative driven by the nonexecutive directors in 2008 to restructure the remuneration packages, which ultimately culminated in the phasing out of the 2007 scheme.

h. The scheme did not result in a tax benefit for the taxpayer and the taxpayer did not have the right to cause a sale of the Preference Shares.

i. The scheme had a significant effect on the taxpayer's risks and cash flows other than obtaining a tax benefit.

j. SARS failed to appreciate that the taxpayer did not have the right to cause a sale of the Preference Shares acting on his own. The 2010 scheme and the terms of the SHS Trust when negotiated between the nonexecutives and the executives, each side determined to obtain the most advantageous position for each side, and that Mr Willor was the middleman between the two sides.

k. SARS fails to appreciate that when the SHS Trust was first established, it was not envisaged that the Portfolio Companies would have to borrow money for the payment of dividends. The raising of the debt to finance the dividends was done on advice from Dbwarf acting in the interest of RB Holdings.

[134] According to SARS, the entitlement to the settlement right arose on 13 July 2010, when the RB Holdings Board approved the settlement proposal as outlined in the Defeasance Note.

[135] The amount received through the SHS Trust constitutes gross income. However, in its current characterisation by the taxpayer as exempt dividend, this amount is not subject to normal tax and is instead classified as an exempt dividend under section 10(1) of the ITA. This classification results in the taxpayer's tax liability being reduced or avoided, thereby creating a tax benefit.

[136] This gives rise to the arrangement being categorized as an avoidance arrangement.

[137] Considering the requirement that the sole or main purpose of the arrangement must be to achieve a tax benefit, it is noteworthy that there is a rebuttable presumption. It is presumed that an avoidance arrangement is entered into or carried out primarily for the purpose of obtaining a tax benefit, unless the taxpayer can demonstrate, based on a reasonable assessment of relevant facts and circumstances, that obtaining the tax benefit was not the primary objective of the arrangement.

Applicable law

Applicable law on Gross Income

[138] The definition of "gross income" in section 1 of the ITA provides that the total amount received by or accrued to in favour of a taxpayer during such year of assessment, excluding receipts or accruals of the capital nature, but including such amounts so received or accrued, that way during any year of assessment a person has become entitled to any amount which is payable on a date or dates falling after the last day of such year, the amount shall be deemed to have accrued to the person during such year.

[139] In *Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (AD) at 363I-J and 365A-C the Court confirmed the position set out in *WH Lategan v CIR* 2 SATC 16 (1926) at paragraph 20 that the "amount" in the definition was to be interpreted widely and included not only income actually received but also rights of a non-capital nature which were accrued during the relevant year and were capable of being valued in money.

[140] In *Commissioner for the South African Revenue Service v KWJ Investments Services (Pty) Ltd* [2018] ZASCA 81 at paragraphs 8 and 11 to 14, the Court confirmed that an amount accrues to a taxpayer when the taxpayer becomes unconditionally entitled to such an amount.

[141] In *Lategan* the Court at paragraph 41 recognized that the value of the right may be less than the cash value.

Applicable law on Substance over Form

[142] In *Commissioner for the South African Revenue Service v Absa Bank Limited and Another* (596/2021) [2023] ZASCA 125 (29 September 2023) at paragraphs 38, 39 and 41 the court reaffirmed the principles laid out in *CSARS v NKW* [2010] ZASCA 168:

> "In terms of section 82(*b*) of the Act NWK bore the onus of proving that the transactions were not simulated. NWK argued that the agreements themselves provided prima facie proof of the true transaction between the parties. Accordingly, the burden rested on the Commissioner to rebut the prima facie inference.
>
> The Commissioner, on the other hand, contended that the agreements had to be viewed in context and having regard to all other evidence, and that NWK had not discharged the onus of proving that the loan was not simulated. The mere production of the agreements was not enough to discharge the onus. NWK had to refute the assessment that it had a dishonest intention to disguise a transaction. And the substance of the loan agreement, viewed in the light of other transactions and negotiations preceding it, was such that NWK had to prove that it genuinely intended to borrow R96 415 776 from Slab, and to repay it by delivering maize five years after the money had been lent.

> It is trite that a taxpayer may organize his financial affairs in such a way as to pay the least tax permissible. There is, in principle, nothing wrong with arrangements that are tax effective. But there is something wrong with dressing up or disguising a transaction to make it appear to be something that it is not, especially if that has the purpose of tax evasion, or the avoidance of a peremptory rule of law. ”

[143] In *Erf 3183/1 Ladysmith (Pty) Ltd v CIR* 1996 (3) SA 942 (A) at 953A-F Hefer JA, dealing with a contention that agreements should be given effect in accordance with their tenor (form), said:

> “The real question is, however, whether they actually intended that each agreement would *inter partes* have effect according to its tenor. If not, effect must be given to what the transaction really is.”

[144] After referring to section 82 of the ITA Hefer JA continued:

> “Therefore, unless the appellants have shown on a preponderance of probability that the agreements do indeed reflect the actual intention of the parties thereto, the Commissioner’s decision cannot be disturbed.”

[145] Harms JA in *Relier (Pty) Ltd v CIR* 60 SATC 1 (SCA) at paragraph 7 said:

> “If the agreements in issue were taken at face value, the taxpayer would have to succeed: but the agreement in question had ‘unusual and unreal aspects to it’ which raised questions as to the real intention of the taxpayer. How then does a court ascertain the real intention of a party to a contract when the contract appears to be simulated? This is the question to which I now turn before examining any of the evidence.”

[146] As Hefer JA said in *Ladysmith* one must distinguish between the principle that one may arrange one’s affairs so as to ‘remain outside the provisions of a particular statute’, and the principle that a court “will not be deceived by the form of a transaction: it will rend aside the veil in which the transaction is wrapped and examine its true nature and substance”.

[147] Hefer JA describes the meaning of a disguised transaction as:

> “[i]n essence it is a dishonest transaction: dishonest, inasmuch as the parties to it do not really intend it to have, inter partes, the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by concealing what the real agreement or transaction between the parties. The parties wish to hide the fact that their real agreement or transaction fails within the prohibition or is subject to the tax and so they dress it up in a guise which conveys the impression that it is outside of the prohibition or not subject to tax. Such a transaction is said to be in *fraudem legis* and is interpreted by the Courts in accordance with what is found to be the real agreement or transaction between the parties.

