THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 903/2012

In the matter between:

GB MINING AND EXPLORATION SA (PTY) LTD **APPELLANT**

and

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

Neutral citation: *GB Mining v Commissioner: SARS* (903/2012) [2014] ZASCA 29 (28 March 2014)

Coram: Navsa, Shongwe, Theron and Wallis JJA and Swain AJA

Heard: **6 March 2014**

Delivered: **28 March 2014**

Summary*:* Revised tax assessments issued by respondent – appellant lodging objection – objection disallowed – appeal to Pretoria Tax Court dismissed – on appeal held:

– Payments as part of an attempted financial rescue offer not deductible.
– Disposal of rights to a mineral tailings dump by appellant resulted in a capital gain.
– Travel expenditure partially deductible.
– Disposal of an asset to a joint venture resulted in a capital gain.
– Disposal of an interest in a joint venture resulted in a capital gain.
– Partial remission of additional tax granted.

Assessments based on tax returns and financial statements by appellant – appellant failing to prove incorrect – effect thereof – assessments upheld.

ORDER

On appeal from the Tax Court, Pretoria, (Mokgoatlheng P sitting as court of first instance):

1 The appeal is dismissed save in the respects set out in paragraphs 2 and 3 below.
2 The penalties raised by the respondent in respect of the OTR amount and the travelling expenses are remitted in their entirety.
3 The order directing the appellant to pay the respondent's costs in the court a quo is set aside.
4 The respondent is ordered to pay 10 per cent of the appellant's costs in the appeal.

JUDGMENT

Swain AJA (**Navsa, Shongwe, Theron and Wallis JJA** concurring):

[1] The appellant GB Mining and Exploration SA (Pty) Ltd (GB Mining) was the subject of revised assessments for the tax years 2003 – 2006 issued by the respondent, the Commissioner for the South African Revenue Service (the Commissioner).

[2] GB Mining objected to the assessments. The Commissioner disallowed the objection in respect of the 2003 tax year and partially disallowed the objection in respect of the remaining tax years. GB Mining appealed to the Pretoria Tax Court which dismissed the appeal save in respect of the issue of

management fees, which does not form part of the appeal to this court. The present appeal is with the leave of the President of the tax court.[1]

[3] In order to place the contested assessments of the Commissioner in context, it is necessary to set out the background concerning the history and activities of GB Mining.

[4] Mr Ken Barnard, a geologist, developed what he considered to be a unique process for the extraction of platinum from chrome mining tailings. Together with Mr Ricky Gardner he decided to exploit his concept, but in order to do so a source of chrome tailings, as well as finance to construct a plant to process the tailings had to be found.

[5] The project was designated as 'RK1' and a shelf company was acquired by Mr Gardner and Mr Barnard and renamed GB Mining. This is the taxpayer in the appeal.

[6] Having formed the vehicle to develop the project a source of chrome tailings was identified on the farm Kroondal 34 (the Kroondal dump). As regards finance, capital was to be raised from the public via OTR Mining Ltd (OTR) a company which was listed on the Johannesburg Stock Exchange (JSE), of which Gardner had previously been the managing director. The intention was that GB Mining would transfer its business to and become the principal shareholder in OTR and thereby secure for itself the advantages of access to the JSE.

[7] OTR was in dire financial straits and in order to prevent its demise and its delisting GB Mining mounted a rescue operation. In terms of a formal rescue offer, subject to approval by the JSE and Securities Regulation Panel (SRP), GB Mining would provide loan capital for payment of creditors and employees in

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[1] Section 86(A)(2)(*b*)*(i)* of the Income Tax Act 58 of 1962. (This section has been repealed. Section 133(2)*(b)(i)* of the Tax Administration Act 28 of 2011 is now the applicable provision).

return for shares in proportion to the amount of the loan. The listing of OTR's options shares on the JSE was terminated on 22 August 2003 which effectively brought an end to the rescue operation. In the interim GB Mining had expended funds in the amount of R2 638 070 on the payment of salaries for staff and office expenses. GB Mining contended that these employees were employed by it and that this expenditure was incurred in the production of income and qualified as a deduction in terms of s 11(*a*) read with s 23(*g*) of the Income Tax Act 58 of 1962 (the Act). The Commissioner, however, determined that the amount had been advanced by GB Mining to OTR as a loan and its deduction was disallowed as being capital in nature. This determination was upheld by the court a quo and is challenged by GB Mining in this appeal.

[8] In order to secure the chrome tailings in the Kroondal dump, GB Mining concluded a notarial prospecting contract on 7 March 2001 with the farmers who owned the mineral rights to the Kroondal dump. GB Mining was granted the right to prospect for minerals in the tailings, with the option to purchase the mineral rights, within a period of six months. This option was duly exercised within the specified period and the mineral rights to the dump were purchased. The purchase price was the sum of R2 400 000, together with 1 250 000 OTR shares and 625 000 OTR options. At this stage the final rescue offer in respect of OTR had not yet failed and it was still envisaged that the mineral rights to the Kroondal dump would be transferred to OTR in terms of the rescue offer.

[9] Soon however, it became clear that the Kroondal dump did not contain sufficient material for the project and additional chrome tailings would have to be obtained from chrome mining companies operating in the area of the Kroondal dump, namely Xstrata SA (Pty) Ltd (Xstrata) and Bayer (Pty) Ltd (Bayer).

