IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 23203/11

In the matter between:

MTN INTERNATIONAL (MAURITIUS) LIMITED APPLICANT

And

THE COMMISSIONER OF INLAND REVENUE, **RESPONDENT**
SOUTH AFRICAN REVENUE SERVICES

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
31 January 2013 [signature]
DATE SIGNATURE

JUDGMENT

TLHAPI J

[1] This is an application in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**). The application is for the review of the procedural defects and actions of the respondent in the determination of the additional tax assessment raised on 31 March 2011, in terms of section 79 of the Income Tax Act, Act 58 of 1962 ('the Act'), in respect of the applicant's 2006 tax year. In terms of the amended notice of motion an order in the following terms was sought, that:

"1. The additional tax assessment in respect of the Applicant's 2006 tax year with due date of 1 May 2011, be and is hereby set aside;

2. The additional tax assessment processed by the Respondent in respect of the Applicant's 2006 tax year on 31 March 2011, be and is hereby set aside;

3. The Respondent is ordered to credit or reverse any set-off that it has applied against the refund owed by the Respondent to the Applicant;

4. The Respondent is ordered to pay to the Applicant the amount of:

4.1 R515,947,937.09; and

4.2 R73,476,101.00

within 10 (ten) days after date of this order, together with any additional accrued interest in terms of section 89*quat*(4) of the Income Tax Act, No. 58 of 1962, as amended, and the interest *a tempore morae* on the amount set-off by the Respondent against the Applicant's refund;

5. The Respondent is ordered to pay the costs of this application, including the costs consequent upon the employment of (two) Counsel;"

The application was opposed. An amount of R520 266 107 was paid out on 29 June 2011, settling the claim in 4.1 above and, in that regard, the only

outstanding issue to be argued was that of costs. Furthermore, the applicant has approached the Special Tax Court concerning issues relating to the merits of the additional assessment.

[2] The applicant is a company registered in Mauritius and a subsidiary of MTN Group Ltd, a South African company listed on the Johannesburg Securities Exchange. It is the intermediate holding company of cellular telephone operating subsidiaries outside South Africa for the applicant and, is registered as a tax payer with the respondent.

[3] The applicant acquired operating groups ('Investments') in Nigeria (MTN Nigeria) and the Middle East ('Investcom') through loans made from its holding company, MTN Holdings Ltd. A new company was incorporated in Nigeria, in which interests were acquired. The interest expenditures on these loans were claimed as deduction in terms of the Act. In respect of the Nigerian Investment R3 044 873 was claimed for the 2006 year of assessment and during previous years the respondent had allowed such deductions. On Investcom LLC, R238 171 121 was claimed for the first time during the 2006 year of assessment.

[4] It was common cause that the original assessment for the 2006 tax year was issued on 1 April 2008. As a result of the applicant's overpayment of provisional tax, issues arose regarding the percentage it allocated as deductable on its interest expenditure. The applicant had claimed a substantial amount in tax refunds as reflected above and, the respondent had decided to conduct a refund audit.

According to Mr Tshilongo of the respondent he had in previous audits queried *inter alia* the applicants interest expenses claimed but that this query was not followed through in that he focused on the issue of foreign tax credits. In its reply the applicant contended that it was not the issue of interest that was 'not followed through' but that an apportionment of that interest was agreed upon between Mr Tshilongo and representatives of the applicant at a meeting in April 2008.

[5] The applicant and respondent participated in a meeting on 13 August 2010 on various issues raised in the agenda attached to the answering affidavit as 'SARS 2'. On 23 August 2010 the respondent sent a letter of audit inquiry to the applicant which was replied to on 16 November 2010, followed by another letter from the respondent on 20 January 2011.

