IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

APPEAL CASE NO: **A162/20**

COURT *A QUO* CASE NO: **IT 13720**

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

18 July 2022
DATE SIGNATURE

In the appeal between:

AC PETER **APPELLANT**

and

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

JUDGMENT

LUKHAIMANE AJ:

Delivered: This judgement was handed down electronically by circulation to the parties' legal representatives by email and uploaded on CaseLines: The date and time for hand-down is deemed to be 10h00 on 18 July 2022.

[1] This is an appeal from the Tax Court (Dippenaar J, sitting as President of the Tax Court) against the whole of the decision of Dippenaar J on 26 March 2020. The appeal is in terms of section 133(1)(a) of the Tax Administration Act 28 of 2011 ("TAA").

[2] The order of the Tax Court was as follows:

> *"[99] For these reasons, the following order is granted:*
>
> *[1] The estimated assessment issued in respect of the 2005 to 2011 years of assessment are altered in terms of section 129(2)(b) of the TAA to reflect the Appellant's taxable income as follows:*
>
> *2005 R2 313 039.00*
>
> *2006 R5 453 609.00*
>
> *2006 R9 245 284.00*
>
> *2008 R nil (loss amounting to R8 359 757.00 to be carried forward to the next year of assessment)*
>
> *2009 R nil (loss amounting to R5 001 972.00 to be carried forward to the next year of assessment)*
>
> *2010 R1 616 907.00 (accumulated losses of 2008 and 2009 years of assessment taken into consideration and the*

assessed losses carried forward in the amount of R11 744 822.00 to the next year of assessment)

2011 R2 815 619.00 (accumulated loss amounting to R8 929 203.00 to be carried forward to next year of assessment)

[2] The understatement penalties levied by SARS in respect of the 2005 to 2011 years of assessment of 125% are confirmed, subject thereto that the understatement penalties must be calculated with reference to the amounts in 1 above;

[3] The interest imposed in terms of section 89 quat of the Act is confirmed but must be calculated in respect of the reduced amounts referred to in 1 above;

[4] No award of costs is made."

[3] The Appellant raises the following ten grounds of appeal in its notice of appeal[1]. The Tax Court erred by:

(a) Altering the assessments in terms of section 129(2)(b) of the TAA;

(b) Finding that the estimated assessments were reasonable;

(c) Finding that the Appellant's taxable income for the 2010 and 2011 years of assessment is R1 616 907.00 and R2 815 619.00, respectively;

[1] Appeal Bundle Volume 20 pp2579 - 2595

(d) Ruling that the Respondent adduced facts to justify the imposition of the understatement penalties ("USP");

(e) Finding that the Appellant was grossly negligent;

(f) Finding that, for purposes of the levying of USP's, Appellant's behavior was obstructive;

(g) Finding that the appellant had unreasonably refused to provide documentation;

(h) Finding that the appellant had not provided SARS with the supporting documentation regarding the Dainfern property;

(i) Failing to rule that the section 89*quat* interest be remitted in whole or in part.

Lastly Appellant assails the Tax Court's decision not to grant him legal costs in terms of section 130 of the TAA.

[4] The facts of this matter are comprehensively set out in the judgement of the court a quo[2] and therefore it is not necessary to repeat same herein in any detail, save as far as they are relevant to the appeal.

[5] The relevant facts are as follows:

[2] Appeal Bundle Volume 20 pp2529 - 2559

SARS carried out an income tax audit into the affairs of the Appellant and some entities in respect of which he had a direct or indirect interest over an extended period commencing in January 2002. A letter of engagement was issued by Mr Ismail Lockhat ("Lockhat") of SARS in June 2009 in respect of the 2005 to 2007 tax years, also requesting documentation[3]. Appellant's representation, Mr Archie Moosa of Octagon Chartered Accountants ("Octagon") provided SARS with the requested information and supporting information which was acknowledged by Lockhat[4].

[5] In September 2011, the Appellant's audit was taken over by Mr Wolf ("Wolf"). The documentation provided to Lockhat was not available to him. In addition, Wolf expanded the audit to cover the period 2005 to 2011 and issued a second letter of engagement on 23 February 2012, requesting certain documentation[5] and information over thirteen different categories.

