**REPUBLIC OF SOUTH AFRICA**

**IN THE TAX COURT OF SOUTH AFRICA**

**(HELD AT JOHANNESBURG)**

CASE NOs.: **VAT 1373 & 13862**

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|---|---|---|
| (1) | REPORTABLE: **YES** / ~~NO~~ | |
| (2) | OF INTEREST TO OTHER JUDGES: **YES** / ~~NO~~ | |
| (3) | REVISED. | |
| **3 July 2023** | | **…………………………..** |
| DATE | | SIGNATURE |

In the matter between:

**TAXPAYER RPC** **APPELLANT**

and

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

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# J U D G M E N T

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**This judgment has been handed down remotely and shall be circulated to the parties by way of e-mail. Its date of hand down shall be deemed to be 3 July 2023.**

**MALI, J:**

**Introduction**

[1] This appeal pertains whether the methodology used by the respondent in issuing estimated assessments against the appellant is reasonable and produce reasonable results. The appellant is Taxpayer RPC, an alluvial diamond miner who was also a shareholder and director of several entities at the time the assessments were issued. The respondent, the Commissioner for South African Revenue Service (SARS) issued estimated assessments against the taxpayer in respect of income tax, imposed in terms of the Income Tax Act 58 of 1962. (ITA) and Value Added Tax 89 of 1991 (VAT). The facts relating to both tax types are common, hence the appeal involves assessments in terms of both laws.

[2] From 2004 to 2006 the taxpayer traded as sole proprietor under the name and style Business A. In 2007 the taxpayer incorporated, an entity called Business A Diamond Mining (BADM), using S42 of ITA, tax relief. Thus resulting in Business A not attracting Capital Gains Tax. In summary all mining operations under Business A were sold as a going concern, resulting in a loan of about R25.799 million in the books of BADM payable to the taxpayer. During 2011 BADM was placed into voluntary liquidation. The taxpayer did not submit his personal tax returns and for BADM Due to taxpayer's failure to file income tax returns and failing to provide SARS with the requested information, SARS initiated the investigation for the 2005 - 2011 years of tax assessment. SARS also issued VAT assessments for the 2006 - 2007 tax periods. SARS utilised information obtained from third parties, including banks, to determine the amounts received by the taxpayer during the years of assessment of disputed assessments.

[3] The taxpayer is not satisfied with the methodology used by SARS in determining the assessments. It is trite that an estimated assessment, unlike an assessment in terms of section 91 of the Tax Administration Act, 28 of 2011 (TAA), is not a precise determination of the undeclared taxable income. This is because all the necessary data for a proper estimate is not available. Section 95 of the TAA states as follows:

> **"Estimation of assessment"—**(1) SARS may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate if the taxpayer—
>
> (*a*) fails to submit a return as required; or
>
> (*b*) submits a return or information that is incorrect or inadequate.
>
> (2) SARS must make the estimate **based on the information readily available to it**."

(Emphasis added.)

[4] In *Africa Cash & Carry (Pty) Ltd v The Commissioner for the South African Revenue Service*[1] the Court at paragraph 52 held that:

> "By its very nature an estimated assessment is subject to change based on an evaluation of the evidence and any information that becomes available. What is important is that the methodology used and the assumptions on the strength of which the estimated assessments were made should remain the same otherwise the conclusions reached by the tax court might not be procedurally fair. The tax court must place itself in the shoes of the functionary to determine whether the methodology followed and the assumptions of which the estimated assessments are based, are reasonable and produce a reasonable result."

[5] At paragraph 67 the court also held as follows:

> "The Act does not provide any guidance or criteria to determine whether an estimate made by SARS is reasonable. Following what was said in Head of Western Cape Education Department and Others v Governing Body of Point High School and Others, in a different context with reference to what is meant by 'unreasonableness' in section 6(2)(*h*) of PAJA, reasonableness would require that SARS strike a balance fairly and reasonably open to it on the facts before it or available to it. Reasonableness requires that a balance must be struck between a range of competing considerations in the context of a particular case. The principal enquiry is whether SARS struck a balance fairly and reasonably open to it on the facts before it or readily available to it. If the choice of the gross profit percentage method is one that reasonably could be applied, then a court will not interfere with that decision. What is required for a decision to be justifiable, is that it should be a rational decision taken lawfully and directed to a proper purpose."

[6] At paragraph 129 the court further held:

> "The tax court did not err in concluding that SARS's assessments were reasonable. The criticism by the taxpayer's expert witnesses, amongst others, failed to take into account that there was a systematic plan in which the taxpayer suppressed its sales and manipulated its records. The taxpayer has elected not to make a full disclosure of its activities in this regard. There is simply no basis to set aside the methodology employed by SARS as being not reasonable.'. Before I deal with evidence it is apposite to deal with determination of tax disputes as this became an issue despite the alleged preparedness by the parties.

