REPUBLIC OF SOUTH AFRICA

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

Case Number: IT 77151

(1)	REPORTABLE: **YES** / ~~NO~~
(2)	OF INTEREST TO OTHER JUDGES: **YES** / ~~NO~~
(3)	REVISED.

10 April 2026
DATE

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SIGNATURE

In the matter between:

TAXPAYER LE (PTY) LTD **APPELLANT**

and

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

J U D G M E N T

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on CaseLines. The date of hand down shall be deemed to be 10 April 2026.

SIWENDU J

Introduction

[1] This appeal is brought in terms of section 107 of the Tax Administration Act 28 of 2011[1] (the TAA) against additional income tax assessments raised by the Commissioner for the South African Revenue Service[2] (SARS) against the appellant, Taxpayer LE (Pty) Ltd (Taxpayer LE), for the 2013 to 2018 assessment years. The tax appeal was set down for hearing from 6 to 10 May 2024.

[2] Although Taxpayer LE instituted the appeal, it proceeded by default, as Taxpayer LE closed its case without leading evidence. The reasons for this development appear later in this judgement.[3] SARS now seeks confirmation of its assessments in terms of section 129(2)(*a*) of the TAA.

[3] The appeal arises from SARS's investigation into payments and financial flows connected with three locomotive supply agreements concluded between Taxpayer LE and Marshall SOC Ltd (Marshall). SARS contends that the taxpayer overstated its costs of sales, channelled funds through related entities, and, amongst others, claimed impermissible tax deductions not incurred in the production of income envisaged under the Income Tax Act 58 of 1962 (the ITA). Consequently, SARS raised additional assessments and imposed penalties for the understatement of taxes due.

[4] Taxpayer LE disputes the factual and legal basis for the additional tax assessments. It contends the disallowed deductions and expenses were legitimate business expenditure incurred in the production of income and therefore deductible under the ITA. It further challenges the lawfulness and reasonableness of the additional assessments.

[5] The parties could not reach agreement on the common cause facts.[4] Nevertheless, they were *ad idem* that the relevant facts appear from the grounds of assessment and opposition to the appeal, read with the statement of the grounds of appeal and the reply to the grounds of appeal.

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1 Section 107(1) of the TAA states that: "After delivery of the notice of the decision referred to in section 106 (4), a taxpayer objecting to an assessment or 'decision' may appeal against the assessment or 'decision' to the tax board or tax court in the manner, under the terms and within the period prescribed in this Act and the 'rules' ."

2 The Commissioner is appointed in terms of section 6 of the South African Revenue Service Act 34 of 1997 (the SARS Act).

3 Rule 44(7) of the Rules Prescribing Procedures for Lodging an Objection and Appeal, the Procedures for Alternative Dispute Resolution, the Conduct and Hearing of Appeals, Application on Notice before a Tax Court and Transitional Rules; GN R3146 in *GG* 48188 of 10 March 2023 (the Tax Court Rules) read with section 129(2) of the TAA.

4 Rule 38(2)(*a*) of the Tax Court Rules.

Background

Taxpayer LE's corporate structure

[6] Taxpayer LE is a private company that was incorporated in South Africa on 18 July 2012. Its registered address is Morningside Extension, Sandton, Gauteng. It is registered as a taxpayer under the ITA and as a vendor for value-added tax purposes. Its financial year-end is 31 December.

[7] Taxpayer LE forms part of the Head Group, an international manufacturer and supplier of rail transport equipment headquartered in the People's Republic of China. Its ultimate holding entity is Head Group Corporation Limited (Head Group), a Chinese state-owned enterprise listed on the Shanghai and Hong Kong stock exchanges.

[8] Entities forming part of the group, and that are relevant to this appeal include Company Kozi Limited (Company Kozi), formerly Kozi-E Company Ltd, Company Zulu Limited (Company Zulu), and Company SZ(Pty) Ltd (Company SZ). Company SZ held 70% of the shares in Taxpayer LE, while the remaining 30% were held by the CBM (Pty) Ltd (CBM).

[9] Several individuals associated with these entities served as directors of Taxpayer LE, notably, Mr WP and Mr MZ. South African directors appointed as representatives of the minority shareholder included Mr Champion and Ms Proverb.

[10] Mr MZ served as Company Kozi's director of overseas business. He was authorised by a power of attorney signed by Mr Zandile, Executive Director – President of Kozi-E Company Ltd to execute:

> "all documents related to the tender submission, acceptance of award and other necessary matters regarding with THE SUPPLY OF 599 NEW DUAL-VOLTAGE ELECTRIC LOCOMOTIVES FOR THE GENERAL FREIGHT BUSINESS FOR THE TFR (RFP No.: TFRAC - HO - 8608)."

Mr MZ Taxpayer LE's shareholders' agreement on behalf of Company Kozi.

Marshall locomotive contracts

[11] Taxpayer LE was established for the purpose of participating in Marshall's locomotive procurement programme. Between 2012 and 2014, Marshall awarded three locomotive supply contracts to the company.

[12] The first contract, concluded on 22 October 2012, concerned the supply of 95 electric locomotives at a contract price of R28.282 million per locomotive, including spares and equipment, the total value of the contract amounted to approximately R2.74 billion.

[13] The second contract, concluded on 17 March 2014, concerned the supply of 100 Class 21E locomotives at a price of R43.8 million per locomotive, resulting in a total contract value of approximately R4.4 billion.

[14] The third contract formed part of a broader procurement programme for 1,064 locomotives sought by Marshall. Taxpayer LE was contracted to supply 359 locomotives at a price of R50.48 million per locomotive, with a total contract value of approximately R18.1 billion. The contract for the supply of the 359 locomotives was on confinement, without following a tender process.

[15] Although Taxpayer LE was the contracting party with Marshall, the locomotives were supplied through a series of sub-contracts concluded with other entities within the Head Group, including Company Kozi and Company Zulu.

[16] The sub-contract agreements recorded that Taxpayer LE lacked the manufacturing capacity to produce the locomotives locally and would procure them from the Chinese group entities for delivery to Marshall.

SARS investigation

[17] On 30 April 2020 the SARB placed a block on funds held in several bank accounts associated with Taxpayer LE. The blocked funds, held with CCB SA, BoC and STD Bank of South Africa Ltd, amounted to approximately R4.3 billion. The block followed forensic investigations conducted by ENSafrica Forensics into suspected breaches of exchange-control regulations. SARS became aware of the block shortly thereafter.

[18] Acting in terms of sections 40 and 42 of the TAA, SARS initiated an investigation into the tax affairs of Taxpayer LE through its Illicit Economy Unit (IEU). In the course of the investigation, SARS issued requests for relevant material under section 46 of the TAA to a number of entities, including Marshall, the SARB, various commercial banks and several auditing firms. SARS also obtained information through an Exchange of Information (EOI) request made in terms of Article 24 of the Double Taxation Agreement (DTA) between the Government of the Republic of South Africa and the Hong Kong Special Administrative Region of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.

[19] Through these investigations SARS identified financial outflows involving several entities, including RG Ltd (RG), TQ Group Ltd (TQ), TJJ and CGT. SARS alleges that the entities were related to Mr E and were involved in receiving payments linked to the locomotive contracts as "kickbacks" and part of the "grand corruption of Marshall".

Additional tax assessment

[20] Following the investigation, SARS found that Taxpayer LE had overstated its costs of sales and channelled substantial funds through Company Zulu to these related entities to finance payments which it considered to be “kickbacks”.

[21] SARS concluded that Taxpayer LE had overstated its costs of sales by approximately R3.05 billion and had claimed deductions that were not incurred in the production of income.

[22] SARS also disallowed an interest deduction of approximately R225 million allegedly paid to Company Zulu as a repayment of a loan and disallowed several consultancy and management fees paid to local entities including PI (Pty) Ltd, SI Investments (Pty) Ltd (SI) and JB (Pty) Ltd (JB).

[23] For the above reason, SARS raised additional income tax assessments for the 2013 to 2018 assessment years. It also imposed 200% penalties for the understatement of income and provisional tax on the basis that Taxpayer LE’s conduct constituted intentional tax evasion.

Objection and appeal

[24] Taxpayer LE objected to the additional assessments on 1 September 2021. SARS partially allowed the objection and issued a revised assessment on 29 March 2022. Dissatisfied with the partial allowance, Taxpayer LE lodged this appeal to the tax court on 13 April 2022.

[25] Taxpayer LE disputes the factual basis of SARS’s findings and contends that:

(a) The costs of sales were legitimate expenses incurred in the production of income.

(b) The consultancy and management fees were genuine business expenses.

(c) Challenges the lawfulness of the additional assessment based on the failure to meet the jurisdictional requirements to raise the assessment based on prescription, hence the unlawfulness.

(d) The interest paid to Company Zulu constituted a deductible expense; and

(e) That the additional assessments were unreasonable.

[26] Before dealing with the merits of the appeal several preliminary questions reserved for the President of the Tax Court to decide[5] arose regarding (a) the duty to begin, (b) the recusal application, (c) whether the tax appeal could continue in the absence of the taxpayer, and (d) the admissibility of SARS documents.

Duty to begin

[27] At the commencement of the hearing, a dispute arose concerning which party bore the duty to begin. Although Taxpayer LE accepted that it has the onus in respect of the disputed issues, it submitted that SARS bore the duty to begin because the whole tax dispute is underpinned by the '20% theory' of kickbacks alleged to have been paid. It needs mentioning that an application to determine on whom the duty to begin lies was contemplated from the pre-trial hearing held on 5 February 2024, but Taxpayer LE brought the substantive application to determine the issue, only on the morning of the hearing.

[28] Taxpayer LE's complaint is that the additional assessments were issued outside the three-year period contemplated in section 99(1) of the TAA. Hence, SARS was required to establish the jurisdictional facts contemplated in section 99(2), namely that the failure to assess the full amount of tax was due to fraud, misrepresentation or non-disclosure of material facts. This preliminary question called for SARS to lead evidence first. Taxpayer LE contended in addition that because SARS relied on the exceptions contained in section 99(2) referred to herein, to reopen earlier assessments, SARS should bear the duty to begin to establish the existence of those jurisdictional facts.

[29] The mainstay of the submission was that there exists a lacuna in the Tax Court Rules regarding the duty to begin. Reliance was placed on rule 42 of the Tax Court Rules, to contend that rule 42 permits a recourse to the Uniform Rules of the High Court where the Tax Court Rules are silent on a procedural issue. Accordingly, it was submitted the Tax Court has recourse to rule 39(11), to determine the order in which parties should begin.

[30] SARS opposed the submission and argued that the question of the duty to begin is expressly regulated by the TAA and the Tax Court Rules. It submitted that the statutory scheme governing tax appeals clearly places both the burden of proof and the duty to begin on the taxpayer, subject only to limited exceptions, which I deal with below. The point made by SARS, was that bearing in mind that the tax court is a creature of statute and does not enjoy the inherent jurisdiction of the high court, the dispute must be determined within the framework of the TAA and the Tax Court Rules.

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[5] Section 118(3) of the TAA reads: "If an appeal to the tax court involves a matter of law only or is an interlocutory application or application in a procedural matter under the 'rules', the president of the court sitting alone must decide the appeal."

[31] I ruled that Taxpayer LE bears the duty to begin and reserved the reasons for the final judgment. The reasons for the ruling can best be understood against the relevant statutory framework, which commences with section 92 of the TAA. Section 92 states that:

> "If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the *fiscus*, SARS must make an additional assessment to correct the prejudice."

