REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 24674

DATE: 25 November 2020

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

25 November 2020
Date

SIGNATURE

Before the Honourable Justice P.M. Mabuse

Ms Anna Teichert, Commercial Member

Ms Natasha Singh, Accountant Member

In the matter between:

CBA (PTY) LTD	APPELLANT
and	
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	RESPONDENT

J U D G M E N T

MABUSE J

[1] This is an appeal by CBA (Pty) Ltd ("the taxpayer"), against the decision of the Commissioner for the South African Revenue Service (SARS) to impose under statement penalties ("usp") at the rate of 15% on the grounds of "no reasonable grounds for tax position taken". For purposes of convenience, the taxpayer will be referred to as the appellant.

[2] The appellant is CBA (Pty) Ltd, a company which is duly incorporated in accordance with the relevant company laws of the Republic of South Africa. The appellant is registered taxpayer with the relevant Tax Reference Number.

[3] The respondent is the Commissioner for South African Revenue Services ("SARS") the official duly appointed to administer the Income Tax Act 58 of 1962 (ITA) and other tax related laws with its principal place of business at 271 Bronkhorst Street, Khanyisa Building, Nieu Muckleneuk, Pretoria.

[4] The dispute in this matter relates to the percentage of the understatement penalty imposed by SARS on the appellant following an understatement.

THE BACKROUND

[5] The taxpayer submitted to SARS an Income Tax Return for audit in 2017. This tax return was submitted in respect of the 2016 tax year. SARS completed the tax type for the said tax period 2016 and, based on the audit findings, made the following adjustment:

Summary and Explanation for the Proposed Adjustment

Tax Period:	2016
Provisions of Income Tax Act (ITA):	Section 11(*e*)
Brief Description of the Adjustment:	Wear and Tear
Adjustment Amount:	R17,564,368.00
Tax Amount:	R4,918,023.00

[6] In the 2016 year of assessment tax return, the taxpayer had claimed "wear and tear" allowance of R54,305,235.00. Included in this allowance was an amount of R17,564,367.99 described by the taxpayer as "wear and tear catch-up" which was due to an error in the 2015 year's calculation of the "wear and tear' allowance. According to SARS the aforegoing description was according to emails sent to Ms Edith Mantloane by Ms LM on 16 April 2017. The taxpayer agreed with the proposed adjustment in its letter dated 30 June 2017 which was the taxpayer's response to SARS's Letter of the Audit Findings.

THE REASON FOR THE ADJUSTMENT

[7] It is SARS's case that the adjustment it made was based on the law, in particular section 11(*e*) of the ITA, which provides that:

> "Save as provided in paragraph 12(2) of the First Schedule, such sum as the Commissioner may think just and reasonable as representing the amount by which the value of any machinery, plant, implements , utensils, and articles (other than machinery, plant, implements, utensils and articles in respect of which a reduction may be claimed under s 12(*b*), 12(*c*), 120 A, 12 E(1) or 378) owned by the taxpayer or acquired by the taxpayer as purchaser in terms of an agreement contemplated in paragraph (*a*) of the definition of 'Instalment Credit Agreement' in s 1 of the Value Added Tax and used by the taxpayer for the purpose of his or her trade being diminished by reason of wear and tear or depreciation during the year of assessment."

Section 1 of the Income Tax Act defines "year of assessment" as:

> "Any year or other period in respect of which any tax or duty leviable under this Act is chargeable and any reference in this Act to any year of assessment ending the last or the twenty eighth or twenty nineth day of February shall, unless the context otherwise indicates, in the case of a company or the portfolio of a collective investment scheme in securities be construed as a reference to any financial year of that company or portfolio ending during the calendar year in question."

[8] The Commissioner contends that tax is an annual event and therefore expenses and/or allowance must be claimed in the year during which such expenses or assets are first incurred. The amount of the allowance must be determined on the basis of the period of use listed for the purpose of section 11(*e*) allowance issued by the Commissioner, or a shorter period of use approved by the Commissioner from the date the asset was brought into use. Therefore, the appellant may not in law, claim in the 2016 year of tax assessment, the "catch-up wear and tear" expenses that it was supposed to have claimed or that it incurred in the 2015 tax year of assessment. It was for that reason that the amount of "catch-up wear and tear' allowance of R17,564,368.00 was not allowed.

