Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 7007/2015

Before: The Hon. Mr Justice Binns-Ward

Hearing: 9 February 2016
Judgment delivered: 17 February 2016

In the matter between:

NEW ADVENTURE SHELF 122 (PTY) LTD Applicant

And

THE COMMISSIONER OF THE
SOUTH AFRICAN REVENUE SERVICE Respondent

JUDGMENT

BINNS-WARD J:

Introduction

[1] Section 26A of the Income Tax Act 58 of 1962 provides that '[t]*here shall be included in the taxable income of a person for a year of assessment the taxable capital gain of that person for that year of assessment, as determined in terms of the Eighth Schedule*'.[1] This matter concerns how a capital gain accrued as a result of the disposal of an asset in a particular year of assessment falls to be treated for capital gains tax purposes when the contract in terms of which the asset was sold is cancelled during a subsequent tax period, with the effect that the taxpayer does not realise the full proceeds of the disposal that had been taken into account in assessing its taxable

[1] My underlining for emphasis.

income in the year that the asset was disposed of. It was ultimately common cause between the parties that on the facts of the current case the relevant provisions of the Eighth Schedule deem the date of the disposal to have been the date upon which the contract was concluded[2] and that the proceeds are deemed to have accrued to the taxpayer and fall to be accounted for income tax purposes in the year in which the disposal occurs, even if the proceeds actually fall to be received after that year.[3]

[2] A more detailed description of the facts will be given presently. It is sufficient for purposes of introduction to relate that the taxpayer sold an immovable property in 2006 (during its 2007 year of assessment[4]) in terms of a contract that provided for payment of the greater part of the selling price to be effected in subsequent years. By reason of the aforementioned incidences of the Eighth Schedule the transaction was accounted for capital gains tax purposes in the assessment of the taxpayer's taxable income for the 2007 tax year as if the proceeds had been received in full in that year. The contract was cancelled during the taxpayer's 2012 year of assessment. The terms of cancellation provided for the return of the property to the taxpayer, which was entitled to retain that part of the purchase price that had been paid by that stage as pre-estimated damages. In the result, part of the amount of the proceeds of the transaction that had been taken into account in determining the taxpayer's capital gain in respect of the disposal became irrecoverable.

[3] The taxpayer contends, in essence, that in the circumstances its income tax assessment for the 2007 tax period should be reopened, and that a reassessment of its taxable income in that year of assessment should be undertaken with regard to the amount of the proceeds actually received and retained by it in the context of the

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[2] Paragraph 13(1)(a)(ii) of the Eighth Schedule. The issue of the date of disposal ceased to be contentious when the taxpayer abandoned its initially advanced contention that the contract had been subject to suspensive conditions.

[3] Paragraph 35(4) of the Eighth Schedule. The relevant provisions of paragraph 35 and their contextual effect are discussed in para [43] et seq., below.

[4] '*Year of assessment*' is defined in s 1 of the Income Tax Act, 1962, to mean '*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 the twenty-ninth day of February shall, unless the context otherwise indicates, in the case of a company or a 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*'. The taxpayer in the current matter is a company. Its counsel advised in argument that the taxpayer's financial year ends on 31 August, although its 2007 return reflected the year-end as 28 February. Nothing turns on the difference.

cancellation of the contract. The taxpayer relies in this regard on what it contends is the effect of the provisions of paragraph 35(3)(c) of the Eighth Schedule.[5]

[4] The sum of the proceeds of a disposal is, of course, an integral component of any calculation of whether a capital gain or a capital loss has resulted from the disposal.[6] The taxpayer accepts that the required redetermination of its capital gain (or loss) has to occur in terms of paragraph 25(2) of the Eighth Schedule.[7] The taxpayer contends that the effect is to require a substitution of the assessed capital gain on the disposal of the asset in the tax year in which the asset was disposed of (2007) with a new determination. If the taxpayer is right that would necessarily require an amendment of its assessed taxable income in the 2007 tax period.

[5] The Commissioner rejects the validity of the approach contended for by the taxpayer. He contends that it would be contrary to basic principle to reopen what had been an admittedly correct and unimpeachable assessment of taxable income for a particular tax period on the basis of an event that occurs in a subsequent tax period. Assuming the balance of the purchase price had indeed become irrecoverable as a result of a cancellation of the contract in a subsequent year, the Commissioner's position is that the effect of the cancellation falls to be addressed in the determination of the taxpayer's aggregate capital gain or loss in the 2012 tax year after a redetermination, in 2012, of the capital gain or loss from the disposal of the asset in 2007, as provided in terms of paragraph 25(2)(b) and (3) of the Eighth Schedule.[8]

[6] The taxpayer has applied[9] for the following substantive relief`:

Orders:

a) Directing the respondent to amend the IT 34 assessment issued by him on 1 August 2008, in respect of the applicant's 2007 year of assessment, so as to comply with the provisions of paragraph 35(3)(c) of the Eighth Schedule to the Income Tax Act, 58 of 1962, by reducing the proceeds of the disposal of the property, described in the cancelled deed of sale dated 20 September 2006 as "perseel 21, Riversdal Nedersetting, Afdeling Riversdal, Provinsie Wes Kaap", pursuant to the cancellation thereof on 18 November 2011, by the reduction of the accrued amount forming part of such proceeds;

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[5] The relevant provisions of regulation 35 are quoted in paragraph [42], below.
[6] See paragraphs 3 and 4 of the Eighth Schedule, the relevant parts of which are quoted in para [45], below.
[7] The wording of paragraph 25(2) of the Eighth Schedule is set out in paragraph [44], below.
[8] The provisions are set out in para [44], below.
[9] In terms of the amended notice of motion, dated 15 July 2015.