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1 *Africa Cash & Carry (Pty) Ltd v The Commissioner for the South African Revenue Service* (783/18) [2019] ZASCA 148 (21 November 2019).

**Determination of tax disputes**

[7] On 30 May 2021 on the day of commencement of the appeal, Counsel for SARS brought an application for exception. The basis being that the taxpayer had not properly pleaded to the amounts in dispute in relation to the 2008, 2009, 2010 and 2011 years of assessment. The exception was upheld. Thus the taxpayer was granted leave to amend its statement of grounds of appeal to plead specific facts in support of the appeal against the disallowance of the objection accordingly. The hearing stood down for a week.

[8] During the week that the trial had stood down, on 2 June 2021, SARS delivered another set of Rule 36(6) of the Tax Court Rules (Rules) for both the VAT and the IT matters ("**the second notices**"). Rule 36 (6) provides: "If either party believes that, in addition to the documents disclosed, there are other documents in possession of the other party that may be relevant to a request under subrule (1) or (2) or the issues in appeal, as the case may be, that have not been discovered…."

[9] Counsel for the taxpayer submitted that the second notices were practically identical to the first notices. In the complaint it is further stated:

> "but this time, knowing that it is time-barred, SARS included a document or two in order to create the impression that, this time, the notices related to the amendments made by the Appellant on 2 June 2021. Any such suggestion is nothing but opportunistic and should earnestly be frowned upon. It is apposite to raise with the Court that Tax Court Rule 36 does not entitle a party to further and better discovery as a consequence of an amendment to the statement of grounds of assessment and/or statement of grounds of appeal. SARS invoking the Rule in this way was improper and opportunistic."

[10] The two documents referred to above were necessitated by the taxpayer in disputing issues for determination on the last hour. The dispute, amongst others revolved around the authenticity of the taxpayer's documents. It did not end with the conclusion of the hearing, it continued to the extent that further and or supplementary closing heads at the instance of the taxpayer were filed by both parties an exercise that prolonged the finalisation of the hearing. There are also other causes that delayed the hearing of the appeal which extended to the delivery of the judgment. It is not necessary to deal with them in the judgment.

[11] The gist of the taxpayer's criticism was the alleged inconsistency on the part of SARS. It was submitted that SARS had on other occasions accepted the information from certain documents which were not authenticated having been satisfied by the taxpayer's explanation. The taxpayer complains that SARS changed its stance by demanding that the documents be authenticated during the hearing. For example, the taxpayer expected SARS to accept the information from General Ledgers (GLs) without supporting source documents as long as the bookkeeper and or an accountant who was not part of the preparation thereof says so.

[12] According to the taxpayer the parties had already agreed during the pre-trial that the documents are what they purport to be, unless a party objects to a document. As said above, SARS prior to the commencement of the trial, objected against the unsupported general ledgers, reconciliation and documents allegedly containing the loan accounts to be dealt with in the analysis of the evidence below. During the course of the hearing, SARS again objected to certain documents, including the GLs supposedly reflecting the loan accounts between the taxpayer and his brothers and brother-in-law as well as other entities. The loan accounts are one of the key issues of disagreement.

[13] In *Principles of Evidence* (Fourth Edition)[2] it is said that there are two basic rules governing the admissibility of documents, namely: the original document must be produced; and the document must be authenticated. The learned authors state the following in respect of the first requirement, namely that the original document must be produced: "However, originality would appear to correspond with the original source of recording." "The requirement that a document be authenticated, generally means no more than tendering **evidence of authorship or possession** depending on the purpose for which it is tendered" Counsel for the taxpayer referred to *SARS v Pretoria East Motors (Pty) Ltd*[3] (Pretoria East) at paragraph 14 where the following is stated:

> "Everything will depend upon the nature of the dispute between the parties as defined by the grounds of assessment and the grounds of appeal. Where, for example, the SARS auditor has based an assessment upon the taxpayer's accounts and records, but has misconstrued them, then it is sufficient for the taxpayer to explain the nature of the misconception, point out the flaws in the analysis and explain how those records and accounts should be properly understood. **That can be done by a witness such as Dr Gold who, as a qualified chartered accountant, is capable of giving such an explanation after a full and proper consideration of the accounts.** 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 leading up to the appeal and the appeal itself to indicate clearly what matters and which documents are in dispute so that the taxpayer knows what is needed to present its case."

(Emphasis added.)

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2 P J Schwikkard and S E van der Merwe at p 432 (para 20.3),

3 *SARS v Pretoria East Motors (Pty) Ltd* (291/12) [2014] ZASCA 91 (12 June 2014).