Accordingly, SARS has the power to issue additional assessments where it is satisfied that an assessment does not correctly reflect the application of a tax act.

[32] However, section 99(1)(*a*) of the TAA imposes a three-year limitation period for issuing an assessment after the date of an original assessment, the limitation is subject to section 99(2) which states that:

> "Subsection (1) does not apply to the extent that—
>
> (*a*) in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to—
>
> (i) fraud;
>
> (ii) misrepresentation; or
>
> (iii) non-disclosure of material facts."

[33] The distinction between the burden of proof and the duty to begin is well recognised. The burden of proof concerns the obligation to establish a fact in issue, while the duty to begin concerns the procedural order in which evidence is led. In tax litigation, these concepts generally coincide. Mr L suggested there may be many burdens of proof within a single case.

[34] However, the burden of proof in tax appeals is governed by section 102 of the TAA which provides that a taxpayer bears the burden of proving that an amount is deductible, that an item is not taxable, or that an assessment is otherwise incorrect. Because the taxpayer bears the burden of proving that an assessment is incorrect, the taxpayer ordinarily bears the duty to begin. This principle was affirmed by the Constitutional Court in *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another*,[6] which confirmed that the tax appeal system is structured on the basis that an assessment stands until the taxpayer proves it wrong. The Supreme Court of Appeal reiterated this position in *Wingate-Pearse v Commissioner, South African Revenue Service*,[7] holding that the burden rests on the taxpayer to disprove an assessment issued by SARS.

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6 *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another* [2000] ZACC 21; 2001 (1) SA 1109 (CC).

7 *Wingate-Pearse v Commissioner, South African Revenue Service* [2016] ZASCA 109; 2017 (1) SA 542 (SCA).

[35] As correctly submitted by SARS, section 102(2) creates a limited exception to this rule, by placing the burden of proof on SARS, and it reads as follows:

> "The burden of proving whether an estimate under section 95 is reasonable or the facts on which SARS based the imposition of an understatement penalty under Chapter 16, is upon SARS."

[36] Against the above provisions, rule 44(1) of the Tax Court Rules is apposite as it provides that:

> "At the hearing of the appeal, the proceedings are commenced by the appellant unless—
>
> (*a*) the only issue in dispute is whether an estimate under section 95 of the Act on which the disputed assessment is based, is reasonable or the facts upon which an understatement penalty is imposed by SARS under section 222(1); or
>
> (*b*) SARS takes a point in *limine*."

Therefore, the scheme created by section 102 of the TAA and rule 44 of the Tax Court Rules reflects the long-established principle that the appellant begins the proceedings, subject only to the two stated exceptions. Even if the characterisation of SARS's case as '20% theory', based on the alleged payments of approximately 20% to 21% of the contract value of the locomotive contracts to finance improper payments through intermediary entities were accepted, it does not alter the procedural position.

[37] The central question remains whether the deductions claimed by Taxpayer LE were properly incurred in the production of income and were therefore deductible. These issues fall squarely within the knowledge of Taxpayer LE and are matters for which it, (ie Taxpayer LE) as the taxpayer and the appellant bears the burden of proof in terms of s 102(1) of the TAA.

[38] None of the exceptions contemplated in rule 44(1) applies in the present case. While the reasonableness of estimated assessments and the imposition of understatement penalties (the exceptions) are also in issue, those questions are not the starting point. The statutory allocation of the burden of proof in section 102(1), is not altered by the allegation of fraud, misrepresentation or non-disclosure to shift the duty to begin to SARS. The taxpayer remains obliged to demonstrate that the assessments are incorrect. Moreover, those facts do not constitute the sole disputed issues in this appeal. At the heart of it, is the correctness the finding of the inflated costs of sales, the disallowance of consultancy fees and the validity of the interest deduction and whether they were deductible expenditure.

[39] In sum: After considering both the relevant statutory provisions and Tax Court Rules, the position is clear. The taxpayer bears the burden of proving that the assessments are incorrect and must therefore commence the proceedings. The point about the reasonableness of the assessment (first exception) in rule 44(1) is not an anterior question. Furthermore, whether SARS was entitled to reopen the assessments forms part of and is linked inextricably to the broader dispute concerning the correctness of the factual findings giving rise to the assessments. The second exception in rule 44(1) is likewise inapplicable since SARS has not raised a point *in limine* in the appeal.

[40] Taxpayer LE's reliance on Uniform rule 39(11) is misplaced. Rule 42 of the Tax Court Rules permits recourse to the Uniform Rules only where the Tax Court Rules do not regulate a particular procedure. In this instance, rule 44 expressly regulates the order in which proceedings must commence. The submission that a lacuna exists is therefore unsustainable. Taxpayer LE accordingly bore the duty to begin in this appeal.

[41] After the court ruled to this effect, Taxpayer LE elected to close its case without leading evidence.

[42] Before turning to the evidence led by SARS, for the efficacy of the judgment, it is prudent to deal with further interlocutory disputes that arose during the hearing, concerning the admissibility and authenticity of several documents on which SARS relied, leading to an adjournment to bring an application for the recusal of the President of the Tax Court. I commence with the application for recusal since it was a precursor to the default hearing.

Recusal application

[43] During the hearing, after SARS had commenced leading the evidence of its witness, Mr F, on 10 May 2024, Counsel for Taxpayer LE, Mr M, indicated that they had been instructed to seek a postponement to prepare an application for the recusal of the President of the Tax Court.

[44] The genesis for the application for the recusal is that Taxpayer LE midway the hearing after substantial evidence was led, disputed numerous documents relied upon by SARS but had failed to identify the specific documents or the basis for the objection, despite being requested by the President of the Tax Court to provide a list with sufficient particularity. The list eventually produced remained deficient and lacked clarity as to whether the objections related to authenticity, hearsay, or some other evidentiary ground. I deal with the admissibility dispute separately and more fully later as it is relevant to the determination of the merits of the tax appeal.

[45] The recusal application was raised orally from the bar by Mr M, purportedly acting at the instruction of Taxpayer LE, who informed the tax court that:

> "We have just been instructed by our client, who has been following the proceedings very closely and intently, to ask for a postponement of this hearing for the following reason: Our client is concerned about its rights to a fair hearing on basis of the manner in which Your Ladyship has steered the proceedings over the course of the last five days. And of course, what I say is I say with the utmost of care and with respect M'Lady. So, our client accordingly wishes to launch a substantive application for Your Ladyship's recusal ..."

[46] The court adjourned the proceedings to 6 August 2024 for hearing, to allow the Taxpayer LE the opportunity to regularise the application, with directions and time frames for the filing of the application, the filing of answering papers and heads of argument specified in the order.

[47] Shortly thereafter, the tax court received a communication from Mr June, a director and commercial manager of Taxpayer LE. Although the communication was procedurally irregular, given that Taxpayer LE was at the time represented by attorneys of record, I directed that it be placed on the record because it bore directly on the conduct of the proceedings. No affidavit setting out the factual basis for recusal was delivered and no submissions were advanced identifying any conduct that might give rise to a reasonable apprehension of bias by the President of the Tax Court. Importantly, no formal recusal application was ever filed.

[48] On 11 May 2024, Mr June, informed the tax court that Taxpayer LE did not intend to pursue the recusal application and that its legal team had indicated an intention to bring such an application without the company's approval. He requested that the appeal continue as constituted without a change before the President of the Tax Court.

[49] Subsequent correspondence addressed to the tax court confirmed that the relationship between Taxpayer LE and its legal representatives had become strained because of this development. Taxpayer LE indicated that it had suspended the authority of its attorneys pending an internal investigation into the conduct of the legal team and the circumstances under which the recusal request had been made. Ultimately the legal services agreement between Taxpayer LE and its attorneys of record was terminated, following which, the attorneys withdrew as legal representatives in the appeal.

[50] The order granted on 10 May 2024 was not abandoned or rescinded. The tax court retained the allocated date of 6 August 2024 for purposes of case management and to determine the further conduct of the proceedings. The registrar subsequently attempted to arrange case-management steps and hearing dates. Despite being advised that it remained bound by the court's orders, Taxpayer LE repeatedly indicated that it did not accept the court's directions and was not ready to proceed. It did not appoint new legal representatives.

[51] The consequence of Taxpayer LE's refusal to participate further in the proceedings despite having received notice of the hearing date is considered next.

Proceedings in the absence of the Taxpayer LE

[52] The appeal was ultimately enrolled for hearing during 1 to 12 September 2025, with a Directive from the Deputy Judge President to finalise the hearing within the allocated dates. Taxpayer LE nevertheless continued to indicate that it rejected the notice of set down and would not attend the hearing until it considered itself ready to proceed. SARS's attorneys ensured that the notice of set down was served on Taxpayer LE through several channels, including email communication to its directors and public officer and physical service at its registered addresses. The returns of service confirmed that Taxpayer LE had been notified of the hearing date.

[53] Before the hearing, the tax court sought submissions and representations on the status of the appeal as it remained pending and was not withdrawn. SARS contended in the absence of Taxpayer LE the appeal must be heard and a determination made in terms of rule 44(7) of the Tax Court Rules which states that:

> "If a party or a person authorised to appear on the party's behalf fails to appear before the tax court at the time and place appointed for the hearing of the appeal, the tax court may decide the appeal under section 129(2) upon-
>
> (*a*) the request of the party that does appear; and
>
> (*b*) proof that the prescribed notice of the sitting of the tax court has been delivered to the absent party or absent party's representative,
>
> unless a question of law arises, in which case the tax court may call upon the party that does appear for argument."

[54] The above submission is fortified by the decision of the Supreme Court of Appeal (SCA) in *Lion Match Co (Pty) Ltd v Commissioner, South African Revenue Service*,[8] which held that the withdrawal of a taxpayer's legal representative does not amount to the withdrawal of the appeal itself nor can the tax court strike the appeal off the roll as that would not debar the appellant from resurrecting the appeal and seek condonation for its default,[9] even though on the facts, the default was due to a refusal to participate in its own appeal. As held in *Lion Match,* the tax court is required to determine the appeal based on the evidence before it, and make an order under section 129(2) rather than treat the appeal as abandoned.

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8 *Lion Match Co (Pty) Ltd v Commissioner, South African Revenue Service* [2025] ZASCA 112; 2025 (6) SA 448 (SCA) (*Lion Match*).

9 *Gumede v Protea Assurance Co Ltd* 1979 (2) SA 851 (A) at 853.

[55] Mr June, the Director and Commercial Manager of Taxpayer LE, informed the tax court that the company had terminated the mandate of its attorneys and that all further correspondence should be directed to Mr Brian. The termination followed allegations of improper conduct against the attorneys. Ordinarily, neither Mr June nor Mr Brian would enjoy a right of audience in proceedings before the high court.[10] However, the tax court, as an administrative tribunal, is not subject to the same strict rules governing legal representation. In these circumstances, it was both permissible and appropriate for the tax court to adopt the approach in *Poulter v Commissioner for the South African Revenue Service*,[11] and to recognise Mr June and Mr Brian as agents or representatives of Taxpayer LE, competent to represent it in the appeal. The tax court further afforded Taxpayer LE an opportunity to pursue its recusal application, which it ultimately abandoned,[12] and granted it time to investigate its former attorneys and, if so advised, appoint new legal representatives.

[56] A year had lapsed from the date when the proceedings were first adjourned on 10 May 2024, and request made to allow Taxpayer LE time to investigate its affairs and/or appoint a new legal representative, if it so wished. Despite being advised that it remained bound by the court's orders, Taxpayer LE repeatedly indicated that it did not accept the court's order and directions. It stated that it was not ready to proceed. Mr June refused to participate in the processes of the tax court and abide by its directions and orders. Importantly, as the appellant, he received a proper notice of the hearing and rejected the notice of set down.

