REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A395/2016

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

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DATE SIGNATURE

In the matter between:

THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE Appellant

and

THE EXECUTOR OF THE ESTATE LATE LOT MADUKE NDLOVU Respondent

J U D G M E N T

PRETORIUS J

[1] This is an appeal against the whole of the judgment and order of the Tax Court, dated 11 March 2016. This appeal is in terms of section 133(1) of the Tax Administration Act, 28 of 2011 ("the Tax Administration Act"). The Tax Court upheld the taxpayers' tax appeal against an additional assessment SARS raised in terms of the Income Tax Act, 58 of 1962 for the 2007-year assessment, as well as allowing the respondent to raise a new ground of appeal in the Tax Court.

No witnesses were called in the court *a quo*, as the parties had agreed to have the matter heard as a stated case.

Issues:

[2] The first issue is the condonation application by the respondent in terms of Rule 27(1) for the late service and filing of the respondent's heads of argument. Although the Court was not convinced that the reasons set out by the respondent for the late service were entirely adequate, the applicant requested the Court to condone it, as the matter has been outstanding for a considerable time. Therefor the Court granted the application for condonation.

[3] The issues on appeal are whether the court *a quo's* finding that the taxpayer could challenge the raising of section 89*quat* interest for the first time before the Tax Court is correct, as it was initially not part of its objection and appeal. Secondly whether the *court a quo's* finding that the 10% additional tax raised by SASS in terms of section 76 of the Income Tax Act, should be further remitted to 0%, is correct.

The Parties:

[4] The appellant is the Commissioner for the South African Revenue Services. The appellant was the respondent in the court *a quo*.

[5] The respondent is Mr Lot Maduke Ndlovu (deceased), represented herein by Younaid Waja Tex and Business Consultants, as the executor of the deceased estate. The respondent was the appellant in the court *a quo*.

Background:

[6] The respondent now deceased, was employed as a director of the Nedbank Group. He was registered as a taxpayer and was liable to pay income tax. The respondent, finally, resigned from the Nedbank group in October 2009, after having resigned as an executive director in May 2005, but staying on as a consultant and non-executive director until October 2009. During his employment at Nedbank, as an executive director, he was granted options to acquire shares from Nedbank. The respondent exercised his options, during his tenure of

employment and sold the vested shares in the market in three tranches. As a result of the disposal of the vested shares he realised a gain of R7 121 744.43. The exercise and sale process was handled by the Nedcor Employment Shares Trust ("the Scheme Administrator"). The Scheme Administrator previously withheld the tax, on behalf of the respondent, where vested shares were sold prior to 2007.

[7] The net gain, of R7 121 744 was paid to the respondent by the Scheme Administrator, without deducting any taxes. This was reflected in the three IT3(a) returns of the payment for work and services from which no employees' tax was deducted, which were supplied to the respondent. The reason therefore was stated as *"Code4: non-taxable earnings"*.

[8] The respondent enquired from the Scheme Administrator whether the option exercised by the respondent, in 2007, were taxable. The Scheme Administrator informed the respondent, in a letter dated 20 August 2010 that *"the earnings arising from the options exercised were non-taxable"*. The respondent, due to this information, did not declare the gain of R7 121 744 in his 2007 tax return, not even as a non-taxable gain.

[9] Following an audit by SARS, an additional assessment was raised and the R7 121 744 was included in the respondents' taxable income. In terms of section 76(1)(*b*) additional tax and interest in terms of section 89*quat*(2) were imposed. The respondent raised an objection to the additional tax and submitted that the R7 121 744 should not be taxed as a capital gains tax in terms of the Eight Schedule to the Income Tax Act ("the Act") and not as income in terms of section 8A and 8C of the Act. He was of the view that the additional tax should be waived in terms of section 76(2)(*a*) of the Act and that the interest should be remitted in terms of section 89*quat*(2) of the Act.

[10] According to the respondent the gain of R7 121 744 should not be taxed as a capital gain as he had exercised his options after he had ceased to be employed by the Nedcor group. The fact that he stayed on as a consultant and non-executive director until October 2009, made him to believe that as he was no longer a fulltime employee and that the departure from the previous tax treatment of the share options exercised by him, was not applicable in this instance. The respondent objected to the imposition of additional tax of 100% in terms of section 76(1)(*b*). His ground of objection was that he had relied on the Administrator to deduct the appropriate taxes.