[9] The Commissioner regarded the disallowed amount of R17,564,368.00 as an understatement. An understatement is defined by section 221 of the Tax Administration Act No. 28 of 2011 (TAA), as:

> "(*a*) A default in rendering a return;
>
> (*b*) an omission from a return;
>
> (*c*) an incorrect statement in a return;
>
> (*d*) if no return is required, the failure to pay the correct amount for tax; or
>
> (*e*) an impermissible avoidance arrangement."

[10]

[10.1] The existence of any form of understatement contemplated in section 222 of the TAA triggers a penalty as referred to in the said section 222. Section 222, which deals with understatement penalty, provides that:

> "In the event of an understatement by a taxpayer, the taxpayer must pay, in addition to the tax payable for the relevant tax period, an understatement penalty determined under subsection (2) unless the understatement resulted from a *bona fide* inadvertent error."

[10.2] The understatement penalty (usp) is the amount resulting from applying the highest applicable understatement penalty percentage in accordance with table 1 , section 223, for each shortfall determined under subsections (3) and (4) in relation to each understatement in a return;

[10.3] the shortfall is the sum of –

(a) the difference between the amount of "tax" properly chargeable for the tax period and the amount of "tax" that would have been chargeable for the tax period if the "understatement"' were accepted;

(b) the difference between the amount properly refundable for the tax period and the amount that would have been refundable if the understatement were accepted ;

(c) the difference between the amount of an asset loss or any other benefit to the taxpayer properly carried forward from the tax period to the succeeding tax period and the amount that would have been carried forward if the "understatement" were accepted, multiplied by the tax ratio determined under subsection (5);

[10.3] If there is a difference under paragraphs (*a*) and (*b*) of subsection (3) the shortfall must be reduced by the amount of any duplication between the paragraphs.

[10.4] The tax rate applicable to the shortfall determined under subsections (3) and (4) is the maximum tax rate applicable to the taxpayer, ignoring an assessed low or any other benefit brought forward from the preceding tax period to the current tax period.

[11] Relying on the law, SARS demonstrated how the understatement penalty was imposed. That was done as follows:

Description:	Tax amount
"Catch-up wear and tear":	R4,418 ,023.04
Applicable behaviour:	No reasonable grounds for tax position taken
Applicable conduct:	Standard
Usp percentage:	50%
USP Amount:	R2,459,011.00

[12] SARS took the view that the *onus* lies on the taxpayer to show that a *bona fide* and inadvertent error was made. It is SARS's case that it was the intention of the appellant to claim "catch-up wear-and-tear" of R17,564,368.00 which was not claimable, in the 2016 tax year.

[13] SARS contends that in terms of section 223 of the TAA, a penalty of 50% was levied because there was an understatement and prejudice to SARS of the *fiscus*. The applicable behaviour in the instant matter is that "no reasonable grounds for the tax position taken", and the applicable conduct labelled as "standard". Accordingly, the USP of R2,459,011.52, in other words, (R17,564,368 × 28% × 50%) was imposed.

[14] Having received this adjustment made to the assessment, the appellant raised an objection in terms of section 04 of the TAA against the assessment. At the heart of the objection was the wear-and-tear error in the 2016 tax return. The appellant tried to explain the tax error in the following manner. According to the taxpayer, the reason for the identification of the error in the 2016 tax year was that a full analysis was performed for the fixed assets and it was decided by management to create a tax register. The appellant went through several financial managers and neither took ownership of the asset register. In the creation of the registers, the tax base of the assets at 28 February 2016 was that the tax value of the assets (for tax purposes), was R17,564,368.00 higher than what it should have been. The conclusion drawn was to adjust the wear-and-tear by this amount. (In other words, increase wear-and-tear). The result of having a higher tax base represented the allowance not claimed in the past. Management passed the adjustment as wear-and-tear in the current year as it was impractical to reopen each year as the registers were not prepared in those years. While we are still on this point, SARS's witness testified that the taxpayer knew that the appellant could open an asset register. There is no explanation why there was no asset register in the first place.

