REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

GAUTENG, MEGAWATT PARK

CASE NO: 13720

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

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DATE SIGNATURE

In the matter between:

MR X Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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J U D G M E N T

DIPPENAAR J

[1] The appellant appeals against certain additional estimated assessments raised by the respondent ("SARS") in respect of income tax for the 2005 to 2011 years of assessment ("the relevant period"), pursuant to following the relevant objection procedures prescribed by the Tax Administration Act[1] ("the TAA") and the Rules promulgated thereunder.

[2] The relevant background facts are not contentious. Over an extended period, commencing in January 2002, SARS conducted an income tax audit into the affairs of the appellant and several other entities in respect of which the appellant had a direct or indirect interest. Its investigations pertaining to the relevant period commenced in June 2009 when a letter of engagement was issued by Mr A of SARS pertaining to the years 2005 to 2007 requesting certain information. The appellant's representative, Mr M from Z Accounting Chartered Accountants ("Z Accounting"), responded and provided SARS with the requested information and documentation.

[3] Mr B joined SARS's specialised audit division in September 2011 and took over the audit from Mr A. Other than a thin file of documents, the documentation provided to Mr A was not available to him. Once Mr B took over, he expanded the scope of the audit which ultimately covered the period 2005 to 2011. SARS via Mr B issued a further letter of engagement on 23 February 2012 for the 2005 to 2011 years and requested a wide ranging scope of information and documentation comprising some thirteen different categories.

[4] The appellant initially adopted the approach that he refused to provide any documentation other than the documentation underpinning the tax returns submitted. Mr B was of the view this was insufficient and identified the appellant and all the entities in which he was involved as a risk. During a meeting between the parties' representatives, SARS acknowledged that information and files previously delivered to SARS were no longer in its possession. Pursuant thereto, SARS was provided with the supporting and substantiating documents submitted together with the appellant's tax returns for the 2005 to 2010 years of assessment. No return had been submitted for the 2011 year of assessment.

[5] Pursuant to a final demand for documentation and information on 3 May 2012, SARS issued a letter of audit findings on 31 August 2012 in respect of the years of assessment 2005 to 2011. A meeting was held between Mr B and Z Accounting on 10 October 2012 at which Z Accounting, now represented by Mr Y, submitted information or "relevant material" in support of adjustments appellant sought to the intended assessments.

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[1] 28 of 2011.

[6] On 15 February 2013, SARS issued the finalisation of audit letter. SARS accepted certain of the adjustments proposed by Z Accounting, which resulted in a reduction of the appellant's taxable income as per the audit findings from R88 104 941 to an amount of R73 469 366. SARS did not take into account certain inter account transfers or returns of the capital portion of the investment in the contracts for difference, discussed in more detail hereunder.

[7] The appellant made a request to SARS for a reduced assessment in terms of section 93 of the TAA. Pursuant thereto, on 10 May 2013, the respondent issued further estimated assessments,[2] reducing the appellant's taxable income to R70 062 028.00. The appellant objected to the latter assessments, which forms the basis of the present appeal.

[8] At the heart of the appeal lies estimated assessments raised by SARS in May 2013 for six years of assessment for 2005 to 2011. SARS's auditor, Mr B was of the view that:

> "[the appellant] submitted incomplete, misleading, inadequate supporting documentation and irrelevant material both in your annual returns of income and in reply to SARS's subsequent request for relevant information for the period under audit.
>
> [his] estimated taxable income is determined from your bank records, relevant material submitted in response to letters of request; and
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> [the appellant had] not discharged the burden of proof required in terms of s102(1) explaining why the amounts included in (schedules) should be excluded."

[9] Ultimately, this conduct resulted in SARS levying understatement penalties of 125% based on it characterising the appellant's conduct as gross negligence and obstructive under the relevant columns of the understatement penalty table in section 223(1) of the TAA.

[10] During the course of the proceedings, the parties each appointed an expert. The respective experts, Messrs D and E, reconsidered the documentation made available to SARS and conducted various meetings. A joint minute was produced. The hearing was due to commence on 14 October 2019. At the behest of the appellant it stood down and commenced on 21 October 2019. Further documentation was provided by the appellant on the eve of the trial on 20 October 2019, pertaining to two outstanding issues on which the experts could not reach agreement. These issues related to appellant's contracts for difference trading on the Dealstream platform and a loan made to the appellant by a related entity, ("F&G CC"). It was undisputed that such documentation was not previously made available to SARS.

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[2] In terms of section 95 of the TAA.

[11] During the course of the hearing and on 22 October 2019 the respective experts reached agreement on the appellant's taxable income in respect of the 2005 to 2011 years of assessment, utilising the documentation provided.[3] It was common cause that the agreed taxable income differed substantially from the taxable income reflected by SARS in its assessments forming the basis of this appeal.

[12] Only two witnesses presented evidence. Mr Y, the accountant who assisted the appellant with the audit and Mr B., who was in charge of the audit performed and raised the estimated assessments here in issue. The appellant did not testify. SARS sought an adverse inference to be drawn from his failure to do so.