[57] The decision in *Lion Match* confirms that where a taxpayer fails to pursue an appeal, the proper course is not to strike the appeal from the roll but to determine the appeal and issue an order under section 129(2) of the TAA. For this reason, the appeal proceeded in the absence of Taxpayer LE.

Authenticity and hearsay evidence

[58] Before turning to the evidence, it is appropriate to address the final interlocutory dispute that arose during the testimony of Mr F, which bears on the outcome of this appeal. By the time the dispute arose, Mr F had already given detailed evidence, much of which was not in dispute, concerning the following:

(a) the three locomotive contracts concluded with Marshall;

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[10] *Manong & Associates (Pty) Ltd v Minister of Public Works and Another* [2009] ZASCA 110; 2010 (2) SA 167 (SCA)

[11] *Poulter v Commissioner for the South African Revenue Service* [2024] 2 All SA 876 (WCC) para 67.

[12] The facts set out in the *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (4) SA 147 (CC) at paras 45 and 48 were never placed before the court.

(b) the procurement process through which those contracts were awarded;

(c) the contractual pricing; and

(d) the subcontracting arrangements concluded between Taxpayer LE and Kozi-E Company, on 8 January 2013 and 17 March 2014, in respect of the 95- and 359-locomotive contracts, respectively.

He had also testified about the two subcontracts concluded with Company Zulu, on 8 October 2014 and 20 November 2014, in relation to the 100-locomotive contract.

[59] His evidence was that the IEU conducted its own investigation into Taxpayer LE's tax affairs. SARS engaged its Customs Division and had issued section 46 of the TAA requests for information from several entities, including Marshall, SARB, CCB, STD Bank, and Ernst & Young in respect of the 2013 year of assessment, and BDO in respect of the 2014 assessment year, Deloitte in respect of the 2015 and 2016 assessment years, and the B-BBEE Commission. SARS also received a notification from the Investigative Directorate in terms of section 73 of the Prevention of Organized Crime Act 121 of 1998 (POCA) indicating that there was an ongoing criminal investigation concerning Taxpayer LE and the transactions related to it. This evidence was not disputed.

[60] When Mr F was about to lead evidence connecting the allegations of the inflated costs of sales, the subcontract supply agreements, the Business Development Services Agreements (BDSAs) entered with foreign entities associated with Mr E, and the evidence of payments made to several bank accounts of these entities, Mr L, for Taxpayer LE, objected to the use of a range of documents forming part of SARS's investigation. These documents included:

(a) Several investigative reports from the following sources: an amaBhungane (*Mail & Guardian*'s centre for investigative journalism) investigative reports which were in the public domain, Werksman Attorneys, Mncedisi Ndlovu and Sedumeni (MNS) and Prof Wainer's Shadow World Investigations.

(b) Agreements described as BDSAs between Company Zulu, RG and TQ.

(c) Email communications in particular "The Businessman E-mail".

(d) Banking records obtained from financial institutions; obtained through the international EOI requests from the Inland Revenue Department of Hong Kong (IRD) comprising:

(i) Declaration of Trust dated 23 June 2014 TQ and RG;

(ii) HSBC Opening Documents;

(iii) HSBC Hong Kong bank statements of TQ and RG,

(iv) Extracts from TQ and RG's Habib Bank Statements; and,

(v) BDSAs

A significant portion of the documents relied upon by SARS consisted of financial records obtained through EOI requests made in terms of Article 24 of the DTA.

[61] Pursuant to these requests, the IRD provided SARS with information on several occasions, namely on 3 November 2020, 30 June 2022, 28 July 2022 and 16 August 2022. The information included banking records relating to entities associated with Mr E, comprising HSBC Hong Kong Bank statements of TQ and RG.

[62] A Declaration of Trust, dated 23 June 2014, that was obtained showed that:

(a) RG was incorporated under the Registry of Companies of the Hong Kong Special Administrative Region on 20 June 2014, with Mr E as the sole director and shareholder.

(b) TQ was also registered in Hong Kong 20 June 2014. Its shares were held in trust by PAMM investments Limited, with Mr E as sole director and beneficial owner (together with RG, referred to as the "E-related companies").

(c) Head Group had dealings with JJT, a company registered in the UAE; and

(d) CGT was also registered in the UAE free zone.

[63] Taxpayer LE contended that the documents contained "hearsay contents, unproven contents, falsified contents, unrelated information, duplicated information and false information". It was submitted that the documents could not be admitted unless their authenticity and admissibility were established in accordance with the law of evidence.

[64] As alluded to, there had been intimation during the pre-trial conference that an objection might be raised, but the stance ultimately adopted by Mr L was untenable. The objection was framed in broad and indeterminate terms and failed to identify the specific documents to which it was directed. In the tax court's view, the two enquiries are conceptually distinct and must be addressed on different legal bases.

[65] In our courts, "authentication" when applied to a document, means, "tendering evidence of authorship or possession depending on the purpose for which it is tendered,"[13] originates from the best evidence rule. A challenge to the authenticity of a document concerns whether the document is what it purports to be. The primary question is that of their cogency, in that the documents are what they purport to be. As the court in *S v Baleka and Others*,[14] stressed, authenticity goes to the evidential weight and value to be attached to the documents in issue. Although the inquiry is not about originality and or admissibility, originality affected and is considered when admissibility is decided upon.

[66] When admissibility is placed in issue, the general principle is that all facts relevant to the issue in legal proceedings may be proved, unless specifically excluded by the law of evidence. *Baleka* described this as a "fact is relevant when inferences can be properly drawn from it as to the existence of a fact in issue".[15] Hence, the primary test for admissibility is relevancy.

[67] Taxpayer LE raised its objection midway through the proceedings, after Mr F had already given substantial evidence. At no stage during the leading of Mr F's evidence was any objection raised to the introduction of the IRD documentation or to his testimony concerning it. Instead, the contention was raised for the first time when it was suggested that SARS lacked authority to use the IRD documents obtained in relation to Mr E in respect of the tax affairs of Taxpayer LE. The belated challenge to the EOI material pertaining to Mr E was therefore unexpected.

[68] Significantly, the objection by Mr L held three positions open, by contending that Taxpayer LE's objection was "but not limited to":

(a) the authenticity of the documents;

(b) the admissibility of their contents as hearsay; or

(c) both.

[69] The lack of particularity created significant practical difficulties in the conduct of the proceedings. Without knowing which documents were challenged and on what basis they were disputed, SARS could not reasonably determine what evidence to lead Mr F on and what the documents the authenticity or admissibility complaint related to – which would cause the appeal proceedings to be in disarray.

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[13] P J Schwikkard and T B Mosaka (eds) *Principles of Evidence* 5 ed (2023) at 467, as quoted in *Taxpayer RPC v Commissioner for the South African Revenue Service* [2023] ZATC 9 para 13.

[14] *S v Baleka and Others (1)* 1986 (4) SA 192 (T) (*Baleka*) at 195H.

[15] *Baleka* at 195J-196A; see also *R v Trupedo* 1920 AD 58 at 62.

[70] The tax court directed Taxpayer LE to identify the documents objected to and to specify the basis of each objection. It was afforded an opportunity to compile a schedule identifying the documents in dispute and indicating whether the objection concerned authenticity, hearsay, or both. Despite this direction, Taxpayer LE failed to provide the requested schedule or to clarify the basis of its objections. It is the questioning of this approach by the President of the Tax Court that led Mr M to seek what is now accepted to have been an unauthorised recusal.

[71] It bears mentioning that before Mr M sought the recusal of the President of the Tax Court, Mr L agreed that: "a practical solution" would be that: each time SARS deals with a document that is hearsay in nature, they will identify it and the court will note the objection relative to it, and argue the point at the end of the hearing. Although the appeal was ultimately finalised in the absence of Taxpayer LE, Mr L's final agreement to raise objections as and when documents were introduced, with admissibility to be argued at the end of the appeal was correct and consistent with the approach in *Elher (Pty) Ltd v Silver*.[16]

[72] On the strength of the decision in *Elher*, the tax court could not exclude evidence based on an interlocutory application, without assessing its relevance, probative value and reliability, linked to the evidence the tax court must in any event hear, weigh and determine at the end of the appeal. Granting such an application would have required the court to predetermine the relevance of the impugned material, a matter which should be more appropriately assessed after the full body of evidence has been heard.

[73] Since Taxpayer LE failed and or refused to participate in the appeal, and in his correspondence, Mr June persisted that the "bank statements from Hong Kong" IRD were "falsified", it is prudent to rule on the question of authenticity and admissibility of the documents forming the basis of the evidence justifying SARS's findings and additional assessment.

[74] On 25 August 2025, I directed the parties to be prepared to address the tax court on the authenticity and admissibility of the IRD documents and the utilisation thereof since they relate to Mr E, and the consequence of the objection on the status of the evidence already led.

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[16] *Elher (Pty) Ltd v Silver* 1947 (4) SA 173 (W) (*Elher*) at 176-178.

Authenticity and use of EOI documents from IRD Hong Kong

[75] The objection targets the IRD documents obtained from Hong Kong on 3 November 2020, 16 August 2022, 30 June 2022 and 28 July 2022 in terms of the EOI request issued based on Article 24 of the DTA. The EOI request identified the relevant taxpayer as Mr E and sought information pertaining to the BDSAs entered between companies controlled by Mr E flowing from the several locomotive contracts with Marshall. It states:

> "In these agreements, TQ and RG were to provide "Business Development Services" in what were referred to in the agreements as the "359 Project" and "95 Project" respectively, with reference to the acquisition by the SOE of 359 locomotives and 95 locomotives from Company SZ through its South African subsidiary, Taxpayer LE Supply (Pty) Ltd. In return, the taxpayer, through TQ, was entitled to receive 21% of the contract value of the 359 Project and through RG was entitled to receive 20% of the contract value of the 95-entered with Taxpayer LE's and the related companies."

[76] The two questions were: (a) whether SARS had to prove the authenticity of the EOI documents, and (b) whether the permission to use the EOI was in any way limited information pertaining to the Tax Appeal of Mr E and not Taxpayer LE. It should be emphasised that it was not contended there is a conflict between domestic law and the DTA, nor was it contended the reliance on the EOI documents affected any clearly articulated rights of a party.

[77] The DTA between South Africa and Hong Kong is aimed at the prevention of double taxation, avoid fiscal evasion and envisages reciprocal assistance in the administration of and the collection of taxes under South African laws and the laws of Hong Kong. As the court held in the *Commissioner, South African Revenue Service v Tradehold Ltd*,[17] DTAs are drawn up in light of section 108 of the ITA, accordingly, the DTA between South Africa and Hong Kong is domesticated by virtue of the section and has the effect of law.[18]

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[17] *Commissioner, South African Revenue Service v Tradehold Ltd* [2012] ZASCA 61; 2013 (4) SA 184 (SCA) (*Tradehold*) paras 15-20.

[18] Section 108 of the ITA provides for "Prevention of or relief from double taxation", and section 108(1) provides:

> "The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and of such other country."