b) Reviewing and setting aside:
   i. the assessment [for the 2007 tax period]:
   ii. the respondent's decision to refuse to condone the late filing of the applicant's objection to the assessment and his decision to disallow the applicant's objection to the assessment;
   iii. the respondent's decision to decline to withdraw the assessment in terms of section 98 of the Tax Administration Act 28 of 2011 ("the Administration Act");
   iv. the respondent's decision to decline to reduce the proceeds of the disposal in terms of paragraph 35(3)(c) of the Eighth Schedule to the Income Tax Act 58 of 1962;
c) Directing that the respondent withdraw the statement filed by him with the clerk of the magistrates court in terms of section 172(1) of the Administration Act;
d) Remitting the matter for reconsideration by the respondent as contemplated in section 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000.
e) Alternatively, directing the respondent to permit the applicant to object to its 2007 assessment so that it can, if necessary, proceed by way of appeal to the Tax Court for an order directing the respondent to amend such assessment so as to comply with the provisions of paragraph 35(3)(c) of the Eighth Schedule to the Income Tax Act, 58 of 1962, by reducing the proceeds of the disposal of the property, described in the cancelled deed of sale dated 20 September 2006 as "perseel 21, Riversdal Nedersetting, Afdeling Riversdal, Provinsie Wes Kaap", pursuant to the cancellation thereof on 18 November 2011, by the reduction of the accrued amount forming part of such proceeds;

The facts

[7] The taxpayer purchased the immovable property concerned in 1999. The purchase price was R185 000. By virtue of the '*valuation date*' for capital gains purposes having been fixed in terms of the Eighth Schedule as 1 October 2001, the property was a '*pre-valuation date asset*', as defined in paragraph 1 of the Schedule.

[8] On 20 September 2006, the taxpayer concluded a written agreement of sale in terms of which the property was sold by it to a third party for the sum of R17 720 000. Despite an initial contention by the taxpayer that the agreement had been subject to certain (unrecorded) suspensive conditions, it was accepted at the hearing that this had not been so. Accordingly, for the reason mentioned earlier,[10] the date of the disposal of the property for the purpose of the determination of the taxpayer's capital gain or capital loss was 20 September 2006. The date of disposal fell within the taxpayer's 2007 year of assessment.

[10] In paragraph 1, with reference to note 1.

[9] The agreement provided for the payment by the purchaser of a deposit in the sum of R1 200 000, which was recorded as having been paid on 30 November 2005. A further payment of R1 million was payable against transfer of the property into the purchaser's name, with the balance of R15 520 000 being payable thereafter in four instalments as specified. The property was transferred to the purchaser in late 2006 against the registration of a mortgage bond over the property in favour of the taxpayer as security for the payment of the outstanding balance of the purchase price. By reason of an advance payment on the balance of the purchase price made during the taxpayer's 2007 year of assessment, the purchaser became contractually entitled to a rebate of R840 000.

[10] The disposal of the property was duly accounted for in the taxpayer's return of income for the 2007 tax period. On 1 August 2008, the taxpayer was issued with an income tax assessment in respect of the 2007 tax year in which the capital gain arising from the disposal of the property was determined as R9 746 875, and the capital gains tax thereon, levied as income tax, was assessed in the sum of R1 413 006,73. The taxpayer raised no objection to the assessment within the prescribed period. In terms of s 81(5) of the Income Tax Act, 1962, which was then still in force, the assessment therefore became 'final and conclusive'.

[11] The taxpayer failed to pay the assessed tax. A final demand for payment was made on 26 May 2009. Payment of the assessed tax had still not been made as at the date of the hearing of this application in February 2016.

[12] On 18 November 2011, during the 2012 tax year, the taxpayer and the purchaser of the property concluded an agreement in terms of which the sale of the property was cancelled because of difficulties being experienced by the purchaser in being able to proceed with the intended development of the property. The cancellation agreement provided that the property would be transferred back into the taxpayer's name and that the taxpayer would retain the amount already paid by the purchaser in reduction of the purchase price as pre-estimated damages. The amount thus retained by the taxpayer was R4 549 082. The mortgage bond in favour of the taxpayer obviously also fell to be cancelled when it resumed registered ownership of the property.

[13] The property was transferred back into the taxpayer's name on 19 April 2012.

[14] On 12 March 2012, notwithstanding that, as mentioned, the prescribed period for objection to the assessment had long expired, the taxpayer purported to file a notice of objection to the assessment of capital gains tax on the sale of the property. The grounds stated by the taxpayer for disputing the assessment went as follows '*Sale was cancelled. No capital gains tax was paid. Assessment needs to be withdrawn.*'

[15] The taxpayer was advised by letter dated 22 May 2012 that the objection could not be entertained. Sections 81(5) and 79A of the Income Tax Act, 1962, (both since repealed in terms of the Tax Administration Act 28 of 2011, which came into operation on 1 October 2012) were cited in support of SARS's[11] refusal to entertain the objection. The effect of s 81(5) has already been described.[12] Section 79A(1) provided that the Commissioner could reduce an assessment, notwithstanding that no objection or appeal against it had been made, if it was proved that an amount had been taken into account in determining the taxpayer's liability which should not have been taken into account. However, s 79A(2) imposed a three-year time limit from the date of assessment on the exercise of the power conferred on the Commissioner in terms of s 79A(1). That limit had been exceeded by the time the cancellation agreement was concluded and the purported 'objection' to the assessment was raised.

[16] On 12 February 2014 the taxpayer purported to submit another objection to the assessment. Upon an overall consideration of the relevant correspondence, it would seem that the second 'objection' was in point of fact an application by the taxpayer for SARS to withdraw its 2007 assessment in terms of s 98(1)(d) of the Tax Administration Act, 2011. That provision read as follows:

> **Withdrawal of assessments**
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> (1) SARS may, despite the fact that no objection has been lodged or appeal noted, withdraw an assessment which-
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> (a)…
>
> (b)…
>
> (c)…
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> (d) in respect of which the Commissioner is satisfied that-
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> (i) it was based on-
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> (aa) an undisputed factual error by the taxpayer in a return; or
>
> (bb) a processing error by SARS; or
>
> (cc) a return fraudulently submitted by a person not authorised by the

[11] The South African Revenue Service.
[12] In para [10].

taxpayer;

(ii) it imposes an unintended tax debt in respect of an amount that the taxpayer should not have been taxed on;

(iii) the recovery of the tax debt under the assessment would produce an anomalous or inequitable result;

(iv) there is no other remedy available to the taxpayer; and

(v) it is in the interest of the good management of the tax system.