[10] GB Mining required further capital while the OTR rescue offer was being considered and approached Aquarius Platinum (South Africa) (Pty) Ltd (Aquarius) as a source of capital and to be a suitable partner in exploiting the RK1 concept. According to Mr Gardner's evidence, which in this case as in others was not reconcilable with the documents, it was agreed that GB Mining and Aquarius would jointly exploit the Kroondal dump on a 50:50 basis and

would use the plant of Kroondal Platinum Mines Ltd, a wholly owned subsidiary of Aquarius, to process the material. He said Aquarius was to contribute R14 million for its 50 per cent share, GB Mining would receive a 25 per cent share in the consortium and 'another 25 per cent for cash at the cost of the plant' and GB Mining would be paid R3,5 million. That amount was paid and it is this payment of R3,5 million which gives rise to the next area of dispute between GB Mining and the Commissioner. The Commissioner contends that in return for payment of this amount Aquarius acquired 50 per cent of the mineral rights in the Kroondal dump. GB Mining, however, contends that it did not dispose of these rights to Aquarius, as they remained ceded to GB Mining, which in turn made them available to the joint venture as its capital contribution. The Commissioner, however, determined that GB Mining disposed of an asset comprising a Kroondal right/interest to Aquarius for R3,5 million. This determination was upheld by the court a quo and is also challenged by GB Mining in this appeal.

[11] GB Mining successfully raised further capital from foreign investors and as a result, Gardner and Barnard (UK) Limited (GBUK) was registered as a company in the United Kingdom, and then became GB Mining's holding company. Investors, Mr Samuel Sher and others were allotted 32 per cent of the shares with Mr Gardner and Mr Barnard holding the remaining 68 per cent. Shortly thereafter Mr Gardner and Mr Barnard resigned from GB Mining to become shareholders of GBUK.

[12] In order to secure the additional source of chrome tailings, GB Mining concluded agreements with Xstrata and Bayer in terms of which GB Mining acquired the right 'to remove and beneficiate the feedstock' being the material and by-products supplied by Xstrata and Bayer, including chrome tailings. Both of these agreements provided that GB Mining would 'cede and assign all its rights and obligations in terms of this agreement to RK1'. The reference to RK1 is a reference to the RK1 joint venture referred to below.

[13] During this period of intense activity Mr Gardner and other representatives of GB Mining travelled overseas on behalf of GB Mining and expenses were incurred. GB Mining claimed these expenses as deductions in

terms of s 11(*a*) of the Act on the ground they were incurred in the production of income. The Commissioner disallowed 50 per cent of the expenses holding that GB Mining incurred the travel expenditure partly for the purpose of creating or acquiring an income producing structure, or a source of profit, and 50 per cent of the travel expenditure was attributable to that purpose. The Commissioner contends that 50 per cent of the travel expenditure in an amount of R412 339 was of a 'capital nature' in terms of s 11(*a*) of the Act and was not deductible. The court a quo upheld the Commissioner's determination which is the subject of a further challenge by GB Mining in this appeal.

[14] On 20 October 2003 GB Mining, Aquarius and Victoria Global Holdings Ltd (Victoria) concluded a Notarial Consortium Agreement in terms of which they would jointly produce platinum group metal concentrate at a consortium plant to be erected in the Xstrata mining area. The concentrate would be sold to Impala Refining Services Ltd and Rustenburg Platinum Mines Ltd. The 'participating interests' of the parties would be Aquarius 50 per cent and GB Mining and Victoria 25 per cent each. The joint venture was styled RK1JV.

[15] Profits from the joint venture would be shared in the same ratio as the respective shareholding. The contribution to be made by the parties was that Aquarius and Victoria would make capital cost contributions of R16 million and the Rand equivalent of £615 000 respectively. GB Mining would contribute the difference between the Rand equivalent of the Victoria contribution and R8 million. In the event that the Victoria contribution was less than R6 765 000 the difference between the Victoria contribution and R6 765 000 would be contributed by Victoria and GB Mining in equal shares. It was recorded that GB Mining had 'contributed to the consortium certain mineral rights and intellectual property'. The Commissioner determined that GB Mining had thereby disposed of an asset to RK1JV, the proceeds of which were R8 million. The base cost was nil and the disposal consequently resulted in a 'capital gain' of R8 million for GB Mining. GB Mining contends there was no disposal of an asset as GB Mining acquired the Xstrata and Bayer minerals for and on behalf of the RK1JV. The court a quo upheld the Commissioner's determination which is challenged by GB Mining in this appeal.

[16] Mr Barnard died during October 2003 which resulted in a change in the shareholding in GBUK with Mr Gardner acquiring effective control over GBUK through the shareholders' agreement. Mr Gardner accordingly held 62 per cent of the shares and Mr Sher and others held the remaining 38 per cent. As at 28 February 2004 GBUK had acquired another subsidiary in South Africa, RK Mining SA (RKMSA) and a company RKR Mining UK Ltd (RKUK). Both groups held shares in the same ratio in RKUK which held all the shares in RKMSA which was involved in the RK2 project. This was similar to the RK1 project but related to the processing of feedstock obtained from a different area. Early in 2005 it was then decided to terminate their joint shareholding in GBUK and RKUK so that each of these companies would become wholly owned by one of these two groups of shareholders. Their entitlement to their previous profit share in the RK1 and RK2 projects needed however to remain unchanged. In February 2005, Mr Gardner accordingly acquired the majority interest in GBUK, in exchange for his majority interest in RKUK. After some inconclusive efforts to transfer between the two groups a proportionate stake in each joint venture, it was agreed in November 2005 that GB Mining, which held the interest in the RK1 project, would hold 38 per cent of that stake on behalf of RKMSA and would pay over that proportion of net income to RKMSA. There was a reciprocal undertaking by RKMSA in respect of a 62 per cent stake in the RK2 project.