[78] Other than domestic law, the Model Tax Convention on Income and on Capital, agreed to by the Committee on Fiscal Affairs of the Organisation for European Economic Co-operation and Development (OECD Model Convention), provides material context to the interpretation of the DTA. The court in *Tradehold,* affirmed that the DTA is premised on the OECD Model Convention, which has served as the basis for similar agreements between many countries. It held that:[19]

> "In interpreting its provisions one must therefore not expect to find an exact correlation between the wording in the DTA and that used in the domestic taxing statute. Inevitably, they use wording of a wide nature, intended to encompass the various taxes generally found in the OECD member countries. In addition, because the double tax agreements are intended to encompass not only existing taxes, but also taxes which may come into existence at later dates (see art 2(2)), and bearing in mind the complex nature of taxation in the various member countries, inevitably the wording in the DTA cannot be expected to match precisely that used in the domestic taxing statute."

[79] South Africa and Hong Kong are signatories to the OECD Model Convention (OECD Convention). Article 26 of the OECD Convention on which the DTA is based provides for the exchange of information between the tax administrators of the contracting States. Article 24 of the DTA between South Africa and Hong Kong, dealing with exchange of information substantially mirrors the wording of Article 26 of the OECD Model Convention. As already alluded to, the documents were formerly exchanged in terms of Article 24 of the DTA.

[80] Article 24 of the DTA provides:

> "1. The competent authorities of the Contracting Parties shall exchange such information as is *foreseeably relevant* for carrying out the provisions of this Agreement *or for the administration or enforcement of the domestic laws of the Contracting Parties concerning taxes covered by the Agreement, in so far as the taxation thereunder is not contrary to the Agreement.* The exchange of information is not restricted by Article 1.
>
> 2. Any information received under paragraph 1 by a Contracting Party shall be treated as secret in the same manner as information obtained under the domestic laws of that Party and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

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[19] *Tradehold* para 18.

3. In no case shall the provisions of paragraph 1 and 2 be construed so as to impose on a Contracting Party the obligation:

(a) To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting Party;

(b) To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting Party;

(c) To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (order public).

4. If information is requested by a Contracting Party in accordance with this Article, the other Contracting Party shall use its information gathering measures to obtain the requested information, even though that other Party may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting Party to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting Party to decline to supply information solely because the information is held by a bank, or other financial institution, nominee or person acting in an agency or fiduciary capacity or because it relates to ownership interests in a person."

(**Own emphasis**.)

[81] The challenge to the authenticity of the EOI documents is directed at the exchange of information between the competent tax authorities of the contracting states, locally represented by the officially designated functionary. It bears emphasising that in its request for exchange of information to the IRD, SARS specifically sought authentication of the documents. In response, the IRD explained that when processing such requests it issues a formal notice to the relevant information holder requiring the production of the requested information. The information holder is legally obliged to provide accurate information and may face penalties for non-compliance under the laws of Hong Kong.

[82] The documents were therefore produced pursuant to a formal statutory process under the laws of Hong Kong and form part of the IRD's official response to a request made under the applicable DTA. The authenticated documents were transmitted to SARS through the competent authority channel established under the treaty framework. In those circumstances, the documents constitute official information obtained through the EOI mechanism contemplated by the DTA.

[83] Although the case deals with discovery of documents, in the context of a taxpayer objection, the tax court in *ABC Limited v Commissioner for the South African Revenue Service*[20] clarifies the process of exchange, the beneficial effects of mutual exchange, and a taxpayer has no right to participate or any right to any disclosure concerning the discussions and interactions that may have taken place between States. The court recognised that information obtained through treaty-based exchange mechanisms constitutes official information received from a competent authority acting within its statutory mandate.

[84] The academic commentary is to the same effect: *Silke on International Tax* explains that the exchange of information mechanism is intended to facilitate the effective administration and enforcement of tax laws between competent contracting authorities.[21] Against that background, I find that the EOI documents transmitted by the IRD constitute official records obtained through the treaty mechanism and are admissible before the tax court. Such information is admissible as the authenticity and provenance are established through the official channel of communication between the contracting states.

[85] Turning to the contention that the permission to use the EOI documents is confined to the tax affairs of Mr E, the person identified in the request, and not to Taxpayer LE, which is the taxpayer in the present appeal. In substance, the argument is that the EOI documents cannot be relied upon in proceedings concerning Taxpayer LE. SARS contends, however, that Article 24(1) is deliberately broad and contemplates the exchange of information that is "foreseeably relevant for carrying out the provisions of this Agreement".

[86] There is no dispute that information obtained under Article 24 of the DTA may only be disclosed to persons or authorities involved in the assessment or collection of taxes, the enforcement or prosecution of tax matters, or the determination of appeals in relation to taxes. It was also not disputed that the permission excludes information obtained on 3 November 2020.

[87] Racecourse can be had to the OECD Convention and apply the provisions to the facts of the appeal to discern its meaning, import and reach. It is the *raison d'etre* of the DTA and the relevant article mirrors it. That approach accords with that adopted in *Secretary for Inland Revenue v Downing.*[22]

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[20] *ABC Limited v Comissioner for the South African Revenue Service* [2020] ZATC 18 paras 7-9.

[21] See generally M Benetello "Chapter 39: Exchange of Information" in *Silke on International Tax* (2022).

[22] *Secretary for Inland Revenue v Downing* 1975 (4) SA 518 (A) at 523 to 525; and *Tradehold* paras 16 and 18.

[88] On this score, Article 24(1) frames the ambit of EOI to that which is "foreseeably relevant" for carrying out the provisions of this Agreement "or for the administration or enforcement of the domestic laws of the Contracting Parties concerning taxes covered by the Agreement, in so far as the taxation thereunder is not contrary to the Agreement". The import and scope of the Article is broad. It covers not merely use of the information exchanged for the present or requested purposes but includes (a) "foreseeable" future use and (b) broader use for administration or enforcement of domestic laws in tax matters. The breadth of the provision is apparent from its wording, which extends to all matters covered by the DTA and is not confined by time or by the identity of a particular taxpayer.

[89] Moreover, the EOI is expressly not restricted by Articles 1 and 2 and may include information relating to non-residents or to the administration or enforcement of taxes not specifically referred to in the treaty. This interpretation of the provision's wide scope is also supported by *Silke on International Tax*,[23] which notes that the EOI provisions are intended to ensure effective tax administration and are drafted deliberately broad to achieve that purpose.

[90] The effect of the submission is to confine the use of the information strictly to the taxpayer identified in the request and to prevent SARS from relying on the EOI documents in these proceedings. There is no basis to the restricted untenable view which would defeat the purpose of the EOI. It is not only inconsistent with the purpose of the DTA but would upend its very purpose, namely the effective, efficient administration of South Africa's tax affairs as a contracting state. I accordingly find that being official communication between the contracting states, provided under the laws and penal regime of Hong Kong, there is no requirement for SARS to prove the authenticity of the documents from the IRD. I concluded that the documents obtained in respect of the identified taxpayer (Mr E) can be used by SARS in relation to an investigation of the affairs of Taxpayer LE (or any other taxpayer) if found relevant for effective tax administration in the foreseeable future.

Hearsay

[91] The scope of the objection based on hearsay to concern the admissibility of the documents of all the documents listed in paragraph 60, even though the relevant documents are in paragraph 60 (b) to (d) above. The challenge goes to proof of the truth of their contents.[24] SARS applied to admit the evidence in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988 (the LEAA).

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[23] M Benetello "Chapter 39: Exchange of Information" in *Silke on International Tax* (2022).

[24] In terms of section 3(4) of the LEAA hearsay evidence for purpose of the Act means "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence".

[92] Having heard Mr F's evidence, reports associated with the State Capture investigations primarily addressed governance irregularities in procurement, rather than tax liability, was not disputed. The *amaBhungane* report based on the Gupta Leaks is in the public domain. Although he read those reports and followed up on leads where necessary, they were not the source of the evidence on which the tax assessment was based. They served only as background material and provided leads for the investigation. The reports in themselves were of limited assistance in determining Taxpayer LE's tax affairs or tracing the flow of funds between the relevant entities. SARS did not rely on them to determine the additional tax assessment.

[93] Evidence concerning the company structure and the supply contracts and subcontracts between the taxpayer, Kozi-E Company and Company Zulu is not disputed on the pleadings. Invoices and purchase documentation obtained through statutorily authorised mechanisms conferred by section 46 of the TAA cannot be gainsaid. Mr F's investigation extended to transactions involving SARS's Customs Division to assess whether Taxpayer LE's VAT submissions and refund claims in respect of the cost of sales and subcontract to evaluate whether they were legitimate.[25]

[94] Of material relevance are the BDSAs, the extracts from TQ and RG's Habib Bank Statements, the "Business man" email, the accompanying schedules, including TQ and RG's HSBC Opening Documents received from the EOI and ID. The documents contain material information about the scheme or architecture of the scheme, the financial arrangements and several transactions of cash inflows and outflows supporting the scheme. The significance of the evidence relates to a substantial tax claim arising from allegations that Taxpayer LE inflated its cost of sales to fund "kickbacks". These documents were directly linked to the calculation of the cash inflows and outflows that informed the tax assessment, which the tax court must examine to assess commercial reality and surrounding evidence of the transactions to determine whether the foundation of the additional tax assessment.

[95] A party objecting to documentary evidence must identify the specific documents in dispute and the basis of the objection. The Supreme Court of Appeal in the *Pretoria East Motors*[26] stressed that where 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. As alluded to above,

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[25] *Commissioner, South African Revenue Service v Pretoria East Motors (Pty) Ltd* [2014] ZASCA 91; 2014 (5) SA 231 (SCA) (*Pretoria East Motors*) para 14; see also *Principles of Evidence*, P J Schwikkard and T B Mosaka (eds) *Principles of Evidence* 5 ed (2023) at 467 and *Taxpayer RPC v Commissioner for the South African Revenue Service* [2023] ZATC 9 para 13.

[26] *Pretoria East Motors* paras 8, and 10-13.

Taxpayer LE, as the appellant, bears the burden of challenging the assessments but failed to do so despite being afforded an opportunity to clarify its position.

[96] What stands out in the present case is that SARS conducted its own independent investigation into Taxpayer LE's tax affairs and obtained information from various sources, including the taxpayer itself through requests issued in terms of section 46 of the TAA. The TAA recognises the need for SARS to gather and use such information as it stands as a stranger to transactions entered into by the taxpayer.[27] The contents of the information at its disposal were independently verified through a lawful investigative process, including statutory requests for information and EOI exchange procedures to show that the additional assessment was raised on proper grounds.[28] Their provenance and relevance were explained by Mr F, a factual witness directly involved in the investigation. The objection cannot stand on this ground alone.

[97] In terms of section 3(1)(*b*) and (*c*) of the LEAA[29] having regard to the nature of these proceedings, the substantial tax liability in dispute and the public interest involved, the documents relied upon by SARS are relevant to the determination of the tax claim. SARS led the evidence of Mr F, the factual witness, and Mr TGM, an expert witness, to establish their probative value and weight. They are central in determining the deductible expenses, or otherwise.[30] Their exclusion would prejudice SARS and impede the proper adjudication of the appeal would be untenable and not in the interests of justice as that would effectively bring the appeal to an end without Taxpayer LE having led evidence to challenge their correctness, truth or reliability in any meaningful way to prove the cash inflows which served to confirm their authenticity and how they accord with proven facts.

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27 *Wiese and Others v Commissioner, South African Revenue Service* [2024] ZASCA 111; 2025 (1) SA 127 (SCA) paras 53-61.

28 *Pretoria East Motors* para 11.

29 Section 3(1)(*b*) and (*c*) of the LEAA reads:

"(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—

(*a*) …

(*b*) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(*c*) the court, having regard to—

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice'.