[6] Mr Gericke averred that the applicant had been dealing with Mr Tshilongo of the respondent's Durban Office, which had been of the view that the percentages had to be adjusted. According to Mr Warner of the respondent's Johannesburg offices and during the period 3 to 15 February 2011, he held discussions with Mr Tshilongo regarding the tax affairs of the applicant. He conducted research on the applicable case law and various rulings of the respondent relating to the deductibility of the interest expenditure. This resulted in an independent audit being conducted by the Johannesburg office which was of the view that the interest expenditures claimed by the applicants did not qualify for deductions under the Act, because it considered such interest expenditure to be 'unproductive interest'.

[7] It was common cause that on 23 February 2011, Mr Limalia of the respondent

requested applicant to agree to an extension of the prescription period to the 2006 assessment, before issuing a 'letter of findings' and to give the applicant an opportunity to respondent thereto. The applicant averred that it was not amenable to the request because it had made full disclosure and that it had given the respondent sufficient time to resolve the issues. A 'letter of findings' dated 24 February 2011 followed, giving the applicant 30 (thirty) days to respond thereto. The applicant replied on Friday, 25 March 2011 and averred that it disclosed to the respondent 'that the management services agreement was negotiated as between the parties at 'arm's length, to comply with section 31 of the Act.

[8] On 31March 2011 the respondent raised an additional assessment and emailed the said assessment on the same day to the applicant. According to the applicant the respondent had dismissed and had not properly considered all matters raised in its reply and preceding correspondence. The applicant averred that the conduct of the respondent was unlawful and reviewable for the following reasons:

1. the respondent issued the revised assessment (IT40) on 31 March 2011 and contrary to its powers and in the 'absence of jurisdictional facts entitling it to do so', by back dating the 'due date' to the 30 March 2011; the respondent thereby 'manipulated the commencement date of prescription in terms of the Act, by pushing it back by a day';

2. the respondent refrained to apply the practice it had consistently applied by setting the 'second date' 30 days later; by raising extraneous and

irrelevant factors, the respondent 'arbitrarily and capriciously' brought forward the 'second date' to the 31 March 2011, because a substantial amount was due to the applicant as refund as at 30 March 2011 and, therefore, it could be inferred that the reason was to 'reduce the substantial interest as quickly as possible';

3. that the decision taken was not rationally connected to the reason contained in the respondent's letter of findings;

The applicant contended that the conduct of the respondent was defective and invalid. Furthermore it was inconsistent with the Constitution (Act 108 of 1996) and the rule of law.

[9] According to the applicant the respondent was engaged and comprehensively addressed in its letter of 25 march 2011 on the different positions it had adopted to the apportionment of interest on borrowings, with regard to the Nigerian and Investcom acquisitions, for the 2005 and 2006 years of assessment. It believed that there were striking similarities between the Nigerian and Investcom acquisitions. There had been an enquiry into the applicant's apportionment on interest on borrowings with regard to the Nigerian acquisition during the 2005 year of assessment and no additional tax assessment was raised. The applicant averred that it legitimately expected the respondent to apply the same principles it applied with regard to the Nigerian acquisition during the 2005 year of assessment, to the Investcom acquisition during the 2006 year of assessment. It contended that the issue of

the *Letter of Findings* was influenced by an error in law and constituted a 'complete lack of appreciation for, and the application of the principles introduced by section 31 of the Act.

[10] Furthermore, the respondent failed to comply with what had become common practice followed after concluding audits. It failed to provide a meaningful reply to the information and extensive annexures attached to its response to the *Letter of Findings*, and it seemed as if nothing so presented, would change the decision already taken to issue an additional tax assessment. A legitimate expectation was created by the former Commissioner, Mr Pravin Jamnadas Gordhan in the Transvaal Provincial Division case 4594/02 when he stated that :

> *"even if upon conclusion of the audit, the view is held that there is additional income not declared by the applicant for which it should be assessed, the applicant will be informed of the basis of such conclusions. The applicant will be given an opportunity to respond to such views prior to the issue of the assessment"*

[11] The applicant averred that by their letter of 6 April 2011 annexure 'CG10' the respondent was requested not to set off the 'unlawful and defective' 2006 additional assessment pending the outcome of a review application on procedural grounds it intended bringing and, demanded immediate payment of the full refund claimed. The full amount in respondent's statement of 12 April 2011 was R515 947 937.09 plus the set off in the amount R73 476 101. The respondent ignored such request.