[6] During 2012, Appellant had refused to provide any documentation except in support of the tax returns already submitted; which was unacceptable to Wolf. Upon being confronted with letters[6], one dated 26 September 2009 to SARS from A Moosa – with an acknowledgement of receipt for Lockhat of documents and information provided by A Moosa that were delivered to SARS together

[3] Appeal Bundle Volume 7, CaseLines G703-G706
[4] Appeal Bundle Volume 7, CaseLines G725 - 726
[5] Appeal Bundle Volume 3/20, CaseLines G7239-245
[6] Appeal Bundle Volume 7, CaseLines G725-G727

with the letter indicating that documentation had previously been provided to SARS by Octagon, SARS acknowledged that such information was indeed previously delivered, however it was no longer in its possession. Appellant then provided SARS with the supporting documents submitted together with the tax returns for the 2005-2010 years of assessment[7].

[7] SARS issued a final demand for information and documentation for the tax years ending June 2005 to June 2011 on 3 May 2012 followed by a letter of audit findings on 31 August 2012 for years 2005 to 2011[8]. Appellant submitted information in support of adjustments sought to the assessment on 10 October 2012, in which meeting Appellant was now represented by Ziyaad Moosa of Octagon[9].

[8] Having accepted certain adjustments proposed by Octagon which resulted in a reduction of Appellant's taxable income from R88 104 941.00 to R73 469 366.00, SARS issued its finalization of audit letter on 15 February 2013[10]. The Appellant made a request to SARS for a reduction in assessment in terms of section 93 of the TAA, which resulted in a further assessment with a further reduced taxable income of R70 062 028[11].

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[7] Appeal Bundle Volume 2, CaseLines G115

[8] Appeal Bundle Volume 3, CaseLines G250-G251; Volume 4, CaseLines G398-399 and Volume 2 CaseLines G115

[9] Appeal Bundle Volume 2, CaseLines G120-G130

[10] Appeal Bundle Volume 2, CaseLines G106-G139

[11] Appeal Bundle Volume 1, CaseLines 82-93

[9] Following Wolf's view that the Appellant submitted incomplete, misleading, inadequate supporting documentation and irrelevant material in reply to SARS's requests, Wolf concluded that the Appellant had not discharged the burden of proof required in terms of section 102(1) of the TAA explaining why the amounts included in the schedules should be excluded, SARS levied USP's of 125% based on the Appellant's behavior being characterised as gross negligence and obstructive under the relevant classification of the USP table in section 223(1) of the TAA[12].

[10] On 25 February 2014, Appellant lodged an appeal with the Tax Court against SARS' disallowance of his objection[13]. On 30 September 2014 SARS issues a statement of grounds of assessment in terms of Rule 31 of the Tax Court Rules[14]. The Appellant issues a statement of grounds of appeal in terms of Rules 32 of the Tax Court Rules in March 2015[15].

[11] On 19 October 2015, the parties met for a pre-trial conference, wherein they agreed to each appoint independent experts to conduct an independent verification of the assessment conducted by SARS[16]. The Appellant appointed his expert on 15 July 2019 and SARS appointed its one on 30 August 2019.

[12] Appeal Bundle Volume 1, CaseLines 82-93
[13] Appeal Bundle Volume 5, CaseLines G452
[14] Appeal Bundle Volume 1, CaseLines 40-72
[15] Appeal Bundle Volume 2, CaseLines G140-G199
[16] Appeal Bundle Volume 5, CaseLines G511-G515; Volume 6, CaseLines G556-G562

The experts met on 3, 10 and 15 October 2019 to discuss the matter and prepare a joint minute[17].

[12] The hearing in the court a quo was postponed from 14 October 2019 to 21 October 2019 at the behest of the Appellant upon providing further documentation on 20 October 2019, which was not previously made available to SARS. This information was in respect of the Dealstream Contracts for Difference and statements in respect of 1134 Dainfern Ext 5 CC, a related entity. The experts reached agreement on Appellant's taxable income for 2005 to 2011 on 22 October 2019, which was substantially lower than the one reflected by SARS forming the basis of the appeal[18]. The trial then proceeded from 21-25 October 2019 with judgment being handed down on 26 March 2020.