[17] The Commissioner determined that the 38 per cent interest which GB Mining held in terms of this arrangement on behalf of RKMSA, was an asset which it disposed of during the 2005 tax year. The proceeds from the disposal were determined as being R23 277 530 and the base cost of the asset was determined as being R8 284 506. The figure for the base cost comprised an amount of R3 629 000 (being 38 per cent of R9 550 000 being the contribution made by GB Mining to the consortium) and an amount of R4 655 506 (being donations tax on the amount of R23 277 530). The court a quo, however, decided that donations tax was not payable and this finding is not the subject of the present appeal. The Commissioner accordingly contends on appeal that the capital gain of GB Mining should be increased from R14 993 024 to R19 648 530 to account for the reduction in the base cost.

[18] GB Mining contends that the transaction was in the form of a multiparty agreement between two groups of shareholders and their companies, which entailed the exchange of assets of equal value and therefore did not result in any capital gain. Having held that no donations tax was payable, the court a quo then held that GB Mining had disposed of the 38 per cent joint venture interest in RK1 for a consideration, being the right to 62 per cent of the interest held by RKMSA in the joint venture interest RK2 and that the value of the rights given up by each party was similar to the rights received. The Commissioner submits that these findings are not in issue in this appeal, as the effect of these findings is that the proceeds from the disposal by GBSA of the 38 per cent interest in RK1, is an amount equal to the relevant value being R23 277 530. The determination by the Commissioner is challenged by GB Mining in this appeal.

[19] The Commissioner assessed GB Mining for additional tax in terms of s 76(1) of the Act in respect of the tax assessed under each of the disputed items. The Commissioner submits that the penalties assessed were appropriate. GB Mining contends that the grounds for imposing penalties were not present and no penalties should have been imposed. The court a quo upheld the Commissioner's determination of the penalties which is challenged by GB Mining in this appeal.

[20] The objections raised by GB Mining to the determinations made by the Commissioner concerning the OTR payments, the disposal of the Kroondal dump and the disposal of an asset to the RK1 joint venture, were based upon what GB Mining contended was incorrect information supplied to the Commissioner in GB Mining's tax returns. Was it permissible for it to do this by way of objection and appeal rather than by asking for a reduction in the assessments?

[21] Section 79A of the Act deals with the reduction of an assessment by the Commissioner:

'Reduced assessments

(1) The Commissioner may, notwithstanding the fact that no objection has been lodged or appeal noted in terms of the provisions of Part III of Chapter III of this Act, reduce an assessment -

(a) . . .

(b) where it is proved to the satisfaction of the Commissioner that in issuing that assessment any amount which –

(i) was taken into account by the Commissioner in determining the taxpayer's liability for tax, should not have been taken into account; or

(ii) should have been taken into account in determining the taxpayer's liability for tax, was not taken into account by the Commissioner:

Provided that such assessment, wherein the amount was so taken into account or not taken into account, as contemplated in subparagraph (i) or (ii), as the case may be, was issued by the Commissioner based on information provided in the taxpayer's return for the current or any previous year of assessment.'

[22] A taxpayer may seek a reduction in the Commissioner's assessment in terms of s 79A without objecting to the assessment in terms of s 81.[2] The Commissioner's power to reduce the assessment exists 'notwithstanding the fact that no objection has been lodged or appeal noted'. In addition, the power of the Commissioner is not restricted to its *mero motu* exercise, because the error in the assessment has to be 'proved to the satisfaction of the Commissioner'. To discharge this burden of proof the taxpayer must place information before the Commissioner to substantiate the error relied upon. In doing so it may rely upon an error that it made in its return.

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[2] Section 81 of the Act provides that:

'(1) Objections to any assessment made under this Act shall be made in the manner and under the terms and within the period prescribed by this Act and the rules promulgated in terms of section 107A by any taxpayer who is aggrieved by any assessment in which that taxpayer has an interest.'

[23] The Commissioner may therefore act in terms of s 79A to reduce an assessment in the absence of an objection in terms of s 81 of the Act and may do so even where it flows from incorrect information provided in the taxpayer's return. Can the taxpayer who has been the cause of the incorrect assessment by the Commissioner instead claim to be 'aggrieved' thereby and object to an assessment in terms of s 81?

[24] The statement that the powers of the Commissioner under s 79A can be exercised 'notwithstanding the fact that no objection has been made', suggests that an alternative route for the taxpayer to follow is by way of objection and, if necessary, appeal. That was the conclusion of Hurt J in ITC 1785 67 SATC 98, where he said;

' . . . the fundamental object of tax legislation is to exact from each citizen his due. What is "due" is, in each case (questions of penalty aside), strictly prescribed by statute and the amount of the taxpayer's taxable income must, in the process of assessment, be accurately determined preparatory to the calculation of the amount which he (or she) is required to hand over to the *fiscus*. In that light, it is clear that a taxpayer whose taxable income has been determined on an erroneous basis, is always "aggrieved" even if the source of error is entirely attributable to him.'

