REPORTABLE

IN THE TAX COURT
(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 2010-10-06

Case Number: 11038/2006

In the matter between:

ABC LTD Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

SOUTHWOOD J

[1] On 15 February 2002 the Commissioner issued tax assessments in respect of the appellant for the 1998, 1999 and 2000 years of assessment. In respect of the 1998 year of assessment the Commissioner assessed normal tax in the amount of R13 887 384,00, additional tax (200%) in the amount of R27 774 768,00 and section 89*quat*(2) interest in the amount of R19 963 093,15 resulting in a total payable of R61 625 245,15. In respect of the 1999 year of assessment the Commissioner assessed normal tax in the amount of R237 241 761,80, additional tax (200%) in the amount of R474 483 523,50 and section 89*quat*(2) interest in the amount of R220 338 286,20 resulting in a total payable of R932 063 571,50. In respect of the 2000 year of assessment the Commissioner assessed normal tax in the amount of R134 703 271,80, additional tax (200%) in the amount of

R269 406 543,60 and section 89*quat*(2) interest in the amount of R70 045 701,34 resulting in a total payable of R474 155 516,74. The assessments were based on the profits (and losses) made by the appellant on the sale of shares and the additional tax was imposed in terms of section 76(1)*(a)* of the Income Tax Act 58 of 1962 ('the Act') because the appellant made default in rendering a return in respect of each year of assessment. Most of the profits were from the sales of shares in DEF Ltd ('DEF Ltd') a company listed on the Johannesburg Stock Exchange ('JSE'). After unsuccessfully objecting to the assessments the appellant noted an appeal to this court.

[2] The appellant was incorporated in the Sunshine Islands on 16 July 1993. The X Trust was established in BB on 9 September 1993 and Y Trust (BB) Limited ('the Y Trust') was appointed the trustee. The Y Trust held the shares in the appellant on behalf of the X Trust and managed the company by means of nominee companies. The Y Trust's nominee companies continued to hold the shares in the appellant until late 1999 when the shares were transferred to the Z Trust, a trust established on 3 September 1996 and administered by the MR Trust Company Ltd ('MR Trust Co'). In March 2000 MR Trust Co resigned as the trustee of the Z Trust and the Y Trust was appointed to administer the trust. Both trust companies held the appellant's shares through two nominee companies, each holding half of the appellant's shares, and they appointed nominee companies as directors of the appellant. However, in practice, employees of the trust companies managed the appellant's affairs. Trust companies such as the Y Trust and MR Trust Co provide corporate trustees, corporate directors and managerial services to administer trusts set up for wealthy individuals from all over the world. As from 1 January 2005 the YTBB Ltd Banking Group in BB merged with the Bank of AA Group and from then on the corporate services were provided by YTBB Trustee (BB) Limited.

[3] As already mentioned, this appeal arises out of the assessment to tax of the proceeds of shares sold by the appellant on the JSE during the period August 1997 to February 2000 (i.e. during the 1998, 1999 and 2000 years of assessment). The Commissioner assessed the proceeds to tax because he considers that they were receipts of a revenue nature. Until the hearing of this appeal the appellant contended that all the proceeds from the sale of the shares were receipts of a capital nature and, accordingly, that they are not subject to tax as they do not fall within the definition of 'gross income' in the Act. The issues raised and the essential facts relied upon by the appellant are set out in the appellant's Consolidated Statement of Grounds of Appeal ('Consolidated Statement') as follows:

(1) Whether the profits on all of the sales of shares reflected in the assessments (set out in the schedules in the Dossier pp31-44) were receipts of a capital nature.