Pretoria East is distinguishable from the present matter. The taxpayer is not in a position to call direct evidence and neither the taxpayer's accountant, Mr Ronny who testified authored the documents. Mr Ronny first got involved with the affairs of the taxpayer in 2011, after the fact. Also in issue were documents that emanated from the tax enquiry that was successfully expunged by the Tax court per the learned Judge Opperman, in another enquiry involving the parties. I allowed SARS to utilise the documents during cross examination because they were discovered in this appeal. It is trite that Tax Court places itself in the shoes of the functionary.

**Alleged abandonment**

[14] The taxpayer alleges that SARS had abandoned certain claims. The taxpayer's contention is that, because SARS initially omitted certain amounts in its statement of grounds of assessment in terms of Rule 31 of the Income Tax Court Rules., such amounts were abandoned. In *Calson Investments Shareblock v C: SARS*,[4] the court confirmed the compulsory nature of taxation and that SARS may not waive / abandon any tax.

[15] The taxpayer submitted that there is no longer a dispute in relation to Capex. I do not want to dwell more on this as the analysis of evidence below will show that the dispute is extant. Furthermore, the taxpayer complained about SARS's evidential value. SARS is blamed for not making available or making means for Ms Calls to testify. Ms Calls previously worked as an auditor for SARS and had initiated the investigation into the taxpayer's affairs. According to the taxpayer she had agreed to abandon some of the assessments. She resigned from SARS's employment and emigrated to New Zealand. It is not in dispute that Covid-19 restrictions did not permit her to travel and that the taxpayer expected SARS to arrange for her evidence to be heard virtually. Ms Calls' evidence was intended to assist the taxpayer's case. There is nothing in law that prohibited the taxpayer to subpoena her. It emerged that that the taxpayer earlier desired to subpoena her, but the taxpayer failed to fulfil his desire. Mr Ale, the only witness who testified on behalf of SARS based his testimony on the documents prepared by her as they were working together. The taxpayer could not identify anything from Mr Ale's testimony confirming the basis which Ms Calls had agreed to the abandonment of certain assessments.

[16] Another issue pertains to the submissions made to the National Audit Committee ("NAC"). It is the taxpayer's case that the NAC was prepared to settle in favour of the taxpayer. The Alternative Dispute Resolution (ADR) meeting was held on 6 March 2015. The ADR report formed part of the application to amend and was discovered by the taxpayer. Paragraph 5.1 of the ADR report states:

> "The dispute could not be resolved and all the issues remain in dispute".

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[4] 2001 (3) SA 201 (W) at 231F-J.

Paragraph 8.1 of the ADR report states:

> "It has been agreed that no further ADR meetings will take place. The SARS auditor and the appellant auditor will however meet in order to sort out calculation differences. The appellant was given two weeks from the date of the ADR meeting to furnish the requested information...".

[17] The recommendations made to the NAC were considered by the committee on 8 July 2015 and 15 July 2015.The following is the decision of the NAC:

> "3.4 The recommendation to terminate ADR process and give the taxpayer the opportunity to give notice to proceed with appeal to the tax court is accepted by the committee".
>
> "3.5 It is not advisable to settle this matter at this stage as the company that the taxpayer is the shareholder of is currently under liquidation and subject to an insolvency enquiry?"

[18] During 2017 a subsequent meeting was held between Ms Calls and Mr Ronny, Mr M who worked with Ms Calls compiled a draft memorandum for presentation to the NAC. In the replying affidavit annexed to the application to amend, Mr O, states as follows:

> "By the end of 2017, I have already taken a view that there was no basis for SARS to concede any of the issues canvassed in the said memo. Contrary to undertakings that had already been made to the taxpayer, it became apparent that what the auditors wanted the relevant committee to concede was not supported by the evidence at hand."

[19] Rule 24 of the Tax Court Rules states:

> "(1) Where the parties are, despite all reasonable efforts, unable to resolve the dispute under rule 23, the parties may attempt to settle the matter in accordance with part F of chapter 9 of the Act;
>
> (2) A settlement under part F of chapter 9 pursuant to proceedings under this Part—
>
> (*a*) is subject to approval of the senior SARS official referred to in section 147 of the Act;
>
> (*b*) must be recorded in writing and signed by the appellant and the senior SARS official."

[20] In *International Business Machines v Commissioner for Customs and Excise*[5] the following is held:

> "Under our system, questions of interpretation of documents are matters of law, and belonging exclusively to the court. On such matters the opinions of witnesses, however eminent or highly qualified, are except in regard to words which have a special or technical meaning inadmissible."