[25] I agree with Hurt J, notwithstanding the oddity of a taxpayer being aggrieved by an assessment based on the erroneous information it provided in its return. Accordingly it was permissible for GB Mining to follow the course that it did.[3]

[26] In the Tax Court's judgment reliance was placed on the provisions of s 82 of the Act which provided that the burden of proof rested upon any person claiming an exception, non-liability, deduction, abatement, or set-off in terms of the Act. Before us, GB Mining contended in its heads of argument a point not

[3] Section 93(1)(d) of the Tax Administration Act 28 of 2011 now provides that SARS may make a reduced assessment if satisfied there is an error in the assessment as a result of an undisputed error by SARS or by the taxpayer in a return.

taken in the court below, that the provisions of s 82 of the Act were unconstitutional and invalid.

[27] It is clearly undesirable for courts to make orders declaring statutory provisions invalid without providing the relevant organs of state with the opportunity to intervene in the proceedings.[4] Rule 10A of the Uniform Rules of Court provides:

'10A. If any proceedings before the court, the validity of a law is challenged, whether in whole or in part and whether on constitutional grounds or otherwise, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings and shall in the case of a challenge to a rule made in terms of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), cause a notice to be served on the Rules Board for Courts of Law, informing the Rules Board for Courts of Law thereof.'

The Minister of Finance had not been joined in these proceedings and had a direct interest in the challenge raised by GB Mining. Counsel for GB Mining when faced with this obstacle abandoned the point.

[28] The taxpayer accordingly bears the onus of satisfying the Commissioner that the information furnished is incorrect and that a reduction in the assessment is justified. In order to do this, additional evidence would have to be placed before the Commissioner. The nature of this evidence will depend upon the facts of each case and particularly the nature of the erroneous information supplied to the Commissioner. So for example, the fiscus might rightly ask how it can be expected to alter or reduce an assessment when information supplied by a taxpayer is not withdrawn or substituted so as to enable the reduction or alteration contended for. This problem arises in the present case as shown below.

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[4] See *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC) and *Parbhoo and others v Getz NO and another* 1997 (4) SA 1095 (CC).

[29] In terms of regulation A2 of the Regulations issued under s 107 of the Act (Government Notice R105 – in Government Gazette Extraordinary No 1011 of 22 January 1965) any return must 'be accompanied by all such balance sheets, trading accounts, profit and loss accounts and other accounts of whatever nature, as are necessary to support the information contained in the return'. The evidence to 'support' the information in the return must accordingly 'corroborate' it (*Concise Oxford English Dictionary*, 12 ed). Balance sheets and accounts perform a vital and formal role in corroborating the information in the return. The Commissioner must be able to rely upon the veracity and accuracy of this evidence which forms the basis for the assessment. The Commissioner is entirely dependent upon the taxpayer to furnish this evidence. In the event of incorrect information being included in the balance sheets or accounts, evidence would have to be furnished to explain the precise nature and extent of the incorrect information and how it was included. All relevant supporting documentation to verify the correct information would have to be submitted. An amended balance sheet or account may have to be submitted to the Commissioner, together with a full explanatory note to clarify the amendment.

[30] Each of the contested determinations made by the Commissioner must be approached on the basis that GB Mining bears the onus of proving that the Commissioner was wrong. In addition, where GB Mining contends that the determination was based upon incorrect information supplied to the Commissioner by GB Mining, whether in the form of balance sheets and accounts or otherwise, GB Mining must show that it has provided credible and reliable evidence to explain the error and substantiate what it maintains is the true position. In any event, even if the Commissioner had borne the onus of establishing the correctness of the determinations made, as will become apparent, the outcome of this appeal would have been the same. I shall in successive paragraphs deal in turn with each of the six issues in this appeal.

<u>The OTR payments</u>

[31] The amount claimed was described in GB Mining's financial statements for the year ending 29 February 2004 as 'OTR loan'. The financial statements were signed by GB Mining's director Mr Van Zanten, as well as its auditors

KPMG Inc and accompanied GB Mining's tax return for that year. Mr Van Zanten was GB Mining's sole director and public officer at the relevant time. When giving evidence before the court a quo he was asked 'at that stage did you know that the loan actually consisted of the expenditure incurred in respect of salaries and other office expenditure of GB itself?' to which he replied 'Yes'. However, he later stated 'the mechanism was such that the expenditure that was incurred by GB on behalf of OTR would be repaid in terms of the shares'. In addition, in a letter dated 12 June 2009 written by Mr Van Zanten on behalf of GB Mining to the Commissioner it is stated that 'the rescue operation, envisaged for OTR at the time, was to inject loan capital and to transfer business assets to the company . . .'. In a memorandum dated 7 March 2002 written by Mr Gardner on behalf of GB Mining addressed to representatives of OTR and GB Mining the following appears:

'1. . . In the meantime GB is operating under a clause that has been recommended by OTR's legal advisors which amounts to "curatorship management" and therefore GB can only make management decisions on behalf of OTR *and cannot offer full time employment until GB is granted full management control by the JSE / shareholders. In the interim GB will do its utmost to protect the current staff of OTR.* The knock back for current OTR staff means in simple terms that the delay in GB being able to offer immediate employment means that the bonus system that GB offers will only kick in later. As stated, these delays were totally unforeseen and in no ways can it reflect on any members of the OTR board.

2. In the meantime any costs incurred will be borne by the relevant companies.' [My emphasis.]

[32] A press release by OTR dated 17 January 2003 announcing the agreement with GB Mining, referred to 'the conversion of R2 466 000 of debt owing by OTR to GB Mining to be converted to equity'. When giving evidence Mr Gardner was referred to this passage in the announcement and he explained 'that is the salaries and the offices etcetera etcetera that we had been paying for. Because we were not allowed by the auditors, KPMG to claim the money we had spent on the nomads, because they had nothing to do, apparently they had nothing to do with running GB Mining at the time'. Counsel for GB Mining submitted that Mr Gardner was referring here to 'nomads' and not

employees generally, but there is no explanation as to which employees would qualify as ‘nomads’ and how such a large sum of money could be spent on them.