[12] The respondent denied that it was influenced by ulterior motives in raising the additional assessment and stated that it was duty bound in terms of section 79 of the Act to raise the 2006 additional assessment, which could not be set aside on the basis of the legitimate expectation relied upon by the applicant.

[13] The respondent averred that the relationship between the parties was not as bad as it was portrayed to be. It averred that besides this matter there had been other interactions during the same period with the applicant regarding other tax affairs of MTN, where the latter had failed to comply. The issues there also involved prescription and requests for extension and where an additional assessment in the amount of R3 billion had been issued . On request of Mr Bulbulia of the applicant this assessment was revisited after the applicant had provided the bulk of the information required and the assessment was reversed.

[14] The respondent averred that subsequent to it receiving applicants' reply and during the period Monday, 28 March and Tuesday 29 March 2011, it reviewed applicant's submissions with regard to various aspects in applicant's operating groups. It is not necessary for the purpose of this application to give a detailed account of the issues considered by the respondent in its investigation and review on taxable income in terms of the Act, that is, in respect of interest generated in respect of the loans acquired to finance applicant's investments. I shall however mention but a few examples and these included issues around the management and royalty fees situation in MTN Nigeria; the failure to submit the management / royalty agreements in respect of Investcom; questions on the arrangement or relationship regarding management / royalty fees between applicant, MTN Nigeria and MTN Dubai.

[15] According to the respondent and at the time, its Durban and Johannesburg offices were conducting independent audits of the tax affairs of the applicant for years 2006 to 2008 including the apportionment of interest. It was agreed that the Johannesburg office would focus on the deductibility of interest and that the Durban office was to finalize the other issues in their investigations.

[16] On 30 March 2011 the respondent was in a position to raise an assessment and according to the respondent this was telephonically communicated to Mr Bulbia of the applicant, who was also informed of Mr Gericke's refusal to grant an extension of the prescription period. Mr Bulbia undertook to speak to Mr Gericke and requested Mr Limalia to 'hold on until such time' that he had spoken to Mr Gericke. Later attempts by Mr Limalia to contact both gentlemen failed and he gave instructions to issue the additional assessment, and the IT40 was issued on 31 March 2011.

[17] Mr Warner of the respondent averred that he was informed by Mr Thsilongo that he manually fixed the 'due date' and the 'second date' as 30 March 2011 and 31 March 2011 respectively, because he was under the impression that the two dates could not be on the same date 'and that he was afraid that if he fixed later dates, then it could be said that the assessment had prescribed'. The respondent admitted that Mr Tshilongo was wrong because the relevant date of assessment was the date upon which the assessment had been raised.

[18] The respondent averred that in order to give effect to the 2006 additional assessment raised on the 31 March 2011, the assessment still had to be

entered into the respondent's 'NITS' system 'which automatically generated and issued an IT 34 assessment which fixed a new 'due date' and 'second date' as 1 May 2011 and 31 May 2011 respectively.

[19] The issues here are firstly, whether the additional assessment was issued without due process being followed; secondly whether the respondent had infringed the applicant's legitimate expectation as set out above and thirdly whether the additional assessment was defective and invalid based on the Constitution and the rule of law and deprived the applicant to just administrative action that was, '*lawful, reasonable and procedurally fair*'.