30 *Commissioner for the South African Revenue Service v Brummeria Renaissance (Pty) Ltd* [2007] ZASCA 99; 2007 (6) SA 601 (SCA) (*Brummeria*) para 15.

[98] Even where documentary material obtained during an investigation contains hearsay, a court retains a discretion to admit such evidence if the interests of justice so require. Having regard to the above factors, the interests of justice favour their admission. The objection raised by Taxpayer LE to the admissibility of the documents must fail. Accordingly, the documents form part of the evidentiary record and may be considered together with the oral evidence led by SARS.

SARS's evidence

[99] Mr F, an experienced SARS official with approximately 31 years of service, who was involved in analysing documents obtained during the investigation known as Project xxx, which examined alleged illicit financial flows connected to State Capture, gave evidence for SARS. His evidence covered the background to the investigation, the methodology used to determine the taxpayer's additional tax liability and the findings reached resulting in the additional assessment.

[100] As already alluded to, a substantial component of the additional tax liability is made up of the alleged inflation of costs of sales. Detailed evidence was led to connect the contract value of the three locomotive contracts procured by Marshall with costs raised by Taxpayer LE and payments made to the parent company subcontractors.

[101] TQ held accounts with the Hong Kong and Shanghai Banking Corporation Limited ("HSBC") in Hong Kong, under account numbers xxx and xxx. It also referred to accounts held with Habib Bank Limited ("Habib Bank"), namely accounts xxx and xxx. Certain deposits into these accounts were identified, while others could not be traced. The information further indicated that TQ maintained an integrated account numbered 000 and an investment account numbered 000. It also revealed that RG maintained similar accounts with HSBC. In addition, SARS obtained extracts from the Habib Bank statements of both TQ and RG.

[102] Evidence led by SARS linked the BDSAs, the locomotive supply subcontracts, the schedules attached to those agreements, the "Business man" email, correspondence and invoices, with payments made into TQ and RG bank account the above.

[103] SARS contends that these payments were inflated and formed part of a scheme through which funds were channelled to finance what it alleges were "kickbacks" connected with inflated costs of sales arising from the Marshall locomotive contracts.

Issues for determination

[104] The appeal raises several interrelated questions of fact and law arising from the additional assessments raised by SARS for the 2013 to 2018 years of assessment. The principal issues for determination are whether:

(a) SARS met the jurisdictional requirements in section 92 of the TAA to raise the additional assessments for the year of assessment on 25 to 28 June 2021 after an assessment was raised for the same year on 24 December 2020.

(b) SARS met the jurisdictional requirements to reopen the assessments for the 2013 to 2016 years of assessment in terms of section 99 of the TAA and whether the right to do so had prescribed.

(c) Taxpayer LE's cost of sales was inflated by "kickbacks" as alleged by SARS and, whether this expenditure is deductible in terms of section 11*(a)* of the ITA, and was incurred in the production of income and for the purposes of Taxpayer LE's trade.

(d) SARS can rely on section 23*(o)* of the ITA on the basis of the factual finding that Taxpayer LE's cost of sales was overstated by the quantum of aggregate of the amounts allegedly paid by Company Kozi and Company Zulu in terms of the "Business Development Services" agreements.

(e) SARS was entitled and correct to disallow the interest deduction claimed for the 2015 year of assessment on the basis that it was (a) not incurred in the production of income and (b) was not bona fide.

(f) SARS correctly disallowed the deduction for consultancy fees and management fees claimed as operating expenditure on the basis that they were (a) not incurred in the year of assessment that they were claimed, and (b) not incurred in the production of income or capital in nature.

(g) SARS lawfully and justifiably imposed the understatement penalties in terms of section 223 of the TAA.

(h) SARS's refusal to remit penalties for the underpayment of provisional tax in terms of para 20(2) of the Fourth Schedule to the ITA is valid in circumstances where the taxpayer has not made such request and consequently SARS has not decided regarding this.

(i) SARS afforded Taxpayer LE the opportunity to make representations on the imposition of interest on the underpayment of provisional tax.

(j) The additional tax assessment raised was reasonableness.

Judgment structure

[105] I first consider whether the jurisdictional requirements to raise the additional assessments for 2016 under section 92 of the TAA and for 2013 to 2016 under section 99 of the TAA was met.

[106] Secondly, the substantial tax liability and grounds for reopening the assessment and raising the additional tax stems from:

(a) allegations that Taxpayer LE created an illusion of legitimate pricing and sales, leading to the inflated costs of sales, which were channelled to the entities controlled by Mr E as "kickbacks",

(b) the margin which Taxpayer LE could have realised from the unlawful transactions paid to controlled by Mr E constituted understated and declared income in the hand of Taxpayer LE rendering it liable for the additional assessment and tax;

(c) Taxpayer LE made impermissible deductions as operating costs comprising of an interest expense of R225 million and consultancy fees paid to entities associated with the minority shareholders.

[107] It is convenient to begin by determining whether SARS has met the jurisdictional requirements to reopen the assessment. Thereafter, the evidence underpinning the additional assessment will be evaluated in relation to each of the grounds relied upon, including whether SARS was correct to disallow the deductions in question. The reasonableness of the estimated additional assessment will then be considered. Finally, the penalties imposed, which Taxpayer LE has placed in issue, will be addressed. These issues are dealt with seriatim below.

Were the jurisdictional requirements to raise the additional assessments for 2016 under section 92 of the TAA and for 2013 to 2016 under section 99 of the TAA met?

[108] The above issues are also connected to Taxpayer LE's prescription argument. There is no dispute that the additional assessments in respect of the 2013 to 2016 years of assessment were issued more than three years after the original assessments based on those returns, between 25 and 28 June 2021.

[109] Section 99(1)*(a)* of the TAA generally limits SARS to a period of three years from the date of an original assessment within which to issue an additional assessment and the section states that:

> "An assessment may not be made in terms of this Chapter—
>
> (*a*) three years after the date of assessment of an original assessment by SARS;
>
> (*b*) in the case of self-assessment for which a return is required, five years after the date of assessment of an original assessment—
>
> (i) by way of self-assessment by the taxpayer; or
>
> (ii) if no return is received, by SARS."

[110] The limitation of the period within which SARS may reopen and make an additional assessment does not apply if the failure to assess the full amount is due to the factors in section 99(2*)*(*a*)(i) to (iii) of the TAA. The section states that:

> "Subsection (1) does not apply to the extent that—
>
> (a) in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to—
>
> (i) fraud;
>
> (ii) misrepresentation; or
>
> (iii) non-disclosure of material facts."

[111] Section 99 permits SARS to reopen an assessment where there is fraud, misrepresentation, or non-disclosure of material facts. In *AB CC v Commission for the South African Revenue Service*[31] held that section 99 is similar to section 79 of the ITA, based on the interpretation in *Natal Estates Ltd v Secretary for Inland Revenue*.[32] The presence of any one of conduct in the section is suffices to trigger its application. The general principle is that fraud cannot be lightly inferred on untested allegations.[33] Importantly, proof for raising the additional assessment triggered by section 99(2) cannot rest on conjecture or suspicion but on proper grounds.[34] There must be cogent evidence of an intention to deceive to the prejudice of the fiscus.[35] This is addressed fully below, in answer to whether SARS correctly disallowed the section11(*a*) deductions.

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31 *AB CC v Commission for the South African Revenue Service* [2017] ZATC 9 (*AB CC*) para 23.
32 *Natal Estates Ltd v Secretary for Inland Revenue* 1975 (4) SA 177 (A) at 207E.
33 *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* 2014(5) 297 at 304 para 18 onwards
34 *Pretoria East Motors* para 11.
35 *Commissioner of Revenue v Tuck* 1989 (4) SA 888 (T).

[112] Read with section 95(1) of the TAA, SARS is empowered to issue an additional assessment where an under-assessment is attributable to the taxpayer's conduct. In *Brummeria*, the court held that "it allows the Commissioner three years to collect the tax, which the Legislature regarded as a fair period of time; but it does not protect a taxpayer guilty of fraud, misrepresentation or non-disclosure". In such circumstances, the taxpayer cannot rely on the principle of finality,[36] and SARS may reopen the assessment at any time.

[113] Taxpayer LE's tax liability was determined under the "self-assessment" system,[37] prescribed by the relevant tax legislation, which obliged it to submit returns containing a full and accurate disclosure of its tax position and liability.[38] The original assessments had been issued based on the information and returns submitted by Taxpayer LE, which were accepted by SARS at face value.

[114] SARS did not have the information necessary to make a correct assessment when the original assessments were issued. The absence of that information was not due to any negligence or neglect on its part.[39] That information only came to light following the block by SARB and other investigation reports, including the amaBhungane Report. Once it was established that the returns contained misrepresentations or material non-disclosures, SARS was entitled to invoke section 99(2)*(a)* of the TAA and issue additional assessments, notwithstanding the expiry of the three-year period.

[115] The challenge to the 2016 assessment year issued by the Large Business Centre on 24 December 2020 is misplaced. That assessment arose from a limited audit confined to specific risks under section 24C of the ITA and allowances claimed and did not constitute a comprehensive audit of the taxpayer's affairs. The subsequent assessments issued by the EIU were based on a different subject matter and followed a separate investigation. They were therefore additional to, and independent from, the earlier assessment, and neither duplicated nor replaced it.

[116] The proper approach to reopening assessments is that SARS is entitled to accept a return at face value but may revisit it where it later emerges that the true facts were not disclosed. The principle that a taxpayer who fails to disclose material facts cannot rely on the limitation period in section 99(1) has been affirmed in tax court jurisprudence. That principle applies with equal force in this case. As will be seen, the evidence establishes that Taxpayer LE made misrepresentations and failed to disclose material information in its

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36 *Brummeria* para 26.
37 In terms of section 1 of the TAA, "assessment" is defined as "the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS".
38 Section 25(2) of the TAA.
39 *Brummeria* para 26.

returns. SARS only became aware of the true position after issuing the original assessments. The challenge to SARS's jurisdiction and reliance on prescription accordingly fails.

Was the cost of sales inflated to pay "kickbacks" and the thus correctly disallowed as deductions?

[117] SARS relies on sections 11(*a*), 23(*g*) and 23(*o*) of the ITA. Section 11(*a*) of the ITA provides that:

> "For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived—
>
> (*a*) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature."

[118] Section 23(*g*) and *(o)* of the ITA state that:

> **"23 Deductions not allowed in determination of taxable income—**No deductions shall in any case be made in respect of the following matters, namely—
>
> …
>
> (*g*) any moneys claimed as a deduction from income derived from trade to the extent to which such moneys were not laid out or expended for the purposes of trade;
>
> …
>
> …
>
> (*o*) any expenditure incurred—
>
> (i) where the payment of that expenditure or the agreement or offer to make that payment constitutes an activity contemplated in Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004)."

[119] It also relies on section 31(2) of the ITA in the alternative, which states that:

> "**Tax payable in respect of international transactions to be based on arm's length principle—**(1) For the purposes of this section—
>
> …
>
> (2) Where—
>
> (*a*) any transaction, operation, scheme, agreement or understanding constitutes an affected transaction; and
>
> (*b*) any term or condition of that transaction, operation, scheme, agreement or understanding—
>
> (i) is a term or condition contemplated in *paragraph (b)* of the definition of "*affected transaction*"; and

(ii) results or will result in any tax benefit being derived by a person that is a party to that transaction, operation, scheme, agreement or understanding or by any resident in relation to a controlled foreign Company contemplated in subparagraph (iv) of the definition of "affected transaction",

the taxable income or tax payable by any person contemplated in *paragraph (b) (ii)* that derives a tax benefit contemplated in that paragraph must be calculated as if that transaction, operation, scheme, agreement or understanding had been entered into on the terms and conditions that would have existed had those persons been independent persons dealing at arm's length.'