The essential facts alleged are that:

(i) The appellant is an investment holding company which acquired the shares with the purpose and intention of holding them as a capital investment;

(ii) The shares when acquired were not intended to be and did not constitute stock in trade and were not acquired or sold as part of a profit-making scheme;

(iii) The disposal of the shares in DEF Ltd was actuated to satisfy a sudden and/or unexpected and/or fortuitous and unsolicited demand, particularly from institutions, at windfall prices unlikely ever to be realised again which in the view of Mr. N rendered it uneconomic to continue to hold the shares and

without any intent on his part or that of the appellant thereby to engage in a scheme of profit-making or in the business of dealing or trading in shares;

(iv) The shares other than the DEF Ltd shares were disposed of for commercial reasons and as part of a process of disinvestment other than a profit-making scheme.

(2) Sale of the shares in OP Ltd

Whether the profit on the sale of the shares in OP Ltd arose in the 2001 tax year and should not have been included in the 2000 year of assessment.

(3) Interest

Whether the interest included in the assessments (set out in the Dossier pp24-28) is exempt from normal tax as the appellant is a non-resident company;

(4) Additional Tax in terms of section 76(1) of the Act

Whether additional tax, particularly, additional tax at the rate of 200%, should not have been levied, alternatively, should have been remitted, there being extenuating circumstances and the appellant not having acted or omitted to act with intent to evade taxation.

The essential facts alleged are that –

(i) The ultimate shareholder of the appellant is a trust governed by the laws of BB;

(ii) The appellant is an investment holding company registered in the Sunshine Islands;

(iii) The directors of the appellant, two companies controlled by the Y Trust which was the trustee of the aforesaid trust:

(a) Had no reason to believe that the appellant was liable to pay income tax, whether in South Africa or elsewhere;

(b) Were not aware that the appellant was obliged to render returns in South Africa;

(c) Were not aware that the appellant was a 'company' as defined by the Act, or that it was subject to the provisions of the Act;

(d) Were not aware that the appellant had engaged in any business in South Africa or in any scheme of profit-making, and they did not intend to do so;

(e) In the event of it being found that Mr. N had engaged in any business in South Africa or in any scheme of profit-making which would or could expose the appellant to liability for income tax:

(aa) were not alive to the fact that Mr. N had engaged in such business or scheme of profit-making;

(bb) had not authorised Mr. N to engage in such business or scheme of profit-making;

(f) Were not advised by Mr. N that the appellant was obliged or had failed to render returns or that the Commissioner had required it to render returns, or that it had registered it as a taxpayer or that it had appointed him as the representative of ABC Ltd ;

(g) Were kept in the dark by Mr. N concerning the affairs of the appellant, including his dealings with its assets and its income tax affairs;

(h) Took steps as soon as they were reasonably in a position to do so

(aa) to cooperate with SARS in regard to all litigation involving SARS including this appeal in an honest and transparent fashion;

(bb) to correct any wrong information or misinformation provided to SARS by Mr. N,

it being constrained by the non-cooperation of Mr. N due to his pending criminal prosecution.

(5) Interest levied in terms of section 89*quat*(2) of the Act

Whether interest should not have been levied in terms of section 89*quat*(2), having regard to the provisions of section 89*quat*(3), and more particularly, in that the appellant, on reasonable grounds, contends that it is not liable to tax in the amounts assessed or at all.

The essential facts alleged are that the appellant acted reasonably in making its contentions (given what is set out in relation to the fourth ground) and given that it has been unable to obtain information from Mr. N other than what is contained in the section 74C enquiry record or the record of the proceedings before the Panel, and it is unable to consult with him.

[4] During the appeal the appellant's witness Mr. N, the Mr. N referred to in the Consolidated Statement, conceded that he had purchased some of the shares with a view to make a profit on selling them and that the proceeds of these sales were of a revenue nature. During argument the appellant's counsel advanced no argument in respect of the tax levied on the interest earned on the proceeds of the shares and the Commissioner's counsel conceded that the Commissioner had wrongly included in the 2000 year of assessment the proceeds of the sale of the OP Ltd shares.