[20] The term 'assessment' is defined in the Act as:

> "*....the determination by the Commissioner, by way of a notice of assessment (including a notice of assessement in electronic form) served in a manner contemplated in section 106(2)*
>
> *(a) of an amount upon which any tax under this Act is chargeable; or*
>
> *(b) of the amount of any such tax; or*
>
> *(c) of any loss ranking for set-off; or*
>
> *(d) of any assessed capital loss determination in terms of paragraph 9 of the Eighth Schedule.....*"

[21] It was submitted by Mr Rip for the applicant, that a valid assessment was a legal document which gave rise to an '*ex facie* and *prima facie* debt

instrument, which could be used by the respondent to execute judgments, collections and insolvency proceedings'. Therefore the respondent had to observe strictly the governing legislation. Furthermore, it was submitted that the assessment as such had to be linked to other provisions of the Act which had to be read with section 79 of the Act. He argued that the respondent could not raise an assessment that omitted entirely the 'period for payment' or set the 'due date' to be before issue of the assessment because, Section 89 of the Act contemplated a period for payment and, interest payable if the amount is not paid within that period. By predating the '*due date*' the tax payer was deprived of the 30 days from '*due date*' within which to object or to request reasons or time within which to pay the assessed amount.

[22] Although Mr Rip conceded that the facts were distinguishable, he argued that the principle articulated in **Rex v Pretoria Timber Co. (Pty) Ltd & Another 1950 (3) 163 (A)** was applicable in as far as it related to the manipulation of the dates where, at **185** Van Den Heever JA stated:

> *"Here the Price Controller has sought to fix "a maximum price.....for one area" which is described in meaningless terms which can be given a meaning only by adding words and notions which the official concerned has not expressed and which can be imported into his demarcation only be conjecture. As Stratford, J (as he then was) remarked on Selikman's case in Rex v Tshabonie (p 456)*
>
> > *"But the real ratio decidendi was that when the date named is obviously bad and cannot be adopted, it is not the province of the Court to take some other date, no matter how equitably and*

fairly it might work out"

[23] Mr Gauntlet for the respondent submitted that the determination being a document produced under hand of the Commissioner was conclusive evidence of such assessment as provided for in section 94 of the Act:

> "*The production of any document under the hand of the Commissioner purporting to be a copy of an extract from any notice of assessment shall be conclusive evidence of the making of such assessment and, except in the case of proceedings on appeal against the assessment, shall be conclusive evidence that the amount and all the particulars of such assessment appearing in such document are correct"*

Relying on the decision in **Metcash Trading Limited v Commissioner, South African Revenue Services 2001 (1) SA 1109 (CC) at 1135 B-F,** paragraph 44, he submitted that this court had jurisdiction to determine ' income tax cases turning on legal issues (only) and that where a specialist court, such as the Tax Court, had been assigned to hear appeals against tax assessments, this court did not have jurisdiction to adjudicate over the merits relating to such assessment. The respondent submitted that for purpose of this application it sufficed to demonstrate that the respondent had ' lawfully satisfied itself as to the question of the additional assessment, considered the matter and did not grossly misdirect itself'.

[24] It was submitted that in view of the applicant's persistence in the reply, that the respondent was influenced by ulterior motives, the enquiry around the

'purpose for which the loan was acquired and on which interest deductions were claimed' was based on fact and, had to be determined 'at the time of borrowing . According to the respondent the interest expenditure claimed in the original assessment was erroneously allowed as a deduction with regard to interest expenditure and should have been assessed to tax. Mr Gauntlet argued that this review and the appeal filed with the Tax Court presented competing determinations.

[25] He submitted further, that there were disputes of fact regarding the merits of the additional assessment. Mr Rip in reply contended that there were no disputes of act in that everyone knew what was happening, and that Mr Thsilongo deliberately chose to do that which he was not empowered to do. In my view the disputes of fact do arise because of the serious allegations (*biasness capriciousness, arbitrariness)* levelled against the respondent, which revolved around the reasons for raising the assessment and for fixing the '*due date'* and '*second date'*. It also revolved around the contention by the applicant that the decision to raise the additional assessment was not 'rationally connected to the reasons in the *'Letter of Findings'* and these have to be examined against the reasons given by Mr Warner and the explanation given by Mr Tshilongo and the denial that the additional assessment was raised for *mala fide* reasons. I further have to establish whether on the papers the applicant has made out a case to support the conduct alleged and the order that it seeks. In my view, it was correctly submitted and, it was trite, that if the dispute of fact was material to the relief sought, the applicant could not succeed in the absence of an application to go to oral evidence. The matter had to be resolved in terms of the rule in **Plascon – Evans Paints Limited v Van Riebeeck Paints Limited 1984 (3)**

SA 623 (A) 634E– 635C.