[120] As articulated in often cited authorities, Taxpayer LE must show that the expenditure or liability was actually incurred (a) in the production of income (b) during the relevant year of assessment for which the deduction was claimed.[40] The evidence rests on two pillars. The first concerns the locomotive contracts, including their pricing, payment terms, and the subcontracting arrangements between Taxpayer LE and subsidiaries of its parent company. The second relates to the BDSAs concluded with RG and TQ, entities controlled by Mr E, encompassing the associated payment terms, supporting invoices and schedules, and the reconciliation of payments reflected in bank statements obtained through the exchange of information process.

[121] Mr F's evidence, supported by the supply agreements, establishes that although Taxpayer LE was incorporated in July 2012, negotiations for the 95-locomotive supply contract commenced as early as December 2011. The contract provided for staged payments linked to project milestones, including a 10% advance on the effective date. However, Marshall paid approximately R268.7 million in December 2012, representing an advance of about 80%, far exceeding the agreed percentage.

[122] Different pricing structures applied across the locomotive contracts. The 100-locomotive contract was priced at approximately R43.8 million per unit, while the 359-locomotive contract was priced at approximately R50.48 million per unit. Although Taxpayer LE attributed these differences to variations in locomotive type and weight, SARS contended that insufficient information was provided to justify the disparity.

[123] The evidence further shows that, while the tender required a local operational presence, Taxpayer LE did not establish manufacturing capacity in South Africa. Instead, it procured locomotives from Company Kozi and thereafter sold them to Marshall. SARS accordingly characterised Taxpayer LE as operating primarily as a conduit entity in the execution of the Marshall contracts.

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[40] *Port Elizabeth Electric Tramway Co. v Commissioner for Inland Revenue* 1936 CPD 241 at 246; *Commissioner for Inland Revenue v Genn & Co (Pty) Ltd* 1955 (3) SA 293 (A) at 298H-299G; and *Caltex Oil (SA) Ltd v Secretary for Inland Revenue* 1975 (1) SA 665 (A) at 674D-F.

[124] Mr F analysed the subcontracting agreements concluded with Company Kozi and Company Zulu. These agreements, denominated in US dollars and inclusive of freight and insurance, reflected a procurement cost of approximately R2.19 billion, being about 80% of the contract value with Marshall when converted at the prevailing exchange rate.

[125] On this basis, SARS calculated that Taxpayer LE anticipated a gross profit margin of approximately 20% to 21%, depending on the contract. This was inconsistent with the taxpayer's assertion that it did not expect to make a profit and had pursued the contracts solely to establish a presence in the South African market.

[126] SARS further contended that this margin underpinned a scheme in which funds were channelled through entities associated with Mr E, allegedly to finance kickbacks linked to the Marshall contracts. These payments were said to be reflected in the BDSA's and financial records obtained through international information exchanges. SARS alleged that Taxpayer LE disguised these payments as purchases from related foreign entities.

[127] In summary, the evidence shows that Taxpayer LE recorded the procurement of 260 locomotives at a total cost of approximately R14.9 billion, while only 234 locomotives were delivered between August 2016 and March 2019. By that stage, Marshall had procured 554 locomotives but received only 234, representing approximately 42% of the order. An amount of R25.24 billion was receivable under the three contracts, constituting approximately 59% of the total contract value.

[128] When the appeal resumed, it was reported that the number of locomotives under one contract had been reduced from 359 to 304, with further units still outstanding. Despite SARS requesting a detailed breakdown of procurement costs for each contract, Taxpayer LE failed to provide the information.

[129] The second facet concerns the relationship between the BDSAs, the alleged "kickback" schedule, and the inflation of costs of sales. SARS identified several BDSAs concluded between Head Group entities and companies associated with Mr E, including RG, TQ, CGT and JJT. These agreements were presented as consultancy or advisory arrangements linked to the Marshall locomotive supply contracts.

[130] Mr F's evidence established that the BDSAs were directly connected to the three locomotive contracts, namely the 95-, 100- and 359-locomotive agreements. Each provided for substantial advisory fees payable to the entities associated with Mr E, typically calculated as a percentage of the value of the relevant supply contract.

[131] In relation to the 95-locomotive contract, an addendum to a consultancy agreement between Company Kozi and RG recorded that payments were due to RG and CGT in respect of a contract valued at approximately R2.686 billion. The accompanying schedule reflected that approximately 20% of the contract value, amounting to about R537 million, was payable to these entities.

[132] Two further BDSAs were concluded. The January 2015 agreement between Company Zulu and RG, relating to the 100-locomotive contract, provided for advisory fees of approximately 21% of the contract value, comprising a success fee and milestone-based payments. Similarly, the May 2015 agreement between Company Zulu and TQ, relating to the 359-locomotive contract, provided for advisory fees of approximately 21% of the contract value, likewise linked to milestone payments received from Marshall.

[133] Although the agreements described services such as identifying opportunities, advising on tender participation, assisting with pricing negotiations, and supporting the expansion of Taxpayer LE's operations in South Africa, SARS found no credible evidence that such services were rendered.

[134] Mr F relied on documentary evidence, including invoices, payment schedules and bank records, which reflected substantial payments to entities associated with Mr E. These payments were traced to HSBC bank accounts held by RG and TQ and corresponded with invoices issued under the BDSAs and payments received under the locomotive contracts.

[135] On SARS's analysis, the BDSA payments formed part of a structured payment scheme linked to the locomotive contracts. The payments broadly corresponded to approximately 20% of the value of the 95-locomotive contract and approximately 21% of the value of the 100- and 359-locomotive contracts. Initial payments were made to CGT and JJT, with an addendum concluded in August 2016 recording prior payments and providing for future payments to be made to RG and TQ. This arrangement was said to have been implemented to resolve disputes between intermediary entities and to prevent duplication of payments.

[136] SARS contended that these payments constituted inflated costs of sales channelled to entities associated with Mr E and formed part of what it described as "kickbacks" linked to the Marshall locomotive procurement. In support of this contention, SARS relied on a payment schedule and related correspondence, including an email dated 7 January 2015, Mr MZ, dated 7 January 2015, to the "Business man" subsequently forwarded from "Business man" to "Ashu" on 22 March 2015 and reflects a schedule encompassing payments made in respect of the 95-, 100- and 359-locomotive contracts. On this basis, SARS concluded that

approximately 20% of the contract value did not represent genuine operational expenditure, but rather payments associated with corrupt activity. The payments are reflected as follows:

CRRC E-Loco (Pty) Ltd **SARS 4**

Calculation of Kick back payments deemed to be part of cost of sales

Category	2013	2014	2015	2016	2017	2018	Total
Cost of Sales							
95 Contract							
Century		181 096 296.36					181 096 296.36
Regiments			206 607 327.19				206 607 327.19
Regiments Accrual				88 017 342.35			88 017 342.35
100 Contract							
JJ Traders		448 545 720.00					448 545 720.00
Regiments			344 327 062.84	122 528 655.83			466 855 718.67
359 Contract							
JJ Traders			706 770 480.00				706 770 480.00
Tequesta			582 983 147.97	42 330 640.83			625 313 788.80
Tequesta Accrual				272 100 289.24			272 100 289.24
Total		**629 642 016.36**	**1 840 688 018.00**	**524 976 928.25**			**2 995 306 962.61**

[137] SARS verified the relevant amounts against deposits reflected in the bank statements obtained. Any deposits that could not be matched to supporting records were excluded from the calculation. Mr F confirmed that, although deposits into Habib Bank accounts in the UAE were suspected to relate to "kickbacks", they were not included unless verified. For example, a deposit linked to invoice 128 could not be traced to RG' bank statements and was accordingly excluded.

[138] The calculation was not based solely on the percentages recorded in the BDSAs. SARS undertook a reconciliation of the agreements, payment schedules, invoices, and bank statements. On this basis, SARS determined that the total payments associated with these arrangements amounted to approximately R3.059 billion, which it treated as inflated costs of sales for the relevant tax years.

[139] Mr F testified that the rand value of US dollar deposits into RG' HSBC account corresponded with the BDSA fees payable to RG. A detailed reconciliation of payments to RG and other entities associated with Mr E, based on the BDSAs, payment schedules, invoices, and bank records, demonstrated that the impugned transfers were consistent with, and attributable to, the BDSA fee arrangements. This analysis was supported by the schedule attached to the Letter of Audit Findings (LOAF) and supplemented by Mr TGM's expert evidence.

[140] The tax court noted a discrepancy between the amount reflected in SARS's Finalisation of Audit Letter dated 25 June 2021 (FOAL), namely R3 059 476 265.50, and the amount of R2 995 306 962.51 recorded in SARS's heads of argument, a difference of R64 169 302.88. SARS's attorneys explained that the lower figure appeared in the earlier LOAF dated 20 December 2020, and that a calculation error of R64 169 302.88 was subsequently identified and corrected prior to the issuance of the FOAL.

[141] This correction is recorded in paragraph 44 of the FOAL. Mr F confirmed the error and verified that the correct amount of the overstated cost of sales is R3 059 476 265.50. He further confirmed that this corrected amount was incorporated into the assessment and is consistently reflected in SARS's rule 31 statement and the appellant's rule 32 statement. Accordingly, the amount properly to be considered is R3 059 476 265.50.

[142] In addition to Mr F, SARS called Mr TGM as an expert witness. Mr TGM, a partner at PWC, is a chartered accountant, registered auditor, and forensic practitioner with approximately 24 years' experience, including 14 years in forensic investigations. His mandate was to independently assess the reasonableness of the tax assessments raised against Taxpayer LE for the 2013 to 2018 years of assessment. He produced an expert report dated 11 April 2024, together with an addendum following receipt of additional bank statements from the UAE, which traced R1 635 027 807.97 of previously unidentified deposits.

[143] Mr TGM testified that SARS derived the approximately R3 billion cost-of-sales adjustment primarily from the BDSAs and a payment schedule referred to as the "Mr MZ Schedule". These documents reflected that approximately 20% to 21% of payments received from Marshall were channelled through intermediary entities as "business development fees". SARS accordingly treated these payments as non-deductible expenditure associated with "kickbacks".

[144] Mr TGM illustrated the flow of funds from Marshall to Taxpayer LE, then to Company Zulu and Company Kozi, and ultimately to intermediary entities, including JJT, CGT, RG and TQ, confirming that the 20% to 21% component of the contract value flowed through this structure. He applied a cash-flow tracing methodology, which involved:

(a) identifying payments made by Marshall to Taxpayer LE;

(b) tracing onward payments to its holding companies;

(c) tracking the movement of funds from those entities to the intermediaries identified in the BDSAs; and

(d) comparing the actual payments with the 20% to 21% percentages reflected in the BDSAs and the MZ Schedule.

[145] The timing and amount of the payments corresponded with amounts received from Marshall and were consistent with the 20% to 21% proportions reflected in the schedules. This analysis independently corroborated SARS's assessment, that the 20% to 21% payments diverted through the intermediary entities as "business development fees" derived from the Marshall locomotive contracts, corresponding with the "MZ Schedule" and the BDSA's. Mr TGM's forensic cash flow analysis independently corroborated calculations used by SARS.