(Paragraph (d) has since been deleted from the subsection and substantially reinserted in paragraphs (d) and (e) of s 93 of the Act, in terms of ss 49 and 50 of the Tax Administration Laws Amendment Act 23 of 2015, with effect from 8 January 2016.)

[17] SARS rejected the application on the grounds that s 99(1)(a) of the Tax Administration Act prohibited it from issuing an amended assessment more than three years after the date of assessment of an original assessment. It also reiterated that in the absence of a timeous objection, the issued assessment fell to be regarded as final. In this respect it invoked s 101(1)(b) of the Tax Administration Act, which in essence is a reincarnation of the repealed provisions in s 81(5) of the Income Tax Act, 1962.[13] SARS also contended that in any event none of the conditions prescribed in terms of s 98(1)(d)(i) of the Tax Administration Act was applicable on the facts of the case. SARS communicated its rejection of the taxpayer's request for consideration in terms of s 98(1) by letter, dated 15 April 2014.

[18] On 3 July 2014 the dispute was referred to the Tax Ombud by the taxpayer's attorneys. The attorneys requested the Tax Ombud to recommend to SARS that it (i) withdraw the assessment, as the taxpayer contended it was empowered to do under s 98 of the Tax Administration Act, and (ii) 'give effect to one or more [unspecified] alternative remedies that would reduce the proceeds in accordance with paragraph 35(3)(c) of the Eighth Schedule'.[14] It bears mention in that regard that the Tax Ombud's mandate is restricted in terms of s 16 of the Tax Administration Act to attempting to resolve complaints by taxpayers regarding service matters or procedural or administrative matters. The Ombud does not have the authority to make any determinative decision.

[13] See para [10], above.
[14] The relevant provisions of paragraph 35 of the Eighth Schedule are set out and discussed in para [43] et seq., below.

[19] The taxpayer's attorneys then wrote to the Legal Delivery Unit of SARS on 30 July 2014 essentially asking for a reconsideration by SARS of its responses to the taxpayer's earlier approaches. The Corporate Income Tax Department of SARS responded on 8 August 2014. The response reiterated SARS's position that on the facts of the matter the prerequisites for the application of s 98(1)(d)(i) of the Tax Administration Act had not been satisfied. It further suggested that in any event, because the taxpayer could approach the High Court on review, s 98(1)(d)(iv) also stood in the way of any reassessment in terms of that section.

[20] Despite this further rejection of the taxpayer's request, the matter was referred for consideration by an 'internal committee' at SARS. By letter dated 28 October 2014, the taxpayer's attorneys were advised that the committee had resolved to confirm SARS's position on the non-availability of any remedy in terms of s 98 of the Tax Administration Act. The taxpayer was also advised of SARS's view that paragraph 35(3)(c) of the Eighth Schedule, upon which the taxpayer sought to rely, found no scope for application on the facts. The latter position was reiterated in a further letter from SARS to the applicant's attorneys dated 26 January 2015. In that letter SARS explained that the downward adjustment in the computation of the proceeds of the disposal of an asset provided in terms of paragraph 35(3)(c) of the Eighth Schedule did '*not allow for an adjustment to be made to a capital gain in the year it arose by an event that occurred in a subsequent year of assessment*'.

[21] On 12 February 2015 the Tax Ombud wrote to the taxpayer's attorney stating that he had been advised that SARS had been in contact with the attorney concerning the complaint about the Commissioner's refusal to afford the taxpayer relief in terms of s 98 of the Tax Administration Act. The Tax Ombud summarised the reasons SARS had given for its refusal and concluded 'Your matter is now regarded as finalised by this office'.

[22] The applicant gave notice on 14 April 2015, as required in terms of 11(4) of the Tax Administration Act, of its intention to institute the current proceedings. The application was instituted on 21 April 2015, when service of the papers was effected on the respondent.

The court's jurisdiction to entertain the application for review in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000

[23] Pivotal to the effective relief sought by the taxpayer is the review and setting aside of the decisions described in paragraph (b)(i)-(iv) of its amended notice of motion and the granting of the ancillary relief sought in terms of paragraph (d) thereof.[15] The application for review has been sought in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). The interdictory relief sought in terms of paragraph (a) of the notice of motion also has inherent in it a review and setting aside of the assessment. It is by its character directory relief of the nature contemplated in s 8(c)(i) of PAJA; that is a remedy that is awarded concomitantly with an order reviewing and setting aside the impugned administrative action. Section 105 of the Tax Administration Act, 2011, moreover, makes it clear that a taxpayer may not dispute an assessment except in proceedings in terms of chapter 9 of the Act (viz. objection or appeal), 'or by application to the High Court for review'. It is difficult to conceive of a review predicated on an alleged misapplication by SARS of the provisions of the Income Tax Act that would not be a review in terms of s 6 of PAJA (as distinct from a so-called 'legality review').

[24] Section 7(1) of PAJA prescribes that review proceedings in terms of s 6 of the Act must be brought without unreasonable delay and not later than 180 days after the date on which any proceedings instituted in terms of internal remedies have been concluded; or where no such remedies exist, the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it, or might reasonably have been expected to have become aware of the action and the reasons for it. In *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2013] 4 All SA 639 (SCA), at para 26, it was held that if an application for review under PAJA is brought outside the 180 day period stipulated in s 7(1) a '*court is only empowered to entertain* [it] *if the interest of justice dictates an extension in terms of s 9* [of the Act]'. The bar to the court's ability to entertain a review application brought in terms of PAJA out of time operates as a matter of law and applies irrespective of the failure by a respondent to rely on it; cf. *City of Cape Town v South African National Roads Agency Ltd and others* 2015 (6) SA 535 (WCC), [2016] 1 All SA 99, 2016 (1) BCLR 49, at para 15-

[15] See para [6], above.

16. Section 9 of PAJA allows for the court, on application, to extend the period in terms of s 7(1) if the interests of justice so require. It also permits the parties to extend the period by agreement.