The taxpayer does not dispute that Mr O is a Senior SARS official, thus clothed with power to approve or withdraw settlement. It is apparent from the above that SARS disapproved the concession due to lack of evidence. As earlier stated the Tax Court has jurisdiction to deal with the issues that had not been resolved during the ADR, sitting as the court of first instance by rehearing the issues. It is within the jurisdiction of this court to interpret matters of law. Applying the law into facts, SARS's case is crisp, the taxpayer's evidence is not supported, therefore there are no basis for concession. I fully agree with SARS's contentions.

**Dispute 1: Whether the taxpayer underdeclared income from mining activities**

[21] **"Gross income"** is defined in section 1 of the Income Tax Act as follows:

> " **'gross income'**, in relation to any year or period of assessment, means—
>
> (i) in the case of any resident, the total amount, in cash or otherwise, **received by** or accrued to or in favour of such resident;
>
> (ii) …
>
> during such year or period of assessment, excluding receipts or accruals of a capital nature…".

Section 102(1)(*a*) and (*f*) of the Tax Administration Act 28 of 2011 ("TAA"), provides that a taxpayer bears the burden of proving that an amount, transaction, event or item is exempt or otherwise not taxable.

[22] SARS's case is that during 2005 - 2007 the taxpayer did not pay any tax on income he earned at the time he was trading as a sole proprietor. It is common cause that that the taxpayer transferred assets to BADM in terms of section 42 of the ITA Consequently, there was no recoupment in respect of the disposal of the mining assets to BADM, as section 42 provides that the party to whom the assets are disposed will eventually be accountable for the recoupment.

[23] It transpired from evidence that BADM did not account for the assets as it received through section 42. In 2011 BADM opted for voluntary liquidation knowing that it was solvent.

5 1985 (4) SA 852 (A).

The taxpayer had already claimed a CAPEX tax deduction against the mining income for the period he was trading as a sole proprietor. Mr Ronny testified that the recoupment did not happen because BADM was not able to pay the appellant the total amount owed to him over time. There were drawdowns by the taxpayer, however, he would put back, capitalise the company when it needed cash. As said above, Mr Ronny only got involved with the affairs of the taxpayer in 2011. Furthermore, he testified that the taxpayer did not instruct him to file the 2011 returns for BADM. Thus, Mr Ronny's evidence is hearsay, therefore is inadmissible.

[24] In respect of the solvency or not of BADM at the time it went into liquidation, in the 2010 financial statements the auditors' notes read as follows:

> "The company incurred a net loss for the year ended 28th February 2010 of R83 million rand, approximately. As at that date its total liabilities exceeded its total assets by R70 million, approximately. Subsequent to year – end the company has entered into a major restructuring via the sale of major assets. The financial statements are prepared on the going concern basis, which in our judgment, is inappropriate in the circumstances."

[25] The taxpayer testified that the reason he did not submit income tax returns on time was that his documents were seized by SARS. Mr Ale for SARS testified that the accounting system of BADM was only removed by the liquidator approximately at the end of March 2012. He took over the audit of the taxpayer from Ms Calls. As earlier stated BADM never recouped the income for tax purposes. Furthermore, the taxpayer did not give explanation pertaining to the non-submission of 2011 year of assessment tax return. BADM blamed his accountants.

[26] The taxpayer did not dispute that SARS requested detailed information from time to time from the taxpayer. The taxpayer was not forthcoming with the required information. Instead in November 2010 Mr W, who was the taxpayer's accountant sent a letter to Ms Calls. In that letter he attached BADM's provisional tax returns with zero or nil taxable income. He also attached BADM's provisional returns for the 2008/01 period also reflecting zero taxable income. It became apparent that all the tax years from 2007-2011 the taxpayer declared zero taxable income. To the above Ms Calls in the letter she wrote to Mr W, dated 9 November 2010 copied to Mr Ale requested a computation in order to understand how the taxpayer arrived at zero taxable income. She further enquired as to when SARS should expect to receive the outstanding tax returns for BADM and the taxpayer.

[27] The above correspondence was ignored, almost a year later on 28 September 2011 SARS issued a letter of audit findings stating that reliance for audit was based on value-added ("VAT") VAT 201 returns. In this letter the taxpayer was reminded of various requests by SARS and numerous emails requesting extension of time. In the 2005 revised estimated assessment reflected a taxable income of R78 010 387.00. The estimation was based on VAT returns submitted by BADM. In the assessment the additional tax in terms of section 76 of ITA was imposed.

[28] From the above it is apparent that SARS had no other information, it had to utilise what it had. The taxpayer throughout his testimony blamed his ever changing book keepers, staff and accountants and of course SARS. The taxpayer could not advance plausible reasons for his omissions and issues which are supposed to be first-hand knowledge on his part. Thus, his evidence is rejected due to lack of credibility.