> Of course, before the Court can find that a transaction is in *fraudem legis* in the above sense, it must be satisfied that there is some unexpressed agreement or tacit understanding between the parties."

[148] In *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369 *Zandberg* Innes JA said:

> "Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is: not what in form it purports to be. The maxim then applies plus valet quod agitur quam quod simulate concipitur. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The enquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down."

[149] In *Randles* Watermeyer JA, after quoting this statement said and paragraph 395:

> "I wish to draw particular attention to the words "a real intention, definitely ascertainable, which differs from the simulated intention", because they indicate clearly what the learned Judge meant by a "disguised" transaction. A transaction is not necessarily a disguised one because it is devised for the purpose of evading the prohibition in the Act or avoiding liability for the tax imposed by it. A transaction devised for that purpose, if the parties honestly intend it to have effect according to its tenor, is interpreted by the Courts according to its tenor, and then the only question is whether, so interpreted, it falls within or without the prohibition or tax."

[150] In *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A) Hoexter JA examined all the peculiar features of a contract, ostensibly for the transfer of ownership, to determine the real intention of the parties.

[151] In *Skjelbreds Rederi A/S v Hartless (Pty) Ltd* 1982 (2) SA 710 (A) the court refused to recognise a cession of rights, enabling litigation, where it was clear that the successful litigant would have to retransfer the rights to the cedent after the litigation. Dishonesty was not in

issue in any of these cases. But in each a transaction had been concluded to achieve a purpose other than that for which it was ostensibly concluded.

[152] In other cases, such as *Hippo Quarries (Tvl) (Pty) Ltd v Eardley*, 1992 (1) SA 867 (A) courts have looked at the form of a transaction and concluded that the parties genuinely intended to give effect to that which they had apparently agreed. And in *CIR v Conhage* 1999 (4) SA 1149 (SCA) at paragraph 9 Hefer JA found that sale and leaseback agreements, which had unusual terms but which made good business sense, were honestly intended to have the effect contended for by the parties.

[153] In *Hippo Quarries* the court drew a distinction between motive and purpose, on the one hand, and intention on the other, in trying to determine the genuineness of a contract, and of the underlying intention to transfer a right, where the transfer was not an end in itself. Nienaber JA said at 877C-E:

> "Motive and purpose differ from intention. If the purpose of the parties is unlawful, immoral or against public policy, the transaction will be ineffectual even if the intention to cede is genuine. That is a principle of law. Conversely, if their intention to cede is not genuine because the real purpose of the parties is something other than cession, their ostensible transaction will likewise be ineffectual. That is because the law disregards simulation. But where, as here, the purpose is legitimate and the intention is genuine, such intention, all other things being equal, will be implemented."

[154] The court in *Absa Bank* stated that the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms and held:

> "Invariably where parties structure a transaction to achieve an objective other than the one ostensibly achieved they will intend to give effect to the transaction on the terms agreed. The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation."

GAAR Provisions

[155] Sections 80A to 80L of the ITA deal with arrangements entered by a taxpayer which have the effect of conferring a tax benefit through the avoidance of a tax liability that would otherwise accrue. These anti-avoidance provisions confer upon SARS the authority to investigate the transactions and to raise additional or compensatory assessments to counteract the consequences of such avoidance schemes or arrangements.

[156] In terms of section 80A, an "avoidance arrangement" is defined as an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit and:

> ". . .
>
> (*a*) in the context of business-
>
> (i) it was entered into or carried out by means of or in a manner which would not normally be employed for bona fide business purposes, other than obtaining a tax benefit; or
>
> (ii) it lacks commercial substance, in whole or in part …
>
> (*b*) …
>
> in any context—
>
> (i) it has created rights or obligations that would not normally be created between persons dealing at arm's length; or
>
> (ii) it would result directly or indirectly in the misuse or abuse of the provisions of this Act."

[157] Section 80B allows the Commissioner to determine the tax consequences of any impermissible avoidance arrangement. Hefer JA said in *Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd)* 1999 (4) SA 1149 (SCA) paragraph 1, this is done:

> "Within the bounds of any anti-avoidance provisions in the relevant legislation, a taxpayer may minimise his tax liability by arranging his affairs in a suitable manner. If, for example, the same commercial result can be achieved in different ways, he may enter into the type of transaction which does not attract tax or attracts less tax. But, when it comes to considering whether by doing so, he has succeeded in avoiding or reducing the tax, the Court will give effect to the true nature and substance of the transaction and will not be deceived by its form. Compensating adjustments to assessments to ensure consistent treatment of all parties to the arrangement. Section 80L defines important terms. An 'arrangement' includes any 'transaction, operation, scheme, agreement or understanding, including all steps therein or parts thereof.' An 'avoidance arrangement' is one that results in a tax benefit. A 'party' is any person, entity, partnership, or joint venture who 'participates in or takes part in an arrangement'."

[158] Section 80G(1) provides that an avoidance arrangement is presumed to have been entered into or carried out for the sole or main purpose of obtaining a tax benefit. A party obtaining a tax benefit is required to prove that, in the light of the relevant facts and circumstances, obtaining a tax benefit was not the sole or main purpose of the avoidance arrangement. Subsection (2) provides that the purpose of a step in or part of an avoidance arrangement may be different from a purpose attributable to the arrangement as a whole. In

terms of section 80H, the Commissioner may apply the GAAR provisions to steps in or parts of an arrangement.

