

## IN THE TAX COURT OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

IT CASE NO: 12524

In the matter between:

**Mr. A**

Appellant

and

**COMMISSIONER FOR THE SOUTH AFRICAN  
REVENUE SERVICE**

Respondent

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**JUDGMENT**

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**MAYAT J****INTRODUCTION**

- [1] This appeal relates to the tax affairs of the appellant as well a trust, which is affiliated to him. Both taxpayers objected to assessments by the respondent for the tax years from 1998 to 2001. The present appeal was accordingly noted when the objections by the appellant were disallowed by the respondent.
- [2] The appellant is Mr. A, an instrument technician, who is also the sole trustee of an *inter vivos* trust, named the A Trust, IT 2304/97. The said trust is referred to in this judgment as “the trust”. A trust deed, dated the 27<sup>th</sup> of February 1997, governing the administration, structure, and objectives of the trust was registered on the 5<sup>th</sup> of March 1997. The said trust deed is referred to in this judgment as “the trust deed”.
- [3] Whilst this matter relates primarily to the respondent’s tax assessments of the appellant in his personal capacity for the tax years 1998 to 2001, for the reasons set out in this judgment, the respondent’s tax assessments relating to the trust, represented by the appellant, for the correlating period, are also germane to this appeal. Thus, it appears from documents on record in the present appeal that the trust also lodged objections to the respondent’s assessments relating to the trust, and further noted an appeal when the respondent disallowed the said objections. However, the appeal by the trust was subsequently withdrawn, and the respondent’s assessments against the trust are now final. Be that as it may, to the extent that the tax affairs of the appellant were inextricably linked to the tax affairs of the trust, both the appellant and the respondent dealt with the two taxpayers in this matter jointly, in the context of both the objection proceedings as well as the appeal proceedings.

**RELEVANT FACTUAL MATRIX**

- [4] Certain facts were common cause *ex facie* the documents on record and the testimony of the appellant. It was accordingly not in dispute that prior to 1997, the appellant, who is an instrument technician, was employed by a labour broker, named D Entity. The appellant testified that he was unemployed prior to 1995 and that D Entity employed him in 1995. In terms of his agreement with D Entity, he provided services as an instrumental technician for certain divisions and subsidiaries of a client of D Entity in the mining industry. The appellant accordingly worked for certain divisions of a number of affiliated companies, including B Ltd, C (Pty) Ltd and E Ltd. For the purposes of this judgment, the said affiliated companies as well as all the divisions of the said companies, which utilized the services of the appellant as an instrument technician, are individually and collectively referred to as "The Companies" in this judgment. The appellant confirmed in his evidence that salary paid to him by D Entity in relation to his services at The Companies was paid into his personal bank account. Whilst he indicated during cross-examination that he could not remember the exact amount of his salary from D Entity each year, he did not dispute from documents on record that on the basis of an income tax return for the period 1 March 1996 to 28 February 1997, he had declared income in the sum of R101 999-00, from which sum employees' tax in the sum of R7508-97 was deducted.
- [5] It is also not in dispute that at the end of the 1996, the appellant was advised to form a trust with a view to continuing to provide his personal services as an instrument technician to The Companies. In these circumstances, the appellant established the trust in 1997 and thereafter continued providing services to The Companies through the trust, with effect from the 1998 tax year. As such, he did not provide any services to The Companies on behalf of D Entity, with effect from the 1998 tax year.
- [6] As indicated above, the trust then received income from The Companies, and the appellant testified that he was advised that he could claim expenses against such income. The founder of the trust was an entity named Trust F and the appellant was nominated as the sole trustee of the trust. The beneficiaries of the trust were specified to be the appellant, his wife and their children. From the factual information and documents provided by the appellant to the respondent, it appeared that the trust acquired capital in the sum of R100-00. It also appeared that on the basis of a purchase and sale agreement, ostensibly concluded between the trust and the appellant, all the appellant's moveable assets were sold to the trust.
- [7] Against this background, the previous arrangement through D Entity was replaced with a series of at least six similar agreements between the trust and The Companies in terms of which the trust provided the services of the appellant to The Companies as an instrument technician for specified periods. Whilst the appellant did not specify the exact number of agreements, which were concluded between The Companies and the trust, he merely confirmed in his evidence before this court that a series of similar agreements were concluded (almost on a continual basis) for the period commencing from the tax year in 1998 until the tax year in 2001. Thus, he stated that during that period, before any specific agreement between the trust and The Companies came to an end, he was generally always confident that such agreement would be followed by another agreement between the same parties.
- [8] It appears from a number of the agreements on record that the trust was obliged to provide the services of the appellant "only" to The Companies. The specialized nature of the services to be rendered by the appellant was also recorded in similar terms in the said agreements. In these circumstances, the appellant simply continued rendering services to The Companies after he was no longer employed by D Entity. Therefore, instead of acting on behalf of D Entity, he provided services to The Companies as an instrument technician on behalf of the trust for the tax years from 1998 to 2001.
- [9] The appellant confirmed in his evidence that the trust was not in a position to provide the services of any other person as an instrument technician. He further confirmed that it was specifically provided in the agreements on record that the appellant was to provide services at the premises of The Companies during