[146] Mr F's evidence that RG and TQ could not have rendered the services described in the BDSAs because they were not in existence at the relevant time was not contradicted. There was no evidence that TQ had any presence in South Africa. The BDSA relied upon was concluded on 18 May 2015, after the locomotive supply agreements had already been concluded on 17 March 2014.

[147] Mr F did not rely solely on the percentages reflected in the BDSAs. He also analysed the cost of sales, including purchases from South African suppliers, whether delivered locally or abroad. This revealed duplication, in that goods procured from South African suppliers were also reflected in invoices from Company Kozi. The tax court accepted that this duplication contributed to the inflated costs, which funded the payments to offshore intermediaries.

[148] The evidence further shows that Mr F reconciled the amounts in the "kickback" schedule with invoices and bank statements. This analysis was independently verified by Mr TGM. The amounts equivalent to approximately 20% to 21% of the contract values, charged to Marshall and paid to related entities, would have formed part of Taxpayer LE's taxable income. SARS accordingly established, on a balance of probabilities, that Taxpayer LE inflated the contract prices by approximately 20% to 21% to fund these payments.

[149] The question is whether on the objective evidence presented, viewed against the commercial reality and the scheme, the expenditure was incurred in the production of income of Taxpayer LE and wholly or exclusively "for the purposes of trade" and qualifies as a deductible expenditure.[41]

[150] First, a "kickback" denotes an illicit payment made to a person of influence to secure an improper advantage. In this instance the "kickback" was disguised as "consultancy services" recorded in the BDSAs concluded with RG and TQ to conceal their true nature. The terms of the BDSA's, which mirrored each other, required RG and TQ to:

> "Identify the various opportunities of participation in various Government and Private projects, leading to the short listing and focus on the current Project as contemplated in this agreement; provide consultancy on participating in the tenders and bidding processes relating to the Project on an ongoing basis; assist the Company in negotiating with the Client on pricing levels in relation to the Project; and assist the Company in increasing their footprint in Government and Private Projects in South Africa."

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41 *L Feldman Ltd v Secretary for Inland Revenue* 1969 (3) SA 424 (A) at 433 onwards.

[151] As the evidence shows, the payments to RG and TQ were preceded by substantial payments to CGT and TJJ. CGT and TJJ who were referred to in the addendum and payment schedule were part of the scheme with RG and TQ. Earlier attempts to distance Taxpayer LE and Company Zulu from the BDSAs and the flow of funds to CGT, TJJ, RG and TQ by characterising them as foreign transactions, is not supported by the objective evidence.

[152] A comparison between of the amounts received by Taxpayer LE and the prices paid under the subcontracts to its parent and related entities, Company Kozi and Company Zulu demonstrates, on a balance of probabilities, that Taxpayer LE functioned not merely as a conduit or intermediary, but that there was a direct nexus between the payments made to RG and TQ and the inflated purchase price of the locomotives. Put differently, the difference between the contract price received and the underlying procurement cost was channelled to RG and TQ through the subcontracting structure.

[153] Secondly, Taxpayer LE placed Company Kozi in funds derived from receivables under the 95-locomotive contract, calculated at approximately 20% of the contract value (R537.32 million), which was earmarked for payment to CGT and RG. SARS established a clear causal nexus between: (a) the 20% to 21% fee structures recorded in the BDSAs; (b) the values of the 95-, 100- and 359-locomotive contracts; (c) the subcontract prices between Taxpayer LE and Company Zulu resulting in the inflated costs of sales; (d) the contemporaneous email correspondence; and (e) the payments traced to the bank accounts of RG and TQ.

[154] Although the payments were made to RG and TQ, and the law recognises the separate legal personality of companies, the evidence establishes that Mr E was their controlling mind. The interposition of these entities does not detract from the substance of the transactions, and the inescapable inference is that they were utilised to advance an improper purpose. The terms of the BDSAs, insofar as they relate to securing business for Taxpayer LE, reinforce the conclusion that such outcomes could only have been achieved through the agency of Mr E who exercised sole control over the entities in question.

[155] Furthermore, the 95-locomotive contract was executed by individuals who were not only decision-makers within Marshall but also exercised oversight over its affairs, underscoring the influence brought to bear in the procurement process. What is more, the payments made under the disguised “consultancy services’ were not only disproportionate to the services purportedly rendered, as Mr F testified, no such services could have been so rendered by the entities. Apart from other evidence already referred to, the procurement of the 359 locomotives, which was by confinement, draws emphasis on this point. The payments were not legitimately due and ought properly to have formed part of Taxpayer LE’s taxable income.

[156] Although SARS acknowledged that at the time it signed the LOAF, Marshall paid an advance payment of R618 million in 2016, being 10% of the contract price, the maintenance agreement was never concluded, and the advance payment was returned to Marshall the taxpayer in 2019, some three years later, the payment does not detract from the conclusion that Marshall paid for what was not delivered and the "kickbacks" were not legitimate payments or due to the services envisaged in the BDSAs since none could have been rendered.

[157] Despite asserting that it had provided all relevant information, Taxpayer LE failed to establish that:

(a) the amounts were exempt from tax;

(b) the amounts were deductible or capable of set-off;

(c) any basis existed for a reduction of tax payable; or,

(d) SARS's calculations were incorrect, as already alluded to Taxpayer LE failed to lead evidence to challenge the conclusions to show either that SARS erred or a different meaning is attributable to the objective evidence. It refused to participate in its own appeal.

[158] Taxpayer LE failed to discharge the burden of proof and closed its case without leading countervailing evidence. Its failure to properly participate in the appeal meant that it did not address the individual transactions underpinning the assessments or justify the claimed accruals and deductions were trading expenses in terms of section 11(*a*).

Overstatement of operating expenses

(a) Interest in Paid on Loans

[159] During the 2015 year of assessment, Taxpayer LE claimed a deduction of R225 million for interest allegedly paid to Company Zulu under an "Interest Supplementary Agreement" concluded on 11 December 2015. The taxpayer contended that the interest arose from Marshall's delayed payment of a 20% "design freeze" penalty of approximately R229 million, said to have been due in October 2014. Its annual financial statements for the year ended 31 December 2015 recorded this amount as interest paid on a loan from Company Zulu.

[160] Although the delay and the "design freeze" were common cause, SARS's investigation under section 46, including an analysis of the subcontract agreements and the taxpayer's ledger, revealed that only two subcontracts between Taxpayer LE and Company Zulu existed, both concluded on 5 April 2015, prior to Marshall's payment on 21 June 2015. Significantly:

(a) unlike the Marshall contracts, the subcontracts contained no provision for penalty charges;

(b) there were material contradictions between the recording of a loan in the financial statements and the taxpayer's responses to SARS;

(c) the "Interest Supplementary Agreement" referred to two supply agreements, yet the taxpayer asserted that the interest was intrinsic to all subcontracts relating to the 359-locomotive contract; and

(d) SARS found that the R229 million payment from Marshall did not arise from any delay, and that the purported "penalty interest" included charges for a future period.

[161] While the financial statements reflected a loan balance before and after 2015, they did not record any other interest accruals or payments. Notwithstanding this, Taxpayer LE claimed the full R225 million as a deduction in a single year. SARS considered it improbable that such a substantial amount, allegedly arising from a multi-year loan, would be recognised as a once-off interest expense.

[162] The improbabilities were compounded by Taxpayer LE's response to SARS dated 15 October 2020, in which it denied the existence of any loans from related parties. On its own version, there was therefore no basis for an interest deduction. Moreover, the interest had not been paid as at the date of the FAOL on 25 June 2021, and the explanation advanced for the charge was found to be untenable.

[163] SARS accordingly concluded that the R225 million was not interest incurred on a loan, as no such loan existed. It found that the amount was either contrived to secure a tax deduction to offset the R229 million received from Marshall, or constituted a mechanism to externalise funds, potentially for the payment of a bribe or kickback. On either basis, the expenditure was not deductible and was correctly disallowed.

[164] The deduction was correctly disallowed under section 11(*a*) and, in any event, under section 23(*g*) of the ITA, as the expenditure was neither incurred in the production of income nor laid out for the purposes of trade. SARS correctly disallowed the deduction. The grounds are that the deduction of the interest:

(a) was thus not a *bona fide* business expense incurred in the production of income but formed part of an arrangement to offset an irregular receipt from Marshall and to externalise funds to Company Zulu.

(b) was not incurred for purposes of trade but was rather an arrangement put in place to offset the payment received from Marshall amounting to R229,367,461.00 and to avoid a tax liability in the 2015 year of assessment.

[165] SARS in the alternative contended that the "Interest Supplementary Agreement" is an "affected transaction" as defined in section 31(1) of the ITA and Taxpayer LE derived a tax benefit by being party to a transaction, operation, scheme, agreement or understanding on terms and conditions that would not have existed had the taxpayer transacted with an independent party dealing at arms- length. The conclusion reached makes it unnecessary to make a finding on this score. It was in any event not vigorously pursued.

Application of section 23(*o*) to the costs of sales and interest deduction

[166] A further ground SARS relied on applicable to the inflated costs of sales and the interest deduction is in terms of section 23(*o)* of the ITA. It bears repeating section 23(*o*) which relates to expenditure constituting a general offence of corruption for ease of reference. The provision relates to:

> "(*o*) any expenditure incurred—
>
> (i) where the payment of that expenditure or the agreement or offer to make that payment constitutes an activity contemplated in Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004)."

[167] Part of SARS's contention based on section 23(*o*) is that the payment of the inflated costs of sales were "kickbacks" falling within the general offence of corruption,[42] corrupt activity relating to a contract[43] and corrupt activity relating to procuring of tenders[44] in terms Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCAA). In so far as the interest deduction, Taxpayer LE used the payment of interest to externalise funds for the purpose of paying a bribe or kickback, a corrupt activity and offence of corruption in terms of the PCCAA.

[168] Taxpayer LE committed a:

(a) general offence of corruption in terms of section 3(*b*).

(b) corrupt activity relating to a contract in terms of section 12(1*)*(*b*); and

(c) corrupt activity relating to procuring of tenders in terms of section 13(2).

Taxpayer LE's conduct aided Company Kozi and Company Zulu in committing the above offences and the taxpayer is therefore guilty of an offence in terms of sections 20 and 21 of PCCAA as accomplice and co-conspirer.

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42 Section 3(*b*) of the PCCAA.
43 Section 12(1)(*b*) of the PCCAA.
44 Section 13(2) of the PCCAA.

[169] Consistent with the basis for reopening the assessment, the purported loan constitutes a dishonest transaction designed to misrepresent and conceal the true nature of the arrangement between the parties. Although these are civil proceedings, and fraud must be established on a balance of probabilities, the evidence must nevertheless be clear and convincing. It is not sufficient for SARS to allege fraud in the abstract.[45] As held in *Motswai v Road Accident Fund*,[46] allegations of fraud or similarly serious misconduct must be proved by clear and convincing evidence.

[170] Taxpayer LE concluded the impugned agreement with its related non-resident entity, Company Zulu, within the same group of companies. The transaction was presented as an interest-bearing loan, thereby disguising its true nature. The financial statements of Taxpayer LE did not accurately reflect the alleged loan, and it is common cause that the amount in question was never paid. On this basis, the false claim is established. As already found, the purported interest was not deductible. On the evidence, SARS has shown, on a balance of probabilities, that the claim constituted a misrepresentation amounting to tax fraud. This conclusion rests on objective evidence, including the financial statements, the deduction claimed, and Taxpayer LE's responses to SARS.