[11] This objection by the respondent was disallowed on 8 February 2012 and the respondent requested that the matter be referred for Alternative Dispute Resolution (ADR), The respondent had conceded prior to the ADR, on 26 September 2011, that the gain should be taxed in terms of section 8A and 8C of the Act. The parties could not resolve the issues through ADR.

[12] The appellant informed the respondent, in the letter dated 10 February 2012, that certain adjustments had been made in the calculations of his taxable income, for, *inter alia*, the 2007 year of assessment.

[13] It is of importance to note that this letter also dealt with other years of assessment, namely 2006 and 2009. The tax adjustments were also for other adjustments made to his taxable income. There was only reference to this letter in Court, but no further evidence was presented to the Court regarding this letter. It was not dealt with, during argument, by the parties.

[14] This resulted in the respondent noting an appeal against the disallowance of his objection on 11 March 2012. The respondent's grounds of appeal, dated 7 March 2012, were the same as his grounds of objection. It is important to note that the respondent had not objected, nor appealed, against the imposition of interest in terms of section 89*quat*(2). His ground of objection was solely against the payment of additional tax, on the ground that it had not been his intention to evade the payment of tax.

[15] It is clear from the stated case, that the respondent had not objected, nor appealed against the imposition of interest, in terms of Rule 7. The first time the respondent raised the issue of section 89*quat* interest was during the ADR meeting, where nothing was resolved.

[16] SARS found further extenuating circumstances and reduced the 100% additional tax to 10 %. There after the matter came before the Tax Court on 19 October 2015, at which time the respondent had passed away. The appeal was pursued by the executor of the deceased's estate. The court *a quo* had to decide whether a taxpayer may include a new ground of appeal for the first time, which was not contained in the objection. The second issue the court *a quo* had to decide was whether the reduced additional tax of 10% should be further remitted to 0%.

On 11 March 2016 Mali J and her two assessors unanimously upheld the respondents appeal.

[17] The court *a quo* found that the issue of the section 89*quat* interest was challenged for the first time on appeal and did not form part of the original objection. The court *a quo* dealt with the contents of the letter dated 10 February 2012, although it did not form the basis for the respondent's appeal. According to the court *a quo* the letter created a legitimate expectation that the respondent, as taxpayer, would receive a further assessment and that the respondent would have objected to such an assessment. No evidence was placed before the Court to sustain such a conclusion by the Court. The court *a quo* held that there was no prejudice for SARS and therefore a new ground of appeal may be introduced, even where it had not formed part of the original objection.

[18] The court *a quo* held, on the issue of the additional tax in terms of section 76, that the respondent did not have the intention to evade paying tax. The court *a quo* held:

> "[48] The provisions of section 76(2)(*b*) are unambiguous, the Commissioner must be satisfied that there was intention to evade the payment of tax; thereafter the Commissioner should exercise its discretion to determine the degree of evasion.
>
> [49] Having regard to the above I find that the 10% additional tax should be remitted in whole."

[19] Section 76(1)(*b*) of the Income Tax Act provides:

> "(1) A taxpayer shall be required to pay in addition to the tax chargeable in respect of his taxable income—
>
> (*a*) …
>
> (*b*) if he omits from his return any amount which ought to have been included therein, an amount equal to twice the difference between the tax as calculated in respect of the taxable income returned by him and the tax properly chargeable in respect of his taxable income as determined after including the amount omitted."

[20] Section 76(2)(*a*) of the Income Tax Act provides:

> "The Commissioner may remit the additional charge imposed under subsection (1) or any part thereof as he may think fit: Provided that, unless he is of the opinion that there were extenuating circumstances, he shall not so remit if he is satisfied that any act or omission of the taxpayer referred to in paragraph (*a*), (*b*), or (*c*) of subsection (1) was done with the intent to evade taxation."

[21] There can be no doubt that remission of tax can only take place if it has been proven that the taxpayer had no intention to evade tax. The only requirements in terms of the provisions of the Act is that a taxpayer had omitted from his return an amount of income which should have been included. There is no indication in this provision that it had to be done intentionally – not declaring income will suffice.

[22] In *CIR v Di Ciccio* 1985 (3) SA 989 (T) at 994 H Nestadt J held:

> "In other words, then, no particular form of *mens rea* is required. The question is simply whether, objectivity considered, there was an omission of an amount which ought to have been included or an incorrect statement."