[159] Section 80J regulates the procedure to be followed prior to the determination made in terms of section 80B. It provides, in peremptory terms that:

> "(1) The Commissioner must, prior to determining any liability of a party for tax under section 80B, give the party notice that he or she believes that the provisions of this Part may apply in respect of an arrangement and must set out in the notice his or her reasons therefor.
>
> (2) A party who receives notice in terms of subsection (1) may, within 60 days after the date of that notice or such longer period as the Commissioner may allow, submit reasons to the Commissioner why the provisions of this Part should not be applied.
>
> (3) The Commissioner must within 180 days of receipt of the reasons or the expiry of the period contemplated in subsection (2)—
>
> (*a*) request additional information in order to determine whether or not this Part applies in respect of an arrangement;
>
> (*b*) give notice to the party that the notice in terms of subsection (1) has been withdrawn; or determine the liability of that party for tax in terms of this Part.
>
> (4) If at any stage after giving notice to the party in terms of subsection (1), additional information comes to the knowledge of the commissioner, he or she may revise or modify his or her reasons for applying this part or, if the notice had been withdrawn, give notice in terms of subsection (1)."

[160] The Court in *Commissioner of Taxes v Ferera* (1976) 2 All SA 552 (RA) stated that an additional consideration in the case of interpreting the GAAR is the need for a wide interpretation in order to "suppress mischief" and provide remedy to the Commissioner without stretching the meaning of the words beyond what language permits.

[161] For the Commissioner to rely on the General Anti-Avoidance Rules, there are four requirements that has to be established:

a. The existence of an avoidance arrangement:

   i. The focus will be to determine what constitutes an arrangement in the event that there was avoidance by the taxpayer.

   ii. It looks at what constitutes steps or parts of an arrangement.

   iii. In the case of *Smith v CIR*, it was stated that, "to avoid liability in this sense is to get out of the way of, escape or prevent an anticipated liability, GAAR will find application when a taxpayer enters into an arrangement which has the effect of avoiding liability which will result in a tax benefit".

iv. In *ITC 1625*, the court held that a possible test to determine the existence of a tax benefit was whether the taxpayer would have suffered tax but for the transaction. The Commissioner would then need to determine or predict another transaction or scheme that the taxpayer would have entered into.

v. The court also referred to *CIR v Louw*, where it was held that:

"another way the question has been posed by the courts as follows; had it not been for the transactions … detailed above, the dividend by the IMC to the SA company and the letter to the Rhodesian company, would have come into the appellants hands and he would have been liable for tax thereon".

b. The arrangement must have been entered into on or after the effective date, 2 November 2006:

i. The insertion of section 80H widens the scope of what can be considered as tax avoidance.

ii. It appears that section 80H was inserted to rectify to the scenario that existed where the taxpayer only had to prove that the overriding reason for entering into a composite transaction was not a tax reason.

iii. Under section 103(1) the taxpayer would have escaped liability even if parts of the transaction were to avoid tax.

c. The sole or main purpose was to obtain a tax benefit:

i. In terms of section 80A, "an avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit".

ii. In *SBI v Lourens Erasmus (Edms) Bpk*, the court looked at the meanings of the words "solely" and "mainly". The court held that, "… in the context under consideration, the word 'mainly' establishes a purely quantitative measure of more than 50% and the associated use of the word 'solely' or mainly is inserted, *ex abundante cautela*, to circumvent the possibility that what may be described as being 'solely' of a particular character would not qualify as being 'mainly' of that character". The court held that "solely" refers to the only purpose of the taxpayer, whereas "mainly" will refer to a quantitative measure of more than 50%. From a quantitative perspective solely would mean 100%.

iii. In *CIR V Bobat* the court held that, "… a main purpose is obviously one which must be dominant over any other, because in ordinary language 'mainly' means for the most part, principally or chiefly". In section 80G however lies a rebuttable presumption, in that an avoidance arrangement is presumed to have been entered into or carried out for the sole or main purpose of a tax benefit, unless and until the party obtaining the tax benefit proves that, reasonably considered in the light of the relevant facts and circumstances, that obtaining a tax benefit was not the sole or main purpose of the avoidance arrangement.

d. The arrangement must include an abnormality element. This test requires that an arrangement must, in a business context, have been entered into and carried out by means or manner that would not normally be employed for *bona fide* business purposes other than obtaining a tax benefit. If it is thus established that, in the context of business, an avoidance arrangement was entered into or carried out in a manner not normally employed for bona fide business purposes, a presumption will exist that the avoidance of tax was the sole or main purpose for the transaction, or it lacks commercial substance; or it has created the rights or obligations not normally created at arm's length; or it would result directly or indirectly in the misuse or abuse of the provisions of the ITA.

Analysis

[162] As part of the executive incentive scheme promised to the taxpayer in his employment agreement, the taxpayer held a participation interest of 25% above a hurdle rate in the asset growth of RB Holdings. A closer inspection of the schemes reveals the following:

a. In the 2006 scheme, the participation interest vested in the executive beneficiaries, and the Trust income accrued or received by the trustee would immediately vest in the beneficiaries.

b. The 2007 scheme was a hybrid scheme, where 75% of the 25% participation interest vested in the form of nominee shares, and the balance was held as discretionary trust shares. The trustees held nominee shares (vesting) on behalf of the executive beneficiaries and would distribute income directly to them upon receipt.

c. In the 2010 scheme, it is stated that the taxpayer's entitlement to participate in the executive incentive scheme was notably designed to reward the performance of the employee. This design was never put into effective operation and will be discussed more fully under the context of simulation. The 2010 scheme was defined it as a discretionary trust, granting the trustee unfettered discretion to distribute income to the beneficiaries.

[163] In each of these schemes, the taxpayer was a trustee and beneficiary.

[164] Considering all the evidence, it is important to note that:

a. RB Holdings had legal obligations towards its executive beneficiaries.

b. The taxpayer, as the CEO of RB Holdings, as well as trustee and beneficiary of the Trust, had to re-evaluate aspects of the SHS Trust as a significant majority of the 25% interest participation vested in him. As part of the executive beneficiaries, he had to compromise by significantly reducing his participation interest to resolve the legal obligations RB Holdings had towards the executives.

c. This was approved on by the RB Holdings Board on 13 July 2010 in order to exit its legal obligations towards the executive beneficiaries, agreed to by the taxpayer on 15 September 2010 and implemented through the SHS Trust on 1 October 2010 when the taxpayer became a member.

[165] For the reasons set out under the discussion on simulation and the application of the GAAR provisions, I am not persuaded by the taxpayer when he asserts that the beneficiaries were entitled as of right to any distribution of the Trust's income, or that the beneficiaries never vested rights to any of the Trust's income. I am also not persuaded by the taxpayer's argument that the tax rights were conditional and dependent on decisions made and steps taken ultimately by the trustees.

