REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No.: **IT 35476**

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED.

25/02/2025
DATE

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SIGNATURE

In the matter between:

Taxpayer D **Appellant**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **Respondent**

J U D G M E N T

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 25 February 2025.

MANOIM, J

Introduction

[1] The taxpayer brings this appeal in respect of four years of assessment by the Commissioner (SARS). The question in this appeal is whether the taxpayer has satisfactorily explained a large sum reflected as a loan account owing to him in one of his wholly owned companies, a close corporation called Company A Property Holdings CC (Company A). SARS maintains this amount, as well as the interest that accrued on it, represents undeclared income. The taxpayer says SARS based its assessment on financial statements for Company A that had been drawn up in error and that he has now reconstituted the accounts and fully explained the errors. SARS does not accept this and hence the appeal.

Background to the taxpayer's financial affairs

[2] The taxpayer is a successful businessman who owns several companies. Their structure is always the same. He is the sole shareholder and director. According to his accountant he has this relationship with 19 or 20 companies. Several of these companies are property owning companies. This case concerns transactions in respect of five of those companies.

[3] The taxpayer earned income from three sources from his companies: salaries, dividend income and interest on his loan accounts.

[4] The property-owning companies derived their revenue from leases. Dividends were declared and the taxpayer then had credit loan accounts in the companies which comprised, on his version, after tax income. The income tax affairs of these companies are not the subject matter of this appeal. It is the taxpayer's personal affairs which are a product of how he used and accounted for his loan accounts. Nor does the case concern his income more generally. It is focussed on a credit loan account in one of his companies, Company A, which SARS assessed as undeclared income as well as the interest accrued thereon.

[5] To understand how this arises it is necessary to consider how the taxpayer operated the accounts of his companies. What the taxpayer did, it is common cause, was to use these credit loan accounts to fund other companies in his group. When he did so he would earn interest income from the company he lent the money to which would then be credited to a loan account he had in the company. But an added complexity was that he also, in his personal capacity borrowed from some of his companies to fund another, and then he paid interest to the lending company. Generally, he paid a lower interest when he borrowed compared the higher interest rate he received when he was lending.

[6] The entity in question in this matter, Company A also played an additional role. It became the entity that owned his personal properties and from which he made payments, inter alia of charitable contributions, to third parties.

Key issues

[7] The key issue in this case is whether the taxpayer's credit loan account in Company A in the relevant years of assessment – 2014 to 2017 – represented undeclared income. SARS assessed the amounts, distinguishing between undeclared income and an undeclared interest, as follows:

> **Undeclared income** — Funds advanced to Company A Property Holdings (Pty) Ltd ("Company A")
>
> 1.1 R30 179 163 in respect of the 2014 year of assessment.
>
> 1.2 R12 637 082 in respect of the 2015 year of assessment. *
>
> **Undeclared interest income**
>
> 1.3 R3 321 051 in respect of the 2014 year of assessment.
>
> 1.4 R5 628 891 in respect of the 2015 year of assessment. *
>
> 1.5 R5 519 590 in respect of the 2016 year of assessment.
>
> 1.6 R5 539 465 in respect of the 2017 year of assessment.

[8] However, SARS has conceded that the amount in 1.2 above (R12 637 082) included the amount in 1.4 above (R5 628 891) and so it has reduced the assessment in respect of the 2015 year of assessment to R7 008 191.

[9] The amount in question appeared in unaudited financial statements submitted at the time by the taxpayer and which had been drawn up by his erstwhile firm of accountants FGB (the FGB accounts).

[10] Once the taxpayer was subject to an assessment he appointed a new firm of accountants, BJP, in 2017, to address his tax issues. This firm initially did not dispute the accuracy of the FGB accounts. Rather is sought to explain that the loan account was capital not undeclared income. But that approach changed in 2020, when it presented SARS with what it termed were reconstructed financial statements whose significance was the loan account was now drastically reduced.

[11] This occurred only after the objection process had been concluded, during a meeting as part of the Alternative Dispute Resolution process (ADR). Thereafter, in the appeal process, the taxpayer led evidence to attempt to establish why the loan account was much smaller than reflected in the FGB accounts, and why the reconstructed accounts reflected the correct position. This entailed a complex tracing of entries from different accounts as well as explaining the relationship between the taxpayer's business and private expenses. SARS sought to rebut this case leading its expert to query both accuracy and the value of this exercise.

[12] In summary SARS contends that the taxpayer gave inconsistent explanations for the source of the quantum of the loan accounts, as reflected in the FGB accounts, and then when reliance on these was revoked, presented a new set of accounts that SARS contends are wholly unreliable. SARS has not put up its own version of what the loan accounts should be. Rather it seeks to rely on the provisions of section 102(1) of the Tax Administration Act, Act 28 of 2011 (TAA) which states:

> "A taxpayer bears the burden of proving —
>
> (*a*) that an amount, transaction, event or item is exempt or otherwise not taxable."

[13] The taxpayer denies the explanations his advisors gave SARS until the accounts were re-drawn were inconsistent. He maintains that his position has always been that the quantum of his loan as reflected in the Company A accounts, represented capital, not undeclared income, and that SARS has sought to make too much of the varying explanations which occurred at a time his new advisors were attempting to familiarise themselves with his businesses. Once the accounts were reconstituted, he argued, SARS had no basis not to accept them having no version of its own.