[33] Consequently, GB Mining did not provide credible and reliable evidence to explain the alleged error in describing the amount in question as an ‘OTR loan’ in its financial statements and why its auditors KPMG had done so. Indeed, all the information at hand points emphatically in the opposite direction. The Commissioner’s view, endorsed by the Tax Court, that this was a loan that was written off when the OTR rescue failed, is plainly correct.

[34] Thus the amount of R2 638 070 did not qualify as a deduction in terms of s 11*(a)* of the Act. The appeal against this determination by the Commissioner must accordingly fail.

The disposal of the Kroondal dump

[35] The schedule to GB Mining’s tax return for the 2003 tax year stated ‘calculation of capital gain / (loss) GB Dump – sold to Aquarius’. The note to this entry stated ‘sold 50 per cent to Aquarius at R1 300 000’. Mr Van Zanten signed the tax return as the director of GB Mining and declared that the particulars contained therein were ‘true and correct in every respect’. He confirmed when giving evidence that this related to a sale of the dump for R1,3 million.

[36] Mr Van Zanten, in response to a query by the Commissioner stated in a letter dated 10 June 2008, that Aquarius was to acquire 50 per cent of the dump and mineral rights and the amount of R1,3 million paid by Aquarius to GB Mining ‘was their portion of the purchase price’. He reiterated this in a letter dated 23 June 2008 stating ‘In February 2002 GB Mining sold 50 per cent of the dump to Aquarius for R3,5 million. The deal was done on the basis that Aquarius would pay the farmers the R2,2 million owed to them by GBSA and pay the balance of R1,3 million directly to GB Mining’.

[37] Mr Van Zanten said that his initial idea that there was a sale of 50 per cent ‘was the original plan as . . . explained to me by Mr Gardner’, but added

that when SARS became involved Mr Gardner clarified 'that it had actually not been sold'. However, in a letter dated 21 February 2002 written by Mr Gardner to Mr Murray of Aquarius he states 'As agreed with your good self your 50/50 upfront cost for the procurement of the GB dump is R3 500 000'. Mr Gardner stated that at the time he wrote the letter he was under the impression there would be a sale of 50 per cent of the dump to Aquarius.

[38] Mr Gardner said that GB Mining had originally tried to sell the Kroondal dump to OTR, but not to Aquarius. He reiterated 'I was under the impression that Aquarius Platinum were going to buy this dump in fact all the way up [to] 3 June 2003'. Mr Gardner confirmed there was a draft sale agreement in terms of which the dump was sold to Aquarius, but sought to explain its terms on the basis that there was a misunderstanding on his part of what Aquarius was prepared to do. An agreement was reached with Aquarius dated 3 June 2003. Clause 14.2 of the agreement provides as follows:

'It is recorded that prior to the signature date, the parties contributed an aggregate amount of R7 000 000 to facilitate the implementation of the tailings project and the RK1 project, which start-up contribution was

14.2.1 in the instance of GB Mining contributed by way of time expenditure and services rendered in establishing the RK1 project and the tailings project, to a value of R3 500 000.'

Mr Gardner said that this clause was agreed upon as early as August 2001. Mr Murray of Aquarius asked how much he should invest, what it would cost and they agreed on a figure of R7 million. According to Mr Gardner, because it was a 50/50 share Aquarius was to pay R3,5 million for the project to continue, plus the past expenses GB Mining had incurred, and the technology GB Mining possessed to extract platinum from the chrome tailings.

[39] Counsel for GB Mining submitted that this clause clearly sets out the reason for the payment of R3,5 million to GB Mining. Counsel for the Commissioner, however, pointed out that if this description is correct, contrary to the determination of the Commissioner, the R3,5 million would fall within GB Mining's 'gross income' and would give rise to an income tax liability for GB

Mining, greater than the capital gains tax liability contended for by the Commissioner. This amount was not included by GB Mining in its gross income in its tax returns, which indicated that GB Mining did not believe the amount to be consideration for 'time expenditure and services rendered' by it.

[40] If the provisions of clause 14.2 had been agreed upon between Mr Gardner and Mr Murray as long ago as August 2001, it is inexplicable why he would have written to Mr Murray on 21 February 2002 recording their agreement that the '50/50 upfront cost for the procurement of the GB dump is R3 500 000'. It is also inexplicable why he would believe up until 3 June 2003 that Aquarius was going to buy the dump. There is no evidence tendered by GB Mining to explain how an amount of R3,5 million which Mr Gardner believed was the amount Aquarius was to pay to purchase the dump, was then transformed into payment for 'time expenditure and services rendered in establishing the RK1 project and the tailings project' to the same value.

[41] It is significant that it was contended by GB Mining for the first time before the court a quo, by amendment to its grounds of appeal dated 12 June 2009, that 'there was no sales transaction or disposal of the dump concerned, which could trigger application of the CGT provisions of the Eighth Schedule'.

[42] An 'asset' as defined in para 1 of the Eighth Schedule to the Act includes property (corporeal and incorporeal) and 'a right or interest of whatever nature to or in such property'. To have disposed of an 'asset', GB Mining need not have disposed of the Kroondal dump. If GB Mining disposed of any Kroondal right or interest, it disposed of an asset.