[15] According to the letter dated 25 August 2017 from CLA & Tax Specialists, for the appellant, to SARS, the treatment of the catch-up wear and tear was approved by the management as well as the auditors. The appellant contends that it was only discovered upon further investigation that the deferred tax balance sheet accounts in the financial statement

were incorrect. The correct entry in the accounts was not to include the adjustment of R17,564,368.00 through the current tax computation but to pass a prior year adjustment to deferred tax by the approval of the following entry:

> DR; TAXATION (PROFIT AND LOSS – PRIOR YEAR OF ADJUSTMENT)
> R4918023 and
> CREDIT DEFERRED TAX BALANCE SHEET R4918023.

The appellant agrees with SARS's findings with regards to the over-claiming of the allowances. It contends that the over-claim of wear-and-tear resulted an error in the preparation of the financial and the registers.

[16] Then the taxpayer indicated that it was objecting against the penalties levied in terms of section 223 of the TAA. The taxpayer states that, because of the adjustment, the taxpayer had an original assessed loss of R37,635,914.00. After the adjustment, the assessed loss to be carried forward was R20,071,546.00. The taxpayer then contends that there had been no loss to the *fiscus* that resulted from the identified error.

[17] The taxpayer objected to the understatement penalty imposed of R2,459,011.00 on the grounds that there is no understatement by the taxpayer in respect of the 2016 year of assessment under this ground of assessment. Under this ground of objection, the taxpayer contended that reading section 222 and section 221 together the understatement cannot be levied unless there is prejudice to SARS or *fiscus*. Harm would be caused to SARS if SARS consented to the erroneous refund and subsequently made payment of that refund to the taxpayer, in other words, to the appellant. In other words, if SARS would be out of pocket in the amount of incorrect sum. There is therefore no loss of the *fiscus*.

[18] SARS disallowed the objection and furnished written reasons for the disallowance. SARS pointed out that following the finalisation of an audit, when the catch up wear-and- tear allowance of R17,564,368.00 was disallowed (and the appellant agreed that this wear-and-tear should not have been claimed in the 2016 year of assessment), an understatement penalty of R2,459,011.52 was imposed. The understatement penalty was imposed because it was found that there was no bona fide inadvertent error; that there was an understatement and prejudice to SARS and *fiscus*. The applicable behaviour was determined to be "no reasonable grounds for the tax position taken" and the conduct was determined to be "standard". A penalty was determined at 50% of the tax of R17,564,368.00.

[19] In the same disallowance of the objection, SARS took steps to explain the applicable understatement penalty.

[20] The taxpayer took the following actions as submitted in the letter of objection dated 25 August 2017. The wear-and-tear was over-claimed by the amount of R17,564,368.00. The taxpayer did a full analysis of the fixed assets register. In the light of the fact that there was no tax asset register, the management decided to create a tax asset register because the taxpayer's financial managers did not take ownership of the asset register. It is not clear as to how this could happen and not corrected in time. It was found that the tax value asset was higher by R17,564,368.00.

[21] The conclusion was that the wear-and-tear allowance in the 2016 year of assessment was increased by R17,564,368.00, the adjustment which was done or passed or approved by the management of the appellant and its auditors. This was done deliberately. Accordingly, it is so submitted by SARS, the appellant made an intentional decision to claim wear-and-tear which was not claimable in the 2016 year of assessment. There was no *bona fide* inadvertent error.

[22] On 15 November 2018 SARS delivered its statement of grounds of assessment. On 18 January 2018 the taxpayer, through its attorneys, Cliff Dekker Hofmeyer ("CDH"), delivered its statement of grounds of appeal in terms of Rule 32 of the Tax Court Rules. The amount of R17,564,368.00 represents the accumulative amount by which the appellant's combined allowances had previously been under claimed, either when the assets were transferred from A to the appellant or thereafter in the 2013, 2014 and 2015 tax year of assessment. Due to an incomplete register being kept, the appellant accepted the variance as a prior year adjustment to deferred checks on the basis that it was not going to claim the variance for tax purposes. At the time of submitting the returns, the appellant and its auditors were of the view that variances must logically relate to the under claim of allowances. It was only upon further examination that it became clear evidence that there may be an issue with the tax value in the audited accounts.

[23] It is common cause that SARS has imposed an understatement penalty on the appellant equal to 50% of the shortfall on the grounds of no reasonable grounds for tax position taken. SARS alleges that such shortfall has occurred because of the appellant's over claiming its combined allowances in the 2016 year of assessment.