History of SARS assessments

[14] The tax assessments relevant to this case are for the 2014 to 2017 tax years. It is useful to start with how SARS commenced looking at the taxpayer affairs. The earliest correspondence is not in the record. But in June 2018, BJP refers to correspondence the taxpayer had received from SARS in April 2018 in relation to an audit. BJP stated that it had been appointed as the taxpayer's representative as of 2 August 2017 "as a consequence of anomalies identified by SARS during the audit of previous financial years." BJP advised that it had only recently taken over and for that reason had not yet had access to all the records. However, the firm stated it received records from the previous accountants but had been unable to locate original loan agreements. The previous accountants referred to was the firm of FGB. More about them later. Various interactions with BJP on behalf of the taxpayer followed.

[15] On 28 February 2019 SARS wrote to the taxpayer to advise that it had finalised its audit for the periods 2013 to 2017. The letter runs to thirteen pages and a lot of what appears there is no longer relevant. However, one sentence indicates the root of the current dispute.

[16] SARS wrote:

> "During the 2014 year of assessment, the Taxpayer advanced funds amounting to R30 179 163 to Company A. The balance on this loan was R42 816 245 at the end of the 2015 year of assessment, resulting to an increase of R12 637 082. The Taxpayer has not provided any proof to confirm the source of these funds. The income declared by the Taxpayer on his returns for the said year is low and the inference is drawn that the Taxpayer received additional income in order to advance funds to Company A and has omitted the said income from his tax returns. Even though the Taxpayer borrowed funds from the Taxpayer D Group during the same period the funds were advanced to Company A, there is no evidence to suggest any link between the borrowings from the Taxpayer D Group and advances made to Company A."

Issues on the pleadings

[17] This is the core of SARS case and despite the lengthy period of litigation and various amendments by both parties to their Rule 31 and 32 statements, the basis of the case in respect of the loan account is still as articulated here. Nevertheless, belatedly during final argument, Ms C, who appeared for the taxpayer, argued that SARS case as currently formulated is not contemplated in its rule 31 statement.

[18] She argued that SARS could not be supine in the appeal. Although section 170 of the TAA states that the production of a document issued by SARS is conclusive proof as to the assessment, there is an exception for cases on appeal that all the particulars of an assessment are correct.[1] SARS was she argued obliged to indicate what facts it was disputing so the taxpayer could make out his case. She relied for this on the following decision by Ponnan JA in *Pretoria East Motors* where had explained what SARS had to do:

> "If there are underlying facts in support of that explanation that SARS wishes to place in dispute, then it should indicate clearly what those facts are so that the taxpayer is alerted to the need to call direct evidence on those matters. Any other approach would make litigation in the Tax Court unmanageable as the taxpayer would be left in the dark as to the level of detail required of it in the presentation of its case. It must be stressed that SARS is under an obligation throughout the assessment process and leading up to the appeal and the appeal itself to indicate clearly

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[1] **170 Evidence as to assessment—**The production of a document issued by SARS purporting to be a copy of or an extract from an assessment is conclusive evidence—
(*a*) of the making of the assessment; and
(*b*) except in the case of proceedings on appeal instituted under Chapter 9 against the assessment, that all the particulars of the assessment are correct.

> what matters and which documents are in dispute so that the taxpayer knows is needed to present its case."[2]

[19] Therefor she argued SARS had to do more than it had done.

[20] But SARS is relying on a document produced by the taxpayer. What SARS alleges in its amended rule 31 statement in clause 6 is that:

> "The money loaned to Company A by the Appellant did not originate from the companies in the Taxpayer D Group. The money advanced to Company A was found to have come from sources unknown to the Respondent, which sources the Appellant failed to disclose to the Respondent. In the absence of a satisfactory explanation from the Appellant, the Respondent taxed the sum of R42 million in the hands of the Appellant as income."

[21] Ms C responded arguing that this paragraph was part of a background sketch giving context and could not be considered to be part of the main pleadings. But I consider this too rigid an approach. The important point is that it was part of the pleadings, and the taxpayer understood the case against it on this aspect and responded to it. SARS case as presented during the appeal process is thus consistent with its pleaded case. This is not a case of the taxpayer being "left in the dark" as contemplated in the *Pretoria East* case.

Chronology

[22] The rest of the chronology can be dealt with briefly. The taxpayer filed an objection to the audit findings, the objection was unsuccessful, and the taxpayer then filed the appeal which has led to the present case. In the interim the parties also underwent a process of mediation or ADR. It too proved unsuccessful for the taxpayer. Two meetings took place as part of the ADR process. The first in January 2020 was of no moment. However, at the second, BJP, who represented the taxpayer at that meeting, presented SARS with a new set of accounts where for the first time the quantum of the taxpayer's loan account in Company A was drastically reduced. SARS however remained unpersuaded. It stood by its assessment and hence this appeal.

[23] What is relevant from SARS perspective in this history is that the taxpayer provided four different versions to it. SARS has spent much time in this litigation on this point; both in requests for documents and in the hearing. The significance of this is to argue that inconsistency in explanations can lead to an adverse inference that the taxpayer is not able to give an explanation because the loan account does indeed represent undeclared income. Since the four versions aspect is central to SARS case, I consider them in greater depth.

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[2] *Commissioner South African Revenue Service v Pretoria East Motors (Pty) Ltd* 2014 (5) SA 231 (SCA); 76 SATC 293paragraph 14.

The four versions

[24] The first version appeared in the letter from BJP dated June 2018, referred to earlier. Two facts emerge from this. The source of the funds is identified as coming from four of the taxpayer's other property-owning companies, and second, the quantum of the loan account as reflected in the FGB accounts is not placed in dispute. The notable fact here is that at the 2015 year end the FGB accounts showed that the taxpayer had a loan receivable in Company A of R42 816 245.