[13] On the papers, the issues which were to be determined in the appeal were:

[13.1] Whether the estimated assessments issued by SARS were reasonable;

[13.2] Whether the facts on which SARS relied to impose understatement penalties at a rate of 125% were reasonable or there are exceptional circumstances for the understatement penalties levied on the understatement of the payment of provisional tax to be waived. Stated differently, whether SARS was justified in imposing an understatement penalty of 125% on the basis that the appellant's conduct constituted "gross negligence" and was "obstructive" in accordance with the understatement penalty table in section 223(1) of the TAA;

[13.3] Whether the interest imposed by SARS in terms of section 89*quat* of the Income Tax Act 58 of 1962 ("the IT Act") should be remitted

[13.4] Whether any costs order should be granted.

[14] It was undisputed that in terms of section 102(2) of the TAA, the onus to prove that the estimated assessments under section 95 of the TAA were reasonable and to prove the facts on which it based the understatement penalties levied, rested on SARS.

[15] In light of the fact that the experts by agreement determined the taxable income for the aforesaid years of assessment, SARS argued that the issue pertaining to the reasonableness of the assessments had become moot. It was argued an order should be granted in terms of

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[3] The schedule reflecting the agreed taxable income of the appellant for the period 2005 to 2011 is attached as "A".

section 129(2)(*b*) of the TAA to alter the assessments to accord with the experts' agreed determination.[4] The question arises whether this court has the jurisdiction to do so.

[16] A tax court is not a court of inherent jurisdiction and, as a creature of statute enjoys only the statutory powers granted to it.[5] It may, as a court of revision, take into account all evidence presented at the hearing, exercise its own discretion and make its own decision in exercising the powers afforded under section 129 of the TAA.[6]

[17] In terms of the relevant provisions of subsections 129(2) and (3) of the TAA, this court can exercise a discretion to make the following orders in the case of an assessment on appeal:

> "2 (a) confirm the assessment or decision;
>
> (*b*) order the assessment or decision to be altered;
>
> (*c*) refer the assessment back to SARS for further examination and assessment;
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> (3) In the case of an appeal against an understatement penalty imposed by SARS under a tax act, the tax court must decide the matter on the basis that the burden of proof is upon SARS and may reduce, confirm or increase the understatement penalty"

[18] In *Africa Cash & Carry (Pty) Ltd v Commissioner South African Revenue Service,*[7] the Supreme Court of Appeal endorsed the following interpretation of section 129(2)(*b*) by the court a quo:[8]

> "Subsection (*b*) envisages that when an assessment is ordered to "be altered", the assessment is changed or modified in identified respects but the assessment is not completely transmuted or transmogrified into an entirely new entity comprising new DNA, Subsection (*c*) envisages that the assessment is referred back to the creator thereof, SARS, for a further process of investigation so as to test the subject matter and arrive at a further result".

[19] It further accepted[9] the principle laid down in ABC that:

> "Subsection (*b*) is an appropriate tool where a portion of the original assessment can be set aside with clarity, where the taxpayer has not been taken unaware and proper notice has been given of

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4 As set out in "A" hereto.

5 *ABC (Pty) Ltd v Commissioner South African Revenue Service* ("ABC") Tax court case no 13251 para 117 upheld in *Africa Cash & Carry (Pty) Ltd v Commissioner South African Revenue Service* ("Africa Cash & Carry") [2019] ZASCA 748 (21 November 2019).

6 ABC para 138.

7 [2019] ZASCA 748 (21 November 2019).

8 ABC para 46.

9 Para 51–52.

> the proposed alteration, where the provenance of the alteration is known to all and has been carefully examined by both SARS and the taxpayer and the court."

[20] It was common cause that the estimated assessments raised by Mr B on behalf of SARS differed materially from the figures agreed upon by the experts pertaining to the appellant's taxable income. The evidence does thus not sustain the amounts determined in the estimated assessments. The argument presented by SARS concedes as much.

[21] As held in ABC:[10]

> "Subject to constitutional principles and compliance with the *audi alteram partem* principle, and fairness, provided that the basis for taxation is not now entirely different and provided the court has all the information it requires to decide the matter before it, a tax court can alter an assessment, rather than refer the assessment back to SARS.
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> Such an alteration, if in compliance with the aforesaid principles and justified on the facts as reasonable, will fall within the powers conferred in section 129(2)(*b*) of the Act, accordingly be competent… The tax court will simply be discharging one if its core functions."

[22] In the present instance, there is no further evidence requiring further investigation and assessment. Both parties employed experts who conducted various investigations and meetings and determined the figures by agreement. In so doing, they utilised the same documentation presented to SARS. The parties are in agreement regarding the taxable income for the relevant period.

[23] Although no evidence was presented on the methodology adopted by the experts, it does not appear from the joint minutes and the addendum minutes that a substantially different methodology was used than that adopted by SARS during the audit process. The same schedules used during the audit process, based on the methodology adopted by SARS in considering the deposits into the appellant's banking accounts, were utilised to motivate adjustments thereto.

[24] In argument, the appellant did not challenge the approach adopted by SARS, albeit that he contended the assessments should be remitted as they were unreasonable. It was not contended that the agreed findings pertaining to the appellant's taxable income should not be taken into account or were flawed. He did also not contend that such approach would be procedurally unfair. Instead, the appellant emphasised, in challenging the reasonableness of the assessments issued by Mr B, that the same documents were used by the experts to determine the figures as had been submitted to SARS. From the available evidence it is not apparent that

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[10] At para 57 and 58.

the methodology used and the assumptions on the strength of which the estimated assessments were made were materially different.