[13] From the parties' joint minute, the common cause facts are as follows:

- Each of the parties appointed an independent expert;
- The independent experts met on 3,10, 15 August 2019 and 22 October 2019;
- The independent experts compiled a joint report, reflecting the taxable amount in respect of the 2005-2011 years of assessment, which information the court a quo relied on to issue its judgment on 26 March 2020;

[17] Appeal Bundle Volume 12, CaseLines G1213-G1220
[18] Appeal Bundle Volume 12 CaseLines G1226

- After the initial meetings of the experts, only two issues remained in dispute; namely, the adjustments in relation to the Dealstream Contracts for Difference in the 2007 and 2008 years of assessment; and the receipt of R5 150 000 from Dainfern in the 2007 year of assessment;
- SARS imposed a USP of 125%[19].

[14] In the joint minute to this appeal signed on 17 February 2022, the parties also indicated that they were close to reaching agreement on the taxable income for the 2010 and 2011 tax years and further communication would be provided in that regard once agreement has been reached[20].

[15] Therefore, the issues to be determined in this appeal are whether the court a quo erred in

- Confirming the Appellant's taxable income as determined and recalculated by the experts;
- Imposing the USP at a rate of 125%;
- Imposing interest in terms of section 89*quat* of the Income Tax Act;
- Failing to make a cost order in favour of the Appellant in terms of section 130(1) of the TAA.

[19] Joint minute page 7-8
[20] Joint minute page 11

[16] In the proceedings before the Tax Court, only two witnesses testified, Wolf and Moosa.

[17] At the outset, given that the parties had indicated in their letter of 22 February 2022 that they might resolve the taxable income for 2010 and 2011 tax years, clarity was sought on progress on this matter. Both parties indicated that the matter had been resolved and SARS had issued new assessments for the 2010 and 2011 tax years based on the agreed taxable income[21],which should be zero. The assessments for both years, issued on 27 September 2021 also indicated that the assessed loss was carried forward.

[18] The Appellant however sought to have the matter of the 2010 and 2011 taxable income referred back to SARS in terms of section 129(2)(c) of the TAA. The Respondent objected to this referral indicating that if that were done, nothing would change in terms of the taxable income amounts because SARS had already interpreted the order of 26 March 2020 to read "income" instead of taxable income with reference to the amounts for the 2010 and 2011 tax years and issued the revised assessments on 27 September 2021 in line with that. A referral back would therefore result in the same assessments being issued as the ones before the court and the Appellant had already accepted these assessments as being correct.

[21] Appeal Bundle CaseLines G1226 at paragraph 5

[19] In addition to that the Respondent indicated that should a referral to SARS be ordered, section 129(4) of the TAA indicates that such assessment may be subject to appeal which would nullify the work on the independent experts. It was at this juncture that Appellant indicated that the USP amount charged in terms of section 222(3)(a)(b)(c) of the TAA and the section 89*quat* interest on the understatement amounts had not been calculated. However, given that the Appellant concedes that the 2010 and 2011 assessments as calculated on 27 September 2021 were correct, this means that the USP amount of 125% and the section 89*quat* interest, which is simple interest on the understatements is a simple calculation on all the amounts that have been agreed upon and a referral back to SARS would serve no purpose but to drag the matter on when it is in the interests of justice for the matter to be finalised as soon as possible. In addition, the issue of the correctness of the USP was not before the court, nor was it in the heads of argument – it was raised from the bar. Neither was the notice of appeal amended whereas the information on the USP raised was available as far back as September 2021. The requirements of rule 49(4) are peremptory[22]. The rule provides that

[22] *Sangono v Minister of Law and Order* 1996 (4) SA 384 E

"Every notice of appeal and cross-appeal shall state (a) what part of the judgment or order is appealed against; and (b) the particular respect in which the variation of the judgment or order is sought."

[20] The Appellant can thus not raise these additional issues unless leave to amend his notice of appeal is granted. No reasons were advanced by the Appellant for the absence of a formal application nor the informal manner in which the matter was raised. Therefore, leave should not be granted for the Appellant to raise these further grounds – this would be a just exercise of the discretion afforded to this court.

[21] The Tax Court had issued its order in paragraph 99(1) of the judgment, in line with the agreement of the independent experts, also in line with the joint minute. Therefore, any referral back to SARS would nullify the work of the independent experts in terms of which both parties were in agreement with the outcome[23].