[25] The second version was given in a letter from BJP dated 2 November 2018. Here the source of the funding is still the same four entities. SARS says the only difference between this version the first one, is that the taxpayer was now contending that the funds were not advanced directly by him but indirectly by him settling Company A's expenses on its behalf. The quantum of the loan account was still not disputed.

[26] This version was still adhered to in a letter that BJP wrote to SARS on 29 January 2019. But the letter illustrates the difficulties BJP was having getting proper information. This is how it put it:

> "Unfortunately this will not be a quick exercise as:
>
> a. The records span a number of years
>
> b. We were not involved ln the accounting records at the time the transactions occurred, and as such have no direct knowledge thereof
>
> c. Input will be required from the taxpayer who is currently out of the country
>
> d. We expect that some information/documents may need to be obtained directly from third party suppliers once input from the taxpayer has been received."

[27] The third version, according to SARS, was furnished in a letter to it from BJP on 30 May 2019. The first change noted by BJP was that although the four companies in the Taxpayer D Group had advanced funds to the taxpayer during the periods audited by SARS it was not these companies that had advanced funds to the taxpayer for the development of the investment properties owned by Company A, as this development had occurred some years earlier. Instead wrote BJP the funds emanated from two of the Taxpayer D entities, NH and MG. These funds BJP stated were advanced in years prior to the years being audited. BJP did not state when. Instead, it stated:

> "… As had been indicated previously our offices were not responsible for the accounting records at these dates and in our communications with the taxpayer it had always been maintained that the funding for the investment property developments of Company A was sourced from Taxpayer D Group.

e. It should be clear that the essence of what had been previously communicated to SARS remains true although the lack of clarity around the matter is regrettable."

[28] While MG was one of the previous sources stated in the second version NH had not been mentioned.

[29] Two other features of this letter are important. First BJP attached a revised version of the 2015 financial statements that it had prepared. These financials still reflected the February 2015 loan account as R42 816 245 and that interest on that account as R5 628 91 paid to the taxpayer.

[30] The second feature of importance related to the costs of the investment properties. Although referred to as the investment properties'' these are two properties in AAA, Johannesburg that the taxpayer and his family use as a private residence albeit owned by Company A. BJP stated that they were unable at that stage to compile a detailed reconciliation in support of the costs of the investment properties. Instead, they attached a letter from a firm of quantity surveyors (QS) in which the latter gave an estimate of what these costs would be. The estimate was that the costs would have been R27 305 377 exclusive of VAT and R31 128 130 inclusive of VAT.

[31] In her testimony at the hearing Ms P stated that these expenses were incurred between 2004 and 2008.

[32] BJP then gave a tentative answer to whether it could furnish direct proof of these expenses. On the one hand it said it had not been given enough time to find these. This suggests the proof was available but just needed to be located. But they also stated that the taxpayer was not required to keep these records given the length of time that had elapsed between the time the expenses had been incurred and the audit period. Hence the latter answer suggested that the taxpayer no longer had proof of the expenses. As it happened with one exception this latter answer became the final position of the taxpayer in the appeal.[3]

[33] SARS argues that the third version is simply a variation of the second version. Although the source of funding was alleged to be from the two Taxpayer D Group companies (MG and NH) there was no evidence to prove this link. Notably at this stage the quantum of the loan account was not placed in issue.

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[3] The one exception was certain municipal accounts which were still extant for the period according to Ms P who testified for the taxpayer.

[34] In January 2020 BJP provided a letter to SARS in which it repeated the size of the loan account at the end of 2015 tax year and the interest received. It repeated the difficulties it had obtaining the costs of the development properties given the effluxion of time and hence why the QS letter had been provided.

[35] A second ADR meeting was set up for February 2020. Shortly prior to this meeting BJP sent another letter to SARS. In this letter for the first time the quantum of the loan account was disputed. BJP had drawn up unsigned financial statements. There was a substantial change to the taxpayers 2015 loan account. It had now been reduced to R3 284 862 while interest paid to the taxpayer was now R893 673. When compared what the position was up until then in respect of the quantum of the loan account as at year end 2015 (R42 816 245) the change was substantial. The loan account was now almost one-twelfth the size of what it used to be and with it a consequential drop in the interest earned on it.

[36] In October 2022 BJP wrote to SARS. In this letter it stated that it was withdrawing the declaration of funds it had supplied previously and was now supplying it with amended audited financial statements. These statements were prepared by a firm of auditors called CW. In her oral testimony Ms P stated that her firm i.e. BJP had compiled the statements, and that CW had reviewed them. This choice of language is important. The terms compile and review all related to the degree of assurance that can be given in financial statements. The reliability of the BJP and CW accounts became the subject for comment by Professor CC, who SARS called as an expert witness, which I deal with later.

[37] BJP said the financial statements had to be redone because FGB's financials were inaccurate. They had had incorrectly included in the taxpayer's loan account mortgage facilities with financial institutions registered in the name of Company A.

Evidence of the Taxpayer at the hearing

[38] The taxpayer only called one witness at the hearing Ms P, who is the managing partner of BJP Chartered Accountants. Ms P is a chartered accountant, but she made it clear in her evidence that she was giving evidence as a factual witness not an expert. For this reason, no expert summary was given of her evidence prior to her testimony.

[39] Ms P's firm had been appointed in August 2017 with the specific brief to regularise the taxpayer's affairs with SARS as he could not get a personal tax clearance. This meant engaging in correspondence with SARS throughout the audit and objection processes, as well as attending two ADR meetings with SARS officials and engaging in the appeal process subsequently.