[166] I am therefore inclined to agree with SARS that, since the taxpayer retained the right to receive future payments, the expiry of the lock-in period was certain, and none of the

restrictions prevented the accrual of the settlement right. The settlement right constituted gross income once the settlement agreement was approved, as the right was not contingent upon uncertain future events.

[167] I find that the taxpayer had rights that accrued to him by 1 October 2010.

[168] The SHS Trust paid R251 575 059 to the taxpayer on 21 December 2010 based on dividends received from three of the Portfolio Companies. Furthermore, a final amount of R381 194 579 was paid to the taxpayer on 18 November 2021, based on the sale of shares in two Portfolio Companies and RB Holdings raising debt.

[169] The taxpayer submitted his 2011 tax return on 13 November 2011. At this stage the taxpayer had received the R251 575 059 payment already and, as I understand, was in the process of receiving the R381 194 579, which was made to him on 18 November 2011 from the Trust.

[170] Accordingly, the entire amount accrued must be included in the taxpayer's income.

[171] In the event that I may be wrong on finding in favour of SARS, I deal with SARS's alternative grounds.

Substance over Form

[172] The taxpayer asserts that his and his witnesses' evidence is uncontested and urges this Court to accept such evidence in support of his claim that the transaction was not a simulation. However, the test is not solely the testimony but the actions of the taxpayer that are determinative.

[173] In this regard, the taxpayer expressly indicated that the executives wished to continue with the executive incentive scheme and that it was crucial for the taxpayer to hold an equity interest. In support hereof, and at the time of the implementation SHS Trust, he had no intention of leaving his employment at RB Holdings; in fact, he intended to remain as CEO and to take all necessary steps to enhance the value of the investments.

[174] This testimony does not correspond with the facts. Examining the timeline of events is revealing:

a. In June 2009, non-executive directors raised concerns.

b. The Willor proposal was finalised and approved in June 2010, and by July 2010, an agreement had been reached.

c. Settlement letters were signed in September 2010, followed by the formation of the SHS Trust in October 2010.

d. Payments were then made in December 2010.

e. In June 2011, the board approved a new remuneration scheme and resolved to dissolve and deregister the SHS Trust.

f. By November 2011, final payments were made to the beneficiaries, coinciding with the approval of a new incentive scheme in October 2011, which was put into effect only after the taxpayer resigned in March 2012.

[175] Considering this timelines and events, it becomes apparent that despite intentions of creating a long-term Trust, the SHS Trust was quickly established, fulfilled its mandate of making payments to beneficiaries, and was promptly deregistered, with the taxpayer resigning shortly thereafter.

[176] This sequence clearly indicates that the SHS Trust served merely as a conduit for payments to settlement beneficiaries.

[177] I agree with SARS. The executive rights were not contingent upon continued employment, achievement of performance thresholds, or the success of the investments. Payments were not linked to incentivizing future performance but were intended to settle a pre-existing liability. While there was a newly formulated employee incentive scheme, it was not operated through the SHS Trust, and the taxpayer was not a participant.

[178] My conclusion is further supported by the fact that the taxpayer held prominent positions throughout this arrangement. He was the CEO of RB Holdings, the trustee of the Deferred Share Trust, and later the RB Holdings Share Trust, and ultimately the SHS Trust. Additionally, he was a beneficiary of the Trusts. This intertwined involvement reinforces the view that the transactions were devised with the primary intention of obtaining a tax advantage without any substantial commercial purpose.

[179] In view of these considerations, it is evident that the SHS Trust was used as a vehicle to facilitate the payment of settlement amounts to the taxpayer and other executives, effectively reducing the taxpayer liability to SARS. SARS correctly determined that the transactions were primarily to secure a tax benefit.

[180] Consequently, I find that the transaction was indeed a simulation and should therefore be disregarded.

GAAR provisions

[181] I have carefully reviewed the submissions made by the taxpayer. Unfortunately, these submissions do not successfully rebut the presumption placed on him to show that the tax benefit was not the sole or main purpose. The taxpayer has not convincingly demonstrated that the SHS Trust served a genuine purpose beyond merely facilitating the payment of the settlement. Specifically, the Trust appears to have functioned solely as a vehicle for the settlement payment. Moreover, if one considers that the trustees did not reinvest or withhold any of the funds received through dividends from the Portfolio Companies —except for the potential tax liability amounts.

[182] Adding to the anomaly, nearly a hundred percent of the funds received were distributed to beneficiaries within a very short period. This distribution is not typical for such Trusts. Another unusual factor is that the taxpayer was not only a beneficiary of all three Trusts but was also a significant beneficiary, holding a considerable percentage of a participating interest in the Portfolio Companies. Additionally, he held the position of CEO of the holding company, providing him with substantial influence.

[183] It is also unusual that, within this arrangement, the executive beneficiaries would have significantly reduced their interest in the Participating Companies. In an arm’s-length transaction, it is unlikely that they would reduce their interest to such an extent or accept a payment at half its value.

[184] Given these considerations, it is clear that the taxpayer has not met the burden of proving that the arrangement had a purpose beyond tax avoidance. Consequently, the payments made through the SHS Trust should be included in the gross income and subjected to normal tax.

[185] After a thorough review of the evidence – both oral testimonies and documentary records – and for the reasons elaborated upon in greater detail in the substance over form assessment, I find the following:

a. It is undisputed that the taxpayer acquired rights under his contract of employment, and that these rights were initially implemented within the Deferred Share Trust. These rights were subsequently retained in the RB Holdings Share Trust.

b. Despite the form the SHS Trust deed takes, I am of the view that the settlement was formalized within the settlement agreement and the settlement was executed via the SHS Trust.

c. As a result, the taxpayer became entitled to an unconditional right, a right that was enforceable.

d. That the accrual of the settlement right occurred on 15 September 2024 upon the settlement, as evidenced by the settlement letter.

[186] I am not persuaded that the wording used in both the SHS Trust deed and the settlement letter should carry significant weight, as it does not align with the actual implementation of the settlement. This matter is addressed comprehensively in the substance over form analysis.