normal working hours or at sites specified by The Companies. Whilst the appellant suggested in this context that he sometimes worked from his home (which he indicated was rented from G Co.), he confirmed in his evidence that for the most part, his services formed part of the installation and commissioning of plants at premises or sites specified by The Companies. It was also not his evidence that any allocated area in his rented home constituted a workshop, which was controlled or owned by the trust. It was his further evidence, that the trust did not own any immovable property between the years 1998 to 2001.

- [10] The agreements on record further provided that the remuneration payable by The Companies to the trust was based upon the agreed hourly rate for the hours worked by the appellant. Thus, the appellant was obliged to keep accurate time sheets to record the number of hours and places worked, and the trust then issued monthly invoices to The Companies for the services rendered by the appellant in each particular month on the basis of the hours worked by the appellant. In addition, The Companies was also obliged to reimburse the trust all travel and accommodation expenses incurred for the purposes of the appellant's services to The Companies. Furthermore, the agreements on record provided that income tax at the prescribed rate would be deducted from fees owing by The Companies from time to time, unless a tax exemption certificate was issued.
- [11] The appellant explained in his evidence that during the time he provided services to The Companies through D Entity, he had established a good personal relationship with The Companies. As such, the subsequent agreements between the trust and The Companies between 1998 and 2002 were based upon his skills, expertise and reputation, as well as the personal relationship he had established with The Companies. Against this background, and based upon his past relationship with The Companies, his stated intention at all relevant times was to continue rendering services as an instrument technician to The Companies. Thus, he indicated that he was confident that he could continue rendering services to The Companies through the trust. However, he also indicated that pursuant to the conclusion of the various agreements between the trust and The Companies, no agreement was in place between him (as an independent contractor) and the trust relating to his services to The Companies, from time to time.
- [12] Against this background, the appellant explained that invoices were issued by the trust to The Companies from time to time. As provided in the various agreements between The Companies and the trust, the invoices on record made provision for the hours worked by the appellant. It appears from bank statements on record that pursuant to the submission of invoices, payments were effected to the appellant or to the trust. The appellant testified that these payments were made electronically or by cheque. As indicated in the bank statements on record, he also indicated that most payments by The Companies between 1998 and 2001 were made to the bank account of the trust.
- [13] In these circumstances, in distinct contrast to the period when he was employed by D Entity, the appellant did not receive a salary in respect of his services to The Companies, in the tax years between 1998 and 2001. However, he admitted in cross-examination in this respect that after 1997, the trust effectively received similar income from The Companies to that previously received by him from D Entity for his services at The Companies. He also testified that he was advised at the time that he could transfer income from the bank account of the trust to his own bank account, from time to time. Thus, he confirmed that as a matter of practice, he transferred virtually all income received by the trust from The Companies to his own bank account. He also stated in this context that he was the sole provider for himself and his family. He further admitted that he had also redirected from time to time, all travelling or other expenses paid by The Companies to the trust. Whilst he testified that he had used money so redirected to his own bank account, for his personal living expenses and the maintenance of his family, he did not dispute that he was at liberty to spend such money from his account as he saw fit. Thus, he admitted that he was not constrained to comply with the trust objectives when he expended money from his personal bank account.