**Dispute 2: taxpayer underdeclared other income (non-mining income) for the relevant period**

[29] The taxpayer testified that, some of the amounts falling under non- mining income were loan repayments by third parties. The first amount characterised by the taxpayer as a loan repayment is R3,7 million the taxpayer and Mr EO who is the taxpayer's brother-in-law testified that the amount of R3,7 million was a loan repayment paid to him through National Diamond (NDM). NDM is a diamond agency assisting miners to trade. In the taxpayer's objection to the assessment by SARS amongst others, it is stated that the taxpayer and Mr EO regularly lent money to each other. Annexure marked E one of the record of loans to the objection reflects that Mr EO owed the taxpayer an amount of R2 352 470.24. He denied owing the amount of R2 352 470.24 whilst maintaining that he owed the taxpayer R3,7 million. According to the taxpayer they used to advance loans to one another. Mr EO denied taxpayer's version. He was adamant that he never advanced monies to the taxpayer. When it was put to him that the entry at Annexure E that as at 1 March 2005 he owed the taxpayer R1,619.454., he was evasive Although he admitted having utilised the services of one bookkeeper, one Mr. Rein he stated that he never saw any of his invoices and neither had record of his expenses in particular relating to the taxpayer's business He conceded that he never kept a loan book.

[30] All the questions regarding how he kept his own financial documents in order to track loans from the taxpayer and payment for machinery were replete with *"I don't know".* He testified that he was paying rent for the use of taxpayer's land, machinery and use of the taxpayer's mining permit. The amount was calculated at the rate of 15% of the diamond sold from Site E, the taxpayer's land owned by Guilford Limited Sydney, the taxpayer's farm. His testimony that he stopped mining in 2006 when the taxpayer took back his equipment made it clear that the amount he paid the taxpayer was income in the hands of the taxpayer.

[31] All the questions regarding how he kept his own financial documents in order to track loans from the taxpayer and payment for machinery were replete with *"I don't know".* His testimony that he stopped mining in 2006 when the taxpayer took back his equipment made it clear that he was paying rent for the use of taxpayer's land, machinery and use of mining permit. The amount was calculated at the rate of 15% of the diamond sold from Site E, the taxpayer's land owned by Guilford Limited Sydney, the taxpayer's farm.

[32] The question that the taxpayer's financial statements did not reflect any loans to him was met with *"I don't know".* In fact, all the questions regarding how he kept his own financial documents in order to track loans from the taxpayer, payment for machinery were replete with *"I don't know".* From the above I find that Mr EO is not a reliable witness. His evidence falls to be rejected.

[33] There are other alleged loan repayments that were from the taxpayer's brothers. The taxpayer testified that in the process of running his business he assisted his brothers as he did with his brother-in-law, Mr EO. The assistance consisted of provision of equipment, use of the land and mining permits. He also financed them for fuel and loans for wages and expenses for their respective businesses. They entered into a verbal agreement of 60/40 profit distribution in return for his assistance. At times it would change to 80/20 split.

[34] Further, the taxpayer's brothers, Mr AB and CD testified about the alleged loans made by the taxpayer to them. The taxpayer testified that they also lent him money. Their evidence was that they never advanced any loans to the taxpayer. Furthermore, their evidence about the loans from the taxpayer to them is contradicted by the annexures to the objection, which reflect that in many instances the amounts were due by the taxpayer to his brothers. Again, this proves that the taxpayer was earning income from rentals as is the case with Mr EO. Taxpayer's evidence that his brothers and his brother-in-law and EO falls to be rejected, because his testimony is contracted in several respects by the documents unsupported with authentic evidence.

[35] From 2005 to the middle of 2007, Business A earned income from the sale of diamonds; sale of used oil from the mining machines; sale of sand at a smaller scale. SARS attributed the income tax from those sales to him personally. According to the taxpayer his bookkeepers entered the amounts in the books as loan repayment. He stated that he could not comment on the treatment of those transactions as his late accountant Mr. U worked on his loan accounts. In an attempt to support the admission of Mr U's purported affidavit annexing invoice Mr Ronny deposed to the same affidavit and also commissioned it. It is trite law the deponent to the affidavit must also have knowledge of facts, even if the witness is deceased for hearsay evidence to be admissible. Mr Ronny was not the taxpayer's accountant

when Mr U was the bookkeeper, they never and neither the invoices were handed over to him by the late Mr U. I have already ruled on the evidence of Mr Ronny.