[26] It was not in dispute that in terms of section 79 of the Act, the respondent was, if so satisfied, entitled to raise an additional assessment in respect of any amount which should have been taxed under the Act and was not assessed to tax, notwithstanding that an assessment may have been raised in respect of that year or years of assessment and, notwithstanding the provisions of section 81 and 83(18); provided that such additional assessment shall not be raised after the expiration of three years from the date of assessment. (my underlining)

[27] Mr Rip argued that the incorrect day 30 March 2011 would remain the date of assessment which could not be corrected neither could a new assessment with a proper date be issued. It was submitted that the Act did not allow for a correction of that day and the effect was that for all time henceforth, the applicant shall have three years less one day to approach the commissioner. Furthermore, he argued, that the determination date 31 March 2011 which was also the second date, could not be preceded by the '*due date';* because to be valid within the meaning of the Act, the additional assessment had to be lawfully and properly issued. If I understand Mr Rip's argument, even if the '*due date'* and '*second date'* were on the same date that is the 31 March 2011, the conduct of the respondent would still be reviewable because it prejudiced and deprived the taxpayer of the 'period for payment' and the 'period within which to object'.

[28] Mr Gauntlet submitted that, with regard to local assessments it was not uncommon for an assessor to manually fix the due date setting them 'one day

apart or virtually immediately, **Motsepe v Commissioner of Inland Revenue 1997 (2) SA 898 (CC) paragraph 5.** In considering the definition of 'assessment' he differentiated between the actual determination of the additional assessment (which in this case occurred within three years, the last date being the 31March 2011), from the notice to the taxpayer of such determination. He argued that the fact that the 'due date' reflected on the notice as 30 March 2011 did not impact upon the determination in that the respondent could not 'enforce it or never tried to enforce it' and, it did not follow that the additional assessment to remain valid had, to include the period in which to file an objection. It was further argued that section 77(5) of the Act provided that 'SARS must inform the taxpayer of his right to object' within 30 days and that 30 day period did not start to run before such notice, further, that there were remedies available to the taxpayer in that he could demand that an opportunity be given to exercise such right, and that SARS could in turn grant condonation.

[29] In my view, the question had to be asked whether, in as far as this matter was concerned, the erroneous date impacted upon the applicant's rights, where the applicant availed itself of the right to ask for reasons in terms of Rule 3 of the Tax Court Rules.

Mr Gauntlet argued further, that as soon as the taxpayer had requested reasons, as the applicants did in terms of Rule 13.1 of the Income Tax Act Rules, Rule 14.3 thereof suspended the running of the 30 days until response had been received with regard to the request. I agree with this submission. He argued further, that this had to be combined with the fact that at the bottom of the IT40 (CG2.1) reference was made to an IT34 that would follow

which, was then issued on 2 April 2011. The IT34 gave the *due date* as 1 May 2011 and *second date* as 31 May 2011. These facts according to him were not insignificant because they drove the applicant to seek an amendment of its notice of motion, seeking to set aside 'not the due date not the notification' but the first step, that is the determination on 31 March 2011.Having regard to the said notice of motion it seemed as if two determinations were made whereas only one was made on 31 March 2011.

[30] While I agree that the manipulation of the dates was wrong and that it could be seen to affect rights afforded to the taxpayer by the Constitution, the respondent also conceded that Mr Tshilongo's conduct was wrong. Whether his explanation would be accepted or not, depended also on the determination of the merits, which was before the Tax Court. In my view, the submission for the applicant entirely ignored the fact that the additional assessment in both the IT40 and IT34 was raised within the three year period and was communicated to the applicant on the same day, after both parties had deliberated over the issue, albeit not to the satisfaction of the applicant. I therefore agree with the submission for the respondent because it gave effect to the meaning and application of section 79 of the Act, that is, an entitlement by the respondent to raise additional tax within the period prescribed.