[23] In the judgment of the court *a quo* the Court referred to the above passage in the *Di Ciccio* judgment, but nevertheless found in favour of the respondent.

In ITC 1518 54 SATC 113 it was held:

> "That even the careless or thoughtless conduct of a taxpayer will fall within the ambit of s 76(1). That in this case the default in rendering the returns in question was not attributable to the (tax payers but to an oversight in the office of the auditors; the oversight originated in the administration of that office and there appeared to have been no wilfulness on the part of the taxpayer or the auditor himself That there were indeed extenuating circumstances that justified a penalty of less than 200 per cent – a penalty of 60 per cent of the amount of the tax payable was a sufficient penalty and the existing penalty must be reduced accordingly."

[24] In *CIR v DA Costa* 1985 (3) 768 (A) at 774 van Heerden JA held:

> "It seems clear, therefore, that in cases involving the exercise of a discretion by the Commissioner the special court on appeal to it is called upon to exercise its own, original discretion."

[25] The appellant's counsel argued that a re-hearing take place before the Tax Court and that the same should apply to this Court. Accordingly, this Court can thus make the decision whether the additional tax should be further remitted to 0 % or, in the alternative, to 1 %.

[26] In this instance SARS, the appellant, did not come to the conclusion that the respondent had the intention to evade the tax SARS found extenuating circumstances and first remitted the additional tax from the prescribed 200% to 100%, and then reduced it further to 10%. The respondent relied on the fact that his employer had to deduct the appropriate tax and he did not intend evading the payment of tax. The appellant had already taken this into account as an extenuating circumstance when further remitting it from 100% to 10%. The provision is very clear that had the respondent had the intention to evade the payment of tax, no remission would have been granted.

[27] Counsel for the appellant submitted that a higher degree of care could and should be expected from a person such as the respondent. As director of one of the major banks in South Africa he should have known that gains on share options are taxable. Furthermore, the taxpayer did not voluntarily declare the gains on the share options. It was only when the appellant conducted an audit on the respondents' tax affairs that it was found that the taxpayer had not declared this amount and had not submitted the relevant tax certificate, which had been provided to him by his employer.

[28] Although the respondent, according to him, relied on his employer to deduct the required taxes, it was still his duty to ascertain whether it had been done. In terms of clause 20 of the trust deed of the Nedcor Group Employee Incentive Scheme, any tax liability shall be the sole responsibility of the participant and shall be for the participants account. Nedbank presented the taxpayer, the respondent with the IT3 (a) certificates and he was advised:

> "We enclose IT3(a) certificate, which will be required by the Receiver of Revenue for the year ending February 2007."

It is clear that the Administrator and the employer of the respondent took it for granted that the respondent would have declared this amount.

[29] It is significant that the taxpayer refrained from declaring this as a non- taxable receipt in his 2007 tax return. No further reasons were submitted for a further remittance to 0%, alternatively to 1%. It is expected of a taxpayer, in the respondent's situation, to set out valid reasons for a further remittance where the appellant had already found extenuating circumstances by first remitting the amount from the prescribed 200% to 100% and then to 10%.

[30] This court has considered all the facts as set out in the stated case, the judgment of the court *a quo*, the arguments by counsel and the authorities referred to. This court finds that there should be no further remittance from 10% to 0%, or alternatively 1%. The appeal against the judgment of the court *a quo* succeeds in this regard. The respondent has to pay 10% additional tax in terms of section 76(1)(*b*) of the Income Tax Act.

[31] Section 89*quat*(2) provides that interest is levied on the underpayment of provisional tax. At the time, section 89*quat*(3) provided:

> "Where the Commissioner having regard to the circumstance of the case is satisfied that any amount has been included in the taxpayer's taxable income or that any deduction or allowance claimed by the taxpayer has not been allowed, and the taxpayer has on reasonable grounds contended that such amount should not have been so included or that such deduction or allowance should have been allowed, the Commissioner may, subject to the provisions of section 103(6) direct that interest shall not be paid by the taxpayer on so much of the said normal tax as is attributable to the inclusion of such amount or the disallowance of such deduction or allowance."

[32] The court *a quo* found that the taxpayer could raise the issue of the section 89*quat*(2) interest for the first time on appeal. Rule 4 of the old Rules provides that a taxpayer's notice of objection must be in the prescribed form, with details of the grounds upon which it relies.