[43] No credible and reliable evidence was tendered by GB Mining to explain the alleged error in its tax return describing the transactions as a sale of the dump to Aquarius. The contradictions and inconsistencies in the evidence of Mr Gardner considered together with the conflict between his evidence and the financial statements, the tax return and other documents, point ineluctably to the conclusion that the amount in question should not be excluded in terms of the Eighth Schedule to the Act.

[44] The Commissioner correctly determined that GB Mining disposed of an asset comprising a Kroondal right or interest to Aquarius for 'proceeds' of R3,5 million. The base cost of the asset, being the amount paid by GB Mining in acquiring the asset from the farmers was R1 780 771. The capital gain for GB Mining in its 2003 tax year was therefore R1 719 229. The appeal against this determination by the Commissioner accordingly fails.

The travel expenditure claim

[45] GB Mining in a schedule annexed to its tax return set out details of overseas travel and the costs associated therewith, undertaken by its representatives, which it claimed as a deduction in terms of s 11(*a*) of the Act.

[46] A deduction was claimed by GB Mining on the basis that the expenses were incurred in the production of income and were consequently not capital in nature.

[47] In *New State Areas Ltd v Commissioner for Inland Revenue* 1946 AD 610 at 620-1 Watermeyer CJ stated:

'The problem which arises when deductions are claimed is, therefore usually whether the expenditure in question should properly be regarded as part of the cost of performing the income earning operations or as part of the cost of establishing or improving or adding to the income earning plant or machinery.'

[48] As to the formulation of a test to assist in the determination of whether expenditure is of a capital or revenue nature, Streicher JA had the following to say in *Commissioner SARS v BP South Africa (Pty) Ltd* 2006 (5) SA 559 (SCA) at para 23:

'A test that has been adopted to assist in the determination whether expenditure is of a capital or revenue nature is to ask whether the expenditure is more akin to the income-producing operations of the taxpayer or whether it is more akin to the income-earning structure of the taxpayer, or to ask, "Is it expenditure required to carry on a business or is it required to establish a business?" Money spent in creating an income-producing concern is capital expenditure; it is invested to yield future profit'.

[49] If the purpose of the overseas travel was partially to produce income for GB Mining and partially to improve the income-earning structure of GB Mining, an apportionment of the expenses incurred can be made on the basis of 'what would be fair and reasonable in all the circumstances of the case'. See *CIR v Nemojim (Pty) Ltd* 1983 (4) SA 935 (A) at 951 C-E.

[50] The Commissioner contends that the expenditure in question was used partially for the purpose of improving the income-earning structure of GB Mining and was therefore of a capital nature and not deductible in terms of s 11(*a*) of the Act. Because of the lack of clear evidence of GB Mining as to the purpose of each of the trips the Commissioner apportioned the expenditure on a 50:50 basis. As a consequence 50 per cent of the amount claimed was determined not to be deductible. It should be noted that GB Mining and the Commissioner had originally reached a settlement in terms of which 50 per cent of the expenses would be disallowed. However, when the Commissioner imposed additional tax on the claims that were disallowed, GB Mining adopted the view that it was no longer bound by the settlement and claimed all of the expenditure incurred.

[51] One would have expected Mr Gardner to explain the purpose of each trip. Although he conceded that the expenses of certain trips were not deductible, when asked by his counsel whether the remaining trips were undertaken 'mainly in order to raise capital, working capital for GBSA' he replied 'that is correct' and added 'everything . . . is about raising money'. His answer does not address the issue of whether the money was raised to enhance the income-producing operations, or the income-earning structure of GB Mining. His concession was justified as the purpose of some of the trips was to explore a stock exchange listing in either the UK or Spain and others were directed at exploring potential new business opportunities. It is clear from the Schedule provided by GB Mining that the 50:50 apportionment was justified.

[52] The apportionment by the Commissioner of the expenses claimed for overseas travel on a 50:50 basis, so that 50 per cent was deemed to be of a capital nature and not deductible in terms of s 11(*a*) of the Act in the amount of R412 339, was fair and reasonable in all the circumstances.

[53] The appeal against this determination by the Commissioner must accordingly fail.

The disposal of an asset to the RK1 joint venture

[54] The accounts of the RK1 consortium in the form of the trial balance for the period 1 July 2004 – 30 June 2005 record a capital contribution by GB Mining of R8 million. This accords with the consortium agreement which, as pointed out above, records that GB Mining has contributed to the consortium 'certain mineral rights and intellectual property'.

[55] Mr Gardner confirmed that Aquarius had contributed R16 million and Victoria had contributed R8 million to the joint venture. He said that GB Mining was not obliged to make any cash contribution and that its contribution was 'in kind' and added 'I do not think you can put a price to that, I mean it is a huge amount of money we spent developing RK1, but I saw a value on the consortium balance sheet. But the consortium balance sheets have nothing to do with us, it is not anything, to do with us'. When he was asked whether he could explain why GB Mining's capital contribution was shown in the consortium accounts as R8 million, he replied 'I have no idea. I just think it is to match up the other 25 per cent shareholders' funds, they put in R8 million and that is the best conclusion that I can come to. I do not know why it's put in there, no. It has got nothing to do with us as such. We are not responsible for their bookkeeping or the way they present accounts, GB Mining is not, sorry'.

[56] The entry in the accounts of the joint venture that GB Mining had contributed an amount of R8 million required an explanation other than Mr Gardner simply saying it was wrong and he had no idea why it was reflected in this manner. This contradiction required evidence to explain the error, if there was one, which may have been clarified by a representative of Aquarius. There is again a contradiction between documentary evidence and the evidence of Mr Gardner.