[25] The applicant alleged that the application had been brought within the 180 day limit. I am not satisfied that that is so. The applicant did not identify the basis for its allegation that the 180 day limit had not been surpassed. It was therefore not evident on the papers when it contended that the 180 day period would have commenced in the context of the facts described above. In oral argument its counsel submitted that the PAJA clock had started ticking only when the Tax Ombud directed the abovementioned letter of 12 February 2015 advising that the matter was regarded as finalised.

[26] The rejection of the taxpayer's objection to the assessment on the grounds that it was too late occurred on 22 May 2012. One of the grounds of rejection was that a reduced assessment in terms of s 79A of the Income Tax Act could not be considered more than three years after the date of the original assessment. Section 98(1)(d) of the Tax Administration Act was essentially nothing other than a reformulated replacement to s 79A of the Income Tax Act. Any relief under s 98 of the Tax Administration Act also appears to be subject to a three-year limit similar to that which applied under the preceding provisions of s 79A of the Income Tax Act, certainly in a case like the present one, in which, if the 2007 assessment were to be withdrawn, it would need to be replaced by a fresh assessment. That seems to me to follow from the provisions of s 99(1)(a). Moreover, I do not think that s 98 of the Tax Administration Act substantively provided a new or alternative internal remedy to that which had already been exhausted by the taxpayer in May 2012. The internal remedy - assuming it to have been one - subsequently provided in terms of s 98 of the Tax Administration Act had already been exhausted by the applicant when its March 2012 'objection' was rejected on the grounds described earlier. Subsequently repeated requests for the 2007 assessment to be reopened, which elicited reiterated rejections on grounds given earlier, did not amount, in my judgment, to exhausting internal remedies within the meaning of s 7 of PAJA. Internal remedies within the meaning of s 7 of PAJA are the defined and identifiable remedies that were available to the applicant for review when the basis for the complaint about the administrative action

in issue, including the administrator's reasons for it, first arose or reasonably should have become known to the applicant.

[27] Assuming in the applicant's favour, without so finding, that notwithstanding the expiry in 2011 of the three-year limit for the re-opening of its assessment, the 180 day period provided in terms of s 7(1) of PAJA commenced to run on or about 22 May 2012, it was required to have instituted review proceedings by no later than a date sometime in late November 2012.

[28] The Commissioner has not admitted that the application was brought within the 180 day limit. The respondent's answering affidavit takes the point that the review sought in terms of paragraphs (b)(i) and (ii) of the amended notice of motion is time barred. The Commissioner has, however, indicated that he has no objection to the court adjudicating the review application, presumably in respect of the relief sought in terms of paragraphs (b)(iii) and (iv). Not raising an objection does not amount to concluding of an agreement in the sense contemplated by s 9 of PAJA. Indeed, on enquiry, counsel for the respondent confirmed at the hearing that the Commissioner had not agreed to an extension in terms of s 9. Counsel explained that by not objecting to the adjudication of the review application, the deponent to the answering affidavit had meant an adjudication within the limits of PAJA, including the time limits set out in s 7. I do not read the answering affidavit to that effect. Such a construction is impossible to reconcile with the deponent's express reliance on the time bar in respect of certain of the review relief sought, but not all of it. However, in the absence of an agreement between the parties, the time bar applies as a matter of law irrespective of the anomaly in the answering affidavit.

[29] Confronted with this position, the applicant's counsel applied orally from the bar for the necessary extension of time. That raised the question whether an application in that form and at that stage of the proceedings was permissible.

[30] Section 9 does not prescribe any particular form of procedure. Applications to the High Court are, however, generally regulated in terms of rule 6. In *Directory Solutions CC v TDS Directory Operations (Pty) Ltd and Others* [2008] ZAECHC 22 (4 April 2008), Jansen J held that it was not competent to introduce such an application in a replying affidavit. The learned judge remarked 'it is wholly untenable for any applicant to adopt such an attitude only in reply after a specific defence has been raised that the application was not brought within the time limit. For a Court to

exercise the discretion contained in section 9 of PAJA it is necessary for an applicant to properly seek condonation and to set out the factual basis for such a (*sic*) relief'. The remarks implied that an application brought separately in terms of rule 6, or at least one expressly incorporated in the review applicant's founding papers, was required. In *Loghdey v City of Cape Town and Others, Advance Parking Solutions CC and Another v City of Cape Town and Others* [2010] ZAWCHC 25 (20 January 2010), 2010 (6) BCLR 591 (WCC), at para 65, in the context of considering the relevant aspect of the judgment in *Directory Solutions*, I had this to say:

> SPS's counsel contended that the application for relief in terms of s 9 of PAJA had been brought too late. In this regard it needs to be mentioned that a notice of application formally seeking the relief was delivered only at argument stage. Mr *Joubert* submitted that this court should follow the approach of the Eastern Cape High Court in *Directory Solutions* …. In that matter Jansen J held that it was "wholly untenable" for an applicant which had brought judicial review proceedings outside the time limit laid down in s 7 of PAJA to deal with the delay only in reply and to make application in terms of s 9 only at that stage. This approach is consistent with the approach in some judgments dealing with the delay rule under the common law; see e.g. *Scott and others v Hanekom and others* 1980 (3) SA 1182 (C) at 1192G-1193G. While I agree that any leave required in terms of s 9 of PAJA should in general be sought in the notice of motion, there is no need for a fixed rule in this regard any more than there was in analogous circumstances under the common law. In the current matter APS did deal with the delay in its founding papers and did indicate therein that an application in terms of s 9 would be made at the hearing. This matter is therefore in any event factually distinguishable in the relevant respects from *Directory Solutions*.

The conclusion in *Loghdey* that there was no need for a fixed rule in respect of the applicable procedure for applications in terms of s 9 militates against the notion that such applications should be entertained only if brought in writing and in compliance with rule 6.

[31] In *Price Waterhouse Coopers Inc and Others v Van Vollenhoven NO and Another* [2010] 2 All SA 256 (SCA), at para 6, the Supreme Court of Appeal adopted the following passage from *Van Wyk v Unitas Hospital & Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC), at para 20, as the appropriate test for determining applications in terms of s 9 of PAJA:

> This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the

> delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.