[5] In terms of section 82 of the Act the burden of proof in respect of the facts in issue rests on the appellant. The section provides that the Commissioner's decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong. With regard to the issue of whether the proceeds of the sale of the shares constituted receipts of a revenue or capital nature the parties agreed that it is only the intention of Mr. N which is relevant (Dossier 127/5 read with 130/5 and 132-134 read with 135 and 136). Mr. N took all the

decisions to acquire and dispose of the shares. Apart from the first sale of DEF Ltd shares he never consulted the appellant or the trustees.

[6] It is clear that Mr. N played a central role. He established the two offshore discretionary trusts, the X Trust and the Z Trust, which at different times held the shares in the appellant; at all times he was - solely in control of the appellant's activities in South Africa; he decided to acquire the shares for the appellant and he decided to sell them; he failed to register the appellant as a taxpayer in terms of the Act and he failed to render income tax returns on behalf of the appellant; he communicated with SARS about the payment of tax by the appellant; he transferred some of the proceeds of the sale of the shares to banks in the United Kingdom and BB and he used the rest to acquire valuable assets in South Africa or the shares in companies holding valuable assets.

[7] SARS considers that the appellant and Mr. N have contravened the Act in a number of respects; the South African Exchange Control authorities consider that Mr. N has contravened the South African Exchange Control Regulations and the Director of Public Prosecutions ('DPP') has instituted criminal proceedings against him. In 2005 the DPP served on Mr. N an indictment containing 322 charges of fraud, purgery, tax evasion, money-laundering, contravening Exchange Control Regulations and racketeering and on 6 May 2010 the DPP served on Mr. N a second indictment containing a further 39 charges. The trial on these charges has yet to commence but the criminal proceedings have substantially delayed the hearing of the appeal.

[8] Because of the criminal prosecution Mr. N refused to consult with the appellant's legal representatives and indicated that he would not testify at this appeal because of the danger that he might incriminate himself. Mr. N relied on his constitutional right to remain silent. This attitude gave rise to three substantive applications in this court. In the first application

the appellant applied for the postponement of the appeal until the criminal trial of Mr. N had been finalised. This application was partially successful. The court granted a postponement but made an order that subject to the leave of the court the Commissioner was entitled, in the event of a material change in the relevant circumstances, to set down or reinstate the appeal for hearing prior to the finalisation of the criminal trial. In the second application the Commissioner successfully applied for leave to re-enrol the appeal for adjudication and an order that a date be set for the hearing of the appeal. In the third application the Commissioner unsuccessfully applied for a declarator that Mr. N is not entitled to refuse to give evidence on behalf of the appellant at the appeal merely because the answers may tend to incriminate him.

[9] Before the re-enrolment application SARS persuaded the National Director of Public Prosecutions to issue an undertaking not to use, in the criminal trial, the evidence given by Mr. N in this appeal. In his judgment in the re-enrolment application Gildenhuys J found that the issue of the undertaking not to use the evidence ('direct use immunity') justified the re-enrolment of the tax appeal and that the appellant was not entitled to adopt the position that being compelled to testify would violate his constitutional rights. The learned judge also dismissed Mr. N's objections to the validity of the immunity. As already mentioned he granted leave to enrol the appeal and ordered that a date be set for the hearing.

[10] Notwithstanding the findings of Gildenhuys J, Mr. N refused to cooperate with the appellant's legal representatives and indicated that he would not consult with them and that he would not testify at the appeal. On 7 June 2010 (the first day of the appeal) Mr. N attended court represented by two counsel and an attorney. *In limine* Mr. Marcus SC, on behalf of Mr. N, handed to the court a 412 page application brought by Mr. N in the High Court against the National Director of Public Prosecutions, the Commissioner of SARS, the Registrar of the Tax Court and the appellant in which Mr. N sought *inter alia* orders setting