- [14] Against this background, the appellant confirmed in his testimony that he simply continued providing services as an instrument technician to The Companies between 1998 to 2001, on the basis of several agreements between the trust and The Companies from time to time. As already stated in this respect, he admitted that he was the only person on behalf of the trust who could render services to The Companies, as an instrument technician. He further confirmed that apart from providing services to The Companies, he had no other employment for the tax years between 1998 and 2001.
- [15] From documents on record, it is not in dispute that the trust submitted income tax returns, supported by income statements of the trust as well as declarations of expenses, for the tax years between 1998 and 2001. In addition, IRP 5 certificates in terms of the Income Tax Act, 58 of 1962, as amended ("the Act") in relation to the appellant's employment with The Companies for the relevant periods were also submitted to the respondent. Thus, in addition to claiming expenses, the trust also claimed refunds of the amounts of employee tax deducted by The Companies in terms of the relevant IRP 5 certificates.
- [16] Specifically, as regards expenses, the trust claimed as deductible expenses inter alia, rental for the appellant's house in terms of a lease agreement with G Co., medical expenses, school fees, and expenses for groceries, gardening services as well as motor vehicle hire. As a result of these and other expenses claimed by the trust, the trust did not show a profit in respect of any of the years of assessment, which fall within the ambit of this appeal. Thus, for example, for the 1998 year of assessment, the trust declared that it had received a gross income in the amount of R129 614-00, and that it had deductible expenses in the sum of R142 151-34 for the same period. As such, the trust declared a loss in the sum of R12 537-34 from its business activities for that year. The expenses claimed by the trust in that year as well as succeeding years also included inter alia expenses for cleaning, entertainment, licenses, office equipment and stationary. Thereafter, on the basis of an income statement submitted to the respondent for the period March 1998 to February 1999, a further loss was declared by the trust, on the basis that it had gross earnings/sales in that year for the accumulated amount of R191 168-75, as well as deductible expenses for that year in the sum of R190 407-64. The previously declared loss in the sum of R12 537-34 was carried forward to subsequent years. As such, it was declared that the trust sustained an accumulated loss in the sum of R24 313-57 in 1999. Similarly, it was declared in the income tax return of the trust for the 2000 year of assessment that the trust had gross income/sales of R206 766-00, deductible expenses in the cumulative amount of R184 780-00, and an accumulated loss based on the loss carried forward from the previous years. It was also declared in relation to the 2000 period of assessment that the trust had made an income distribution to the appellant as a beneficiary of the trust in the sum of R20 000-00.
- [17] In these circumstances, it is not in dispute that the appellant supported himself and his family by rendering services as an instrument technician, both prior to and after 1997. In so far as his personal income tax was concerned, in the years preceding the 1998 tax year, the appellant was liable for tax on income earned from The Companies. Thereafter, in the tax years between 1998 and 2001, the appellant declared either no income at all or a minimal income in his income tax returns for each year. Thus, the appellant's taxable income for the 1998 tax year was declared to be nil. Thereafter, in relation to the 1999 tax year, the appellant declared that he had received an annual taxable rental income in the sum of R8960-00. After claiming deductions for medical expenses in the sum of R8552-57 in relation to the 1999 tax year, the tax payable by the appellant for that year, was declared to be a negligible sum. Thereafter, in the 2000 tax year, the appellant declared inter alia that his only income as a beneficiary of a trust was an amount of R20 000-00, for which he was liable to pay tax in a very negligible sum. Similarly, in respect of the 2001 tax year, the appellant declared inter alia that he was unemployed from 1 August 2000 to 28 February 2001, and that he was a beneficiary of a trust. He further declared that his only income he earned for that year was an amount in the sum of R22 000-00, in respect of which he declared that a tax in a very negligible sum was payable by him.

[18] In his evidence before this court, during cross-examination the appellant could not explain and/or justify a number of expenses claimed by the trust. Thus, when he was asked to explain specified expenses claimed for lease agreements as well as instalments sales/hire agreements, motor vehicle hire costs and costs of travel/fuel/ lubricants between 1998 and 2001, he stated he could not state how the amounts claimed were computed by his financial advisor, Mr Y. Thus, he appeared to concede in cross-examination that the expenses claimed by the trust could not be substantiated as expenses in the production of income of the trust.

