

**REPUBLIC OF SOUTH AFRICA**



**IN THE TAX COURT OF SOUTH AFRICA  
(HELD IN JOHANNESBURG)**

**Case Number: IT 24852**

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

**14 April 2026**  
DATE

\_\_\_\_\_  
SIGNATURE

In the matter between:

**TAXPAYER EPP**

**APPELLANT**

and

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

**RESPONDENT**

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**J U D G M E N T**

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**This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on CaseLines. The date of hand down shall be deemed to be 14 April 2026.**

## **MALI J**

### **INTRODUCTION**

[1] This is an appeal against an additional income tax assessment issued by the respondent on 25 May 2018 in respect of the appellant's 2015 year of assessment. The appellant had claimed a deduction of R38 831 547 in its 2015 income tax return, representing excise duties and levies paid during the 2013 year of assessment which were not refunded because the refund claims had prescribed under the Customs and Excise Act 91 of 1964 ("the C&E Act"). The respondent disallowed the deduction, levied a 10% understatement penalty, and imposed interest in terms of section 89*quat* of the Income Tax Act 58 of 1962 ("the ITA").

### **COMMON CAUSE FACTS**

[2] The material facts are not in dispute. The appellant operated as a licensed distributor of fuel during the 2011 to 2015 tax periods. It sourced and purchased fuel from South African manufacturers for resale to customers outside South Africa. Upon each purchase, the appellant paid excise duties and levies in addition to the purchase price.

[3] As an exporter, the appellant was entitled to a refund of the excise duties and levies under the C&E Act, subject to compliance with its requirements. The refund claims had to be submitted within two years from the date of entry for export, in terms of section 76B(2) of the C&E Act.

[4] During 2013, the appellant became aware that its clearing agent had not prepared and forwarded certain refund applications timeously. Consequently, refund claims relating to the 2011 to 2013 tax periods had become prescribed. The appellant had not claimed the excise duties as a deduction in its 2013 tax return, nor did it include them in its trading stock costs for purposes of section 22 of the ITA.

[5] On 12 December 2016, the appellant submitted its 2015 income tax return claiming the amount of R38 831 547 as a deduction under section 11(a) of the ITA. The respondent issued an original assessment reflecting a loss and a refund due to the appellant. Following an audit, the respondent issued an additional assessment disallowing the deduction, levying a 10% understatement penalty, and imposing interest.

### **THE ISSUES**

[6] The issues for determination are:

[6.1] Whether the appellant is entitled to deduct the amount of R38 831 547 as a loss under section 11(a) of the ITA in its 2015 year of assessment;

[6.2] Whether the respondent was correct in imposing a 10% understatement penalty; and

[6.3] Whether the interest levied under section 89*quat* of the ITA should be waived.

## APPLICABLE LEGISLATION

[7] Section 11(a) of the Income Tax Act states the following:

“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.”

[8] Section 23 of the Income Tax Act, which is the negative counterpart to section 11(a), provides for deductions that are not permitted in the determination of taxable income.

[9] Section 23(g) of the Income Tax Act states the following:

“No deduction 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.”

[10] Section 102(1)(b) of the Tax Administration Act 28 of 2011 (TAA) provides that a taxpayer bears the burden of proving that an amount or item is deductible or may be set off.

## ARGUMENTS

### Appellant's Submissions

[11] The appellant submits that it never claimed a deduction for expenditure in its 2015 year. Instead, it claims a deduction for a loss actually incurred during that year. The loss arose when the refund claims became time-expired under the C&E Act, rendering the excise duties irrecoverable. Prior to 2015, the refund claims were intact and the amounts could still be recovered. The loss became final and absolute when the two-year limitation period expired.

[12] The appellant distinguishes between “expenditure” and “loss” for purposes of section 11(a). Relying on *Joffe & Co Ltd v CIR*<sup>1</sup> and *Sentra-Oes Kooperatief Bpk v Kommissaris van Binnelandse Inkomste*,<sup>2</sup> it contends that expenditure involves a voluntary

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<sup>1</sup> 13 SATC 354.