[25] There is thus merit in the approach adopted by SARS to alter the assessments in order to bring finality to the matter, rather than remitting the matter back to SARS for reconsideration. To simply set aside the assessments as sought by the appellant, would not bring any finality to the matter and would by necessity involve incurring substantial additional time and costs. This court has the jurisdiction to do so. SARS's contention that the reasonableness of the assessments has become moot, however oversimplified the issue.

[26] The reasonableness of the assessments is relevant to costs, an issue to which I return later. It is also necessary to consider the reasonableness of the conduct of the respective parties in relation to the audit process in order to consider the understatement penalties levied by SARS. It is in this context that the conduct of both the appellant and that of SARS in raising the assessments remains relevant, as it informed the basis on which SARS exercised its discretion in finding that the appellant's conduct was grossly negligent and obstructive.

[27] As a starting point, understatement penalties are regulated by sections 221 to 223 of the TAA. In terms of section 222, an understatement penalty, in addition to the tax liability due, must be paid in specified circumstances. Section 223(1) contains a percentage table in respect of understatement penalties. In terms of section 123(2)(*a*) an understatement penalty is chargeable in cases where an assessment based on an estimation under section 95 is made.

[28] This court is required to consider the issue de novo and to exercise its own original discretion[11] based on the facts placed before it, rather than to review the decision of SARS. In terms of section 129 of the TAA, this court has an unfettered discretion to reduce, confirm or increase the understatement penalty.[12] In terms of section 102(2) of the TAA, SARS bore the burden of proving the facts on which it based the imposition of the understatement penalty.

[29] Our courts have held that the imposition of a penalty is by definition punishment although it may also be compensatory in effect. The levying of a penalty depends on the level of blameworthiness attributed to the conduct of the taxpayer.[13]

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11 *CIR v Da Costa* 1985 (3) SA 768 (AD) 774; ITC 1430 50 SATC at 56 confirmed recently by the Supreme Court of Appeal in Pretoria East Motors supra.

12 ITC 1906 80 SATC 256

13 Unreported decision of the Tax Court, Durban, ITC 13725 and VAT1426; ITC 13727 and VAT 1096, para 41.

[30] Albeit in the context of the reasonableness of an assessment, the Supreme Court of Appeal held in ABC:[14]

> "SARS had to consider all reliable information readily available to it in arriving at the assessments and must have acted rationally, in accordance with principles established in Bato Star[15] and Bel Porto School Governing Body[16]. Factors relevant to determining whether a decision is reasonable or not would include amongst others the nature of the decision, the identity and expertise of the decision maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. This list is not exhaustive.
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> 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… struck a reasonable equilibrium between the applicable principles and objectives sought to be achieved, in the context of the established facts of this case."

[31] On the concept of reasonableness, our courts have also held:

> "This confirms the inherent variability (of the concept reasonableness) and the need for flexibility in its application. It also points to the need for appropriate deference by requiring a prudential (cost-benefit) balance to be struck between a range of competing interests or considerations by decision makers with technical expertise and insight, and implies flexibility and variation in the application of the standard. This is what is meant when reasonableness is referred to as context specific."[17]

[32] Returning to the facts; SARS issued the estimated assessments and levied the understatement penalties on the basis that the appellant had not provided necessary information and had provided returns which substantially under declared his taxable income. SARS's case was based on the averment that the estimated additional assessments were raised as a result of the appellant's failure to provide "corroborating and supporting documentation and relevant material". This was also the version testified to by Mr B at the hearing. His version was that the documentation provided by the appellant throughout the course of the audit and even after the assessments were raised was insufficient and incomplete. SARS levied a penalty of 125% based on "gross negligence" under item 1(iv) and "obstructive conduct" under column 4 of the understatement penalty table in section 223(1) of the TAA.

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14 Para 69-70.

15 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).

16 *Head of the Western Cape Education Department and Others v Governing Body of the Point High School and Others* 2008 (5) SA 18 (SCA) para 18.

17 Free Market Foundation v Minister of Labour and Others [2016] JOL 35802 (GP) para 97.

[33] The starting point of this enquiry is to establish whether SARS was entitled to raise an understatement penalty at all. To do so, it is necessary to consider the returns submitted by the appellant and the taxable income ultimately determined by the experts.

[34] It was undisputed that during the relevant period, the appellant declared the following taxable income: for the 2005 and 2006 years of assessment an amount of R600 000 was declared. For the 2007 to 2010 years of assessment, the appellant declared assessed losses of R3 648 164, R6 930 167, R15 660 868, and R15 440 868 respectively. No income was declared in 2011 and no return was submitted.

[35] Pursuant to agreement being reached between the parties' respective experts, it was common cause that the appellant under declared his taxable income by the following amounts in the relevant period:

2005 R1 713 039;

2006 R4 853 609;

2007 R12 893 448;

2008 (R1 429 590);

2009 R10 658 896;

2010 R13 823 961;

2011 R2 815 619.

[36] In section 221 of the TAA, the concept *"understatement"* is defined to mean any prejudice to SARS or the fiscus as a result of, inter alia, an incorrect statement in a return. A "substantial understatement" is defined as "*a case where the prejudice to SARS or the fiscus exceeds the greater of five percent of the amount of 'tax' properly chargeable or refundable under a tax act for the relevant tax period, or R1000 000"*.