[40] Ms P sought to give evidence on key aspects crucial to the taxpayer's case:

a. To contend that the FGB accounts were erroneous and needed to be reconstituted;

b. To show that the taxpayer's loan account in the years of assessment constituted capital, not undeclared income;

c. That the size of the loan account was considerably lower than reflected in the FGB accounts with the knock-on effect that the taxpayer's interest liability was negated; and

d. To explain the document trail, she had followed to arrive at her conclusions.

e. To satisfy the court as to the accuracy of the reconstituted financial statements for Company A.

[41] Since the taxpayer elected not to give evidence or to call any other witness, the task of discharging the onus in the TAA fell to Ms P.

[42] Ms P conceded that different versions had been given to SARS throughout the process. This was attributed to her firm needing to obtain more documents and getting to understand their brief more fully. There is also a suggestion that they were being put under pressure from SARS before they were fully prepared. Nevertheless, given that the taxpayer had ample opportunity to develop his case in the appeal process this no longer constitutes a reason for there being any deficiency in the way the taxpayer's case was finally presented during the appeal.

[43] At some stage during the ADR process Ms P and her colleagues embarked on the exercise of reconstructing the taxpayers Company A accounts. The objective was to go further than demonstrating that the FGB accounts were erroneous but to show what they should be.

[44] The challenge for Ms P and her colleagues was to somehow account for the taxpayer's habit of moving money between the accounts of his various entities and his personal accounts.

[45] The method Ms P and her BJP colleagues employed, was to get hold of all the Company A bank statements for the period from 2004 until 2020. Based on descriptions of transactions that appeared in the bank statements she then entered them into a spreadsheet. With this as the source, Company A's financial statements were re-drawn. What was crucial for present purposes was the way in which the loan account was accounted for. That required her to make certain assumptions about the nature of the entry. She went through a laborious exercise of debiting and crediting the loan account depending on how it was classified in the bank statements. But bank statements are not always exact renditions of a transaction, something she readily accepted. But she stated that where there was not sufficient evidence

about a transaction, they (she or her staff involved) allocated it to the taxpayer's loan account. She repeated several times that this was a conservative approach. Explaining what this meant she said it meant it was to the benefit of SARS. But under cross examination she was unable to explain why it was to the benefit of SARS given that it did not change her version that these figures did not represent undeclared income.

[46] Ms P testified that as part of the revision exercise, she reduced the taxpayer's loan account (then R42 million) by an amount of R20 million because these were mortgage bonds that had been (erroneously on her version) entered on the taxpayer's loan account. This she said would then have a "ripple effect" on the bearing of interest income.

[47] During her testimony other unusual features of the taxpayer's finances were revealed. Payments by one government department the Department of Public Works in respect MG Property had been paid into the Company A account. Ms P testified that the payment arose because of a lease agreement between the DPW and MG. Why this money should have landed up in Company A is not clear. But what Ms P had to do was to try and find a way of accounting for this payment. This was an amount of R10,2 million. According to the records she got from another prior accounting system this payment was made in 2007. She then treated this as an amount that the taxpayer owed to MG. But not much confidence can be gained from this exercise or its attempt to restore confidence in the reliability of the redrawn financials. Rather it illustrates the manner in which the taxpayer moved money between his personal accounts and those of his separate entities. The amounts are large. It called for an explanation from the taxpayer, but he did not come to give one. Ms P could do no more than find entries in one account and make assumptions about what she should do about it. Professor CC would later criticise this technique as being forced.

[48] The other problem for Ms P is that she did not have first-hand knowledge of the transactions. She was only retained in 2017. She conceded that but said she relied on supporting documentation. The supporting documents she relied on were the Company A bank statements, bond statements and accounts from MG. She also had regard to the quantity surveyors report, a Windeed document that gave land prices, and some of the contracts of sale. But in relation to the crucial question of the development costs of the house she conceded that there were no vouchers in the record to evidence these costs.

[49] In an affidavit in one of the interlocutory disputes over documentation Ms P had stated that:

> "Company A developed the AAA properties in the period 2005 to 7 and that there is no documentation available and none was retained by Company A."

[50] But in the appeal, she testified in chief to having looked at vouchers. But when cross examined on this, she conceded the vouchers were limited to invoices from the City of Johannesburg i.e. for municipal expenses.

[51] Thus, in relation to what was a significant part of the reconstruction – how much the taxpayer had paid for the development costs of the home constructed on the Company A owned property, her evidence was indirect and second hand. She relied on the report of the QS who was not called. Moreover, neither she nor the QS had any direct evidence of the development cost expenditure incurred by the taxpayer, save for the municipal accounts.

[52] In cross examination she was challenged on what reliance could be placed on the work she had done. Here we enter a technical area where concepts count. Her first answer was that the work was fair. This is a term without technical meaning. But when it was put to her that she could not give an assurance – which is a technical term as far as accounting standards are concerned – she conceded she could not. She only functioned as a compiler. It was also clear that as an accountant she understood the significance of these terms.

[53] Part of Ms P's difficulty and she conceded this point, was that the bank account was not helpful as a definitive source of a transaction. It was pointed out to her in cross examination that several entries in the Company A bank account simply referred to "cash". She did not know what this meant as the following extract from her cross examination by Mr M, counsel for SARS, illustrates:

> ADV M SC: Thousands of entries and multiple references, cheque, cheque cashed. There is a vast, vast number of entries over here where you simply would not know what they were one way or another way. Correct?
>
> MS P: Correct.