<sup>2</sup> 1995 (3) SA 197 (A).

payment, whereas a loss signifies an involuntary deprivation occurring fortuitously. The loss of the refund claims was involuntary and fortuitous, resulting from the clearing agent's failures.

[13] The appellant further argues that the excise duties do not constitute a "tax" for purposes of the Tax Administration Act ("the TAA") because the definition of "tax Act" in section 1 expressly excludes customs and excise legislation. Section 23(g) of the ITA, which prohibits deductions of taxes, is therefore inapplicable.

### **Respondent's Submissions**

[14] The respondent contends that the appellant conflates two separate obligations: the unconditional obligation to pay excise duties to fuel suppliers at the time of purchase, and the potential entitlement to claim a refund upon export. The liability to pay the excise duties was incurred in the 2011 to 2013 tax years when the fuel was purchased. That expenditure should have been claimed in those years. It cannot be carried forward to the 2015 year under the guise of a "loss".

[15] The respondent submits that section 11(a) requires expenditure to be claimed in the year it is incurred. The principle that tax is a yearly event precludes the shifting of deductions between years. The appellant's failure to claim the expenditure in the correct years, and its failure to submit refund claims timeously under the C&E Act, cannot convert that expenditure into a deductible loss in a later year.

[16] Regarding the understatement penalty, the respondent submits that the appellant made an incorrect statement in its return by claiming an undue deduction. The prejudice to the fiscus exceeds R1 million, constituting a "substantial understatement". There was no bona fide inadvertent error; the appellant deliberately took a tax position. The 10% penalty is the lowest applicable penalty in the substantial understatement category.

[17] On interest, the respondent argues that section 89*quat* interest is payable because the normal tax exceeded the credit amount. The interest does not arise from circumstances beyond the appellant's control, but from its decision to claim a deduction to which it was not entitled.

## **ANALYSIS AND EVALUATION**

### **The Nature of the Claim: Expenditure or Loss?**

[18] The threshold question is whether the amount claimed is properly characterised as "expenditure" or "loss" for purposes of section 11(a). The distinction is not merely semantic. As the SCA observed in *Sentra-Oes Kooperatief Bpk (at 203E-G)*, expenditure generally

refers to disbursements or expenses incurred voluntarily, whereas losses connote involuntary deprivations occurring fortuitously.

[19] However, the characterisation must be applied to the true nature of the transaction. The appellant paid excise duties and levies to its suppliers as part of the purchase price of fuel. That payment was a voluntary disbursement made in the ordinary course of its trading operations. It was not fortuitous or involuntary; it was a necessary incident of acquiring the fuel. The fact that the appellant anticipated recovering those amounts through refund claims does not alter the nature of the initial outlay.

[20] In *Caltex Oil (SA) Ltd v Secretary for Inland Revenue*,<sup>3</sup> the court held that “actually incurred” means a liability has been incurred during the year, whether discharged or not. The appellant incurred the liability to pay the excise duties in the years when it purchased the fuel. That is when the expenditure was actually incurred.

### **THE TIME OF INCURRAL**

[21] The appellant's argument that the loss was “incurred” only when the refund claims prescribed in 2015 conflates the payment of expenditure with the failure to obtain a refund. The payment was an unconditional obligation. The refund claim was a separate statutory entitlement, the loss of which might constitute a loss of an asset (the right to claim the refund), but not the expenditure itself.

[22] In *Sub-Nigel Ltd v CIR*,<sup>4</sup> the court emphasised that no expenditure incurred in a year previous to the particular tax year can be deducted. The scheme of the Act is that tax is assessed on a yearly basis. If the appellant wished to claim a deduction for the excise duties, it was obliged to do so in the years when the expenditure was incurred.

[23] The appellant's submission that it never claimed a deduction for expenditure but only for a loss does not assist it. The “loss” for which it seeks a deduction is, in substance, the expenditure that was never refunded. To permit the deduction in 2015 would effectively allow the appellant to shift expenditure from the 2011-2013 years to the 2015 year, circumventing the yearly assessment principle.