[37] On these undisputed facts, the appellant substantially understated his taxable income for the relevant period as envisaged by the TAA. SARS was thus justified in believing that there was under declared income resulting in it raising the assessments under section 95 of the TAA,[18] albeit that the assessments were substantially overstated.

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[18] In terms of section 95 of the TAA: *"(1) SARS may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate if the taxpayer-(a) fails to submit a return as required; or (b) submits a return or information that is incorrect or inadequate (2) SARS must make the estimate based on the information readily available to it".*

[38] It is also necessary to consider the methodology adopted by SARS in relation to the audit. The methodology adopted by Mr B in raising the assessments was to "follow the cash" and consider each and every deposit into the bank accounts of the appellant as gross income and then required the appellant to show to the contrary. He testified:

> "My approach was to actually follow the cash, i.e. get his bank statements, check all of his bank statements, bank movements, find out exactly what the source of the income was before proceeding to any expenses and actually checking to see what was deductible. … The approach was to pick up on the cash first of all to find out and get an explanation for all this money. … the fundamental…risk that we identified… was that there was an understatement of income and the only income that we could see on the face of things was largely income that he had declared from one of the close corporations or was it a company…but at the end of the day his expenses, the money that he was defraying out of his personal account and out of his credit cards and all the rest were far in excess of the money that he declared for income tax purposes."

[39] Certain documentation had been provided to SARS by the appellant pursuant to Mr A's letter of engagement on 30 June 2009, which was not available to Mr B. When the latter requested copies of such documentation during a meeting with appellant's representative, Z Accounting, the documentation was refused.

[40] Pursuant to SARS's letter of findings of 23 February 2012, appellant's legal representatives raised various legal arguments based on an interpretation of the TAA why the appellant was not obliged to provide the documentation requested. Throughout the process, SARS on various occasions informed the appellant that it regarded the latter's approach as obstructive. This notwithstanding, the appellant persisted in that approach.

[41] Although the appellant contended that it had submitted relevant documentation to SARS, his case was not that such documentation constituted all the documentation ultimately presented to SARS or the experts. Initially he was only willing to provide the documentation submitted with his returns, which the facts now established, were substantially understated. The approach adopted by the appellant pertaining to the provision of documentation, was unreasonable.

[42] When SARS was not provided with the documentation requested, it obtained copies of the appellant's bank statements which were converted into excel spreadsheets. These spreadsheets were used as working documents. The facts established that Mr B adopted this methodology after the appellant's initial refusal to provide documentation which had previously been submitted to SARS and his refusal to provide certain of the information and documentation requested by SARS. In light of the appellant's refusal to provide certain documentation, SARS utilised reliable

information readily available to it[19] as a starting point for the audit. It cannot be concluded that the methodology chosen was in the circumstances *per se* unreasonable.

[43] The evidence established that where Mr B was not satisfied with the explanation, information and documentation provided by the appellant, he took the view that the appellant had failed to discharge the burden of proof. Central to the appellant's case was that in so doing, Mr B adopted an unorthodox methodology and misconstrued the onus SARS bears in relation to an estimated assessment, which rendered the assessments and the penalties unreasonable.

[44] It is clear that Mr B misconstrued SARS's onus and there is merit in the appellant's contention that this was unreasonable. However, this too did not per se render the methodology adopted by Mr B unreasonable or unorthodox. The appellant argued that he had no alternative but to accept SARS's unorthodox methodology. The appellant did not however suggest another more appropriate methodology in evidence, nor did he propose a more appropriate methodology during the engagements with Mr B. The appellant's argument also disregarded the fact that because of the deficient nature of the returns submitted by the appellant, which did not in all instances disclose all his sources of income, the supporting documentation initially submitted would have been insufficient, considering the substantial under declaration of his income. For example, in the 2005 and 2006 years of assessment, the applicant only declared income of R600 000 as a salary and did not disclose any other income at all. The appellant's argument further disregarded that Mr B adopted the methodology because he refused to provide all the documentation requested in the letter of engagement.

[45] The disputes between the parties primarily centered around broken undertakings, errors, inter account transfers and the appellant's trading activities in contracts for difference. It must be considered whether their respective conduct in relation thereto was reasonable.

[46] The evidence established that the appellant did provide SARS with documentation after a meeting on 10 October 2012 held between Messrs. Y and B. At such meeting Mr Y submitted relevant material in support of adjustments appellant sought to the spreadsheets constituting the working papers. These spreadsheets had various revisions and adjustments.

[47] Mr Y's evidence was that he experienced Mr B as obstructive during their first meeting on 10 October 2012. He disputed that the approach adopted by Mr B and his tone at the meeting were reasonable. He objected to Mr B's failure to respond to his email requesting Mr B to provide a list of sample documents which he required from the K Equities' server. There had been a

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[19] As envisaged in ABC fn 14 supra.

meeting at his offices where Mr B was given access to the said system. As the documents were voluminous they had agreed that Mr B would identify a sample list of transactions for which the broker notes and other documents would be required. This was never done by Mr B. There was however no evidence that Mr Y ever followed up on this issue, rather he criticised the approach adopted by SARS.