[54] But that she also did not have independent knowledge of the facts is evident from another concession she made during cross examination:

> ADV M SC: So how do you know that this was a lease that was concluded in the name of MG rather than Company A?
>
> MS P: Those were representations made by Dr Taxpayer D when we compiled the financial statements.
>
> ADV M SC: So you did not verify that independently?
>
> MS P: No, I did not.

[55] But on the two fundamental aspects that her testimony was relevant to she made crucial concessions. In relation to the proof that the taxpayer had paid Company A's expenses on behalf of Company A she conceded that the bank account she considered could not tell her anything about those expenses because none of them went through that bank account and she was forced to rely for this on the QS report.

[56] As far as the second aspect of her evidence was concerned which was to discredit the reliability of the FGB accounts she conceded that she did not have access to the latter's ledger accounts as this exchange with Mr M illustrates:

> ADV M SC: And the proposition to you is you never had the FGB general ledger you have said so.
>
> MS P: I agree with that.
>
> ADV M SC: So we really do not know what Mr FGB did or did not do?
>
> MS P: I agree with that statement.
>
> ADV M SC: And therefore when you say on either version, whether it was understated or overstated that, with respect, is just speculation because we do not know.
>
> MS P: We do not know.

[57] To be fair to Ms P she could only testify to what she knew personally, and she did not attempt to go beyond that.

Professor CC's evidence

[58] Professor CC was the only witness called by SARS. He was called as an expert witness. Professor CC is a practicing-chartered accountant and registered auditor with 40 years of experience. He has had both academic and commercial experience. Relevant to the subject matter is that he has at various times in his career served on bodies that set auditing and accounting standards. He also regularly appears as an expert witness in cases concerning accounting and auditing matters. His expertise was not contested.

[59] While the taxpayer did not challenge CC's expertise, Ms C argued that he was not giving evidence on facts that he knew. I discuss later whether this criticism is justified.

[60] Professor CC made quite clear what his brief was. He stated that his task was to comment on the reliability of the taxpayer's most recent version of his financial statements. That did not require Professor CC to do anything more than to express an opinion as a qualified auditor on the reliability of the figures that the taxpayer had put up as well as the explanations given by the taxpayer. That type of evidence falls within the mainstream of his expertise. It thus a classic case of where expert evidence constitutes an exception to the

hearsay rule. Professor CC was measured in what he opined on and did not stray from his brief.

[61] The first part of CC's evidence was to explain the difference between the levels of assurance that could be given about financial statements according to professional guidelines. This evidence was not contested. Professor CC explained why the CW financial statements did not meet the standards for assurance that an auditor would normally be able to give. CW did, had simply worked off the financial statements that Ms P had prepared. She confirmed this. Although she described these statements as audited, and CW are auditors, Professor CC testified that they could not be regarded as audited financial statements, because an auditor has to test "…underlying assertions for every material item in the financial statements". He testified this requires the auditor to examine the underlying documentation. His conclusion was that the absence of proper records is "a non-starter" for any auditor. Moreover, his evidence was that an auditor cannot accept an engagement if he is not able to conduct the audit properly.

[62] He also dealt with the issue of prior year balances. He explained that accounting flows go from year to year. This means if an account is misstated in some prior year – in this case going back to 2004 - because that is when the AAA development started - it would also be misstated in all the following consecutive years.

[63] Professor CC then dealt with the payments the taxpayer had allegedly made for the development of the AAA properties. He characterised these payments not as transfers into Company A but payments that the taxpayer made directly to creditors of Company A. How were the Ms P and her staff to know how to reconstruct an account from a series of bank statements.

[64] Nor was he that impressed with the robustness of Ms P's reconciliation exercise. Ms P had testified that most of the reconciliation work had been done by her staff after she had instructed them what to do. But Professor CC was critical of this; she, as he put it, did one month herself "…and for the other 14 years times twelve months the staff had to go and themselves decide where to allocate every receipt and payment on the bank statements".

[65] On the AAA property development costs he made the point that there was no documentation of the actual cost. Secondly that the taxpayer had paid the property development costs on behalf of the company. This meant that by definition it will not be in any bank statement of Company A. So, no analysis of Company A's bank statements was going to assist because there were no direct transfers to Company A. As he put it the loan account was now a function of various guesses as to allocation.

[66] But his harshest criticism was for the attempt to establish the development costs without any direct proof of expenditure. There was no proof of the expenditure or that the taxpayer had paid them, nor when it was incurred and finally where the taxpayer had got the money to fund the expenditure.

[67] As for the Company A bank statements he said there were several terse descriptions and others with no description whatsoever. Thus, where a cheque is reflected this could be an expense, but it could also be the purchase of an asset. If it is a receipt, this too could be a liability or something to do with the loan account but there is no way of knowing which. Where descriptions are terse the compiler is required to guess but does not know.

> "In other words and again quoting from the standards, you cannot get the assurance to enhance the degree of intended confidence of users in the financial statements."

[68] His conclusion then was that the latest version cannot be considered reliable. As for the efforts of Ms P he testified that her work would be classified as that of a compiler. This is something that Ms P herself had conceded in cross examination. That being the case it is, as he put it was: "… a zero assurance engagement."

[69] What then was required then of Ms P and her colleagues faced with the predicament they had in 2017? Professor CC said they first needed to engage with the taxpayer or his staff who were directly involved at the time; second, they needed to isolate what was known from the unknown, to gauge its extent. Third, they could have contacted the actual parties who had performed the services. The latter might be able to give statements, contracts, or bank receipts to verify what they may have charged at the time. Then to examine the taxpayer's bank accounts to see where the money flowed. Given the numbers involved and the fact that the taxpayer had given a previous version which was now no longer going to be advanced, it was incumbent on them not to do a superficial exercise.