The decision whether or not to grant an application for an extension of time in terms of s 9 of PAJA entails the exercise by the court of a broad discretion in the light of all relevant facts; cf. e.g. *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 333 (SCA), at para 57.

[32] With one exception, all the aspects for consideration identified in para 20 of *Van Wyk v Unitas Hospital* have been sufficiently canvassed in the papers in the review application. The exception is the absence of any explanation on the papers for the delay. Even in that regard, it may be inferred that the applicant probably thought, albeit misdirectedly, that its on-going engagement with SARS obviated the need to institute litigious proceedings. That much seems to follow from the aforementioned claim in the founding papers that the application had in fact been timeously instituted.

[33] In the circumstances I do not see why there should be an absolute bar to the court entertaining the application moved orally by the applicant's counsel. It is not desirable that applications of this nature be brought informally in the manner that happened. But if the manner in which the application is brought does not occasion the other litigant(s) involved in the case substantial injustice it would be counterintuitive to the promotion of constitutional values for a court to decline to consider it on its merits on purely procedural grounds; cf. in this regard the remarks of Plasket J in *Ntame v MEC for Social Development, Eastern Cape, and Two Similar Cases* 2005 (6) SA 248 (E), at para 25. The apparent reason for the failure to bring the application in proper form would, nevertheless, be one of the considerations to be taken into account in deciding whether the interests of justice would be served by granting it.

[34] The respondent's counsel, whilst making the point that the application should have been brought in proper form so that the respondent could have dealt with it in his answering affidavit, nevertheless had no objection to my proceeding to hear submissions from both sides on the application on the basis of the contingency that I might find it to be competent to entertain it notwithstanding the irregular manner in which it had been brought. In listening to the respondent's counsel's address in opposition to the application I did not detect indications of any areas in which the respondent might have been substantially prejudiced as a consequence of not having

had the opportunity to deal with the application on paper. This did not surprise me because the relevant factual context seems to have been amply traversed in the review papers and the determination of the application turned on a consideration of the matters identified above in the context of the given facts. For all these reasons I had decided to entertain the applicant's belated application in terms of s 9 of PAJA.

[35] As it was, three days after the hearing, and at a stage when this judgment was at an advanced state of preparation, the applicant delivered a written application in terms of s 9, together with a set of written submissions in support of it. The written application was placed before me together with an email to my registrar from senior counsel for the Commissioner indicating that the respondent did not object to the late application and did not intend to oppose it. I understood that to convey that, upon reflection, the respondent did not persist with the grounds of opposition raised by his counsel when they were confronted unexpectedly with the oral application for condonation at the hearing. By virtue of the requirements of ss 7 and 9 of PAJA, it still remains, however, for the court to determine whether it is in the interest of justice to entertain the review. The considered decision by the respondent not to oppose the application does, however, suggest that he was not inclined to argue that it would not be.

[36] It does not appear that the delay has been prejudicial. No third party rights are affected and SARS has been content to engage internally with the applicant concerning the merits of the applicant's various contentions over a period of several years. The institution of the application occurred reasonably expeditiously after the Tax Ombud's indication that he was closing his file. The issue involved raises important and difficult questions of statutory interpretation concerning capital gains tax. A judicial determination on their import would, in principle, conduce to certainty, which would be in the public interest. In this respect, it has weighed with me that SARS's responses to the applicant's complaints did not provide the sort of guidance that one might have expected had a there been a clear understanding of the legislation. It is not the Commissioner's duty to proactively advise the taxpayer how to deal with the issue of the reduction in the proceeds of disposal in a subsequent tax period (cf. *Medox Ltd v Commissioner, South African Revenue Service* 2015 (6) SA 310 (SCA), at para 17), but having regard to the basic values and principles governing public administration in terms of s 195(1) of the Constitution, one would have

expected SARS's response to the taxpayer's purported objection in 2012 to have been along the lines of the argument advanced by their counsel in these proceedings had there been a clear understanding by its officials of the import of the relevant legislation. SARS's responses to the taxpayer were not as enlightening as they ideally should have been.

[37] In all the circumstances I am persuaded that it would be in the interests of justice to entertain the review application out of time notwithstanding, as will become apparent, my adverse opinion as to its merits.

The merits of the review application

[38] The merits of the review application turn on the application and proper construction of the pertinent provisions of the Eighth Schedule. The approach contended for by the applicant would require (as the terms of the relief sought in terms of paragraph (a) of the amended notice of motion confirm) an amendment of the taxpayer's 2007 tax assessment in consequence of an event that occurred in a subsequent tax year. It is common cause that there was nothing objectionable about the 2007 assessment when it was issued. It correctly reflected the amount of the taxpayer's capital gain on the disposal and the amount that consequently fell to be included in the taxpayer's taxable income for that year in terms of s 26A of the Income Tax Act.

[39] In their written argument, counsel for the Commissioner emphasised the well recognised principle that income tax is an annual fiscal event. They called in aid the following remarks of Botha JA in *Caltex Oil (SA) Ltd v SIR* 1975 (1) SA 665 (A), at 674B-D:

> … [I]ncome tax is assessed on an annual basis in respect of the taxable income received by or accrued to any person during the period of assessment, and determined in accordance with the provisions of the Act. … It is only at the end of the year of assessment that it is possible, and then it is imperative, to determine the amounts received or accrued on the one hand and the expenditure actually incurred on the other during the year of assessment.

and further, at 677H-678A:

> What is clear, I think, is that events which may have an effect upon a taxpayer's liability to normal tax are relevant only in determining his tax liability in respect of the fiscal year in which they occur, and cannot be relied upon to re-determine such liability in respect of a fiscal year in the past.

They submitted that the construction of the relevant provisions of the Eighth Schedule contended for by the taxpayer ran counter to that well established principle.