[24] The appellant disputes that the respondent is entitled to impose such an understatement penalty. The appellant contends that:

> [24.1] the respondent has failed to discharge the burden of proof imposed on it under both sections 102(2) and 129 (3) of the TAA. Section 102 (2) states that:
>
> > "The burden of proving ... the facts on which SARS based the imposition and understatement penalty under Chapter 16 is upon SARS."

In my view, SARS has satisfied this requirement. The appellant has also admitted that it was incorrect for it to claim the said amount in the 2016 year of assessment. Accordingly, there is no merit in the appellant's contention that SARS has not discharged the *onus* that lies on it in terms of section 102 (2) of the TAA;

[24.2] there was no prejudice to SARS or the *fiscus* because of adjustment and accordingly no "understatement" or "substantial understatement" as contemplated in section 221 of the TAA has occurred;

[24.3] in the alternative, if there was an *understatement* as *envisaged by section 221 of the TAA, such understatement resulted from* a *bona fide* inadvertent error;

[24.4] further alternatively, if there was an understatement or substantial understatement as contemplated in section 221 of the TAA and such understatement did not result from a *bona fide* inadvertent error, the appellant's behaviour did not constitute "no reasonable grounds for the tax position taken" but rather should be classified as "a substantial understatement" in terms of the understatement percentages penalty table contained in section 223 of the TAA.

[25] According to the parties the issue in dispute is whether SARS was correct to impose the USP in terms of section 223 of the TAA at the rate of 50% as standard case, based on the behaviour categorised as "no reasonable grounds for tax position taken" to claim the wear-and-tear allowance in the 2016 year of assessment, instead of the respective years 2012, 2013 and 2014 years of assessment. In expounding on the issue in dispute as set out by SARS, the appellant stated that the issue in dispute pertains to –

[25.1] whether the SARS has discharged the burden to prove imposed under section 102(2) and 129(3) of the TAA;

[25.2] whether there was an understatement or substantial understatement·,

[25.3] should the Court find in favour of the respondent in respect of the issue referred in paragraph 24.2 above, whether there was a bona fide inadvertent error on the part of the appellant;

[25..] should the Court find in favour of the respondent in respect of the issues referred to in paragraphs 24.2 and 24.3 above, whether an understatement penalty of 10%, as opposed to 50% should be imposed.

[26] Three witnesses testified in this appeal, one for SARS and the other two for the appellant. Mr Tsamana Calvin Tshilonga (Mr Tshilonga) testified for SARS. He told the court that he was currently employed by SARS at Woodmead as an Operational Specialist and Investigative Division of the Life Centre; had, among others, the following qualifications: BCom; Higher Diploma in Tax Law; Advanced Certificate in Value Added Tax; and Master of

Commerce in International Tax. More importantly he is the person who in 2016 conducted the appellant's audit for 2016 year of assessment in this matter He confirmed that SARS issued a Letter of Findings to the appellant after the appellant had, in its tax returns, claimed an allowance. In conducting that audit, SARS asked for tax returns and tax schedules from the appellant. Tax returns are used to determine the tax liability of a taxpayer.

[27] In the tax return, an amount of R37,425,254.00 was calculated as a loss. According to the tax returns, the amount represented the loss sustained by the appellant under the 2016 tax year. This amount was calculated by the appellant. He referred to the Final Audit , which was prepared by him and confirmed its contents. He referred furthermore to the tax depreciation and called it a wear-and-tear. Then he testified that no taxpayer is in law permitted to claim more than the law allows. The allowance that the appellant claimed was called the "catch-up allowance" and it was for the previous years. According to the principles of accounting, one cannot claim in one year what one should have claimed in previous years. In other words, one cannot claim in the 2016 tax year of assessment what one should have claimed in 2012, 2013, 2014 and the 2015 tax years of assessment. This is so because in essence section 11(*a*) of the ITA permits a taxpayer to deduct the business expenditure of revenue nature and prohibits a deduction of capital expenditure. The underlying logic is that the income tax system operates on an annual basis in which income tax is levied on the taxpayer's taxable income for each year of assessment. The essence of expenditure of a capital nature is that it results in the creation or acquisition of assets of enduring benefit to the taxpayer's trade, hence if capital expenditure were deducted in full in the year in which it was incurred, the taxpayer's taxable income for that year would be understated. He testified that in conclusion the appellant cannot claim a "catch-up wear-and-tear" in the 2016 year of assessment when it should have been claimed in previous years.