[70] He then commented on another aspect of Ms P's evidence which was the alleged correlation between the taxpayer's credit loan accounts in some of his entities and his debit loan accounts in Company A. He described this analysis as 'superficial'. There was he testified not a proper basis for drawing conclusions about what was owed in one account and what was allegedly used for the development expenses.

[71] Under cross-examination he was asked if any reliance could be placed on the FGB statements. Professor CC said he could not comment on the FGB statements because he did not know what documents he had used. Nor did he consider whether the assessment was correct as that was not part of his brief.

[72] He was cross examined on why he considered the quantity surveyors' report unreliable. He gave several reasons for doing so including the observation that the firm itself had stated that it had used "… the superficial method of estimating". He referred to how the costs of properties was given inconsistent values the report, how construction costs were given at R6 million to the cent. The more he was cross examined on the QS report the more deficiencies he revealed in it.

[73] At the end, no serious criticism was made of CC's evidence. In argument the challenge was not what he said but that he had no firsthand knowledge of the facts. I consider this in the next section.

The dispute over expert evidence

[74] As I noted earlier, only two witnesses testified during the hearing, and both were professional accountants. The difference was that Professor CC was qualified as an expert witness and submitted a report prior to the hearing as required by the Rules. Ms P did not do so and did not claim to testify as an expert, nor did she file an expert report. Her legal team also did not claim she testified as an expert.

[75] Yet in the case of Ms P, SARS argues that despite not being qualified as an expert she nevertheless expressed opinions in her evidence concerning the taxpayer's accounts which were not based on fact but her opinion. This argued SARS concerned her evidence that the Appellant's loan account was R10 390 950 as of 28 February 2014 and was R3 284 862 28 in February 2015. The same applied to the subsequent adjustment of that sum to R3 184 967in the CW financials.

[76] SARS argues that she had no personal knowledge of these facts. Rather she used her expertise as an accountant to come to these conclusions as the following extract from her testimony illustrates:

> ADV M SC: All right. I asked you the question whether the exercise that you performed in relation to the reallocation in relation to the movement of loan accounts, dividends tax, SDC, all the rest of those things were matters that one would require accounting skills in order to perform. And you said the answer was yes. Is that correct?
>
> MS P: That is correct.
>
> ADV M SC: All right and a layperson, it follows a layperson could not go and perform that accurately with any kind of professional skill, not so?
>
> MS P: That is correct.

[77] SARS correctly argues that on this aspect Ms P's testimony is that of an expert. But she did not testify as an expert so her testimony on these facts cannot be admissible. She was on her own admission a compiler of financial information not an expert in a position to express an opinion. Since her evidence was crucial to the issue of whether the loan account was derived from undeclared income, her opinion on this issue does not take the taxpayer further in his burden in respect of the onus.

[78] In respect of Professor CC's evidence the taxpayer also made a claim for his evidence to be rejected. Here the basis was different. There was no challenge to his expertise or that he had not been qualified. Rather here the challenge was that Professor CC had no first-hand knowledge of the facts. SARS argues that unusually in this case Professor CC had testified as the only witness for SARS and was not preceded by any factual witness called by SARS. That observation is correct, but it is not a basis to reject CC's evidence. He did not testify in the absence of any facts. He expressed an opinion on the facts put up by the taxpayer. There is nothing objectionable about this.

[79] As Wessels JA explained in *Coopers*:

> "... an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness."[4]

[80] Professor CC's testimony was based on the factual record put up by the taxpayer from his records and the evidence of Ms P who has testified before him. The taxpayer is correct that Professor CC had no first-hand knowledge of the facts. But that is not what the purpose of his evidence was. Professor CC was tasked with commenting on the reliability of the taxpayer's reconstructed accounts. His opinion was sought as an expert if these accounts could be relied upon from the point of view of an expert in matters accounting. His conclusion was they could not. This did not require him to have first-hand knowledge where each entry came from. Rather he was asked to opine on whether as an expert the explanations put up on behalf of the taxpayer met the requisite standard for assurance. Commenting on the reconstructed financial statements drawn up by CW on behalf of the taxpayer his conclusion as he expressed it in his report was that:

> "… there were significantly inadequate and incomplete records, it was not possible to audit, and not possible to properly express an audit opinion or assurance on the reconstructed financial statements."

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[4] *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft fur Schadlingsbekampfung MBH 1976 (3) SA 352 (A)* at 371 F-H.

[81] But the taxpayer argued that Professor CC's opinion on how the taxpayer's records had been reconstructed was "mere speculation". I do not agree with this. Professor CC was testifying on what assurance could be given to the financials put up by the taxpayer as tested against the appropriate regulatory standards. These standards are common cause. His task was to comment on how others such as Ms P and CW had justified their reconstruction of the financials. This did not require him to have firsthand knowledge. His evidence was based on what they had stated. Professor CC's approach met the legal standard for expert evidence.

[82] The taxpayer's effort to have his evidence rejected as inadmissible is rejected. His conclusions were not seriously challenged. His reasoning was sound, and he was careful to limit himself to what he could comment on. But the import of his evidence is significant to the question of whether the taxpayer has by reconstructing his accounts discharged the onus place on him. I turn to this topic next.