aside the subpoena issued against him and declaring that Mr. N cannot be compelled to give evidence in the tax appeal pending the finalisation of the criminal proceedings instituted against him. Mr. Marcus relied on this application in support of an argument that Mr. N had 'reasonable cause' as contemplated by section 84(2) of the Act not to testify and requested that Mr. N be excused from further attendance. The Commissioner and the appellant opposed this request and after full argument the court handed down judgment on 9 June 2010 finding that Mr. N did not have reasonable cause to refuse to give evidence and refused his request to be excused from attending court. Immediately after judgment Mr. Marcus informed the court that Mr. N accepted the court's ruling and undertook to co-operate fully and give evidence. However, Mr. N, after listening to the appellant's counsel's opening address, persisted in his refusal to consult with the appellant's legal representatives. He said he was offended by the disparaging remarks made about him. Accordingly, when Mr. N testified, the appellant's counsel had not consulted with him and did not know exactly what he would say. The appellant's counsel was dependent on the transcript of Mr. N's evidence before the section 74C enquiry.

[11] (1) The parties agreed that the following evidence would be placed before this court:

(i) The papers in the substantive applications in this court for the postponement, re-enrolment and declarator;

(ii) Whatever documents they consider relevant in the trial bundles used in the Commissioner's action against Mr. N, the appellant and ST Ltd under case number 4745/2002 ('the ST Ltd action'). The parties agreed on 9 trial bundles which are referred to as TB1-6, TB11-13;

(iii) Whatever other documents the parties consider to be relevant (these are contained in 9 lever arch files referred to as AB1-9);

(iv) The transcript of the evidence given by Mr. G in the ST Ltd action. (The parties agreed that the transcript of his evidence would stand as evidence on the same basis as if it had been given before a commission *de bene esse.*)

(2) The parties also agreed that the documents used in the ST Ltd action (i.e. the TB bundles) would have the same status as was agreed for purposes of that action and that the status of the documents in the other bundles (AB bundles) would be determined once the bundles had been compiled. In the action the parties agreed that unless objection is made to any particular document, the documents contained in the bundles:

(a) Are authentic, i.e. they are what they purport to be;

(b) Insofar as they bear dates, were brought into being on the said dates;

(c) Insofar as they are correspondence or file notes, they were written by the persons who purported to write them;

(d) Insofar as they are correspondence, were sent on the dates that they purport to bear, and were received in the ordinary course;

(e) Insofar as they purport to be agreements or resolutions, were entered into or taken on the dates which they purport to bear;

(f) Insofar as they purport to be the minutes of meetings, they are of meetings which were held on the dates which they purport to bear;

(g) Are not proof of the truth of their contents.

(3) The parties also agreed that any party may at any time, whether in the course of evidence or during argument, refer to any document contained in the trial bundle and not objected to as aforesaid, even though it has not been identified or otherwise referred to by any witness subject to the rider that insofar as the documents are concerned the documents will be receivable in evidence and will constitute evidence by their mere production. Any document not referred to in evidence or in argument shall be excluded.

[12] The agreement relating to the use of documents is important as most of the history of this matter is set out in formal documents, e-mails, letters and attendance and file notes written or made by Y Trust employees and its attorneys. The documents reflect that they were prepared contemporaneously and they usually record the relevant conversation or incident in some detail. Many of the documents were prepared before the Commissioner issued the assessments and the rest were prepared after the assessments but at a time when the author could not foresee that they would become available to the Commissioner. In these circumstances they are regarded as a contemporaneous record of events which is more reliable than any of the witnesses' memories. Both Mr. G, when he testified in the ST Ltd action, and Mr. H when he testified in this appeal, relied on the correctness of the contents of the documents and much of their evidence was an interpretation of the contents of the documents. Although the parties did not agree that the documents are proof of their contents it is clear that they are and should be accepted as such. In argument the appellant's lead counsel, Mr. Slomowitz SC, conceded as much.

[13] The following is common cause:

(1) During the 1980's and early 1990's Mr. N, who qualified as a chartered accountant in Scotland, became involved in various businesses in the financial services industry. He conducted business in a number of corporations including GH CC, IJ Ltd, KL (Pty) Ltd and MN (Pty) Ltd (which later changed its name to DEF Ltd (i.e. 'DEF').)