[19] Pursuant to the submission of income tax returns by the appellant as well as the trust incorporating the above information for the years under discussion, the respondent directed a request for factual information and documentary proof to the appellant in February 2002. It is not disputed in the context of the present appeal that in June 2002, the appellant (apparently in personal capacity and on behalf of the trust) provided certain information and documents to the respondent by way of response to the said request. Certain cheques and/or receipts were also provided to the respondent for expenses relating inter alia to school fees, doctors fees, electricity, municipal rates and taxes as well as garden fees. The appellant further advised the respondent at the time that he had rendered services to the trust, and that the trust had in turn claimed expenditure in respect of lease agreements as well as hire agreements in respect of motor vehicles for the 1998-2001 years of assessment.

[20] Against this background, the respondent initiated an audit relating to both the appellant and the trust in relation the 2001 year of assessment. To the extent that it is relevant in this context, the said audit was initiated after the trust had claimed a refund in respect of the 2001, year of assessment. The said audit revealed inter alia that the trust had claimed exorbitant expenses in relation to income resulting in a declared loss in 2001. This loss was compounded by the declared losses from previous years, which were carried forward to 2001.

[21] Thereafter, a further audit was initiated by the respondent in relation to the 1998, 1999, 2000 and 2001 tax years. The latter audit revealed inter alia that:

- i) The trust had claimed a refund of employees' tax, which was deducted by The Companies for the year 2001.
- ii) During the correlating tax periods between 1998 and 2001, the appellant had declared to the respondent, either that he had no income at all or that he had a negligible tax liability.

[22] On the basis of the above findings, the respondent assessed the appellant in terms of the Act and determined the appellant's liability for tax for the 1998, 1999, 2000 and 2001 years of assessment. These assessments by the respondent were based upon the amounts received by the trust for services rendered by the appellant on behalf of the trust in the tax years from 1998 to 2001. In terms of the said assessments, the appellant's gross income was accordingly determined by the respondent to be as follows:

<b>Year</b>	<b>Amount</b>
1998:	R129 614-00
1999:	R191 168-75
2000:	R206 766-00
2001:	R 82 835-00

As already indicated, the appellant objected to these assessments on the 20<sup>th</sup> of August 2003. Thereafter, on the 16<sup>th</sup> of September 2003, the respondent disallowed the objections, which were lodged by the appellant. The said objections and the present appeal are, of course, premised upon the same averments.

#### APPLICABLE LEGISLATIVE FRAMEWORK

[23] The ambit of “gross income” as defined in terms of section 1 of the Act generally includes the total amount, in cash or otherwise, which is received by or accrued to or in favour of a tax payer, in any year of assessment, in respect of services rendered, subject to certain provisos. One such proviso in the context of the definition of gross income is incorporated in paragraph (c)(ii) of the said definition in the Act. In terms of this proviso,

“any amount received by or accrued to or for the benefit of any person in respect of services rendered or to be rendered by any other person, shall for the purposes of this definition be deemed to have been received by or to have accrued to the said other person.”

Thus, the respondent is empowered to tax the person rendering the service, irrespective of who actually derives the remuneration for such service.

[24] Section 103 (1) of the Act, as applicable at the time the appellant was assessed by the respondent, provided that:

“Whenever the Commissioner is satisfied that any transaction, operation or scheme -

- (a) has been entered into or carried out which has the effect of avoiding or postponing liability for the payment of tax or reducing the amount thereof; and
- (b) having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out –
  - i. was entered into or carried out –
    - (aa) in the case of a transaction, operation or scheme in the context of a business, in a manner which would not normally be employed for a bona fide business purpose, other than the other than obtaining of a tax benefit; and
    - (bb) ...; or
  - ii. has created rights and obligations which would not normally be created between persons dealing at arm’s length under a transaction, operation or scheme in question; and
- (c) was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit,

the Commissioner shall determine the liability for any tax and the amount thereof, as if the transaction, operation or scheme had not been entered into or carried out, or in such manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such avoidance, postponement or reduction.”