Conclusion

[83] In terms of section 102(1) of the TAA, the onus is on the taxpayer to prove that an amount is not taxable. What this duty means in litigation is explained by Corbet JA *in South Cape Engineering* as:

> "… the duty which is cast on the particular litigant in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be;"[5]

[84] I accept that the taxpayer is correct to argue that the question of onus of proof relates to the factual aspects of the dispute not the legal ones, as was held in *Pick 'n Pay,* where the then Appellate Division explained the different implications:

> "The Trust can escape liability for normal tax on the profits made in the tax years 1982, 1983 and 1984 provided it establishes that such profits are non- revenue. In the present matter the relevant facts are either common cause or not in dispute. The question whether the receipts are capital or income is a matter of inference from such facts and therefore ultimately a matter of law. The fact that the onus rests on the trust is accordingly not a material consideration."[6]

[85] But this case is not a legal dispute about common cause or undisputed facts from which a legal dispute has arisen. It is about a factual dispute about the source of a loan account that is not common cause. As SARS counsel put in their heads of argument this is not a case where there is a legal dispute over whether a particular amount constitutes capital or revenue. SARS contends the case is about whether the taxpayer has discharged his onus on a balance of probabilities that the funds he held as a loan receivable in his loan account in Company A

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5 *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548.

6 *CIR v Pick 'n Pay Employee Shares Purchase Trust* 1992 (4) SA 39 (A).

in the relevant years of assessment were from a known identifiable source rather than from undeclared income. This then is properly characterised as a dispute of fact.

[86] But having found that this case is in essence about a factual dispute it is nevertheless not the same as in *CIR v Middelman* where the court held that:

> "Mr Meyerowitz, while acknowledging that the ipse dixit of a taxpayer as to his intentions is not necessarily conclusive, submitted that when the court has no reason to disbelieve his evidence and it is not contradicted by the objective facts then the taxpayer will have discharged the onus borne by him. With that submission there can be no quarrel."[7]

[87] I now go on to consider the factual dispute and why I have concluded, following the approach to onus in South Cape Engineering that the taxpayer has failed to "finally satisfy this court" that he has discharged the onus on him in terms of section 102(1) of the TAA. There are several reasons for me coming to this conclusion:

[88] First the taxpayer has changed his version on the source of the funds in the loan account several times including the size of the loan account. The fact that he has consistently argued that the loan account represented capital not income is irrelevant to what inference is to be drawn from this inconsistency. What is relevant is why these versions kept changing both as to the source of the funds and their size. Notably the reconstructed version of his Company A account emerged at the eleventh hour and were first presented to SARS as the second ADR meeting.

[89] SARS is correct to rely on this chronology to question the credibility of the reconstructed accounts. In the language of Professor CC, it was entitled to be sceptical about the varying versions.

[90] Second the taxpayer was required to establish that the FGB accounts were erroneous. But he did not testify, nor did he call FGB. If FGB was a reluctant witness, he could have been subpoenaed. But it is difficult to discredit FGB without his new accountants having access to his records. Ms P conceded that she did not have this access. Given the evidence of how the taxpayer moved funds from one entity to another and made payment of some sums from his personal accounts for Company A, it is relevant from what underlying source FGB drew up or purported to draw up his accounts. No reason has been given for why the taxpayer could not have obtained these records or subpoenaed them from FGB. Ms P could not testify to this, only the taxpayer could.

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7 1991 (1) SA 200 (C).

[91] Thirdly, the revised version of his accounts did not withstand scrutiny. Despite the gloss given to them, that a firm of auditors had prepared them, they were not audited financial statements as that concept is understood in the professional guidelines. CW had relied on the preparation of BJP and had not acted qua auditors in preparing these financials. The expert evidence of Professor CC on this issue must be accepted.

[92] The reconstruction effort was reliant on the bank and bond statements of Company A and then the report of the quantity surveyor. But not only was this approach methodologically unsound as explained by Professor CC, but it also involved guesswork by BJP, and it staff and unexplained entries in the accounts like the payments from the government meant for MG. Nor did the efforts of Ms P to attempt to establish that the taxpayer had no undeclared income because the entities which she had examined had paid dividend withholding tax prove persuasive. If this was an effort to show that any amounts in his loan account were after tax income, regardless of the quantum, it was unpersuasive. This established no more than because some of the taxpayer's many entities had paid tax some of the time, he must have paid tax on all his income all the time.

[93] Ms P cannot be faulted for the diligence of her efforts. But she was given a poisoned chalice. She had to account for funds without access to the FGB records and it would seem, for they were never discovered, the taxpayer's private accounts. Not having had the benefit of his testifying she had to rely on evidence that was hearsay. Nor was she qualified as an expert so she could not venture opinion evidence either.

[94] Missing as well from the lineup of potential witnesses the taxpayer did not call but might have, were FGB or his staff, and the compiler of the quantity surveyor's report. All might have given evidence on aspects that Ms P was not able to, given that she did not have direct knowledge.

[95] But the most notable absence was the taxpayer himself. There is no suggestion that he was not available to be called. SARS counsel claimed, without being contradicted, that he was present throughout the hearing of the appeal.

[96] Granted he may not be a person on top of accounting minutiae. But that was not the only reason why he was the only witness to testify on certain issues. He needed to explain for a start why he had signed the FGB accounts if they were incorrect. Then only he could explain why he had decided FGB had got the entries incorrectly. Why did he approve the FGB financial statements recording a loan account of R42 million, which now, in terms of the reconstructed accounts is R3 million. The difference is so stark it called out for an explanation from him.