[40] In response, the taxpayer's counsel submitted that the principle to which his opponents had referred was pertinent to income tax and that it was misdirected to confuse income tax with capital gains tax. Counsel emphasised various differences between the operation of the two taxes. While I accept that there are valid bases to distinguish the nature of income tax and capital gains tax, there is no getting away from the fact that s 26A of the income tax draws them together in requiring the taxable capital gain of that person for that year of assessment to be included in the taxable income of a person for a year of assessment. In my judgment the provisions of s 26A of the Income Tax Act militate strongly against the validity of the basis upon which the taxpayer's counsel sought to distinguish the principle highlighted by the Commissioner's counsel. As I shall seek to demonstrate below, the application of the principle that is evident in the wording of s 26A is carried through in the relevant provisions of the Eighth Schedule. It is, of course, the effect of the relevant provisions of the Schedule, rather than the principle, that is determinant, but I am nevertheless in agreement with the respondent's counsel that being mindful of the principle can afford some assurance in resolving any difficulties encountered in construing the applicable provisions. The principle of finality that infuses our tax legislation is similarly a relevant consideration.

[41] It is useful to begin by describing the method by which a capital gain (or loss) falls to be calculated in terms of the Eighth Schedule. It is provided for in terms of paragraphs 3 and 4 of the Schedule. I shall deal with those provisions in more detail later, but it is sufficient at this stage to say that a capital gain (or loss) falls to be determined with reference to a year of assessment. Ordinarily the calculation will fall to be undertaken in terms of sub-paragraph (a) of paragraph 3 in respect of capital gains and in terms of sub-paragraph (a) of paragraph 4 in respect of capital losses in respect of the year of assessment in which the asset in question is disposed of. In that event the capital gain is equal to the amount by which the proceeds received or accrued in respect of the disposal exceed the base cost of the asset and, in the case of a capital loss, the amount by which the base cost of the asset exceeds the proceeds.

[42] Part V of the Eighth Schedule sets out the various methods by which the base cost of an asset may be calculated. It is common cause in the current matter, which it

will be recalled involves a 'pre-valuation date asset', that the time-apportionment base cost calculation method provided in terms of paragraph 30 was used by the taxpayer for the purposes of its return in the 2007 tax year, being the year in which the disposal of the asset occurred.

[43] The bases upon which the amount of the proceeds of a disposal of an asset fall to be calculated are set out in Part VI of the Schedule. It is common ground that the general provisions set out in paragraph 35 were applicable in the current case. Insofar as relevant they provided as follows at the relevant times:

> 35. **Proceeds from disposal**.
>
> (1) Subject to subparagraphs (2), (3), and (4), the proceeds from the disposal of an asset by a person are equal to the amount received by or accrued to, or which is treated as having been received by, or accrued to or in favour of, that person in respect of that disposal, and includes –
>
> ….
>
> (2) ….
>
> (3) The proceeds from the disposal of an asset by a person, as contemplated in subparagraph (1) must be reduced by-
>
> (a) …;
>
> (b) …; or
>
> (c) any reduction, as the result of the cancellation, termination or variation of an agreement or due to the prescription or waiver of a claim or release from an obligation or any other event, of an accrued amount forming part of the proceeds of that disposal.
>
> (4) Where during any year of assessment a person has become entitled to any amount which is payable on a date or dates falling after the last day of that year, that amount must be treated as having accrued to that person during that year.[16]

[44] It was also common cause for the purposes of the argument that the following provisions of paragraph 25 of the Schedule became applicable when the applicant became no longer entitled, as a consequence of the cancellation of the contract, to part of the proceeds that had been taken into account in calculating its capital gain in the 2007 year of assessment:

---

[16] The provisions of paragraph 35(3)(b) and (c) have been amended, in terms of s 111 of the Taxation Laws Amendment Act 25 of 2015 with effect from 1 January 2016 to expressly state that the event causing the reduction in the proceeds must have occurred in the year of assessment in which the disposal has occurred. In my view - notwithstanding s 111(2) of Act 25 of 2015, which might suggest the contrary - the amendment is expositionary in character.

25 Determination of base cost of pre-valuation date assets

(1) …

(2) If a person has determined the base cost as contemplated in subparagraph (1) of a pre-valuation date asset which was disposed of during any prior year of assessment [2007 in the current case] and in the current year of assessment [2012 in the current case]-

(a…;

(b) any amount of proceeds which was taken into account in determining the capital gain or capital loss in respect of that disposal has become irrecoverable, or has become repayable or that person is no longer entitled to those proceeds as a result of the cancellation, termination or variation of any agreement or due to the prescription or waiver of a claim or a release from an obligation or any other event during the current year;

(c) …; or

(d) …

that person must redetermine the base cost of that asset in terms of subparagraph (1) and the capital gain or capital loss from the disposal of that asset, having regard to the full amount of the proceeds and base cost so redetermined.

(3) The amount of capital gain or capital loss redetermined in the current year of assessment [2012] in terms of subparagraph (2), must be taken into account in determining any capital gain or capital loss from that disposal in that current year [2012], as contemplated in paragraph 3 *(b)* (iii) or 4 *(b)* (iii).

[45] Paragraph 3 of the Schedule provides as follows insofar as relevant:

3. Capital gain.

A person's capital gain for a year of assessment [2012 in the current case], in respect of the disposal of an asset-

(a) during that year, is equal to the amount by which the proceeds received or accrued in respect of that disposal exceed the base cost of that asset; or

(b) in a previous year of assessment [2007 in the current case], is equal to-

(i) …

(ii) …

(iii) the sum of-

(aa) any capital gain redetermined in terms of paragraph 25(2) in the current year of assessment [2012] in respect of that disposal; and

(bb) any capital loss (if any) determined in respect of that disposal in terms of paragraph 25 for the last year of assessment during which that paragraph applied in respect of that disposal [2007].

[46] Paragraph 4 of the Schedule provides as follows insofar as relevant:

4. Capital loss.

A person's capital loss for a year of assessment in respect of the disposal of an asset-

(a) during that year, is equal to the amount by which the base cost of that asset exceeds the proceeds received or accrued in respect of that disposal; or

(b) in a previous year of assessment [2007 in the current case], is equal to-

(i) …

(ii) …

(iii) the sum of-

(aa) any capital loss redetermined in terms of paragraph 25 (2) in the current year of assessment [2012 in the current case] in respect of that disposal; and

(bb) any capital gain (if any) determined in respect of that disposal in terms of paragraph 25 for the last year of assessment during which that paragraph applied in respect of that disposal [2007].