[28] If a taxpayer has not claimed the "catch-up wear-and-tear allowance" in the relevant year of assessment, such a taxpayer may use section 93 of the TAA and submit a revised return. An adjustment must be made to the taxpayer's income to remedy any inaccuracy in the "wear-and-tear allowance" granted in prior years. This is only possible if the claim has not become prescribed. The "catch-up wear-and-tear allowances" were contained in the 2016 year of assessment. The appellant could still have requested SARS to revise the assessment. This was never done.

HOW THE USP LAW WORKS

[29] He then explained how the USP was imposed in terms of the law. He explained that it was a "catch-up wear-and-tear" that was disallowed in the sum of R4,918,023.04; that the applicable behaviour was "no reasonable grounds for tax position taken"; that the applicable conduct was classified as "standard' as determined by the USP at 50%. It is this 50% that is

the subject of this appeal. It is on this 50% that the appellant requires a determination. In the place of the 50% USP, the appellant proposes a 10% USP and has furnished reasons for that proposition.

[30] I now turn to the reasons why SARS imposed 50% USP. In the first place, it is contended by Mr Tshilonga (and here I agree with him), that the duty is on the appellant to satisfy the Court that a *bona fide* inadvertent error was made. The TAA does not define a bona fide inadvertent error. I was referred to the Collins Oxford Dictionary, definition of “inadvertent” and I was informed that it means:

> “Failing to act carefully or considerably, inattentive, resulting from a needless action, and intentional.”

Although the TAA requires bona fide inadvertent error, the duty of the Court is still to analyse the entire evidence and to establish whether it shows intention or bona fide inadvertent error. A finding that the error was intentional will exclude bona fide inadvertent error and will not assist the taxpayer. A finding that there was indeed a bona fide inadvertent error will exclude intention. I will come back to this point later in the judgment.

[31] Furthermore, Mr Tshilonga testified that it was the intention of the taxpayer to claim a catch-up wear and tear of R17,564,368 which was not claimable in the 2016 year of tax assessment. He denied that that was a bona fide inadvertent error, as the appellant claimed. He gave four reasons why, in his opinion, the conduct of the appellant was intentional and not, as the appellant claims, a mistake. Those reasons are that:

[31.1] the appellant did not have proper books of account;

[31.2] the appellant should have known what to consider and what to leave out;

[31.3] claiming the catch-up wear and tear in the sum of R17,564,368 which was not claimable in the 2016 tax year was done with the full knowledge of the appellant’s senior management;

[31.4] if you deal with tax matters you should know or are expected to know the law.

[32] He testified furthermore that if SARS had accepted that allowance, that would have reduced the appellant’s tax liability. In a letter dated 25 August 2017, CLA & a taxation specialist had written that:

> “A management passed the adjustment as wear and tear in the current year as it was impractical to reopen each year as registers were not prepared in those years.”

To these remarks Mr Tshilonga disagreed with the statement. He testified that it was practical to reopen the registers.

[33] On receipt of the appellant's objection, he prepared a memorandum, which was later submitted to a committee at SARS for scrutiny. The committee agreed with his assessment. For that reason, the objection was overruled. There would have been prejudice. There was no bona fide error. The appellant took a policy decision to claim the amount in the 2016 tax year of assessment.

[34] The appellant's first witness was a Mr X. He described himself as Chartered Accountant (CA) employed by Price Waterhouse Coopers (PwC) and was so employed during the years and 2015 and 2016. He was, during the said period, involved with the issue that related to a determination of wear and tear allowance at the appellant's business. He was aware that the appellant had a problem with the wear and tear. He sent an email to the appellant and inquired as to how the appellant had planned to resolve the issue of the wear and tear.

[35] Ms LM gave very brief evidence. She told the Court that she holds a degree of Bachelor of Commerce from the University of South Africa (UNISA): that she has been involved with ACME since 2006 and that in 2016 she became a consultant. She read into her evidence certain paragraphs of the appellant's grounds of appeal and confirmed their correctness. She confirmed that when she started at ACME in the year 2006 there were no tax registers.

[36] She testified that in 2016 she realised that the appellant had the assessed loss position for the first time. When she realised that and finalised the fact that there was the sum of R17,000,000.00 that had been under claimed for the previous years of assessments , the first thing that she had to do was to ensure that the tax base was correct. She needed to balance the tax base back to the correct value and true date. She needed to adjust the wear and tear. So, to do that she exchanged correspondence with PwC about how to manage that wear and tear. She also approached her Group Financial Manager in Bloemfontein to ask them how to treat the wear and tear at the year end.