[25] The respondent is accordingly empowered in terms of section 103(1) of the Act, to determine the tax liability of transactions, operations or schemes which have the effect of avoiding or reducing the liability for income tax. The determination of a taxpayer’s liability in terms of section 103(1) of the Act can accordingly only be invoked by the respondent if he is satisfied that the following four elements are present:

- i) A transaction, operation or scheme has been entered into or carried out;
- ii) Such transaction, operation or scheme has the effect of avoiding, postponing or reducing the liability for the payment of any tax imposed in terms of the Act;
- iii) Having regard to the circumstances under which the transaction, operation or scheme was entered in or carried out, that such transaction, operation or scheme was entered into or carried out in a manner which would not normally be employed for a bona fide business purpose, other than carrying out such transaction, operation or scheme; or (my emphasis) it has created rights and obligations, which would not be normally created between persons dealing at arm’s length; and
- iv) the sole or main purpose of the transaction, operation or scheme is the avoidance, postponement or reduction of liability for the payment of any tax in terms of the Act.

- [26] In terms of section 103(4) of the Act, it is presumed, until the contrary is proved, that the sole or main purpose of a transaction, operation or scheme as envisaged in the Act, is the avoidance, postponement or reduction of liability for tax.

#### ISSUES IN DISPUTE

- [27] Against this background, pursuant to a pre-trial conference held on the 16<sup>th</sup> of October 2012, the parties identified the following two primary issues in dispute for determination by the court in the context of the present appeal:
- i) With respect to the amounts received by the trust during the 1998, 1999, 2000 and 2001 years of assessment:
    - a) Whether the creation of the trust and the conclusion of the service agreements between the trust and The Companies can be regarded as a scheme to avoid income tax by the appellant as contemplated in section 103(1) of the Act; and
    - b) Whether the remuneration paid to the trust constitutes taxable income in the hands of the appellant on the basis of the relevant provisions of the Act relating to gross income.
  - ii) Whether the deductions claimed by the appellant are allowable in terms of section 11(a) of the Act read with section 23 of the Act.

- [28] To the extent that the appellant could not explain and/or substantiate specified expenses claimed by the trust from 1998 to 2001, the appellant's counsel correctly conceded during the course of the present hearing that such expenses were not allowable in terms of the Act. It was also effectively conceded by the appellant that the deductions claimed by the appellant on behalf of the trust from 1998 to 2001 were not allowable as envisaged in the Act. Therefore, notwithstanding the identification of issues in dispute at the pre-trial conference, point ii) above was subsequently not really in issue at the hearing of this matter.

#### **Whether the trust constituted a scheme to avoid income tax as contemplated in section 103(1) of the Act?**

- [29] The appellant had the onus of proving that at least one of the four elements of section 103(1) of the Act, referred to above, was not present in the circumstances of this case.
- [30] As regard the first requirement of section 103(1), it can hardly be doubted that the notion of a "transaction, operation or scheme" as envisaged in section 103(1) of the Act is sufficiently widely stated to incorporate the termination of the arrangement with D Entity, the establishment of the trust, and the subsequent use of the said trust by the appellant. See the dicta in this context, in the case of *Meyerowitz v Commissioner for Inland Revenue* 1963 (3) SA 863 (A).<sup>1</sup> In the present case, the scheme from beginning to end involved a series of transactions entered into by the appellant. These transactions and surrounding circumstances included the following: terminating the contract with D Entity; establishing the trust with a view to continuing the appellant's association with The Companies; the nomination of the appellant as trustee, as well as the nomination of the appellant, his wife and his children as beneficiaries; opening a bank account for the trust;

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<sup>1</sup> In this case the Appellate Division dealt with the author who received royalties in respect of two books. He was also a publisher in a company, which published a monthly journal. The appellant ceded his rights in respect of his books to another company for no consideration. The appellant and his wife were the sole shareholders of the latter company and this company ceded rights to his books to a trust set up for the benefit of his children. The other company, which published the monthly journal ceded the rights to the said journal to a partnership consisting of the above trust, another trust linked to a colleague and a third person, also for no consideration. Thus, the trust in that matter held rights in respect of the appellant's books and a share of the rights of the journal published by him. The income from the books and journal accrued to the trust for the benefit of his children and the appellant drew a nominal editorial fee for the work he did, despite the fact that all income and profits were generated solely by his skill and labour. The Appellate Division held in these circumstances that from "beginning to end" the transactions constituted a scheme, even though in that case all the tax implications were not contemplated at the outset. Thus, the court held that the intention to avoid the payment of tax could manifest itself in later steps.

negotiating and concluding service agreements with The Companies; the appellant rendering services on behalf of the trust, in the absence of an agreement between himself and the trust; invoices being sent to The Companies for services rendered by the appellant; the appellant not receiving a salary from The Companies; the appellant not taking up employment elsewhere; and the transfer of virtually all the income received by the trust to the appellant's own account, apparently for the living expenses of the appellant and his family.