[187] Thus, I conclude that SARS correctly assessed that the unconditional entitlement to the settlement right accrued to the taxpayer during the 2011 tax year. Accordingly, the taxpayer should have accounted for the full amount of R632 640 138.

[188] To the extent necessary, I must point out that the valuation provided by Mr E was not a credible valuation assessment. Among other issues, it failed to accurately reflect the true value, being significantly understated compared to the Willor presentation valuation and the actual amount ultimately paid out to the SHS Trust.

[189] Now turning to the taxpayer's alternative ground of appeal.

Section 8C: Restricted Equity Instruments

[190] The taxpayer's alternative argument is that his rights under the SHS Trust were not taxable in the 2011 tax year as a result of section 8C read with section 10(1)(*n*D) of the ITA.

[191] Section 8C includes in a taxpayer's income any gains made on the vesting[6] of equity instruments, which were acquired by virtue of employment, on or after 26 October 2004.

[192] Section 8C was introduced on 26 October 2004 and aimed to effectively tax any gains made by employees on equity instruments received from their employers by virtue of their employment.

[193] At first it would seem that such gains should be taxable under the definition of gross income and the provisions of the Seventh Schedule of the ITA, which deals with benefits received as a result of being employed. However, paragraph 2(*a*) of the Seventh Schedule

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[6] A right is vested in a person once he or she has all the rights of ownership, which rights are unconditional. The word "vesting" has been used in order to distinguish between what is certain and what is conditional: A vested right is therefore different from a right that depends on a future contingency or condition.

relating to the receipt of financial instruments by any employee/director specifically excludes instruments acquired under section 8C.

[194] Section 8C prescribes the requirements, circumstances, exclusions, valuation methodology as well as procedural matters relating to the inclusion of amounts that relate to the vesting of equity instruments in the hands of the taxpayer.

[195] Section 8C applies to equity instruments[7] where the value of such right or obligation is calculated directly or indirectly with reference to a share.

[196] Subject to certain exceptions, the gain is the amount by which the market value on the date of vesting exceeds any consideration paid in respect of the equity instrument. The event that triggers taxation in the hands of the taxpayer is the vesting of an equity instrument. Therefore, the taxpayer should include in his income any gain once the equity instrument has vested in him.

[197] Section 8C also contains the deferral of taxes but it differs in the sense that the calculation of the gain is deferred until such time that all restrictions have been lifted. It is not merely a deferral of payment of taxes but rather a deferral of the determination of taxes payable.

[198] Section 8C(3) states that, in the case of an unrestricted equity instrument[8], it is deemed to have vested in the taxpayer at the time of acquisition of the instrument.

[199] In section 8C(3) where it is stated that in cases of restricted equity instruments, it will only vest in the taxpayer once all the restrictions cease to exist.

[200] The principle of "vesting" is also used in tax legislation relating to Trusts in order to describe the rights that the beneficiaries may have and to distinguish a vested right from a contingent right. In *ITC 76* it was held that "vesting implied the transfer of dominium" and "a vested right was something substantial, which could be measured in money".

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7 An equity instrument relates to a share (or part thereof), an option to buy a share (or part thereof) or an instrument that can be converted into a share (or part thereof) of a company's equity share capital. It also includes "any contractual right or obligation the value of which is determined directly or indirectly with reference to a share".

8 The complete definition of restricted equity instrument as per section 8C(7) of the ITA. In essence the definitions provide for specific circumstances under which an equity instrument will be regarded as a restricted equity instrument.

[201] The employee with a contractual right to the value or appreciation in value of the shares and no such right in the shares itself, will also be taxed under section 8C.

[202] The date of inclusion of the gain for tax purposes in the case of unrestricted equity instruments, will be the date that the equity instrument is acquired.

[203] In contrast with the term "vesting" a lot has been said about the term "accrued to" in the courts and in some instances the term "vesting" was used to indicate that accrual has taken place. In *CIR v Polonsky* it was held that even though income had not been paid to a beneficiary but rather invested on her behalf, the income had vested in her, and therefore had accrued to her. In *Lategan* it was held that the term "accrued to" means to be "entitled to". This meaning was also accepted in *People's Stores*. Being entitled to income seems very similar to the principle of vesting, relates to when a person owns a right or have "all rights of ownership in such right including the right of enjoyment".

[204] Therefore, if a restriction exists resulting in income not vesting in a taxpayer, it will probably also not accrue to the taxpayer.

Taxpayer's case

[205] The taxpayer listed implications of section 8C it considered applied to his case. These are:

a. The taxpayer's rights as beneficiary of the SHS Trust constituted an equity instrument as defined in section 8C(7).

b. The taxpayer acquired the equity instrument by virtue of his employment within the meaning of section 8C(1)(*a*)(i).

c. The equity instrument was exempt from normal tax in terms of section 10(1)(*n*D) and its taxation was exclusively governed by section 8C:

    i. in terms of section 8C(1) a taxpayers gain on an equity instrument is taxable only when it vests in the taxpayer.

    ii. in terms of section 8C(3)(*b*)(i) a restricted equity instrument vests only when it becomes an unrestricted equity instrument.

d. The taxpayer's equity instrument remained restricted throughout the 2011 tax year. The SHS Trust deed did not allow the taxpayer to dispose of his rights and his right as a beneficiary of the SHS Trust were not deliverable to him for as long as the Trust continued to hold Reference Shares in the Portfolio Companies.

SARS's case

[206] SARS contends that the settlement right accrued prior to the exchange that the taxpayer made on 15 September 2010 or 1 October 2010 of his settlement right for a right as a beneficiary of the SHS Trust and the liability to tax arose when the taxpayer acquired an unconditional entitlement to the settlement right.

[207] SARS submits that the taxpayer's reliance on section 8C with reference to his rights under the SHS Trust does not assist him if the Court upholds the above contention. This SARS further submits is the position with a finding in favour of SARS on the substance over form or GAAR provisions. SARS say so because under these grounds, the Commissioner is entitled to disregard the interposition of the Portfolio Companies and the SHS Trust as a simulation or under sections 80A to 80L of the ITA.