[57] This is particularly relevant in the context of the provision in the consortium agreement that GB Mining has contributed 'certain mineral rights

and intellectual property to the consortium'. In terms of the agreements concluded by GB Mining with Xstrata and Bayer it was recorded that 'GB will as soon as practically possible after the effective date cede and assign all its rights and obligations in terms of this agreement to RK1. . .'.

[58] Despite these provisions, counsel for GB Mining submitted in his heads of argument that 'appellant did not acquire any mineral rights from Bayer / Xstrata but merely their consent for the construction of the relevant pipeline and for the "off-take" of their chromite waste material, against payment of royalties'.

[59] It was also submitted that the crux of GB Mining's case was that these rights were acquired on behalf of the consortium as part of GB Mining's initial cash contribution and not for GB Mining's own account.

[60] GB Mining's *ipse dixit* in the form of the trial balance which was never withdrawn and never properly explained is fatal to its case. I agree with the submission made by counsel for the Commissioner, that the probabilities are that GB Mining disposed of an asset, being the Xstrata and Bayer rights to the other members of the consortium for a consideration of R8 million. The appeal against the Commissioner's determination must accordingly fail.

<u>The disposal of a 38 per cent joint venture interest</u>

[61] As pointed out above, the Commissioner determined that the 38 per cent interest in 25 per cent of the RK1 joint venture which GB Mining held on behalf of RKMSA was an asset which it disposed of, attracting capital gains tax. GB Mining contends that there was an exchange of assets of equal value, which did not result in any capital gain.

[62] GB Mining and RKMSA agreed on 28 October 2005 that GB Mining would pay to RKMSA 38 per cent of the net income received by GB Mining from Aquarius in terms of the consortium agreement. In terms of clause 3.1 it was provided that RKMSA 'will be deemed to have acquired a 38 per cent share in the "participation share"' which was defined as the 25 per cent participation share which GB Mining held in RK1. Clause 3.2 of this agreement provided that

'in as much as the consortium agreement provides for a pre-emptive right in favour of the consortium participants and the consortium participants were not prepared to waive their pre-emptive rights, GBMSA acknowledges that for all purposes of the relationship between them, RKM will be regarded by GBMSA as a 38 per cent owner of the participation share'. Mr Gardner said this was caused by Aquarius not allowing RKMSA into the consortium.

[63] In terms of clause 4.1 of the agreement it was provided that RKMSA would be entitled to 38 per cent of the net income derived by GB Mining from the participation share (25 per cent) in the consortium. The effective date of the agreement was 1 February 2005.

[64] On 30 June 2006 Ivanhoe Nickel and Platinum Ltd (Ivanhoe) purchased all the shares of RKUK. The only asset of RKUK was 100 per cent of the issued shares in RKMSA. In clause 7.2.10.1 of this agreement it is recorded 'RKSA owns as its sole asset, its 38 per cent interest in the 25 per cent interest held by GBSA in the RK1 consortium'. The purchase price as provided for in clause 5.2 was the Sterling equivalent of R26 847 000. At the same time Ivanhoe purchased all the shares in GBSA thereby effectively acquiring the remaining 62 per cent of the entire 25 per cent stake in the RK1 joint venture. A reading of the agreements shows that the price was a global price in respect of both transactions divided between them in the proportion of their respective effective interests in the joint venture.

[65] As regards GB Mining's contention that there was an exchange of assets of equal value, namely that GB Mining gave up its 38 per cent interest in the joint venture and in turn RKMSA gave up its 62 per cent interest in the joint venture to the group of companies in which Mr Gardner held the majority shares, the court a quo held that GB Mining had disposed of the 38 per cent JV interest for a consideration being the right to 62 per cent of the interest held by RKMSA in the joint venture RK2. The court a quo then concluded 'the inference of the interlinking of the transactions between the parties was that the value of the rights given up by each party was similar to the value of the rights received, although no evidence was led on this point'. Counsel for the Commissioner stated that this finding of the court a quo is not in dispute in this appeal.

[66] In terms of the agreement concluded between GB Mining and RKMSA, RKMSA would be regarded as a 38 per cent owner of the participation share. GB Mining accordingly ceded these rights to RKMSA. In terms of paragraph 11 of Part III of the Eighth Schedule a 'disposal' includes the cession of an 'asset' and the definition of an 'asset' in Part I 'includes a right or interest of whatever nature to or in such property'.

[67] In terms of paragraph 38 of the Eighth Schedule, where a person disposes of an asset for a consideration not measurable in money, the person must be treated as having disposed of that asset for proceeds equal to the market value of the asset, as at the date of disposal. The finding of the court a quo that the value of the rights that were exchanged were similar, or according to GB Mining of equal value, does not alter the fact that the 38 per cent share ceded by GB Mining to RKMSA, was disposed of for 'a consideration not measurable in money'.