[22] The Appellant contends that the estimated assessments in terms of section 95 of the TAA were unreasonable and this also impacts on the issue of costs. The burden of proof as to the reasonableness of an assessment is on the taxpayer[24]. SARS bears the burden in terms of section 95 of the TAA. The Appellant submitted that SARS from the engagement through Lockhat to Wolf had carried

[23] Appeal Bundle Volume 12 CaseLines G1225 – G1227
[24] Section 102 of the TAA

out several audits, some of which overlapped. Octagon provided some information to SARS, which at certain periods was not available to SARS although the latter had acknowledged receipt thereof. In addition, Lockhat signed for the Dainfern documents and the Dealstream statements in 2009.

[23] It was also submitted by Appellant that SARS did not plead any facts to support the finding of gross negligence.

[24] The Appellant further submitted that the understatement by the taxpayer was R23 million, yet the Tax Court had somehow double counted resulting in an understatement finding of R45 million.

[25] The Respondent submitted that SARS is entitled to issue assessments on the documents that are readily available to it. SARS had relied on the information sourced from Appellant's bank account when Appellant refused to provide further documents and information to them. It is also not so that the same information was asked over and over again; the first letter of engagement issued by Lockhat on 30 June 2009 was for the 2005 to 2007 years of assessment; whilst the one issued on 23 February 2012 was for the 2005 to 2011 years of assessment.

[26] The Appellant's attitude was to reply that he had supplied the information/documents and will not do so again. On 16 April 2012, his attorneys forwarded a legal letter to SARS indicating that if a request does not relate to a specific amount, they will not provide such information/documentation[25]. This was clearly incorrect as SARS is entitled to ascertain the correctness of any return and in that respect would be entitled to request any information from the taxpayer. This is what then prompted SARS to issue its letter of final demand for information for the tax years ending June 2005 to June 2011 on 3 May 2012[26].

[27] The Respondent submitted that given the history of this matter and the fact that some of the audits were overlapping, it would still have been reasonable to expect the Appellant to resubmit documents that he had provided before.

[28] It was in response to this letter that Appellant had delivered certain information to SARS on 16 May 2012 which the latter found to be insufficient, prompting it to issue a letter of audit findings on 31 August 2012. It is in this letter that SARS informs the Appellant that he has understated his gross income over the period of the audit. It also brought to Appellant's attention that SARS then considered the failure to obtain and provide such detail, documentation and information to be obstructive and without just cause in the manner contemplated by section

[25] Appeal Bundle Volume 3 CaseLines G246 – G249 and Volume 4 CaseLines G394 – G397
[26] Appeal Bundle Volume 3 CaseLines G250 – G251 and Volume 4 CaseLines G398 - 399

75 of the TAA[27]. SARS finally informs the Appellant of the nett adjustment it intended to make also referring to the total receipts in Appellant's bank account over the 2005 – 2011 assessment period of R202 607 479.48.

[29] The Respondent further submitted that meetings were held with Appellant's representatives on 26 September 2012 and both the Appellant and his representatives on 10 October 2012 for the Appellant to provide outstanding information and documents. The meeting of 10 October 2012 was actually a final grace period by SARS for the Appellant to provide the outstanding information and documents required by SARS in light of the Appellant's representative misunderstanding what had up to then been provided to SARS[28]. In the meeting of 10 October 2012, amongst other things, the parties discussed the Contracts for Difference ("CFDS") and SARS made it clear that it had insufficient information and documentation to allow for the deduction of losses claimed, however it was not its intention to deny the Appellant such deductions. The documents underlining the transactions are required to justify the deductions.

[30] SARS then issued its finalisation of audit letter on 15 February 2013[29] indicating adjustments made, the revised and updated taxable amounts for each period

[27] Volume 3, page 266 (first paragraph) and page 267 (first paragraph)
[28] Volume 2, page 131 paragraph 7.7
[29] Appeal Bundle Volume 2, page 118

under audit, estimated tax due and payable including the USP of 125% thereon. There were also Explanatory Notes indicating why the adjustments requested by the Appellant were made or not made.