[37] She confirmed that it was decided to claim the wear and tear in 2016. Ms LM called the error and incorrect misstatement of a taxpayer in his or her return. She believed that the appellant's return was innocent. She testified that the appellant did not intend to harm SARS.

[38] She claimed that when the appellant claimed the wear and tear in the 2016 year of assessment it relied on PwC and the management of the appellant in the group. She, however, failed to clarify the extent to which she relied on PwC. She testified furthermore that she received advice from PwC and her external managers.

[39] She testified that the amount of R17,560,368 was claimed for the 2015 tax year of assessment. She conceded that the appellant should have corrected the situation by employing the provisions of section 93 of the TAA. Furthermore, she conceded that the appellant did not follow the provisions of section 93 of the TAA and more importantly that the system that the appellant used was not permitted by the law. According to her evidence, SARS was not prejudiced. She relied on PwC and her Group Executive. There was no intention to deceive.

[40] The evidence that she received advice from her superiors stands uncontested. The court is prepared to accept it and in fact does accept. It is her evidence that she received advice from PwC as to how to treat the wear and tear that bothers the court. This evidence is contradicted by Mr X. It is not supported by any witness from PwC or her management.

[41] It will be recalled that during cross-examination Mr X told the court that he was not a tax specialist and was therefore not qualified to give any advice on tax matters. In the premises it is highly unlikely that he could have told Ms LM what to do with the wear and tear allowance. This poses another problem on the credibility of Ms LM. Where does she get the evidence that PwC advised her on how to treat the wear and tear allowance? Mr X never testified that he gave the appellant any advice as to how to resolve the issue of wear and tear allowance. Furthermore, it was neither put to him that he gave such advice nor was it put to him that Ms LM, who was still going to testify, would tell the court that it was him who had advised her how to claim the wear and tear allowance of the previous years in the 2016 tax year of assessment. He confirmed, still under cross- examination, that the purposes of the email that he wrote to the appellant was to try and find out how appellant was going to resolve the problem of the wear and tear and not to give any advice.

[42] The Commission had determined that in this case the USP was the product of “no reasonable grounds for the tax position taken.” This generated a penalty of 50% of the tax raised in the appellant’s additional assessment. The percentage of USP is prescribed by section 223 of the TAA. In terms of section 223 there are five items, each one of them with its unique category. These categories as follows: Behaviour, Standard Case, If Obstructive, or If It Is a Repeat Case, Voluntary Disclosure After Notification of Audit Investigation and Voluntary Disclosure Before Notification. In terms of item (iii) of section 223, SARS found that there was “no reasonable grounds for tax position taken” and 50% was the Standard Case. In other words, once SARS found that there were no reasonable grounds for the tax position taken, it was obliged, by the operation of the law, to impose a 50% USP as a Standard Case.

[43] The approach to be adopted by this Court in an appeal against a decision made by the Commissioner regarding to an understatement penalty is the first question that this Court should consider. In terms of section 129(3) of the TAA, in such an appeal, "the Tax Court must decide the matter on the basis that the burden of proof is on SARS". The Court may reduce or confirm or increase the understatement penalty. In the case of Income Tax Case No. 1906 80 SATC 256, reference was made to *CIR v Da Costa* 47 SATC 87. In this Da Costa case a question arose as to whether a special Court hearing the tax appeal could interfere with the decision of the Commissioner only when the discretion was exercised on an incorrect basis or unreasonably or whether the Tax Court exercises its own discretion, starting with a clean sheet of paper. In the Da Costa matter, the Court held that in cases involving exercise of a discretion by the Commissioner, the Court is called upon to exercise its own, original, discretion as it is not a Court of Appeal but is a Court of Revision. The Court found that there seemed to be a reason to regard the function or role of a Tax Court convened under the TAA as any different to that of a special court under the legislation considered in Da Costa, if that incorrect, then the question for this Court was "whether or not the present case (i.e. income tax case no. 1906 80 SATC 256) involved gross negligence on the part of the appellant." The Court in that matter found that the "tax positions adopted by the appellant was the product of advice given by accountant. It found that in such case, and this was the case of misguided reliance by a member of the Close Corporation on incorrect professional advice and that it did not support a conclusion that the case was gross negligence. For that reason, the penalty was reduced to 50% on the basis that this was a case where there was an absence of reasonable grounds for tax position taken by the appellant. I was referred to several judgments regarding the USP. The major difference between this instant case and those cases is that in those cases the taxpayer acted on professional advice. For that reason, the percentage of the USP was reduced. See in this regard Income Tax Case No. 79 SATC 62: *ABC Holdings (Pty) Ltd v CSARS*.