[31] As regards the second element of section 103(1) of the Act, referred to above, Steyn CJ in the case of *Smith v Commissioner for Inland Revenue* 1964 (1) SA 324 (A) at 333 E-F stated that the ordinary and natural meaning of avoiding a liability for tax on income is “to get out of the way of, escape or prevent an anticipated liability...”. Thus, avoiding liability connotes taking steps to free oneself of an imminent or certain liability.

[32] Watermeyer CJ stated in the case of *Commissioner for Inland Revenue v King* 1947 (2) SA 196 (A) at 210 that there is a real distinction between

“the case of a man who so orders his affairs that he has no income which would expose him to the liability of income tax, and the case of a man who so orders his affairs that he escapes from liability for taxation which he ought to pay upon income which in reality is his.”

Thus, whilst a person can, of course, always enter into legitimate transactions, which have the effect of freeing him from taxation of future income by channeling such income through a third party, the respondent is empowered in terms of the Act to declare such income to be in reality the income of the person who entered into the relevant transactions, and not the income of the third party concerned.

[33] The appellant admitted that he anticipated a stream of income from The Companies with some degree of certainty, given his past relationship with them. This was obviously so as he had received income from D Entity for his services to The Companies, on a continuous basis prior to 1998, when such income was subject to taxation. It was further common cause that the appellant had subsequently rendered the same services through the trust. Therefore, pursuant to the creation of the trust, the income, which the appellant had previously earned, effectively accrued to the trust. Moreover, had it not been for the transactions detailed above, the income declared by the trust would have been taxable in the appellant's hands.

[34] In the final analysis in relation to avoiding a liability for tax as envisaged in terms of section 103(1) of the Act, it was quite clear from the evidence that the *raison d'être* of the trust between the years 1998 and 2001, was the avoidance of income tax, normally payable by the appellant. This was exacerbated by the fact that the trust also declared continuous losses on the basis of questionable expenses, which were obviously intended to absolve the trust from any tax liability.

[35] Whilst the third element of section 103(1) of the Act, is stated in the alternative, as Trollip JA noted in the case of *Hicklin v Secretary for Inland Revenue* 1980(1) 481 SA AD at 494H-495A the notion of an “arm's length” transaction is often an easily determinable premise from which to commence an enquiry. The appellant testified in this regard that he did not conclude an agreement with the trust. He also admitted that he had appropriated all trust income at his sole discretion, after he had transferred income from the trust bank account, to his personal bank account, from time to time, without accounting to the trust. Moreover, he admitted that he was at liberty to spend money, which he had transferred from the trust bank account, as he saw fit, and not necessarily in accordance with the trust objectives.

[36] Against this background, the admissions by the appellant obviously demonstrated an abnormal state of affairs, primarily so as the appellant was not obliged to account to the trust at all, even though he allowed the fruits of his labour to accrue to the trust. Therefore, the circumstances surrounding the scheme perpetrated by the appellant gave rise to abnormal rights and obligations between the appellant and the

trust, and such rights and obligations would not normally have been created between persons dealing at arm's length.