[47] The applicant argues that the redetermination that falls to be undertaken in terms of paragraph 25(2) and (3) is substitutive in character and effect; that is that it replaces the determination done in 2007, which, according to the argument, is notionally expunged, with the redetermined capital gain or loss, as the case might be, being substituted in its place. It is the effect thus contended for that underpins the taxpayer's claim for the amendment of its 2007 tax assessment. The basis for the argument is what the applicant submits is the effect of paragraph 35(3)(c) of Schedule. It contends that the reduction in the proceeds which is required by paragraph 35(3)(c) has an *ex post facto* effect on the original computation of the proceeds for application in the capital gain calculation.

[48] The applicant's argument finds no support in the wording of paragraph 25(2) and (3). On the facts of the case the '*current year of assessment*' within the meaning of paragraph 25(2) is the 2012 year of assessment. It is also clear from the context that the terms '*current year of assessment*' and '*current year*' are synonymous. It is plain that the rationale for the required redetermination, triggered by an event of the sort referred to in paragraph 25(2)(b), is to give effect to the generally applicable requirement of paragraph 35(3)(c). It is expressly evident that the object of the redetermination that it is common cause must be carried out is not to redetermine or amend the determination of a capital gain or loss in a previous year of assessment (2007), but to provide a basis for the result of the redetermination to be taken into

account for capital gains tax purposes in the current year (2012). The way in which that falls to be done is, as indicated in paragraph 25(3), 'as contemplated in paragraph 3(b)(iii) or 4(b)(iii)'. Those provisions make it even clearer that the result of the previous (2007) assessment falls to be taken into account in computing the redetermined capital gain or capital loss for the 'year of assessment' (2012). That characteristic of the exercise is wholly irreconcilable with any notion that the previous determination is expunged. On the contrary, the event in the 2012 tax period that brought about a reduction in the proceeds fell to be taken into account in that year of assessment. Regard would be had in doing so to the previous year of assessment in which the disposal had been accounted for, but the assessment in respect of such previous year would not be affected. It would remain effective.

[49] The Commissioner's counsel handed up a calculation showing how the redetermination that fell to be undertaken in terms of paragraph 25 would work in practice on the actual figures involved in the current case. It is convenient to reproduce it (the formula used for computing the base cost comes from paragraph 30 of the Schedule) :

> **Original (2007) CGT assessment**
>
> The original CGT assessment was based on the following calculation, using the time-apportionment basis of ascertaining the base cost:
>
> Base cost = B + (((P-B) x N) / T + N)
>
> Where:
>
> - B = allowable expenditure incurred in respect of the asset (R185 000 plus R1 100 000, i.e. R1 285 000)
> - P = proceeds as determined under para 35 (R17 720 000 minus rebate of R840 000, i.e. R16 880 000)
> - N = years from acquisition to valuation date on 1 October 2001) (here 3 years)
> - T = years from valuation date to disposal (here 5 years)
>
> Base cost is therefore:
>
> R1 285 000 + (((R16 880 000 – R1 285 000) x 3) / (5 + 3))
>
> = R1 285 000 + ((R15 595 000 x 3) / 8)
>
> = R1 285 000 + R5 848 125
>
> = R7 133 125
>
> The capital gain on disposal is then proceeds (R16 880 000) less base cost (R7 133 125)
>
> = R9 746 875 (as appears on the original -2007- assessment).
>
> **Re-determined (2012) CGT assessment in terms of para 25(2) of the Schedule**
>
> Base cost = B + (((P-B) x N) / T + N)

Where:

- B = allowable expenditure incurred in respect of the asset (R185 000 plus R1 100 000, i.e. R1 285 000)
- P = proceeds as re-determined under para 25(2) (R4 549 082)
- N = years from acquisition to valuation date on 1 October 2001) (here 3 years)
- T = years from valuation date to disposal (here 5 years)

Base cost is therefore:

R1 285 000 + (((R4 549 082 – R1 285 000) x 3) / (5 + 3))

= R1 285 000 + ((R3 264 082 x 3) / 8)

= R1 285 000 + R1 224 030

= R2 509 030

The capital gain on disposal is then proceeds (R4 549 082) less base cost (R2 509 030)

= R2 040 051 (not a capital loss).

Impact on current year

On the assumption that paras 3(b) and 4(b) apply to a cancellation of a sale where the asset is returned to the seller [an issue which is not conceded by the Commissioner, but does not need to be determined for present purposes], the re-determined gain is "pulled through" to the calculation of capital gains and losses in the current year of assessment as follows:

Para 3(b)(iii): the capital gain for the current year is (a) the re-determined capital gain (R2 040 041) plus (b) any prior capital loss determined in respect of the disposal (R0) = R2 040 041.

Para 4(b)(iii): the capital loss for the current year is (a) the re-determined capital loss in the current year (R0) plus (b) any prior capital gain determined in respect of the disposal (R9 746 875) = R9 746 875.

Assuming no other CGT events in the current year, the taxpayer shows an aggregate capital loss for the current year (under para 7 of the Eighth Schedule) of R9 746 875 less R2 040 041 = R7 706 834.

[50] The redetermination exemplified in the calculation put up by the Commissioner's counsel requires the word '*or*' in the expression '*as contemplated in paragraph 3 (b) (iii) or 4 (b) (iii)*' in paragraph 25(3) of the Schedule to be construed as '*and*'. That is not an altogether exceptional incident in statutory interpretation; see e.g. *Barlin v Licensing Court for the Cape* 1924 AD 472, at 478, where Innes CJ said

> Now the words "and" and "or" are sometimes inaccurately used; and there are many cases in which one of them has been held to be the equivalent of the other. Much depends on the context and the subject matter.