[44] The principles espoused in the *Da Costa* case is that where a taxpayer acts on professional advice, this was a case where there was an absence of reasonable grounds for "tax position taken" by the appellant. For the following reasons that principle does not apply in the current case:

[44.1] the appellant took a policy decision to claim the allowance in the 2016 tax year of assessment;

[44.2] there is no evidence that the appellant took that policy decision on any professional advice. Even though in paragraph 20 of the statement of grounds of appeal in terms of Rule 32 of the TAA court rules in a statement is made that:

> "40.3 Although Mr X testified that it was his advice that the appellant could claim the allowances in 2016."

This evidence was contradicted by Mr X himself. It will be recalled that during cross-examination and when reference was made to an e-mail that he, Mr X, had written to the appellant, Mr X denied that he was giving Ms LM any advice in that e-mail. Moreover, the evidence of Ms LM is unreliable as to whether she was advised by Mr X.

[45] As correctly pointed out by Adv Seshoka, SARS's mandate to collect tax relies entirely on the integrity or honesty of the taxpayer. It is common cause between the parties that the respondent imposed an understatement penalty on the appellant amounting to 50% of the shortfall. The understatement penalty was imposed in terms of section 222 of the TAA as stated in paragraph [7] supra. It was compulsory for SARS to do so. It has no discretion to exercise within the contemplation of section 222. The basis for imposing 50% USP was that the appellant had "no reasonable grounds for tax position taken". Furthermore, it is common cause between the parties that the appellant has elected not to contest the USP imposed on it. The only issue that the appellant contests is the percentage at which the USP was imposed. In principle, the appellant is not averse to pay USP, only that it should not be determined at 50%. I have already pointed out somewhere that the appellant has demonstrated its preparedness to pay the USP at 10%.

[46] In Income Tax Case NO. 1989 80 SATC 299 at paragraph [50] in dealing with Understatement Penalties and their measure, Nkosi-Thomas AJ stated that:

> "[50] The purpose to be served by levying penalties such as the ones we are concerned with in *casu* was articulated in such cases as *Commissioner of Inland Revenue v McNeil* 22 SATC 374 in which the court was dealing with a similar provision, namely, section 65 of the Income Tax Act 31 of 1941. There, the following was stated as to its purpose: To ensure, if possible, that returns shall be honest and accurate. Its amount depends on only indirectly on the size of the taxpayer's income: directly it depends on the size of his default. It does not conform with ordinary usage to speak of the tax on misconduct as the kind of tax or income. Where a tax takes the form of a percentage of tax on income it is natural to regard it as itself a tax on income. But where a percentage of imposed for failure to make a return or for an omission from a return or for an incorrect statement in a return is not at all like a tax on income.
>
> [51] in *Federal Commissioner of Taxes v Trantwein* 4 A.T.D at p. 96 Evatt J, in dealing with a section similar to section 65 referred above, said:
> 'The object of the section is to impose a heavy penalty so as to ensure accuracy of returns, upon which the whole income tax system of the Commonwealth his based. The penalty is imposed 'by way of additional tax' but as I endeavored to point out in Richardson case, although the penalty is collected via to machinery of the assessment, the section is definitely a penal provision."

[47] It is important to observe that there was no evidence by the appellant to contradict Mr Tshilonga's evidence that the problem that the appellant had with the "wear and tear" could have been resolved in other lawful means, for instance, by:

> "1. employing the provisions of section 93 of the TAA, and;
>
> 2. requesting SARS to revise the previous assessments."

At least Ms LM was honest enough to testify that she was not aware of the provisions of section 93 of the TAA. We accept the evidence of Mr Tshilonga that when one deals with tax matters, one should be aware of the provisions of section 93 of the TAA. The one important principle of law is that ignorance of the law is no excuse. From this we find that Ms LM should have been aware of the provisions of section 93 of the TAA.