[36] Furthermore, there are alleged loan accounts between Business B and the taxpayer. Basfour 2012 is the taxpayer's lodge, known as Business B Lodge, established in his game farm. The amounts received by the taxpayer in 2009 for 2010 tax year from Basfour 2012 are also in dispute. The amounts received were allegedly for his loan account. His testimony is that he had loaned Business B funds to build the lodge, building of the hall and construction of restaurants amongst others. Taxpayer's accountant Mr JAC testified about Business B. He conceded that the documents which the taxpayer relied upon for the alleged loans between the taxpayer and Business B, were created afterwards. These were only created in 2015/2016, long after the alleged loans occurred.

[37] The taxpayer's accountant Mr JAC testified about Business B one of the entities of the taxpayer. He conceded that the documents which the taxpayer relied upon for the alleged loans between the taxpayer and Business B, were created afterwards. These were only created in 2015 / 2016, long after the alleged loans occurred. Mr JAC further admitted that though Business B had an accounting system, that system was not used to create the documents relied on by the taxpayer rather the bank statements were used, however, these bank statements were not discovered or introduced as evidence.

[38] There were several discrepancies pointed out to Mr JAC during cross-examination to which he could not answer. These discrepancies pertain to the alleged loans between the taxpayer and Business B. Throughout his testimony the taxpayer, was very evasive about the accounting system of Business B. He shifted the blame to his auditors, accountants, bookkeepers and office workers. He also did not provide any explanation why the returns were not submitted timeously, but kept on blaming his accountants.

[39] Regarding amounts received by the taxpayer into his personal account through BADM, he testified that on 15 January 2011 he transferred his shares from BADM to one Mr D. Although he testified that he transferred a company to Mr D without assets and liabilities, it is evident that BADM went into voluntary liquidation in 2012. At that stage BADM was very solvent. This information is found in the special resolution reading *"notice of special resolution to wind a solvent company",* signed by the taxpayer himself. For example, to prove that BADM was solvent the following transactions took place; on 29 August 2011 he signed a sale of assets from BADM to various companies where he is a shareholder.

[40] The other reason advanced by the taxpayer as to why the amounts received into his bank accounts do not constitute gross income, is that he received those amounts on behalf of BADM. These amounts were received, mostly in the 2011 year of assessment the year in which BADM did not submit a tax return and was consequently not taxed on any amount. The amounts in issue relate to third party payments by Blue Dust and C&M, connected entities to the taxpayer.

[41] In 2011 BADM sold assets worth R55 million to Business D Developments. The taxpayer is a director of Business D. Although there was a vitriolic objection under cross examination by the taxpayer's Counsel, because Business D enquiry was set aside by the court as above. This information is contained in the financial statements of Business D discovered in this appeal under the subheading purchases from related parties. The taxpayer first pretended that he did not own shares in Business D. He testified that he was a shareholder without a value, nevertheless he later admitted being a 20% shareholder. In 2011 BADM also disposed of some assets to Business C Development. The taxpayer had 20% shareholding in Business C.

[42] On 28 October 2011 Mr. W on behalf of the taxpayer responded by email to Ms. Calls who had asked the taxpayer about outstanding returns and to submit mitigating factors. Instead, he seemingly addressed the 2005 tax assessment issued by SARS to the taxpayer based on the VAT 201 return instead of addressing why the outstanding tax returns were not submitted. The taxpayer's declaration is that for the 2005 tax year, his computation leaves the taxpayer without taxable income. The taxpayer's financial statements for 2005 - 2007 tax years were not signed by the taxpayer. In his evidence in chief, he did not offer explanation for the omissions. The taxpayer had assessed loss of R5,6 million carried forward from 2004. In the 2004 income tax return the amount of R129 863 621.00. was declared as loans made to third parties.

[43] When the taxpayer eventually submitted the tax returns for 2005-2007 tax periods, he sought a deduction of expenditure from income that was declared as mining income. SARS assessed the income from the sale of sand and oil as non-mining income. According to the taxpayer the sand came from the washing of pans when sifting and washing out diamonds, that separate the gravel of the lighter and heavy articles. The sand would be sold as it was ideal for use in the construction industry. Same goes with the oil drained from mining machinery for reuse. SARS assessed income from both streams as non-mining income, therefore forming part of the gross income. The taxpayer later conceded that oil drainage was not a mining product, therefore income from the sale of oil is not mining income. In the result, it stands to be included in the gross income of the taxpayer and no mining expenditure could be deducted from it. On the same reasons that drained oil is not mining product the sand is also not.

[44] The taxpayer also testified in respect of the refund guarantee from the Department of Minerals and Energy for the mine rehabilitation. SARS assessed the amount of R2 million as income, taxable in the hands of the taxpayer. Taxpayer‘s evidence was that that the guarantee was a personal one and not transferrable to BADM. All the assets that were transferred by the taxpayer, trading as Business A to BADM were personal assets belonging to the taxpayer. It stands to reason that the guarantee would also have been transferred to BADM.