[48] The appellant argued that Mr B's conduct in giving undertakings to the appellant that he would consider documentation and information provided to him and make the necessary adjustments and then failing to do so, in the correct period or at all was unreasonable. In so arguing, reliance was placed on an undertaking given at the meeting of 10 October 2012 to make an adjustment for a foreign loan advanced to the appellant in an amount of R18 522 248.83 in the 2010 year of assessment. Whilst eventually conceding to such adjustment, Mr B did not take into consideration that appellant had access to the loan to give justification for the manner in which appellant funded his business activities. Reliance was further placed on an error in the B Bank bond account ascribed to the wrong year of assessment and a duplication of manufactured dividends in the tax calculation.

[49] Mr Y testified that he had provided the bank statements of the related entities to Mr B to show that the monies were advanced by the related entities to appellant on loan account, and that this justified the adjustment of the inter-company transfers as these were loans and did not constitute taxable income in the hands of the appellant. The source of the funding by the related entity was not relevant to the determination of whether the amount was received by the appellant on loan account as the entities were separate and distinct taxpayers.

[50] Mr B was aware that the appellant transferred funds between the related entities and into his banking account. Mr B did not accept that the related entities had advanced loans to the appellant utilising access facilities in the bond accounts of such related entities to fund his business activities. Mr B's evidence was that he arrived at the taxable income after excluding all inter-company and inter account transfers. The appellant averred this was factually incorrect as Mr B did not do so in so far as the requested adjustments by appellant's representatives were concerned. His only explanation for failing to account for inter-company transfers was that he required the sources of the funding by the transferring entities. This focus may have detracted from the establishment of the appellant's taxable income. The evidence established that Mr B accepted a limited number of the proposed amendments with the supporting documentation, but rejected the vast majority of the documentation and information provided.

[51] It was further undisputed that the experts accepted the loan from F&G CC in the 2007 and 2008 years of assessment. Mr B's evidence that he accepted and adjusted for the capital receipt from that entity in 2007 was at odds with the assessment.

[52] On the evidence Mr B accepted that a deduction for interest on the loans advanced to the appellant from his related entities utilised by the former for his share trading activities, was an allowance expense in principle. According to Mr Y, Mr B was not prepared to accept the adjustment as the loan was extended to appellant by a separate legal entity 111 CC on the basis that the loan was not used for the purpose of trade by 111 CC.

[53] Appellant argued that the experts had no difficulty accepting in principle that there should be a deduction for interest and did so, albeit in arriving at a different proportionate calculation. It was argued that Mr B's failure to make an adjustment for the deduction of interest was unreasonable. It was further argued that Mr B's refusal to accept any of the information as he required to find out "what the source of the income was" was unreasonable. Considering the facts, there is merit in these contentions.

[54] Much of the dispute centered around the appellant's trading activities in contracts for difference on three platforms, K Equities, T Entity and P Entity. The evidence established that Mr B was insistent that the underlying contracts should be provided, despite such documentation not being available. Mr B had, in addition to the information provided by the appellant, independently approached the third parties for the provision of documentation.

[55] The adjustments sought by the appellant in respect of the proceeds from trading in contracts for difference, fell into three categories. (1) the duplication of dividends in SARS's calculation; (2) the failure to deduct capital receipts and (3) errors in accounting for profits and losses in the contracts for difference trading.

[56] It was not disputed that substantiating and supporting documentation in the form of profit and loss statements from T Entity and K Equities were provided but were rejected out of hand by SARS. Mr B sought the documentation underpinning these statements, Mr B also rejected as insufficient the broker notes which underpinned the third party statements.

[57] Mr Y's evidence on the other hand was that the determination of profit and loss by the appellant in his share dealings on the above platforms could easily be ascertained by the profit and loss statements provided. As pointed out by the appellant, the experts had regard to the third party documentation provided to SARS in relation to T Entity, K Equities and P Entity and were able to determine the appellant's taxable income. It was argued that the documentation provided

to SARS was sufficient for the experts to agree to the adjustments requested by the appellant in his response to the letter of audit findings, his request for the reduced assessment and finally in his objection.

[58] It was however common cause that at the time, the documentation pertaining to the Dealstream platform were not available and was not previously provided to SARS. They became available during the course of the trial and on 20 October 2019. The quantum of the Dealstream issues was some R24 305 683. Pursuant thereto, the parties' respective experts agreed on the requested adjustments which needed to be made. No explanation was proffered by the appellant why the said documentation was only provided so late.

[59] The appellant argued that Mr B's failure to accept the third party documentation evidencing the appellant's gains and losses for the CFD trading on the Global Trading and K Equities platforms was not reasonable. It was argued that the parties' experts did not require all the underlying contracts or broker notes to accept that there was sufficient third party information to justify the adjustment. Mr B's insistence on documentation that did not exist or could not be found, it was argued, rendered the assessment unreasonable.

[60] Mr B in evidence persisted in his contention that the underlying contracts relating to the contracts for difference should have existed and that this was the only documentation he would accept. Despite Mr B attempting to obtain the documentation he required from third parties, being JJ Entity, they were unable to provide the documentation. There is merit in the appellant's argument that such insistence and Mr B's insistence that he could not make the adjustments absent such documents was unreasonable.

[61] Appellant further argued that Mr B's insistence on the documentation actually requested by him as contained in his letter of 23 February 2013 was particularly unreasonable. It argued that in SARS's letter of February 2012, it had not requested underlying contracts but in broad terms requested information pertaining to securities, options, futures, traded through registered brokers or exchanges. On this basis it was argued that Mr B's insistence that documentation which was requested was not provided was incorrect, as such documentation was never specifically requested.