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<sup>3</sup> 37 SATC 1.

<sup>4</sup> 1948 (4) SA 580 (A).

## CONDITIONALITY

[24] The appellant relies on cases such as *CIR v Golden Dumps (Pty) Ltd*<sup>5</sup> and *Nasionale Pers Bpk v KBI*<sup>6</sup> to argue that expenditure is incurred only when conditions are fulfilled. Those cases dealt with liabilities contingent on future events. Here, the liability to pay the excise duties was not conditional on anything. The appellant was obliged to pay the duties upon purchase. The possibility of a later refund did not render the initial liability conditional. The refund was a separate statutory mechanism, not a suspensive condition attached to the payment obligation.

## CUSTOMS AND EXCISE CONSIDERATIONS

[25] The appellant's concession that the refund claims had prescribed under the C&E Act is significant. The C&E Act establishes a comprehensive regime for refunds, including time limits. The appellant's failure to comply with that regime does not entitle it to claim an income tax deduction for amounts it could have recovered had it complied. In the circumstances of this case, there is no legal basis for the appellant's claim for deduction.

[26] The respondent correctly points out that the Tax Court does not have jurisdiction to determine whether the refund claims would have been successful but for prescription. That would require an assessment of compliance with the C&E Act, which falls outside the scope of a tax appeal under the TAA. The appellant's recourse, if any, lies against its clearing agent for the losses occasioned by its failure to lodge claims timeously.

## THE UNDERSTATEMENT PENALTY

[27] Section 222 of the TAA provides that a taxpayer must pay an understatement penalty unless the understatement results from a bona fide inadvertent error. The appellant made an incorrect statement in its return by claiming a deduction that was not permissible under section 11(a). The prejudice to the fiscus amounts to R10,872,833 (the tax fraction of the disallowed deduction), which exceeds R1 million, constituting a "substantial understatement" as defined.

[28] The appellant did not act inadvertently. It deliberately claimed the deduction based on its interpretation of the law. There was no mere error in completing the return. The conduct falls within the definition of "substantial understatement". The 10% penalty is the lowest applicable penalty for that category. The respondent has discharged its burden of proof under section 102(2) of the TAA.

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<sup>5</sup> 1993 (4) SA 110 (A).

<sup>6</sup> 1986 (3) SA 549 (A).

## INTEREST

[29] Section 89*quat*(3) of the ITA empowers the Commissioner to waive interest if it arises from circumstances beyond the taxpayer's control. It is not in dispute that the income tax audit revealed that the normal tax payable by the appellant exceeded the credit amount in relation to the relevant year of assessment as envisaged in section 89*quat*(2) of the Income Tax Act. The appellant was responsible for its own tax affairs and for engaging clearing agents to lodge refund claims. The failures that led to the position were not beyond the appellant's control.

## CONCLUSION

[30] The deduction claimed by the appellant does not constitute expenditure actually incurred in the 2015 year of assessment; neither does it constitute losses actually incurred in the 2015 year of assessment. Therefore, the appellant was not entitled to claim the deduction of R38 831 547 in its 2015 year of assessment. The expenditure was incurred in the 2011 to 2013 tax years and should have been claimed then. The failure to claim it in those years, and the failure to lodge refund claims timeously under the C&E Act, does not entitle the appellant to claim the amount as a loss in a later year.

[31] The understatement penalty was correctly imposed. The appellant's conduct amounted to a substantial understatement, and the 10% penalty is appropriate. The interest levied under section 89*quat* is payable as there are no circumstances beyond the appellant's control justifying a waiver.

## ORDER

[32] Accordingly,

1. The appeal is dismissed. The additional assessment issued on 25 May 2018 for the appellant's 2015 year of assessment is confirmed.
2. The appellant is ordered to pay the costs of the appeal.

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**N.P MALI**  
**JUDGE OF THE HIGH COURT**