[97] He also needed to explain how the monies moved between his entities and his private account. This was not a matter of explaining journal entries. It was to explain why and how money had moved from his private accounts to the Company A accounts and how government payments for MG had got into the Company A account, to mention just a few issues on which his personal knowledge would have been essential and could not be replicated by Ms P. He also needed to explain about the development cost of the AAA properties. Why had he paid for them not Company A. Did he have any vouchers evidencing these expenditures. If not would his personal bank statements able to show this. If the answer to both was no, he would need to explain this. If he had paid, when was this amount credited to his loan account in Company A. What were the cash amounts reflected in the Company A bank accounts for. These are just some of the questions that only he could answer but they are directly related to the onus he had to discharge.

[98] SARS asks that an adverse inference be drawn from his failure to testify. Courts do not invariably draw an adverse inference from the failure of a witness to testify. But there are circumstances where a court will. In *Magagula v Senator Insurance Company* Didcott J cited from Wigmore the following:

> "… Wigmore wrote …:
>
> > 'The failure to bring before the tribunal some... witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the... witness, if brought, would have exposed facts unfavourable to the party."

Elsewhere in the same volume (para 290 at 179) one finds this passage:

> "The inference... is, of course, that the tenor of the specific unproduced evidence would be contrary to the party's case, or at least would not support it."[8]

[99] In the present case, for the reasons I have given earlier, an adverse inference is warranted. These were issues that only the taxpayer could answer and given he was available his failure to testify suggests that if he did, it would elicit facts unfavourable to his case.

[100] This adverse inference, as well as the criticisms I had of Ms P's testimony, explained earlier, and Professor CC's expert evidence, leads me to my conclusion that the taxpayer has failed to discharge the onus in terms of section 102(1) of the TAA.

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[8] 1980 (1) SA 717 (N) at 720 A to C.

Referral back

[101] In terms of section 129(2) of the TAA the court has various options open to it. It can confirm the assessment, order it to be altered, or refer the assessment back to SARS for further examination or assessment. The taxpayer has argued that if the court was against him, the matter should be referred back to SARS in terms of section 129(2)(*c*).

[102] SARS is against such a proposal. Earlier in this litigation prior to the appeal hearing the parties had taken the opposite position. That however does not matter now. The question is to be judged by the state of the case after the hearing of the appeal. If the taxpayer had given a reason for a referral back, other than to avoid an adverse finding, this might have been possible. But there seems no basis to do so. This case has been litigated for several years with the existence or non-existence of documents a crucial feature of various discovery disputes. There is unlikely to be any new documentation that might surface that would throw a different light on the facts. Ample time has been given to the taxpayer, and he has not said he has uncovered any new treasure trove of entries that would vindicate his position. A referral back would thus not prove fruitful and only result in further delay and expense.

Section 89*quat*(2) interest

[103] In terms of this section of Income Tax Act the taxpayer is liable for interest at the prescribed rate on the amount of additional tax for which he has been assessed. The Commissioner does have a discretion to remit or reduce these charges in circumstances beyond the control of the taxpayer.

[104] No case has been made out for this amount to be remitted so I consider that the taxpayer is liable for this amount.

Understatement penalty

[105] SARS seeks to have an understatement penalty levied on the taxpayer.

[106] The term ‘understatement’ is defined term in terms of section 221 of the TAA. The definition that SARS relies on in the present matter is that the taxpayer filed an incorrect statement in his tax return for Company A. In its assessment SARS had levied a penalty of 25%. However, before this court SARS now seeks an understatement penalty of 100%.

[107] The level of a penalty is determined by what are termed the behaviours of the taxpayer. Thus, a substantial understatement results in a 10% penalty, reasonable care not taken in completing a return, 25%. For a penalty of 100% there has to be proof of ‘gross negligence’.

[108] The onus to establish the USP is on SARS. In this case SARS needed to establish gross negligence. Up until the assessment stage it did not consider there had been gross negligence. SARS now seeks to rely on the reconstruction efforts to make out this case. I do not find it persuasive.

[109] This case has relied on SARS invoking the onus provision of section 102(1) of the Act. I do not think in the circumstances without SARS having its own version of what the figure should have been such a conclusion of gross negligence can be reached. In my view the facts show “reasonable care not taken in completing a return. On this basis a penalty of no more than 25% is appropriate.

ORDER

1. The appeal is dismissed.

2. The Appellant is liable for tax on the following additional income tax assessments raised by the Commissioner:

   Undeclared income — Funds advanced to Company A Property Holdings (Pty) Ltd

   2.1. R30 179 163 in respect of the 2014 year of assessment

   2.2. R7 008 191 in respect of the 2015 year of assessment.

   Undeclared interest income

   2.3. R3 321 051 in respect of the 2014 year of assessment.

   2.4. R5 628 891 in respect of the 2015 year of assessment.

   2.5. R5 519 590 in respect of the 2016 year of assessment.

   2.6. R5 539 465 in respect of the 2017 year of assessment.

3. The Appellant is liable for the USP of 25% of the additional tax payable levied by the Commissioner in terms of section 221(1) of the TAA.

4. The Appellant is liable for interest in terms of section 89*quat*(2) on the additional tax levied by the Commissioner.

5. The Appellant is liable for the costs of the appeal, including the cost of two counsel, with such costs to be on the C scale in respect of the Commissioner's senior counsel and on the B scale in respect of the Commissioner's junior counsel, and the qualifying fees of Professor CC.

MANOIM, J
JUDGE OF THE HIGH COURT

CONCUR:

Dr Mike Van Wyk (Accounting member)

Ms Rose T. Mohale (Commercial member)

Coram:	Manoim, J (Dr. Van Wyk and Ms Mohale, assessors)
Hearing dates:	24 to 30 October 2024 and 02 December 2024
Date of judgment:	25 February 2025