[62] However, as early as 31 August 2012, Mr B recorded in his letter of findings in relation to the contracts for difference trading "*the information submitted by you together with your returns of information and subsequently thereafter does not provide sufficient evidence corroborating that the CFD transactions terminated and settled by you resulted in realised losses or expenses that were certain, absolute and unconditional obligations incurred by you on settlement date. No*

contractual arrangements, deal tickets and/or broker notes have been submitted by you substantiating that you have incurred a tax deductible expense in the relevant tax period". The appellant's argument thus lacked merit.

[63] Considering the facts, Mr B's insistence on demanding the contracts from the appellant, was unreasonable. His evidence was not that there were no other means available to determine profit and loss; rather he referred to the "jigsaw" which was provided which required that he put it together. Mr Y's evidence that the appellant obtained an overseas loan, was substantiated only to the extent of a loan of some R18 million advanced in the 2010 year of assessment. The burning question which remained unanswered was where the R202 million inflow into the appellant's banking accounts came from. Despite this, the experts were able to agree on the appellant's taxable income during the relevant period.

[64] However, the appellant's counter argument that he had provided SARS with all the documentation necessary to make a determination of his tax liability, also lacked merit. The appellant's tax liability could only be determined after the P Entity (and F&G CC) documentation was provided. The evidence established that the appellant did not make all the necessary documentation requested by SARS available to it when requested to do so. Ultimately, the final documentation required to determine his tax liability was only provided some 7 years after it was requested. The quantum of the P Entity and F&G CC disputes amounted to more than R30.6 million. The evidence established that the appellant had invested some R78 million in trading in the contracts for difference. His failure to provide the relevant documentation for some 7 years after it was first requested was unreasonable. No explanation for such inordinate delay was provided.

[65] The appellant sought to paint himself as a cooperative taxpayer, rather than an obstructive one. It was argued that this was illustrated by the appellant bringing to SARS's attention that there had been a duplication of a deduction of loan funding received from third parties, and that it had been over generous in making allowable adjustments in the intended assessment. It was argued that Mr B's failure to make such concession in evidence was not reasonable.

[66] As with the raising of an assessment, the discretion afforded to SARS is not unfettered, but must be based on reasonable grounds. As stated by Ponnan JA in *Commissioner, South African Revenue Services v Pretoria East Motors (Pty) Ltd*[20] in relation to an assessment:

> Although the words 'is satisfied' used in s 79(1) of the Income Tax Act – and now in s 92 read with s 99(1) and (2) of the Tax Administration Act – confer a subjective discretion on SARS, I accept that

[20] 2014 (5) SA 231 (SCA0 at para 11.

the discretion is not unfettered, and an objective approach must be adopted to that subjective discretion. SARS, therefore, must show that its subjective satisfaction was based on reasonable grounds. The raising of an additional assessment in the case of income tax

> *'must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified'.*[21]

[67] There is merit in the appellant's contention that Mr B was persistently argumentative, was not prepared to make any concessions in evidence, and in various instances, failed to answer questions directly. Measured against such conduct, 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's conduct in an attempt to exculpate his own.

[68] SARS sought a negative inference to be drawn from the appellant's failure to testify, who was present at court and was afforded an opportunity to present rebutting evidence. It was argued that absent any evidence being led, there were no facts before this court explaining the substantial under declaration of the appellant's income, nor the source or reason for the inflow of some R202 million into his accounts. There is merit in these contentions.

[69] The appellant sought to counter this argument by arguing that the methodology adopted by Mr B was flawed. He argued that the differences between the returns submitted by the appellant and the figures finally arrived at by the experts, could be attributed to the approach adopted by SARS in relation to the audit in assuming everything in the banks accounts was income and working backwards, rather than allowing the appellant's auditors to follow the more logical process of backing the returns up with documentation. No evidence was however presented to justify such a conclusion being drawn. The argument also disregards the appellant's conduct in materially understating his taxable income in the returns submitted, as established by the experts. Considering how flawed the returns were as illustrated by the findings of the experts and the failure by the appellant's auditors to substantiate his approach, it cannot be said that the methodology adopted by SARS was unreasonable or that the differences can be attributed to the methodology adopted. No explanation was tendered by the appellant for this state of affairs.

[70] In considering whether the methodology adopted by SARS struck a reasonable equilibrium between the applicable principles and objectives sought to be achieved in the context of the facts, it must be concluded that the methodology adopted by Mr B was reasonable. He

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[21] *Wingate-Pearse v Commissioner South African Revenue Services and Others* 2019 (6) SA 196 (GJ) paras 80–81.

utilised the documentation available to him, including documentation obtained from third parties. The appellant was afforded various opportunities to provide information and documentation supporting adjustments to the schedules. Although Mr B's conduct in certain instances in relation to the adjustments was unreasonable, it cannot be concluded that this rendered the methodology unreasonable.

[71] The appellant relied on past conduct on the part of SARS in averring that no facts were disclosed by SARS on which it relied for the imposition of the said penalty either prior to or at the time it issued the assessment. It was argued that no such facts were set out in the initial estimated assessment dated 15 February 2012[22] or the letter of assessment of 10 May 2013. It was contended that the first time SARS provided any facts for the imposition of the said penalty was set out in the disallowance of objection, being the failure by the appellant to provide SARS with specific information requested. It was further contended that no facts were pleaded in the statement of grounds of assessment to justify the imposition of the penalty at the rate of 125% or at all. The argument however disregards that it is the obligation of this court to consider the issue de novo based on the evidence before it and to exercise its own original discretion on the basis of a rehearing.[23]

[72] It was argued by the appellant that he had made available all the documentation he was required at law to provide to SARS and had not been called upon by SARS to provide any further specified documents. For the reasons already provided, this argument has been rejected.