- [37] As regards the fourth element of section 103(1), the respondent has to be satisfied that the scheme was entered or carried out solely or mainly for the purposes of the avoidance or postponement of liability for any tax imposed by the Act. As indicated above in this respect, in terms of section 103(4) of the Act, it is presumed, until the contrary is proved, that the sole or main purpose of a transaction, operation or scheme was the avoidance, postponement or reduction of liability for the payment of tax. This presumption places a heavy duty on the appellant.
- [38] In order to displace the presumption against him, it is not only necessary for the appellant to point to some compelling reason for entering the scheme. Then, the court has to be convinced, on an objective basis, that the reason so disclosed motivated the actions of the appellant. In the present case, the appellant did not disclose any compelling reasons for the transactional elements or steps relating to his scheme set out above, other than that he intended to avoid liability for the payment of tax. Thus, objectively assessed, on the basis of the evidence of the appellant and the surrounding circumstances, the only inference is that the main or sole purpose of the trust was to avoid liability for the payment of tax. This is borne out by the inescapable fact that if the appellant had accounted for his income from The Companies in his personal capacity, he would have been liable for tax, as he was in the years preceding 1998.
- [39] In these circumstances, I was persuaded that all four elements of section 103 (1) of the Act are present in relation to the series of transactions executed by the appellant. As such, the appellant failed to discharge the onus on him of establishing that one or more of the said elements were not present. Therefore, the respondent was entitled to invoke the provisions of section 103(1) of the Act and was also entitled to determine the appellant's tax liability and the amount thereof. The objections by the appellant were accordingly, justifiably disallowed by the respondent.

**Whether the income received by the trust for services rendered by the appellant should be taxed in the hands of the appellant?**

- [40] Turning now to the second main issue in this matter, pertaining to the whether the money paid to the trust can be deemed to form part of the appellant's gross income, all the authorities in this sphere of law (as in other areas of our law) justifiably give weight to substance over legal form.<sup>2</sup> Applying this principle to the present case, it is undisputed that the salary, which the appellant had previously received for services rendered by him as an instrument technician to The Companies, was effectively still in place after the conclusion of the agreements between the trust and The Companies relating to the appellant's services as an instrument technician. Significantly in this respect, after the trust was established, the appellant testified that, as in previous years, he simply continued using the income from the trust (which he had transferred to his own account, from time to time) for living expenses for himself and his family.
- [41] It is accordingly my view that the respondent in the present case justifiably invoked the relevant provisions of the Act relating to the definition of gross income when making assessments relating to the appellant for the relevant tax years. Taking substance over form, the true nature and substance of the income received from The Companies was that such income was effectively the income of the appellant. This is further borne out by the fact that there was no evidence to suggest any genuine resolve on the part of the trust to exist as a commercial entity and/or business, autonomously of the appellant. Moreover, and perhaps most

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<sup>2</sup> Thus, for example, it was stated by Melamet J in the case reported at 113 SATC at 120 that:  
 "it is a well established principle of the income tax law that emphasis must be placed on the substance of a transaction and not the legal form wherein it is clothed."

importantly, the trust was not in a position to generate any income without the personal services of the appellant. The appellant admitted in this regard that the trust had no employees, and that only he (on behalf of the trust) could render services as an instrument technician to The Companies. In these circumstances, the respondent also justifiably disallowed the appellant's objections in this regard inter alia on the basis that, all the income, which the trust had received from The Companies, from time to time, was effectively received by the appellant.

#### **Expenses and Deductions**

[42] Whilst this aspect was not an issue at the hearing of this matter, for the sake of completeness, it may be mentioned that both the appellant and his representative conceded that all the stated expenditure or losses claimed by the appellant and the trust, were not incurred in the production of income. As such, it was conceded that the appellant and the trust did not qualify for all the deductions claimed, particularly so as the appellant could not confirm in his evidence that all the expenses claimed were actually incurred in the production of income and/or were closely linked to the production of income. As such, the respondent justifiably disallowed the expenses claimed, allegedly in the production of income for the relevant years of assessment.

#### **ORDER**

[44] Based on the foregoing, there is no basis for this appeal to be upheld, and the following order is accordingly made:

1. The appeal in this matter is dismissed with costs.

DATED AT JOHANNESBURG THIS 20th DAY OF NOVEMBER 2012.

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MAYAT J  
JUDGE OF THE HIGH COURT  
OF SOUTH AFRICA

I agree

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FREDA VENTER  
ASSESSOR OF THE  
TAX COURT OF SOUTH AFRICA

I agree

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ANNA CATHERINA TEICHERT  
ASSESSOR OF THE  
TAX COURT OF SOUTH AFRICA

Appellant's Representative : A Strydom  
Respondent's Counsel : L Haskins  
Date of Hearing : 5<sup>th</sup> to 7<sup>th</sup> November 2012