[31] It is clear from the evidence before the court a quo that everytime the Appellant provided information and documents relevant, SARS adjusted his taxable income from R88 104 940.97 in 2012 to R70 062 028.54 in May 2013. Once SARS adopted the methodology of getting the bank account information, it sought information against those receipts from the Appellant and where it was provided, made the necessary adjustments. This methodology did not change throughout. The Dealstream and Dainfern issues remained outstanding until 20 October 2019, seven years after information was requested by SARS representing R30 605 683.00 of the Appellant's gross income.

[32] The test for whether the assessments issued by SARS are reasonable or not is based on reference to the information readily available to SARS. In light of the Appellant's failure to provide information related to his income, SARS was forced to rely on the information in his bank account. The SCA in Africa Cash & Carry held as follows:

> "By its very nature an estimated assessment is subject to change based on an evaluation of the evidence and any information that becomes available. What is important is that the methodology used and the assumptions on the strength of

which the estimated estimates were made should remain the same, otherwise the conclusions reached by the tax court might not be procedurally fair. The tax court must place itself in the shoes of the functionary to determine whether the methodology followed and the assumptions on which the estimated assessment are based, are reasonable and produce a reasonable result."

[iii] The SCA in the Africa Cash & Carry matter held as follows in respect of the reasonableness of an assessment:

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

[iv] The SCA further held in paragraph [70]:

"[70] The issue is not whether the decision to adopt the gross profit methodology is necessarily the best decision in the circumstances. What this court has to

decide is whether the decision to apply the gross profit methodology struck a reasonable equilibrium between the applicable principles and objectives sought to be achieved, in the context of the established facts of this case."

[v] The evidence established that the under declaration of taxable income was as follows:

Table 1

(a) Years of assessment	(b) Taxable income declared	(c) Taxable income determined by experts	(d) Under declarations
2005	R 600 000	R2 313 039	R 1 713 039
2006	R 600 000	R5 453 609	R 4 853 609
2007	-R 3 648 164	R9 245 284	R12 893 448
2008	-R 6 930 167	-R8 359 757	(R1 429 590)
2009	-R15 660 868	-R5 001 972	R10 658 896
2010	-R15 440 868	R1 616 907	R13 823 961
2011	Nil	R2 815 619	R 2 815 619

[33] In the end, the Appellant's under declaration of taxable income was R45 328 982.00 against the Appellant's return over the same period of R1.2 million for the 2005 – 2011 years of assessment.

[34] It is the finding of this court that the court a quo was correct in concluding that under the circumstances, the methodology adopted by Mr Wolf (SARS) was reasonable.

The Appellant's taxable income for 2010 and 2011

[35] As indicated earlier, this matter has since been resolved and the correct assessments issued in line with the decision to replace the reference to taxable income in the court a quo's order with taxable income. This was also in line with the experts' findings.

SARS did not advance/prove facts to justify USP

[36] The Appellant submitted that SARS did not plead any facts to support a finding of gross negligence on his part to justify the levying of USP. The Appellant also submitted that the understatement was R22 million and not R45 million plus, which is clearly erroneous as the former amount ignores the losses carried over.

[37] SARS notified the Appellant that he understated his income in its letter dated 31 August 2012[30].

[38] As an appeal court may only interfere with the court a quo's findings on limited grounds, reference should be made to the test on appeal. SARS is entitled to impose an USP under the following circumstances:

[30] Appeal Bundle Volume 3, pages 260-286

[iii] In paragraph [12] the Court held:

"[12] The first issue in this appeal relates to whether or not SARS has proven that it is entitled to impose understatement penalties in terms of s 222 of the TAA. Section 221 of the TAA defines the term 'understatement' as: 'any prejudice to SARS or the fiscus in respect of a tax period as a result of

(a) a default in rendering a return;

(b) an omission from a return;

(c) an incorrect statement in a return; or

(d) if no return is required, the failure to pay the correct amount of tax."

[iv] In paragraph [18] of the judgment the Court a quo held:

"[18] Considering that SARS had clearly stated in its statement of grounds of assessment and opposing appeal filed in terms of Rule 31 (Rule 31 Statement) that the 'nil returns' and the non-rendition of the correct CIT returns were the reasons why understatement penalties were imposed, one would have expected the appellant to have adduced some evidence in refutation, especially in relation to the alleged submission of 'nil returns'. It is thus inescapable that the appellant indeed filed 'nil returns'."