[171] SARS further seeks a finding that Taxpayer LE's conduct facilitated offences by Company Kozi and Company Zulu under sections 3(*b*), 12(1)(*b*) and 13(2) of the PCCAA, and that it is accordingly liable as an accomplice or co-conspirator under sections 20 and 21, as contemplated in section 23(*o*) of the ITA. In this regard, Interpretation Note 54 confirms that payments constituting bribes or other corrupt expenditure are not deductible under section 23(*o*), and that a criminal conviction is not a prerequisite for its application.

[172] As observed in *S v Scholtz and Others*,[47] corruption is often established by inference drawn from a constellation of proven facts. The court in *Scholtz* stressed that under section3, both the giver of the gratification and its receiver, commit the crime. While the evidence discloses potential offences in terms of sections 20 and 21 of PCCAA with grave consequences, extending beyond Taxpayer LE to non-resident entities, the interests of justice are best served by referring these matters to the National Director of Public Prosecutions for comprehensive investigation and possible prosecution, rather than making piecemeal findings in these proceedings.

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45 *Wingate-Pearse v Commissioner, South African Revenue Service and Others* 2019 (6) SA 196 (GJ) para 61.
46 *Motswai v Road Accident Fund* [2014] ZASCA 104; 2014 (6) SA 360 (SCA) para 46.
47 *S v Scholtz and Others* [2018] ZASCA 106; 2018 (2) SACR 526 (SCA) (*Scholtz*) paras 6 and 124.

[173] It is sufficient for this appeal that this court has found that Taxpayer LE, as the resident taxpayer, was not entitled to the deductions claimed in terms of sections 11(*a*) and 23(*g*). That finding confirms the prejudice suffered by the fiscus and justifies the additional assessments.

(b) Adjusted Operating Expenses from Consultancy Agreements

[174] Mr F testified that Taxpayer LE overstated its operating expenses in respect of a cluster of services, including tender preparation, administration and project management, consulting, and professional fees. Some of these expenses were ostensibly incurred for the preparation of tender documents for the Marshall 95-locomotive contract. After excluding the interest expense of R225 million, these operating expenses amounted to R320 329 271.00.

[175] Several consultancy agreements were concluded in relation to the 95-locomotive contract.

(a) On 18 September 2012, Taxpayer LE concluded an agreement with PI (Pty) Ltd (PI) to provide advisory and assistance services in the preparation of the bid, including support up to contract award and the facilitation of the down-payment.

(b) Taxpayer LE also concluded an agreement with CBM, associated with minority shareholders. The agreement linked deliverables to targets contained in the Supplier Development Plan approved by Marshall Freight Rail.

(c) On 25 September 2012, Taxpayer LE entered into an agreement with SI to assist with the analysis of bidding procedures and the preparation of bid documentation. SI represented SMM Community Trust and CBM.

(d) In terms of these agreements, SI was entitled to invoice R16.5 million (excluding VAT), and PI R24.5 million (excluding VAT), payable within five working days of receipt of a VAT invoice.

(e) Additional amounts classified as management fees were paid to CBM and SMM Community Trust, totalling R3.15 million in 2013.

[176] Subsequent invoicing reflected further irregularities. On 6 August 2014, SI invoiced Taxpayer LE R1.2 million (excluding VAT) for technical, management and advisory services. On 21 October 2014, CBM issued an invoice for R9.5 million (excluding VAT), described as an advance payment for enterprise development. However, SARS found that no corresponding services had in fact been rendered. The directors of CBM were employees of Taxpayer LE and did not contribute to the supplier development programme. Furthermore, neither PI nor SI declared the invoiced amounts for VAT purposes.

[177] A further example concerns JB. On 22 May 2014, JB issued an invoice for R9.12 million, described as a 20% down payment for project management and logistics services in respect of the 100-locomotive project. This was followed by a further invoice dated 24 June 2014 in the amount of R28 648 200 (including VAT). SARS found that JB's business operations were unrelated to such services, that discrepancies existed in the bank account details and invoice formats compared to its dealings with other customers, and that the amounts claimed exceeded its usual trading values.

[178] Mr F analysed the operating-cost schedules and requested supporting documentation, including financial records and ledgers, to substantiate the claimed expenses. Taxpayer LE failed to provide evidence of the services allegedly rendered. Save for the PI invoice, which was allowed (increasing allowable operating costs by approximately R30 million), the remaining expenses were not substantiated.

[179] His evidence was that the audit could not establish the nature of the work performed, the basis on which the fees were calculated, or the commercial necessity of the payments. In the absence of adequate supporting evidence, the expenses were disallowed. SARS further considered that, as with the RG and TQ arrangements, these payments bore the hallmarks of irregular payments, including possible "kickbacks".

[180] SARS also examined the VAT registration status and returns of SI, Mbatsede, SMM and JB. The VAT records did not reflect output VAT consistent with the substantial fees claimed, reinforcing the conclusion that the expenses were not genuine.

[181] The evidence demonstrates that Taxpayer LE failed to substantiate the services rendered, the calculation of the fees, or their commercial rationale. Material irregularities in invoicing and VAT records were identified, and in some instances no services were performed. Taxpayer LE accordingly failed to discharge the onus under section 11(*a*). There is insufficient evidence that the expenses were incurred in the production of income or for the purposes of trade.

[182] SARS was thus correct to disallow the deductions. The disallowance is justified under section 11(*a*) of the ITA.

Understatement penalty and interest on late payment on income tax[48]

[183] SARS imposed an understatement penalty of 200% on the taxpayer's determined tax liability for the 2013 to 2018 years of assessment in terms of section 222(1) of the TAA, determined based on the table set out in section 223 in terms of which SARS concluded that the taxpayer falls under the category of an "obstructive taxpayer" and that the behaviour displayed by the taxpayer is that of "Intentional tax evasion" (for the reasons set out above within the headings of "SARS's findings").[49] Mr F's evidence dealt with above, justifies the conclusion and the imposition of the understatement penalties.

[184] SARS raised interested in terms of section 89*quat*(2) of the ITA, due to the underpayment of provisional tax arising because of the above adjustment. Although section 89*quat*(3) of the ITA permits the commissioner to remit the interest payable in terms of section 89*quat*(2), in whole or in part, the court in *Sishen Iron Ore Co (Pty) Ltd v Commissioner, South African Revenue Service*[50] explains the operation of the two provisions. Section 89*quat*(2) provides for interest to be raised on an amount by which the normal tax payable exceeded any credit due to a taxpayer. SARS has a discretion in terms of section 89*quat*(3) to remit or reduce the interest charged, if satisfied, having regard to the circumstances of the case, that the interest payable is a result of circumstances beyond the control of the taxpayer. We agree with the conclusion that there were no evidence proving circumstances beyond the control of the taxpayer.[51] In this case, evidence points to intentional calculated conduct by the taxpayer.

[185] SARS has therefore levied the said interest with the assessments for the financial years 2013 to 2018. As Mr F testified, Taxpayer LE were advised before the decision to impose the penalty and granted an opportunity to make representation why the understatement penalty should not be imposed by no later than 15 February 2021. Although Taxpayer LE disputed the legality of SARS's understatement penalty in the appeal, it has not

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48 Section 222 of the TAA provides for the "Understatement penalty", the following subsections are relevant to this matter:

"(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.

(2) The understatement penalty is the amount resulting from applying the highest applicable understatement penalty percentage in accordance with the table in section 223 to each shortfall determined under subsections (3) and (4) in relation to each 'understatement'."

49 In the Fourth Schedule to the ITA, para 20 is headed "Penalty for underpayment of provisional tax as a result of underestimation", and specially paras 20(2) reads:

"Where the Commissioner is satisfied that the amount of any estimate referred to in *subparagraph (1)* was seriously calculated with due regard to the factors having a bearing thereon and was not deliberately or negligently understated, or if the Commissioner is partly so satisfied, the Commissioner may in his or her discretion remit the penalty or a part thereof."

50 2025 (4) SA 458 (SCA) para 32

51 See also the following, *Sishen Iron Ore Co (Pty) Ltd v Commissioner, South African Revenue Service* [2025] ZASCA 16 2025 (4) SA 458 (SCA) paras 82-105 – various provisions of section 11, and paras 106-112 – section 89*quat*.

advanced a cogent basis for doing so. SARS has correctly levied the understatement penalty and the interest on late payment on income tax with the assessments for the financial years 2013 to 2018 in terms of section 89*quat*(2) of the ITA on the tax that was computed because of the under-declaration of income before the enactment of the TAA and justifiably refused a remittal. There is no basis to interfere with the decision.

Is the additional tax estimate reasonable?

[186] For the reasons already stated, SARS was obliged to make an additional assessment. In the circumstances, SARS is empowered by section 95 of the TAA to make a reasonable estimate of the additional assessment based on the information before it.[52]

[187] SARS accepted that it has the duty to discharge the burden in section 95 of the TAA, that it must prove that its assessment is reasonable. Reasonableness of the estimate is not defined in the TAA, but is a matter of judicial interpretation.[53] The tax court must consider a variety of factors, principally, whether SARS (a) maintained a fair and reasonable balance based on the facts and information available to it, (b) took account of all relevant factors (c) applied a methodology that is justifiable, and (d) the identity and expertise of the decision maker responsible for the computation. Ultimately, a reasonable estimate is one that is justifiable, rational, lawful, and serves a proper purpose.[54]

[188] Accordingly, the tax court confirms the additional assessment as determined by SARS in terms of section 129(2)(*a*) of the TAA. What remains is the question of costs.

[189] Under sections 130(1)(*b*) and (2) of the TAA, the tax court has a discretion to award costs where a party has acted unreasonably. The conduct of Taxpayer LE goes beyond mere error or poor compliance. The evidence establishes that the appellant advanced claims which were found to be fraudulent, failed to discharge the burden of proof, did not produce relevant supporting documentation, and persisted with untenable contentions, only to refuse to abide by the orders of the tax court and participate in its own appeal. Taxpayer LE putting the already stretched resources of the tax court under unwarranted strain. Its conduct in relation to the

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[52] Section 95(1) and (2) of the TAA reads:

"(1) SARS may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate, if the taxpayer—

(*a*) does not submit a return;

(*b*) submits a return or relevant material that is incorrect or inadequate; or

(*c*) does not submit a response to a request for relevant material under section 46, in relation to the taxpayer, after delivery of more than one request for such material.

(2) SARS must make the estimate based on information readily available to it."

[53] *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service* [2019] ZASCA 148; 2020 (2) SA 19 (SCA) (*Africa Cash and Carry*) para 67.

[54] *Africa Cash and Carry* para 67.

appeal and the litigation reflects deliberate and obstructive conduct and justifies a punitive cost order.

[190] Accordingly, the appellant is ordered to pay the respondent's costs on scale C which shall include the costs of two senior counsel, one junior counsel employed, as well as the qualifying and preparation fees of the respondent's expert witness, Mr TGM.

The order

[191] Accordingly, the following order is made:

(a) an order is granted in favour of the respondent in terms of section 129(2)(*a*) confirming the tax estimate and assessment.

(b) the appellant is ordered to pay the respondent's costs on scale C which shall include the costs of two senior counsel, one junior counsel employed, as well as the qualifying and preparation fees of the respondent's expert witness, Mr TGM.

NTY SIWENDU
PRESIDENT OF THE TAX COURT

MEMBER OF THE TAX COURT:
Ms LEBOGANG MTILENI
COMMERCIAL MEMBER

MEMBER OF THE TAX COURT:
Ms THULISIWE ZM NKONKI
CHARTERED ACCOUNTANT (SA)

Dates of Hearing: 5 to 10 May 2024
1 to 10 September 2025

Date of Judgment: 10 April 2026