[208] SARS disagrees with the taxpayer's argument and contends that the first question whether section 8C applies is incorrect because it overlooks the settlement right accruing prior to the subsequent steps taken by Dbwarf to implement the settlement by way of a new trust. Alternatively, it overlooks that the SHS Trust should be disregarded for tax purposes and thus there is no need to conduct any section 8C analysis.

[209] SARS further contends that the only basis upon which the taxpayer relies for his contention that section 8C was applicable is that the exchange of the right or interest is held in the RB Holdings Share Trust was a qualifying exchange as contemplated in section 8C(4)(*a*). SARS also disagreed with this argument.

[210] In support of the disagreement, SARS contends the following:

a. The taxpayer's rights or interest in the RB Holdings Share Trust were not equity instruments as defined at the relevant time.

b. The broader definition upon which the taxpayer's contention is reliant was only applicable and respective and equity instrument acquired on or after 21 October 2008.

c. The taxpayer acquired his rights or interest in the RB Holdings Share Trust After 21 October 2008.

d. The settlement agreement was referred to Dbwarf to implement and thereafter on the recommendation implement by way of the SHS Trust. Thus, the rights in the SHS Trust were quiet by virtue of the settlement and the taxpayer cannot rely on the deeming provision in section 8C(4).

e. The taxpayer's rights under the SHS Trust when not equity instruments as defined because he had no rights to the Reference Shares, his rights were contractual rights as against the trustees under the SHS Trust Deed.

f. The value of his rights was thus not determined with reference to the Reference Shares but with reference to his contractual rights under the SHS Trust Deed.

g. RB Holdings intended to be able to retain its strategic stake in the portfolio companies. The intention was that the Portfolio Companies would redeem the Preference Shares and distribute the proceeds to the SHS Trust after two years or by the time the long stop liquidity date occurred.

h. Even on the taxpayer's own version he had no rights against the SHS Trust and that everything was discretionary.

i. There was a deemed vesting in the taxpayer during the 2011 year of assessment is contemplated in section 8C(3)(*b*)(ii) as the restrictions cease to have effect when the SHS Trust and the taxpayer disposed of the References Shares and were paid.

j. This deemed vesting occurred during December 2010 when the SHS Trust was paid R485 million, of which R251 million was paid to the taxpayer, and to the extent the taxpayer's rights were extinguished.

k. In the result, the gain of R251 million would have been subject to tax during the 2011 year of assessment in terms of section 8C(1) because the specific exemption in section 10(1)(*n*D) would have been applicable and would have superseded the more general exemption provided for in section 10(1)(*k*).

l. There were no restrictions in relation to Agri, Astrapak, Zurich and Mogs. Thus, under section 8C(3) these amounts would deem to have vested on acquisition, i.e., 1 October 2010.

m. The amounts paid in respect of these different shares would not have been subject to double tax because the specific exemption in section 10(1)(*n*D) precluded that result.

n. In relation to the restrictions on Merafe and RB Plats, these ceased to have effect by the time the SHS Trust and the taxpayer disposed of their rights and were paid in November 2011. By that time, a new proviso to section 10(1)(*k*) had come into effect. From 1 January 2011, these amounts were expressly stated not to be exempted and even if paid as dividends, they were taxable receipts in the 2012 year of assessment.

[211] For the reasons set out above, I have concluded that the liability to tax arose when the taxpayer acquired his unconditional entitlement to the settlement right on 15 September 2010. In light of this conclusion, I agree with SARS that any reliance on section 8C, with reference to the taxpayer's rights under the SHS Trust does not support the taxpayer's position. Similarly, my findings on the application of the substance-over-form doctrine and the application of the GAAR provisions also render the taxpayer's reliance on section 8C ineffective. This is because SARS is entitled to disregard the interposition of the Portfolio Companies and the SHS Trust as a simulation or under the anti-avoidance provisions.

[212] Under these circumstances, the value of the taxpayer's rights as a beneficiary of the SHS Trust is not exempt from normal tax under section 10(1)(*n*D) of the ITA for the duration of the 2011 tax year.

Understatement Penalty

[213] SARS imposed a 10% understatement penalty of R25 305 604 as contemplated in section 222(1) of the TAA, characterizing the taxpayer's behaviour as substantial understatement and on the basis that this was a standard case.

[214] The taxpayer contends that the understatement penalty should not have been imposed for the following reasons:

a. First, that the taxpayer has not understated his income and should the Court conclude that the distributions to him were taxable, then the taxpayer contends that the understatement penalties ought to be set aside:

i. In *Commissioner, SARS v Thistle Trust* 2023 (2) SA120 (SCA) at paragraph 29 the understatement penalty was set aside on the basis of a *bona fide* inadvertent error where the taxpayer had believed that a certain statutory regime as applicable to its case. Although it erred, it did so in good faith and acted unintentionally.

ii. In *Commissioner, SARS v Coronation Investment Management (Pty) Ltd* 2023 JDR 0295 (SCA) at paragraphs 60 to 64 the understatement penalty was set aside where the taxpayer adopted a *bona fide* stance that a certain section of the Income Tax Act was applicable to its case, relying on professional advice of external auditors.

b. Second, the taxpayer adopted the stance that the dividends were exempt from tax in terms of section 10(1)(*k*) of the ITA. He did so on the following advices:

i. Dbwarf's email of 17 December 2010.

ii. Seligson Opinion of 26 May 2011.

iii. PWC Opinion of 28 November 2011.

iv. CDH orally confirming the PWC Opinion.

c. Third, the taxpayer disclosed the distributions received by him from the SHS Trust as nontaxable because he truly understood the dividends to retain the character as exempt evidence. Such disclosure was made in a manner similar to prior tax years, and his understanding of the tax status of the dividends was consistent with the legal advice received. He completed his tax return honestly.

[215] According to SARS, the Seligson SC Opinion was guarded, ambiguous and qualified, and the PWC Opinion was obtained after the taxpayers 2011 return was submitted to SARS.

[216] Chapter 16 of the TAA regulates understatement penalties.