[33] In terms of section 81(5) of the Income Tax Act if no objections are made to any assessment, it becomes final and conclusive. In this instance no objections were made against the interest imposed and it therefore become final and conclusive.

[34] These sections and rules were repealed by the Tax Administration Act, which applies to the taxpayer's appeal to the court *a quo* and to this Court.

Rule 7(2) provides:

> "A taxpayer who lodges an objection to an assessment must:
>
> (a) Complete the prescribed form in full;
>
> (b) Specify the grounds of objection in detail including: –
>
> i. The part or specific amount of the disputed assessment objected to;
>
> ii. Which of the grounds of assessment are disputed."

[35] In terms of Rule 10(2)(*c*)(i) a notice of appeal has to specify in detail the grounds of objection appealed against. Rule 10(3) provides that a taxpayer may not appeal on any ground that constitutes a new objection against a part or amount of disputed assessment not objected to under Rule 7.

[36] In *HR Computek (Pty) Ltd v Commissioner South Africa Revenue Services* 2012 JDR 2281 (SCA) the Supreme Court of Appeal held that a taxpayer is precluded from raising a new ground of objection at the appeal stage before the Tax Court.

[37] This Court takes note of the dictum in *Matla Coal Ltd v Commissioner of Inland Revenue* 1987(1) SA 108 (A) where the Court, inter alia, held that a Court should not be unduly rigid in its approach when deciding whether to allow a new ground of objection only at the appeal stage. The circumstances of each case should be taken into consideration, when the Court considers the facts of the case.

In *CSARS v Brummeria Renaissance (Pty) Ltd and Others* 2007 (6) SA 601 (SCA) at para 26 held:

> "… But it is also in the public interest that disputes should come to an end – interest reipublicae ut sit finis litium and it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to change the basis upon which the taxpayer were assessed until the Commissioner got it right – memories fade; witnesses become unavailable; documents are lost."

The converse should apply, that it is in the public interest that a taxpayer cannot be allowed to continue changing the grounds of his objection and appeal.

[38] It is clear from the Brummeria Renaissance judgment that it is in the public interest that disputes should be resolved. The same principles should apply where it would be unfair to the appellant, SARS, if a respondent is allowed to change the basis of its appeal at a late stage when appealing to the Tax Court.

[39] The basis for the court *a quo's* finding that the issue of section 89*quat* interest could be addressed on appeal, although it was not previously objected to, was the letter of 10 February 2012. According to the judgment the letter caused a legitimate expectation with the taxpayer that a further assessment would be raised. Unfortunately, no such evidence was presented to the court *a quo* on which such finding could be made. No reason has been advanced as to why the taxpayer filed his appeal on11 March 2012 and did not mention the section 89*quat* interest at the time.

[40] Therefore this Court finds that the court *a quo* could not have made the decision that the taxpayer was entitled to raise this issue only at the appeal stage, thereby causing prejudice to the appellant.

[41] We agree, in these circumstances with the appellant's submissions, that the court *a quo* erred in finding that the section 89*quat* interest must be waived.

[42] Should we be wrong in this finding, it is clear that the taxpayer had not shown any reasonable grounds for his failure to declare the amount of gain in his tax return and has not succeeded in convincing the Court that the interest should be waived. The appeal will therefor also succeed on this ground. The respondent has to pay the interest in terms of section 89*quat*(2).

In the result the following order is made:

1. The application for condonation is granted for the late service and filing of the respondent's Heads of Argument.
2. The appeal against the whole of the judgment of the Tax Court is upheld and the order of the court *a quo* is set aside and substituted with the following:

   "a) The respondent is ordered to pay 10% additional tax in terms of section 76(1)(*b*) of the Income Tax Act.

   b) The respondent is ordered to pay interest on the amount in terms of section 89*quat*(2) of the Income Tax Act."
3. The respondent to pay the costs of the appeal, including the costs of two counsel.

C PRETORIUS

JUDGE OF THE HIGH COURT

R G TOLMAY
JUDGE OF THE HIGH COURT

S S MAAKANE
ACTING JUDGE OF THE HIGH COURT

Matter heard:	27 August 2020
Judgment delivered:	12 October 2020
Counsel for Applicant:	Adv H G A Snyman SC
Instructed by:	Rooth and Wessels
Counsel for Defendant:	Adv M A Dewrance SC
Instructed by:	Shepstone and Wylie