[73] Reliance was further placed on Mr B's evidence that it was the committee who considered that the appellant's behaviour was obstructive and grossly negligent. It was argued that absent evidence from the committee on this issue, there was no evidence presented justifying the decision to raise the understatement penalty.

[74] From Mr B's evidence it was however clear that he provided guidance to the committee and was present at the meeting at which the decision was taken. The facts which underpinned the decision were canvassed at the trial. It is that evidence which must be considered in determining the issue.

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[22] Headed "finalisation of audit", constituting an assessment as defined. *Commissioner of the South African Revenue Services v South African Custodial Service (Pty) Ltd* 2012 (1) SA 522 (SCA) para 29.

[23] *CIR v Da Costa* 1985 (3) SA 768 (A) 124I; confirmed in *Commissioner South African Revenue Service v Pretoria East Motors (Pty) Ltd* 2014 (5) SA 231 (SCA) para 54.

[75] Lastly, the appellant argued that no facts were pleaded or evidence led in support of the conclusion that his conduct was that of gross negligence or that he was obstructive and that SARS's determination on the issue was unreasonable. In the alternative, appellant disputed the reasonableness of the penalties levied and contended that understatement penalties of 25% and 50% should be levied in terms of the table provided in section 223(1) of the TAA, representing penalties for substantial understatement and repeat cases.

[76] In terms of section 221 of the TAA, a repeat case is defined as *"a second or further case of any of the behaviours listed under items (1) to (iv) of the understatement penalty percentage table reflected in section 223 within five years of previous cases".*

[77] On a conspectus of all the facts, it can be concluded that it was not unreasonable for SARS to levy an understatement penalty, although in certain instances, the approach adopted by SARS was unreasonable in insisting on the production of documents which were not available or did not exist. The conduct of the appellant in relation to the substantial under declaration of his taxable income and the audit however overrides any perceived unreasonableness on the part of SARS.

[78] SARS argued that the under declaration by the appellant was a total departure from the standard of a reasonable man and that he was reckless in submitting his returns. It was argued that no explanation was offered by the appellant for his failure to declare all his income. There is merit in the latter contention. What was ultimately agreed upon by the experts was that the appellant had indeed substantially under declared his income, the reasons for which remained unexplained. SARS argued that the imposition of a 125% penalty was justified in the circumstances and that the conduct of the appellant was obstructive and grossly negligent, thus justifying confirmation of the penalties levied in the assessments.

[79] Gross negligence was defined by the Scott JA, in *MV Stella TIngas: Transnet Limited t/a Portnet v Owners of the MV Stella Tingas and Another*[24] thus:

> "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 be categorized as extreme; it must demonstrate where there is found to be a 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."

[24] 2003 (2) SA 473 (SCA) para 7.

[80] From the facts it is clear that the appellant's conduct fell short of the standard of a reasonable man and that he was negligent. Whether his conduct can be classified as grossly negligent and involved a conscious risk taking or a total failure to take care, is the true question.

[81] The appellant's conscious and deliberate decision not to provide an explanation for his conduct, is a factor that weighs against him. It is trite that an adverse inference may be drawn from a failure to present available evidence[25] and from a failure to rebut a fact peculiarly within the knowledge of a party.[26] The evidence of Mr Y did not provide clear answers to the questions which arose on this issue.

[82] On a conspectus of the facts it can reasonably be concluded that the appellant's conduct was obstructive. Ultimately, if the conduct under column 4 of the table in section 223(1) is considered, other than for the first year of assessment, it matters not whether the appellant's conduct was "obstructive" or "a repeat case" as the impact would be the same.

[83] The determination of a reasonable understatement penalty primarily centres around the behaviour classifications in column 2 of the penalty understatement table in section 223(1). The appellant sought to classify, in the alternative, the appellant's conduct as a "substantial understatement" as envisaged in item (i).

[84] The experts determined the net understatement of income by the appellant to be some R45 328 982.[27] In his returns the appellant only declared a total salary of R1 200 000 in the 2005 and 2006 years of assessment and did not declare income from any other source. In the 2007 to 2010 years of assessment, where the appellant declared income from other sources, he declared substantial assessed losses whereas the experts determined that either substantial taxable income should have been declared or the assessed loss was overinflated.

[85] There was no direct evidence to support a conclusion that the appellant was consciously taking a risk in completing his returns. Absent his evidence his state of mind remained unexplained. The evidence did however establish that the appellant did not take reasonable or any care in completing his returns. On a conspectus of the facts, the reasonable conclusion can be drawn that the appellant was grossly negligent and that there was a total failure on the part of

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25 *Galante v Dickinson* 1950 (2) SA 460 AD.

26 *National Director of Public Prosecutions v Zuma* 2009 (1) SACR 361 (SCA).