[v] In the rule 31 statement, SARS inter alia stated in paragraph 20:

"Scrutiny of the documentation submitted by you together with your returns of income, and information obtained from third parties including bank statements relating to certain accounts operated by you in your name and identified in **Annexure 3**, indicates that you

have understated the gross income you have received over the period of our audit."

(own emphasis)

[39] SARS did indicate why an USP was imposed on the Appellant. As indicated earlier there is an agreement between the parties that there was an understatement of taxable income, although there is disagreement on the amount which is irrelevant as in both instances the understatement is significant. As indicated earlier, the correct understatement is some R45 million.

[40] Therefore, the Respondent did fulfil the requirements for the imposition of an understatement penalty.

Gross Negligence

[41] Again, an appeal court may interfere with the findings of the court a quo on limited grounds. The test in respect of penalties, was set out by the Appellate Division in CIR v Da Costa 1985 (3) 768 (A) at 775 B – G:

"'It was also common cause that this Court will interfere with the determination of the extent of the penalty (or the exercise of any discretion) by the Special Court only on limited grounds on which a valued judgment of a court of first instances may be set aside or varied on appeal ... It follows that, if a decision of a Special Court is based on the exercise of a discretion, this Court will interfere only if the Special Court did not bring

an unbiased judgment to bear on the question, or did not act for substantial reasons, or exercise its discretion capriciously or upon a wrong principle."

On the other hand, the test for gross negligence was considered in *Transnet Limited t/a Portnet* v *Owners of the MV Stella Tingas and Another* per Scott JA:

"...

The concept is not capable of precise definition but examined a number of authorities which provide guidance. His conclusion was as follows:

'It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, **must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.**'" (own emphasis)

[42] The court a quo correctly concluded that the Appellant understated his income over the period in question. This court cannot come to a different view as to the conclusion of recklessness in an instance where the taxpayer declares taxable income of R1.6 million and an understatement of R45 million odd especially as the Appellant himself did not take the court a quo into his confidence and explain how it came about that such a gross understatement for taxable amount occurred. In the very least, the Appellant should have been forthcoming and

willing to indicate how reasonable it was that he could have committed such a gross error in understating his taxable income.

Taxpayer's behavior was obstructive

[43] As indicated earlier (the facts will not be repeated here) from the issuing of the initial engagement letter to the several meetings afforded to the taxpayer, SARS tried to get information and documents from the Appellant. In some instances, they were met with a flat refusal whilst in others they were told that they had to justify why they were entitled to such information as in the Appellant's view they were not entitled to such information. Much was made of Mr Wolf's attitude both in the court a quo and in this appeal i.e., not being a SARS lifer and having been through a messy divorce. While this might have been the case, nothing in Mr Wolf's evidence and the methodology he followed, including the multiple opportunities he provided the Appellant to submit documents and information to substantiate his taxable income can be assailed. The factual findings by the court a quo cannot be interfered with under these circumstances.

Documents not provided

[44] From the details above, it is clear that the Appellant failed to provide documents and information as and when requested to do so by SARS. As and when such

information was provided, SARS considered it and made adjustments to Appellant's taxable income where applicable. The Appellant contended that the same information was asked over and over again by SARS. However, the engagement letters were over two different periods of assessment, some of which overlapped and were handled by different SARS employees, with Lockhat resigning in the middle of the audit. The Appellant was assisted by Fluxman's and therefore it was reasonable under the circumstances for him to resubmit documents where applicable as he would be expected to retain his records until the audit is complete. Some of the documents pertaining to the Dealstream and Dainfern issues were only provided during the first week of trial in the court a quo and these represented a significant amount of Appellant's gross income. The court a quo correctly found that:

> "... The Appellant's conduct in refusing and later failing to provide all the documentation necessary to finalise the audit was similarly unreasonable in various respects. No explanation was tendered in evidence for his failure to do so. Instead, the Appellant's case was focused on criticism of SARS' conduct in an attempt to exculpate his own."

Which is something that was also evident in this court with Appellant repeatedly focusing on criticism of SARS' conduct in an attempt to exculpate his own – a fact brought to Counsel's attention on numerous occasions.