In that matter, the Chief Justice agreed with the finding by the court a quo that the word 'and' in the statutory provision there in issue fell to be construed as 'or'. The reason was that to find otherwise would give rise to absurdity.[17]

[51] If the word 'or', were to be construed in the context of paragraph 25(3) of the Eighth Schedule in accordance with its strictly literal meaning, which is disjunctive, it would give rise to an absurdity. As already noted, the provisions of paragraph 25(2) and (3) of the Schedule are there to give effect, in the particularised context of an event in a subsequent tax period, to the general principle expressed in paragraph 35(3) that the proceeds of a disposal must be reduced by the amounts contemplated in paragraphs 35(3)(a)-(c). A reduction in the proceeds necessarily will give rise to either a reduction in the relevant capital gain or an increase in the capital loss. If the reductions provided for in terms of paragraph 35(3) were to happen in the year of assessment in which the disposal was made, it would result in a reduction in the taxpayer's net capital gain (determined in terms of paragraph 8), or an increase in its assessed capital loss (determined in terms of paragraph 9). It would be manifestly unjust were the taxpayer not to be afforded the benefit of the reduction in such circumstances for it would otherwise result in it being exposed to a capital gains tax liability calculated with regard to a gain that had become impossible to realise. The evident object of the redetermination contemplated by paragraph 25(2)(b) of the Schedule is to provide a comparable benefit to the taxpayer which experiences the events contemplated in paragraph 35(3(c), not in the year of assessment in which the disposal of the asset occurred, but in a subsequent tax period.

[52] If the redetermination in terms of paragraph 25 were to result, as it does in the postulated example using the amounts involved in the current case and the formula prescribed in paragraph 30, in a capital gain, it would not achieve the evident object of the redetermination if the taxpayer were, in addition to the assessed capital gain for which it had become liable in terms of its 2007 assessment, also to be exposed to a further liability in respect of the redetermined capital gain (R2 040 051) falling to be accounted for in 2012 year of assessment as required by paragraph 25(3). If the redetermined capital gain in the amount of R2 040 051 were to be dealt with only in

[17] For a useful collection of reported cases in which the question of whether 'or' can be construed as 'and' and *vice versa* was discussed, see *Coetzee v Stadsraad van Parys* 1986 (2) SA 33 (O). The most recent case that I was able to find in which the practical approach demonstrated by Innes CJ in *Barlin* was applied is *Panamo Properties (Pty) Ltd and Another v Nel and Others* NNO 2015 (5) SA 63 (SCA), at para 31.

terms of paragraph 3(b)(iii), it would have the effect of making the taxpayer liable in 2012 tax year for capital gains tax in that year in an amount over and above that to which it had become liable in 2007. That result would be absurd. It would defeat the obvious rationale for paragraph 35(3)(c) and produce a result in conflict with the evident purpose of the redetermination exercise provided in terms of paragraph 25. It would also give rise to a manifestly unjust and irrational treatment of the taxpayer.

[53] The absurdity is avoided, and the evident object of the provisions of paragraph 25(2) and (3) is achieved, only if the word '*or*' in paragraph 25(3) is construed as '*and*', with the result that that the redetermined capital gain amount is treated in terms of paragraph 3(b)(iii) *and* paragraph 4(b)(iii) (and not paragraph 3(b)(iii) *or* paragraph 4(b)(iii)) in the manner illustrated in the calculation handed up by the Commissioner's counsel. It is only by construing the word 'or' as 'and' that a result consistent with the manifest object of the legislation is achieved.

[54] In the circumstances I am satisfied that the construction of the relevant legislation propounded by the Commissioner's counsel is correct. The contesting interpretation advanced on behalf of the taxpayer is inconsistent with the plain wording of the provisions. It is clear in the wording of paragraph 25(3) that the outcome of the redetermination exercise required to be undertaken in the 2012 year of assessment falls to be taken into account in that year. If regard is had to the provisions of paragraphs 8-10 of the Schedule, the benefit derived by the taxpayer from the redetermination falls to be realised by offsetting the effect of the determined capital loss against any capital gains realised by the taxpayer in that year (2012), or, if no capital gain is made in that in that year, in subsequent years. There is no basis in the provisions for the expungement of the capital gains tax liability in the taxpayer's 2007 year of assessment.

[55] The taxpayer therefore did not have a valid basis to object to or appeal against its 2007 income tax assessment. It has not shown any reason why that assessment should be amended. It follows that s 98(1)(d) of the Tax Administration Act cannot be of assistance to it. The 2007 assessment was in any event not based on an undisputed factual error by the taxpayer in a return. The information concerning the disposal given by the taxpayer in the relevant return was correct. The taxpayer's counsel's contention that s 98(1)(d) admitted of what he called '*ex post facto* errors' to qualify '*as a[n]… factual error by the taxpayer in a return'* finds no support in the

wording of the provision. The return was in fact correctly completed in the relevant respect. Counsel's contention is in any event also irreconcilable with the effect of the applicable provisions of the Eighth Schedule to the Income Tax Act, 1962, discussed above.

[56] For all these reasons the application for review and the associated relief will be dismissed with costs, including the costs of two counsel.

[57] The respondent sought costs against the applicant on the scale as between attorney and client. He did so because of what he contended to have been the disingenuous reliance by the applicant on allegations that the sale agreement had been subject to suspensive conditions that had not been expressed in the deed of agreement. The allegations that the contract had been subject to such conditions were misguided and could not have been sustained for a number of reasons, including their inconsistency with the applicant's conduct. However, I am not persuaded that they were made with the deliberate intention to mislead the court. They were abandoned before the hearing. Costs will therefore be awarded on the ordinary basis as between party and party.

[58] The following orders are made:

1. The late institution of the review application is condoned in terms of s 9 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and, to the extent necessary, leave is granted to the applicant with retrospective effect to 21 April 2015 for the institution of those proceedings.

2. The application for review, including the relief sought in terms of paragraphs (a), (c), (d) and (e) of the amended notice of motion, dated 15 July 2010, is refused with costs, including the costs of two counsel. The costs awarded to the respondent shall include the costs of the application for relief in terms of s 9 of PAJA.

A.G. BINNS-WARD

Judge of the High Court

Before:	**Binns-Ward J**
Applicant's counsel:	**T.S. Emslie SC**
Applicant's attorneys:	**Shepstone & Wylie Attorneys**
	Cape Town
Respondent's counsel:	**M.W. Janisch SC**
	T.S. Sidaki
Respondent's attorneys:	**State Attorney**
	Cape Town