**Dispute 3: Whether the taxpayer was entitled to claim CAPEX**

[45] Capital expenditure on the articulated dump truck VD6X6 - in the amount of R3 814 million was claimed in 2005 tax year. SARS's submission is that CAPEX could had been claimed in 2006 tax year because the invoice was issued in May 2005, after the end of 2005 tax year meaning that it fell to be taxed in the 2006 tax year. Mr C from Bell the sellers of the dump truck testified there was an agreement with the taxpayer that the delivery would take place in 2005 year whereas the invoice would be issued later. It is trite that expenditure is claimed during the year it is expended. The taxpayer did not expend money for 2005 tax year. This evidence cannot assist the taxpayer.

**Dispute 4: Value-added tax (VAT)**

[46] The taxable supplies for the 2005 period: amount to R385 million, aggregated returns for twelve months, on assessment issued by SARS. Taxpayer's taxable supplies: amount to R384 million SARS adjusted about R527000. For 2006 period taxable supplies by the taxpayer: amounted to R404 million SARS calculated taxable supplies at R465 million, and made the adjustment in the amount of: R60 million by using the amounts from the bank statements, on cash basis methodology. For 2007 in respect of March to August 2006 periods SARS concluded that the correct amount is R187million. All the amounts were not declared by the taxpayer. SARS: made adjustment of R7,8 million for 2008 – 2011 periods. It is common cause that the taxpayer had declared nil taxable supplies as he had ceased trading by August 2006. The VAT portion in respect of these amounts would then constitute the output VAT payable by the taxpayer.

[47] The taxpayer contended that SARS's calculation of the taxpayer's taxable value is incorrect because SARS calculated the taxable supplies on the receipt basis whereas the appellant was registered on the invoice basis. The taxpayer further contended that the disputed amounts are loan repayments hence he did not disclose them in his VAT returns. The evidence in relation to loans canvassed under income tax assessment is the same for VAT purposes. The proven evidence is that the taxpayer failed to submit income tax and VAT returns as well as to provide the necessary information.

[48] It would therefore make no difference whether the invoice- or receipt basis has been used by SARS. It would only have made a difference if amounts were included by the taxpayer when invoices were issued, and the payments received for those invoices were only received in later tax periods. In the present appeal the disputed amounts were not included in taxable supplies at all.

**Dispute 5: Whether SARS was justified to impose an understatement penalty of 200%**

[49] The 2005 revised estimated assessment reflected a taxable income of R78 010 387.00 The estimation was based on VAT returns later submitted by BADM. When the assessment was issued the additional tax in terms of section 76 of ITA was imposed. In terms of section 76(1)(*a*) of ITA for the relevant years of assessment, a taxpayer is obliged to pay additional tax, in an amount equal to twice the tax chargeable in respect of the taxpayer's taxable income for the relevant year of assessment, if the taxpayer defaults in rendering a return in respect of any year of assessment.

[50] The taxpayer was afforded opportunity to submit mitigating factors against the imposition of 200% Instead, as said above on 28 October 2011 submitted claims for losses and unsigned income tax returns by the taxpayer. SARS classified the taxpayer's behaviour as intentional tax evasion and the conduct of the taxpayer was regarded as "obstructive and/or repeat case". The taxpayer contended that SARS had not given any facts in the letter of audit findings as to the reason why SARS raised an understatement penalty (USP) of 200%. SARS imposed a USP in terms of sections 221–223 of the TAA. The relevant provisions of the TAA "Understatement" is defined in section 221 to mean "any prejudice" to SARS or the fiscus **as a result** of *inter alia* failure to submit a return. an omission to file a return. an incorrect statement in a return. Section 222 of the TAA states: "(1) In the event of an 'understatement' by a taxpayer, the taxpayer must. pay, in addition to the 'tax' payable for the relevant tax period, the understatement penalty determined under subsection (2) **unless the 'understatement' results from a bona fide inadvertent error**." (Emphasis added.) It is clear that taxpayer did not make error of any kind, let alone inadvertent error. He was obstructive as he carefully planned evading paying tax. SARS was correct to impose the 200% USP.

**Dispute 6: Penalties in terms of the Fourth Schedule**

[51] In terms of paragraph 20A(1) of the Fourth Schedule to the ITA, SARS must impose a 20% penalty for the late filing of an estimate of taxable income. Paragraph 20A(2) of the Fourth Schedule to the ITA stated that the Commissioner may:

> "if he is satisfied that the provisional taxpayer's failure to submit such an estimate timeously was not due to an intent to evade or postpone the payment of provisional tax or normal tax, remit the whole or any part of the additional tax imposed under subparagraph (1)".