Dainfern documents

[45] It has already been established that the Dainfern issue could only be resolved by the experts one week into the trial after the Appellant provided documents in relation thereto one week into the trial in the court a quo and seven years after these were requested. No reasons were advanced to the court a quo and this court as to why this was the case. The experts' Joint Minute indicated that they needed both the Dealstream and Dainfern documents in order to finalise the taxable income in that respect.

[46] Therefore, on the facts, the Dainfern documents were not provided until a week into the trial.

Section 89*quat* interest

[47] It is a fact borne by the evidence that the Appellant understated his income. SARS was prejudiced by the fact that the under-declaration of provisional income by the Appellant meant that no provisional income tax was paid. This issue is further only being raised on appeal and was not pleaded[31], therefore should correctly not be entertained.

Costs

[31] Rule 34 of the Tax Court rules

Section 130 of the TAA provides that:

"130. (1) The tax court may, in dealing with an appeal under this Chapter and on application by an aggrieved part, grant an orderf or costs in favour of that party, if –

(a) The SARS grounds of assessment or 'decision' are held to be unreasonable;

(b) The appellant's'grounds of appeal are held to be unreasonable;

(c) The tax board's decision is substantially confirmed;

(d) The hearing of the appeal is postponed at the request of the other party; or

(e) The appeal is withdrawn or conceded by the other party after the 'registrar'allocates a date of hearing.

(2) The costs referred to in subsection (1) must be determinesd in accordance with the fees prescribed by the rules of the High Court.

(3) A cost order in favour of SARS constitutes funds to SARS within the meaning of section 24 of the SARS Act."

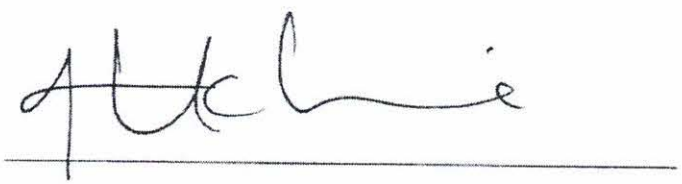
[48] The Appellant is of the view that he was substantially successful in that his taxable income was reduced from R70 million odd to approximately R8 million for the period of assessment whilst SARS is of the view that it was successful in that the Appellant had initially declared R1 million odd which was later finalised as approximately R8 million.

[49] The levying of costs is a value judgment that is best left to the trial court and the appeal court will seldom interfere with the trial court's findings in that regard.

[50] What is clear from the evidence is that had SARS been provided with the information/documents sought from the Appellant, the correct taxable income would have been arrived at much sooner, as also illustrated by the experts' findings. This was not a matter where documents were provided and not taken into consideration by SARS; this was an instance where documents/information was not provided to SARS, resulting in the latter adopting a methodology deemed reasonable under the circumstances and therefore the court a quo was correct in not awarding the Appellant any costs.

[51] In the result, the following order is made:

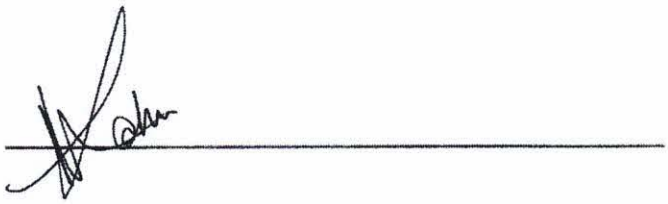
[1] The appeal is dismissed with costs, including the costs of two counsel.



MA LUKHAIMANE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

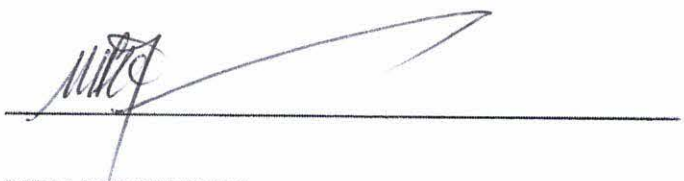
GAUTENG DIVISION, PRETORIA



SNI MOKOSE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA



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APPEARANCES

Counsel for the Appellant:	Adv Retha Marais
Instructed by:	Bisset Boehmke McBlain
Counsel for the Defendant:	Adv Cornelius Louw, SC & Adv Kagiso Magano
Instructed by:	RW Attorneys