[217] Section 221 of the TAA defines an understatement:

" **'understatement'** means any prejudice to SARS or the fiscus as a result of—

(*a*) the failure to submit a return required under a tax Act or by the Commissioner;

(*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 of 'tax'; or

(*e*) an 'impermissible avoidance arrangement'."

[218] Section 221 of the TAA defines a tax position:

> " **'tax position'** means an assumption underlying one or more aspects of a tax return, including whether or not—
>
> (*a*) an amount, transaction, event or item is taxable;
>
> (*b*) an amount or item is deductible or may be set-off;
>
> (*c*) a lower rate of tax than the maximum applicable to that class of taxpayer, transaction, event or item applies; or (d) an amount qualifies as a reduction of tax payable;"

[219] Section 222 of the TAA imposes an understatement penalty in the event of an understatement by a taxpayer, except if the understatement is as a result of a *bona fide* inadvertent error and reads:

> "**222. Understatement penalty.**—(1) In the event of an 'understatement' by a taxpayer, the taxpayer must pay, in addition to the 'tax' payable for the relevant tax period, the understatement penalty determined under subsection (2) unless the 'understatement' resulted from a *bona fide* inadvertent error.
>
> (2) The understatement penalty is the amount resulting from applying the highest applicable understatement penalty percentage in accordance with the table in section 223 to each shortfall determined under subsection (3) and (4) in relation to each 'understatement'.
>
> (3) The shortfall is the sum of—
>
> (*a*) the difference between the amount of 'tax' properly chargeable for the tax period and the amount of 'tax' that would have been chargeable for the tax period if the 'understatement' were accepted;
>
> (*b*) the difference between the amount properly refundable for the tax period and the amount that would have been refundable if the 'understatement' were accepted; and
>
> (*c*) the difference between the amount of an assessed loss or any other benefit to the taxpayer properly carried forward from the tax period to a succeeding tax period and the amount that would have been carried forward if the 'understatement' were accepted, multiplied by the tax rate determined under subsection (5).
>
> (4) (*a*) If there is a difference under both paragraphs (*a*) and (*b*) of subsection (3), the shortfall must be reduced by the amount of any duplication between the paragraphs.
>
> (*b*) Where the 'understatement' is the failure to submit a return, the 'tax' resulted from the 'understatement' had the 'understatement' been accepted, for purposes of subsection (3), must be regarded as nil.

(5) The tax rate applicable to the shortfall determined under subsections (3) and (4) is the maximum tax rate applicable to the taxpayer, ignoring an assessed loss or any other benefit brought forward from a preceding tax period to the tax period.

(6) Any penalty imposed under subsection (2) must be reduced by any penalty imposed under section 4(2) of the Employment Tax Incentive Act, 2013, in respect of the same employment tax incentive amount."

[220] The understatement penalty is determined by applying the highest applicable understatement penalty percentage in accordance with the table in section 223 to each shortfall:[9]

Section 223(1) – Understatement penalty percentage table

1	2	3	4	5	6
Item	**Behaviour**	**Standard case**	**If obstructive or if it is a 'repeat case'**	**Voluntary disclosure after notification of audit or criminal investigation**	**Voluntary disclosure before notification of audit or criminal investigation**
(i)	'Substantial understatement'	10%	20%	5%	0%
(ii)	Reasonable care not taken in completing return	25%	50%	15%	0%
(iii)	No reasonable grounds for 'tax position' taken	50%	75%	25%	0%
(iv)	'Impermissible avoidance arrangement'	75%	100%	35%	0%
(v)	Gross negligence	100%	125%	50%	5%
(vi)	Intentional tax evasion	150%	200%	75%	10%

9 Each "shortfall" is determined under section 222(3) as the sum of paragraph (*a*), (*b*) and (*c*) depending on the specific facts of the taxpayer for the respective tax period to determine the shortfall in tax.

[221] The degree of culpability giving rise to the understatement are therefore listed in ascending order in the table, from item (i) (substantial understatement), where culpability is absent, to item (vi) (intentional tax evasion), where culpability is highest.

[222] Although 'substantial understatement' is listed in the table, it is not actually behaviour. It is included on the table in recognition of the severity of the prejudice suffered by SARS and the fiscus due to the acts or omissions that culminate in the substantial understatement of tax.

[223] It is clear from the table that the quantum of the understatement penalty which may be levied on a taxpayer is determined by the taxpayer's behaviour, with the level of the penalty increasing according to the degree of severity of that behaviour.

[224] It follows that in circumstances where an alleged understatement of tax has occurred, a three-phase process is contemplated:

a. SARS must consider whether the understatement constitutes an "understatement" as defined in section 221 of the TAA.

b. If it does, SARS must then consider whether the understatement results from a "*bona fide* inadvertent error".

c. If such an error is established, that is the end of the inquiry, and no understatement penalty may be levied. However, where there is no such error, SARS is then required to identify the appropriate behavioural category under which the taxpayer's conduct resorts in terms of the table set out in section 223 before it can impose a penalty.

[225] The Court in *ITC 1890* 79 SATC 62 at paragraphs 77 to 88 Set aside the understatement penalty because the taxpayer relied on the professional advice of a professor.

[226] In *ITC* 1881 87 SATC 132 at paragraphs 171 to 173 the Court was required to consider the meaning of a "*bona fide* inadvertent error" and noted that the TAA does not define the meaning of the phrase "*bona fide* inadvertent error". The court considered the dictionary meaning of these words and concluded that a "*bona fide* inadvertent error has to be an innocent misstatement by a taxpayer on his or her return, resulting in an understatement, while acting in good faith and without the intention to deceive". The court held that there was merit in excusing the taxpayer for its reliance on the Professor's opinion on the basis of it being lay on issues of tax and the law and therefore ordered that the understatement penalty be remitted.

[227] Where an understatement penalty is imposed, the taxpayer must pay the understatement penalty in addition to the tax payable for the relevant tax period.

[228] Based on the evidence and particularly the advice received, even if guarded, the taxpayer and other relevant parties – namely, the SHS Trust, RB Holdings – acted in accordance with the advice received. There is not sufficient evidence presented by SARS to demonstrate that the taxpayer did not make an innocent misstatement on his return resulting in an understatement, while acting in good faith and without intention to deceive.