The overwhelming evidence points to the taxpayer's unjustified failure to submit timeous estimates of his income.

**Dispute 7: Section 89*quat* interest**

[52] Section 89*quat*(3) of the Income Tax Act at the relevant time (for the 2010 year of assessment) stated as follows:

> "(3) Where the Commissioner having regard to the circumstances of the case, is satisfied that any amount has been included in the taxpayer's taxable income or that any deduction, allowance, disregarding or exclusion claimed by the taxpayer has not been allowed, and the taxpayer has on reasonable grounds contended that such amount should not have been included or that such deduction allowance, disregarding or exclusion should have been allowed, the Commissioner may, subject to the provisions of section 103(6) direct that…"

[53] The interest imposed in terms of section 89*quat* of the ITA compensates the fiscus for the loss of interest. The taxpayer's failure to under declare and failure to pay provisional tax is prejudicial to SARS. The taxpayer did not advance any reasonable grounds why the section 89*quat* interest should not be imposed. The taxpayer's attitude is that he is not liable for any tax at all because he employed accountants and auditors thus there is nothing further to advance.

**Dispute 8: Prescription**

[54] The taxpayer contended that the VAT assessments for the periods 02/2006 and 02/2007 had become prescribed. Section 99(1)(*b*) of the TAA states that in the case of a self-assessment, an assessment may not be made five (5) years after the date of the original assessment. Section 99(2)(*b*), states that the five-year period is not applicable if the fact that the full amount was not assessed, was due to: (i) fraud; (ii) intentional or negligent misrepresentation; (iii) intentional or negligent non-disclosure of material facts; or (iv) the failure to submit a return.

[55] All the amounts in dispute relate to monies received by the taxpayer which he contends were repayments of loans or loans advanced to him by his brothers and his brother-in-law. Findings that the abovementioned amounts were not loan repayments and neither loans made to the taxpayer. Therefore, the amounts are subject to VAT. It also follows that the taxpayer intentionally failed to submit VAT returns. Consequently, there was either an intentional or negligent misrepresentation or non-disclosure of material facts. It is already found that the abovementioned amounts were not loan repayments or loans made to the taxpayer therefore the amounts are subject to VAT. It also follows that the taxpayer intentionally failed to submit VAT returns. Consequently, there was either an intentional misrepresentation and non-

disclosure of material facts therefore the assessments for 2/2006 and 2/2007 have not prescribed.

**Dispute 9: Costs**

[56] Section 130 of the TAA, amongst others provides that the Tax Court may, in dealing with an appeal, and on application by an aggrieved party, grant an order for costs in favour of the party, if –

> "the Appellant's grounds of appeal are held to be unreasonable".

[57] I am wary not to repeat the analysis of evidence as above. The taxpayer proceeded with the appeal on the grounds that SARS 's methodology was not sound without proof for same. For example, he challenged SARS without evidence including and not limited to submission of information bar the source documents. In the result the taxpayer's grounds of appeal are unreasonable. Thus SARS is entitled to costs.

**Conclusion**

[58] In conclusion I find that SARS did the best it could with the limited information in its possession. The taxpayer had a clear plan of evading tax, amongst others disguising income for non-existent loan accounts without supporting documents. The taxpayer further elected not to make a full disclosure of its activities, the classic example being the treatment of his tax affairs in BADM SARS had no other option, it had to utilise and make assumptions based on the minimal information. SARS methodology is not expected to be precise under the circumstances, as long it satisfies the objective test. The methodology used by SARS is reasonable under the circumstances.

[59] In the result I grant the following order:

**Order**

1. The appeal is dismissed;
2. The assessments issued by SARS for 2005 – 2009, after the settlement agreement was entered into during November 2020, and the 2010 and 2011 assessments, are hereby confirmed;
3. The understatement penalty of 200% is hereby confirmed;
4. The 20% penalty in terms of paragraph 20A of the Fourth Schedule to the Income Tax Act is hereby confirmed;
5. The s89*quat* interest imposed by SARS is hereby confirmed;

6. The appellant is ordered to pay the respondent's costs, including the costs of employing two counsel, where applicable.

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**N.P. MALI**

**JUDGE OF THE HIGH COURT**

| | |
|---|---|
| Ms N JIYANE | Accountant member |
| Ms T MTOMBENI | Commercial member |
| **Date of hearing from:** | 31 May to 1 June 2021; |
| | 30 August to 17 September 2021; |
| | 27 September to 1 October 2021; |
| | 17 to 19 January 2022. |
| **Heads of argument from:** | 1 February 2022; and |
| | 16 May 2022 |
| **Date of judgment:** | 3 July 2023 |