[68] The Commissioner determined that the value of the 38 per cent JV interest thus disposed of was the amount of R26 847 000 paid by Ivanhoe on the basis that this was an arm's length transaction. The present value of this amount as at 1 February 2005, being the effective date when GB Mining sold the 38 per cent JV interest to RKMSA calculated at the SARS rate at the time of 10.5 per cent, produced an amount of R23 277 530 which constituted the 'proceeds' of the disposal. The base cost of the asset in terms of paragraph 20(1)(*a*) of the Eighth Schedule to the Act is the expenditure actually incurred in respect of the cost of acquisition of the asset. This is 38 per cent of R9 550 000 (being the contribution made to the consortium) which produces an amount of R3 629 000. As will be recalled, the Commissioner originally determined that the base cost of the asset included donations tax of 20 per cent on the amount of R23 277 530, producing an amount of R4 655 506. The court a quo, however, decided that there was no donations tax payable and there is no appeal against this finding. The base cost accordingly falls to be reduced from R8 284 506 to R3 629 000 with a consequent increase in the capital gain from R14 993 024 to R19 648 530 (the latter being the difference between the proceeds of R23 277 530 and the amended base cost of R3 629 000) for GB

Mining in its 2005 tax year. The assessment was accordingly raised on a lower amount than could be justified by the Commissioner. That cannot be a cause for complaint by the taxpayer.

[69] The appeal against the Commissioner's determination must accordingly fail.

The assessment of additional tax in terms of s 76 of the Act

[70] The Commissioner submits that in relation to each of the contested assessments there was an omission in terms of s 76(1)(*b*) of the Act, or an 'incorrect statement' in terms of s 76(1)(*c*), in respect of the relevant tax return. These sections provide that the additional tax payable is an amount equal to twice the amount of the tax chargeable. The Commissioner, however, has a discretion in terms of s 76(2)(*a*) to remit the additional tax 'or any part thereof as he may deem fit'. Should the Commissioner decide not to remit the whole of the tax imposed, this decision is subject to objection and appeal.

[71] The Commissioner exercised his discretion to remit the penalties imposed as follows:

(a) Travel expenditure – originally 180 per cent reduced to 20 per cent penalties assessed.

(b) OTR amount – originally 160 per cent reduced to 40 per cent penalties assessed.

(c) Disposal of asset to Aquarius with the resultant capital gain – originally more than 150 per cent reduced to less than 50 per cent penalties assessed.

(d) Disposal of an asset to RK1JV with the resultant capital gain – originally assessed at 160 per cent reduced to 40 per cent penalties assessed.

(e) Disposal of 38 per cent JV interest with the resultant capital gain – originally assessed at 180 per cent reduced to 20 per cent penalties assessed.

[72] The Commissioner submitted that relevant facts in the assessment of the additional tax payable were:

(a) The circumstances giving rise to the assessments did not come to the attention of the Commissioner as a result of any voluntary disclosure by GB Mining.

(b) There were inconsistencies in the information furnished to the Commissioner which made it difficult to establish the true facts.

(c) The views of GB Mining could not reasonably have been held.

[73] Although there is some substance to these submissions, in my view the Commissioner erred in imposing the additional tax that he did in respect of the travel expenditure and the OTR amount.

[74] There was no omission or incorrect statement in respect of the travel expenditure. The details of the trips were disclosed and GB Mining then entered into negotiations with the Commissioner. As pointed out GB Mining abandoned the expenses claimed in respect of certain of the trips and a settlement was reached in terms of which 50 per cent of the expenses would be disallowed. When the Commissioner imposed additional tax on the claims that were disallowed, GB Mining adopted the view that it was no longer bound by the settlement and claimed all of the expenditure incurred. Counsel for the Commissioner submitted that GB Mining had furnished insufficient information and on this basis the additional tax was justified. In my view, this does not amount to an omission or furnishing incorrect information and the imposition of the additional tax was not justified.

[75] In the case of the OTR amount GB Mining originally declared that the amount in question was a loan to OTR. It was only at a later stage that it sought to retract this and submit that the amount involved was expenditure incurred by GB Mining in the production of income. No omission or incorrect statement was made in the tax return. When this proposition was put to counsel for the Commissioner, he fairly conceded that the additional tax should not have been raised.

[76] As regards the remaining instances where additional tax was imposed, I am satisfied that it was correctly imposed at an appropriate rate. In each

instance it is clear that there was an omission or incorrect statement concerning the relevant facts.

[77] The appeal against the additional tax raised in respect of the travelling expenses and OTR amount accordingly succeeds, but fails in respect of the additional tax raised in respect of the remaining categories.

[78] The court a quo ordered GB Mining to pay the Commissioner's costs. It was only entitled to make this order if the Commissioner applied for it in terms of s 83(17) of the Act. Counsel for the Commissioner conceded that no application had been made by the Commissioner and the costs order should be set aside. He did, however, ask for the costs of the appeal including the costs of two counsel. However, when regard is had to the fact that the appellant has in this appeal succeeded in having the additional tax in respect of the OTR amount and the travelling expenses entirely remitted, which constitutes a total saving of R352 911.44, a suitable order, having regard to the significance of this in the context of the case as a whole, is that the Commissioner should be ordered to pay 10 per cent of GB Mining's costs in this appeal.

[79] The following order is made:

1 The appeal is dismissed save in the respects set out in paragraphs 2 and 3 below.
2 The penalties raised by the respondent in respect of the OTR amount and the travelling expenses are remitted in their entirety.
3 The order directing the appellant to pay the respondent's costs in the court a quo is set aside.
4 The respondent is ordered to pay 10 per cent of the appellant's costs in the appeal.

K G B SWAIN
ACTING JUDGE OF APPEAL

Appearances:

For the Appellant:	E M Du Toit SC
	Instructed by:
	Manong Badenhorst Abbot Van Tonder, Johannesburg
	Phatsoane Henney Attorneys, Bloemfontein
For the Respondent:	A Subel SC (with him J Boltar)
	Instructed by:
	The Commissioner for the South African Revenue Service, Pretoria
	State Attorney, Bloemfontein