27 The differences between the declared taxable income and the taxable income determined by the experts, being R1 713 039, R4 853 609, R12 893 448, (R1 429 590), R10 658 896, R13 823 961 and R2 815 619 for the 2005 to 2011 years of assessment respectively.

the appellant to take care in the completion of his returns. As such, the applicable item on the understatement penalty table to be applied is item (iv).

[86] It is thus concluded that a reasonable understatement penalty would be 125 % for the 2005 to 2011 years of assessment and that the understatement penalties imposed by SARS should be confirmed.

[87] On the facts of the present matter, it is not necessary to make any determination of the appellants' challenge to the provisions of section 223 of the TAA based on it being irrational and arbitrary.

[88] The next issue to be determined is whether the interest levied under section 89*quat* should be waived. Section 89*quat* of the IT Act was amended with effect from 10 November 2010 by section 17(1) of Act 8 of 2010. For the years of assessment 2005 to 2010, section 89*quat*(3) at the time provided:

> "Where the Commissioner having regard to the circumstances of the case, is satisfied that any amount has been included in the taxpayer's taxable income or that any deduction, allowance, disregarding or exclusion claimed by the taxpayer has not been allowed, and the taxpayer has on reasonable grounds contended that such amount should not have been included or that such deduction allowance disregarding or exclusion should have been allowed, the Commissioner may, subject to the provisions of s103(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, allowance, disregarding or exclusion."

[89] Pursuant to the amendment and in relation to the 2011 year of assessment, section 89*quat*(3) provided:

> "Where the Commissioner, having regard to the circumstances of the case is satisfied that the interest payable in terms of subsection (2) is as a result of circumstances beyond the control of the taxpayer, the Commissioner may direct that interest shall not be paid in whole or in part by the taxpayer."

[90] Appellant argued that he was not liable for any interest as there was no underpayment of provisional tax in any of the years of assessment in dispute and as the methodology adopted by SARS in raising the disputed assessments rendered them unreasonable. It was thus argued that the appellant contended on reasonable grounds that he was not liable for the tax and interest should be remitted.[28] It was argued further that the appellant's conduct was reasonable in refusing to pay the substantial amounts claimed in the assessments in 2013 and that the delay in

[28] Relying on ITC 1913 80 SATC 455 para 64.

finalisation of the matter by a hearing in the tax court in 2019 was occasioned by circumstances beyond his control.

[91] Although there is merit in the contention that the appellant's conduct was reasonable in refusing to pay the assessments raised, this is but one of the factors which must be considered. A further factor is that the evidence established that the appellant substantially under declared his provisional income in each of the years of assessment and that where he incurred an assessed loss, no provisional tax was paid.

[92] The delay in the finalisation of the matter cannot solely be attributable to SARS. The appellant's conduct contributed to the delay. The conclusion cannot reasonably be drawn that the delays were occasioned by circumstances beyond the appellants control.

[93] On a consideration of all the facts, no proper case has been made out for interest to be remitted or that the relevant criteria of section 89*quat*(3) was met. It follows that the interest should not be remitted.

[94] The last issue to be determined is that of costs. Section 130 of the TAA provides as follows:

> "The tax court may in dealing with an appeal … and on application by an aggrieved party grant an order for costs in favour of a party if: (a) SARS grounds of assessment and decision are held to be unreasonable; (b) the appellant's grounds of appeal are found to be unreasonable."

[95] This court thus has a discretion to award costs[29] if one of the parties was unreasonable as envisaged in section 130. Both parties have on this basis sought costs against the other, including the costs of two counsel, SARS on a punitive scale.

[96] The evidence established that the estimated assessments raised by SARS are substantially different to the agreed taxable income determined by the experts and cannot be confirmed. It is undisputed that the amounts determined by the experts is some 90% less than reflected on the assessments. The appellant's grounds of appeal were thus not unreasonable. For the reasons already advanced the assessments must be altered in terms of section 129(2)(*b*) of the TAA to accord with the amounts determined by the experts.

[97] It was argued by the appellant that but for the unreasonable approach adopted by SARS, the parties may well have agreed on figures and the assessments and all of the concomitant costs of the appeal would not have been necessary. There is merit in the contention that the appellant

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[29] ITC1806 SATC 117 (Gauteng Tax Court).

had no recourse but to appeal the assessments raised by SARS as its grounds of assessment and decision were in certain instances unreasonable for the reasons already stated. The conduct of the appellant in relation to the audit cannot however be ignored. It was only when the P Entity and F&G CC documentation was provided during the course of the trial that resolution could be reached on the appellant's taxable income. Speculation regarding the possible earlier resolution of the parties' dispute would be inappropriate.

[98] Considering all the imperatives relevant to balancing the competing interests of the parties in the exercise of the discretion afforded, and in considering their respective conduct, it is concluded that no award of costs should be granted.

[99] For these reasons, the following order is granted:

[1] The estimated assessments issued in respect of the 2005 to 2011 years of assessment are altered in terms of section 129(2)(*b*) of the Tax Administration Act 28 of 2011 ("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 next year of assessment)

2009 R nil (loss amounting to R5 001 972.00 to be carried forward to 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 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 IT 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.

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EF DIPPENAAR

PRESIDENT OF THE TAX COURT

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MS S MAKDA

ACCOUNTING MEMBER

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MR C MRASI

COMMERCIAL MEMBER

APPEARANCES

DATES OF HEARING	:	21-25 October 2019 10 December 2019
DATE OF JUDGMENT	:	27 March 2020