[229] Under the circumstances, I find that the understatement resulted from a "*bona fide* inadvertent error". It is therefore not necessary to deal with the aspect of remission of penalties.

[230] Accordingly, SARS should not have imposed the 10% understatement penalty.

Penalty on the underestimation of provisional tax

[231] SARS imposed a penalty in the amount R40 446 769 on the underestimation of provisional tax in terms of paragraph 20 of the Fourth Schedule of the ITA.

[232] The taxpayer contends that SARS Letter Findings dated 19 November 2018 did not deal with the penalty on the underestimation of provisional tax. In the premises, the taxpayer submits, SARS did not give the taxpayer an opportunity to make representations on the issue as SARS was required to do in terms of section 3(2) of PAJA.

[233] The Letter of Findings is uploaded on CaseLines 044-1698 to 1750 and states under the **"OVERALL CONCLUSION"** on 044-1749:

> "This letter constitutes a letter of findings in terms of section 42(2)(*b*) of the TAA and a notice referred to in section 80J.
>
> You are hereby afforded 60 calendar days within which to respond to the audit findings set out in this letter. Your response should include representations relating to any understatement penalties by applying the understatement penalty percentage table as set out in section 223(1) of the TAA and or interest that may be levied should additional assessments be made."

[234] The taxpayer contended that SARS failed to issue a penalty assessment to the taxpayers contemplated in section 214 of the TAA. In addition, that SARS did not give notice of the assessment as contemplated in that section and disputes SARS's entitlement to disregard the provisions of section 214(1)(*e*) by virtue of the fact that the income tax and a penalty were raised in the same assessment.

[235] The taxpayer further contended that the procedural flaw on the part of SARS is unlawful, and the penalty imposed under paragraph 20 ought to be reduced to nil.

[236] Alternatively, the taxpayers relevant estimate for 2011 was not less than 80% of the amount of the actual taxable income as contemplated in paragraph 20(1)(*a*) of the Fourth Schedule and if the taxpayer is liable for tax on the basis of the application of section 80B such tax arose from the date upon which the Commissioner exercised its powers. This date would have occurred only when the additional assessment was issued.

[237] Under these circumstances, the Commissioner should have exercised his discretion conferred in terms of paragraph 20(2) of the Fourth Schedule and or section 217(3) of the TAA to remit the penalty on the basis that the relevant estimate was seriously calculated with due regard to the factors having a bearing thereon and or was not deliberately or negligently understated as contemplated in paragraph 20(2), and that reasonable grounds for the noncompliance existed as contemplated in section 217(3)(*b*).

[238] SARS must give notice of the assessment in the manner prescribed in section 214 and an opportunity must be afforded to the taxpayer to request a remittance under section 215(1) of the TAA. This was not done.

[239] Consequently, and in view of the conclusion I have reached, there is no need for this Court to consider other points of argument raised by SARS and the taxpayer.

Interest

[240] SARS levied interest in terms of section 89*quat* of the ITA.

[241] The taxpayer similarly contended that SARS Letter Findings did not deal with section 89*quat* interest and was required to do in terms of section 3(2) of PAJA. SARS contends otherwise.

[242] I have referred to the Letter of Findings above. While I found that SARS did not give the taxpayer an opportunity to request remission of the penalty, the Letter does give the taxpayer an opportunity to make representations on the interest levied.

[243] The taxpayer did not make any submissions on the interest because he was of the view that SARS did not provide him with an opportunity to make such representations.

[244] As already indicated above, this Court does not have the jurisdiction to determine grounds of review raised under PAJA. However, I am inclined to consider the submissions made for the remission of the interest under section 89*quat*(3) of the ITA.

[245] The taxpayer referred the Court to *Eveready (Pty) Ltd v CSARS* 74 SATC 185 decision and specifically paragraph 25. The taxpayer submitted that this Court could remit section 89*quat*(2) interest on the basis that the taxpayer took the tax position in good faith on the basis of opinions received from professional advisors and that the Court in *Eveready* remitted interest in accordance with section 89*quat*(3).

[246] Section 89*quat* of the ITA deals with interest on underpayments and overpayments of provisional tax and the relevant subsections reads:

> "(2) If the taxable income of any provisional taxpayer as finally determined for any year of assessment exceeds—
>
> (*a*) R20 000 in the case of a company; or
>
> (*b*) R50 000 in the case of any person other than a company, and the normal tax payable by him in respect of such taxable income exceeds the credit amount in relation to such year, interest shall, subject to the provisions of subsection (3), be payable by the taxpayer at the prescribed rate on the amount by which such normal tax exceeds the credit amount, such interest being calculated from the effective date in relation to the said year until the date of assessment of such normal tax.
>
> (3) Where the Commissioner having regard to the circumstances of the case is satisfied that any amount has been included in the taxpayer's taxable income or that any deduction, allowance, disregarding or exclusion claimed by the taxpayer has not been allowed, and the taxpayer has on reasonable grounds contended that such amount should not have been so included or that such deduction, allowance, disregarding or exclusion should have been allowed, the Commissioner may, subject to the provisions of section 103(6), direct that interest shall not be paid by the taxpayer on so much of the said normal tax as is attributable to the inclusion of such amount or the disallowance of such deduction, allowance, disregarding or exclusion."

[247] Section 89*quat* of the ITA states that if a taxpayer underestimates its provisional tax payments, then the Commissioner must levy interest on the underestimation. In the absence of the taxpayer providing reasonable grounds because the income should not be included, SARS cannot remit such interest.

[248] For the reasons I find SARS should not have imposed the penalty, I find that the interest should be remitted.

Costs

[249] Finally, as to the question of costs.

[250] 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. The taxpayer's grounds of appeal are held to be unreasonable.

[251] I exercise my discretion in not awarding costs for the successful party in the appeal.

ORDER

[252] The following order is made:

1. The objection to the assessment is dismissed and the additional assessment is upheld.

2. The objection to the imposition of understatement penalties, underestimation of provisional tax penalties and section 89*quat* interest is upheld.

3. There is no order as to costs.

L HASKINS
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

M NOGE
ACCOUNTING MEMBER

H MTEGHA
COMMERCIAL MEMBER