[31] The argument based solely on the issue of the unfairness to the taxpayer because of the manipulation of the dates or if the two dates fell on the same date was, in my view flawed. If I have to comment, by the way, my understanding of Mr Rip's argument, meant that, despite the presence of sections 79, and 94 of the Act, the Commissioner would not be entitled to raise an additional assessment on any day which bordered on the last days of

the 3 year period (in this case the 31 March 2011), because the issue thereof had the potential of disentitling the taxpayer of the 30 day period for payment or period to object and, should effect be given to the 30 day period, that in any event, the additional assessment shall have prescribed. This in my view could not have been what was intended in the provisions.

[32] The question to ask is whether the alleged 'manipulation of the '*due date*' and '*second date*' was *mala fide* and therefore invalidated the additional assessment raised. I agree with the submission for the respondent that in order for the applicant to succeed, the court had to reject the explanation for the manipulation and the reason for raising the assessment as 'far fetched and untenable' and find that the conduct was irregular, vitiated the proceedings and was prejudicial to the applicant. I can not in these proceedings properly decide the alleged *mala fides* of the respondent, that it was motivated by ulterior motives without first examining whether the respondent had satisfied itself that it was, in the circumstance proper to raise the additional assessment, and this is an issue that has to be decided by the Tax Court.

[33] Whether the applicant could rely on a legitimate expectation relates to an aspect which is not settled in our law. I took the liberty to examine two cases mentioned in Cora Hoexter's book, Administrative Law in South Africa 2nd Edition. In **Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA)** at 733C-D Brand JA warned against importing into our law the English doctrine of substantive legitimate expectation.

"*The question..... is a difficult and complex one. Before simply*

transplanting a legal concept from one system of law to another it is imperative first to examine the context in which that concept originated and developed in its system of origin.

However, in **South African Veterinary Council and Another 2003(4) SA 42 (SCA)** at 49 E-H, Cameron JA relied on the requirement of a legitimate expectation as set out by Heher J in National Director of Public Prosecutions v Phillips 2002(4) SA 60 (W) SACR 542 para 28:

"*The law does not protect every expectation but only those which are 'legitimate'. The requirement for legitimacy of expectation, include the following:*

(i) *The representation underlying the expectation must be 'clear and unambiguous and devoid of relevant qualification.....The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril;*

(ii) *The expectation must be reasonable;*

(iii) *The representation must have been induced by the decision maker;*

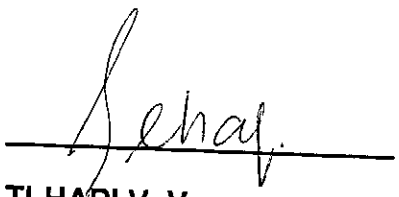
(iv) *The representation must be one which it was competent and lawful for the decision to make without which the reliance cannot be legitimate;*"

Having regard to the above, and without pronouncing on the doctrine, it is my view that the court could endorse such legitimate expectation, if the issue had first been raised with the respondent and if the court, dealing with merits of the additional assessment found that it was justifiable for the applicant to rely on such expectation. Therefore the Tax Court would be the appropriate forum to address this issue.

[34] I have further considered submissions on costs and do not find that the applicant has made out a case for the splitting of costs up to the time that the refund was paid.

[35] In the circumstances the following order is made:

'The application is dismissed with costs which includes the costs of two counsel.



TLHAPI V. V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	05 MARCH 2012
JUDGMENT RESERVED ON	:	05 MARCH 2012
ATTORNEYS FOR THE APPLICANT	:	TRM DANIEL ERASMUS ATT
ATTORNEYS FOR THE RESPONDENT	:	EDELSTEIN-BOSMAN INC