[48] As I have pointed out in paragraph [44] *supra*, the conduct of the appellant does not qualify as a *bona fide* inadvertent error. The inclusion in the 2016 tax year of assessment of the sum of R17,564,370, which had been previously under claimed in 2013, 2014, 2015 years of assessment was done intentionally and not by mistake. The Court understand that the motive was to claim allowances not claimed in the past. It is important that motive is not confused with intention.

[49] Intention, in this regard, comprises of the appellant directing its will towards achieving the prohibited result or towards the performance of the very prohibited act. The result of such conduct is the appellant's goal. The appellant is fully aware that he commits a prohibited act and that notwithstanding he performs it.

[50] I now turn to the evidence of Tshilonga to determine whether he was correct in concluding that the conduct of the appellant was intentional. To establish intention, the Court must have regard to the objective facts which constitute the foundation of his conclusion; the conduct of the appellant and the explanation proffered by the appellant why it performed the impugned act.

[51] In the premises the conclusion is inescapable that the decision to claim the allowance in 2016 was made by the appellant. In the premises no grounds of justification exist for this Court to interfere with the finding of SARS regarding the "no reasonable grounds for the tax position taken" and therefore the 50% USP was correctly imposed.

PREJUDICE

[52] It is the appellant's case that SARS did not suffer any prejudice because of the USP. It will be recalled that section 221 defines an understatement as: any prejudice to SARS or the *fiscus* as a result of ... . The appellant has, based on section 221, raised an argument regarding the issue of prejudice. This prejudice is necessary for the USP penalty to be imposed. SARS's view is that the appellant has no reasonable grounds for the "tax position taken" in that the appellant's tax return included an amount which was not deductible in the 2016 tax year. Even in its amended Rule 31 statement, SARS stated that because of the USP, it suffered prejudice. In his evidence, Mr Tshilonga testified that SARS stood the risk of potential prejudice if the overstated loss had not been discovered. He testified that the overstated loss had potential to reduce the appellant's tax liability, especially in the event the overstated amount was squared against the appellant's future profits. It is not necessary that SARS should, in the circumstances of this case, prove actual prejudice. It is enough if SARS proves that it ran the risk of prejudice or to put in another way, it proves potential risk.

[53] The attitude of the appellant is aptly captured in the following statement contained in its Rule 32 statement:

> "1. Management was therefore satisfied that the respondent would not suffer any loss as a result of the adjustment, because the appellant's assessed loss would merely increase , and no cash would be payable to or from respondent. Due to the fact that no financial impact on the respondent was evident to the appellant, the approach and adjustment were not flagged as a concern."

Adv Seshoka's reaction to this statement was that it is incorrect. His view is, that the word "prejudice", as contained in section 221 of the tax does not only refer to immediate final impact. The word "prejudice" does not only refer to actual prejudice. According to him, "prejudice" also includes prospective or potential prejudice. It will be recalled that Mr Tshilonga testified that if SARS had allowed that allowance, that would have reduced the appellant's liability to SARS. This is the prospective or potential prejudice that Mr Seshoka referred to.

[54] In support of this argument Adv Seshoka referred the Court to the Tax Court case of *Wavelengths Construction CC v The Commissioner for the South African Revenue Service* (Case No. 24622) where the Court stated that:

> "There is nothing in the context provided by the provisions in Chapter 16 of the Ac, t either individually or as a whole that is indicative of limiting prejudice, to immediate final prejudice to the Respondent. Any prejudice is, in our view, wide enough to include the existence of a realisable that the mistake will hamper the ability of the Respondent to effectively and efficiently administer the provisions of the tax legislation and to perform in terms thereof by assessing and collecting taxes which are due"

It has not been argued that the *Wavelengths Construction* case was wrongly decided or that it has been set aside. We therefore feel impelled to apply it in this judgment.

[55] In the result I am satisfied that there is no merit in the appeal and that it stands to be dismissed. Accordingly, I make the following order:

1. The appeal be and is hereby dismissed, with costs.
2. The assessment issued on 3 August 2017 is hereby confirmed.

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PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	Dr T E Brincker
Instructed by:	Cliff Decker Hofmeyr Inc
Counsel for the Respondents:	Adv ST Seshoka
Instructed by:	South African Revenue Service
Dates heard:	18-19 March 2020
Date of Judgment:	25 November 2020