(2) In about June 1993 Mr. N consulted Mr. J of UV CC with a view to obtaining advice on the rationalisation of his and his mother's shareholdings in various South African companies. In June 1993 Mr. J, on behalf of UV CC, provided Mr. N with his written advice as to how their shareholdings should be structured. Mr. J proposed two possible structures. Each involved an offshore discretionary trust holding 100 % of the shares in an offshore holding company. He suggested that Mr. N establish a discretionary trust in accordance with the laws of one of the Channel Islands, the trustee of which would be the Bank of AA, a private bank, and that Mr. N determine the discretionary beneficiaries. He also suggested that Mr. N's mother, Mrs N, transfer her shareholding in a number of South African companies to the trust. This discretionary trust would hold all the shares in a holding company incorporated in the Sunshine Islands, Coconut Islands or similar tax haven (TB11 2-14).

(3) On about 25 June 1993 Mr. N instructed UV CC to set up such an offshore structure. (TB11 15).

(4) On 2 July 1993 Mr. J on behalf of UV CC instructed the Bank of AA (BB) Ltd ('Bank of AA') to prepare the documents necessary for the establishment of a discretionary trust and to incorporate a holding company in the Sunshine Islands under the name

of ABC - Ltd (TB 11 16-17). On the same day the Y Trust sent UV CC the forms for the incorporation of the company and requested payment of $3 500 for the incorporation of the company and costs of the first year (TB11 18).

(5) On 16 July 1993 the appellant was incorporated in the Sunshine Islands (TB11 20). Clause 4 of the memorandum of association contains the following objects:

> '(1) To buy, sell, mortgage, lease, manage, build, develop, possess and generally deal in real property; to buy, sell, underwrite, invest in, exchange or otherwise acquire, and to hold, manage, develop, deal with and turn to account any bond, debentures, shares (whether fully paid or not), stocks, options, commodities, futures, forward contracts, notes, or securities of all types, precious metals, gems, works of art and other articles of value.
>
> (4) To engage in any other business or businesses whatsoever, or in any acts or activities which are not prohibited under any law for the time being in force in the Sunshine Islands.' (TB11 22-23)

(6) At the first meeting of the appellant's Board of Directors on 22 July 1993 the Board resolved to issue 1 000 $1 shares of which 500 were issued to W Ltd and 500 to XX Ltd (TB11 48-49).

(7) On 23 July 1993 Mr. N addressed a letter to the Bank of AA to explain the delay in transferring the sum of £6 000 to the bank. He had instructed his bank by fax to transfer the money and this instruction was causing the delay. Mr. N concluded his letter by saying that he looked forward to seeing the bank's representative (Mr. K) in the Channel Islands in September (TB11 51).

(8) Mr. K had met Mr. N in Johannesburg during July 1993 and had discussed with him the creation of the offshore structure proposed by UV CC. It is clear from the file note that Mr. N decided who would hold the shares in the appellant and that this would be a 'new BB discretionary settlement' to be created by Mr. N's mother for the benefit of Mr. N, his wife and their three children. He also told Mr. K that he thought his mother should be included in the 'specified class': i.e. that she should be a beneficiary of the trust. Mr. N also decided that the Y Trust would act as sole trustee and that Mr. JJ, a solicitor of JJDR, would be appointed first protector of the settlement to be known as The X Trust. They also agreed that the initial corpus of the trust would be £1 000 and that Mr. N would transfer £5 000 to cover the establishment costs of the trust and the company and ongoing expenditure during the first year. Mr. N also made known his desire that the trust and company be in place by 31 July 1993 after which Mr. N would transfer the consulting and agency businesses conducted by GH CC to HI Holdings Ltd (shortly to be renamed KL (Pty) Ltd). Mr. N also expressed a wish to visit BB in September to meet the bank and Mr. JJ. At that time 'Letters of Wishes' to the trustee and to the protector (to be drafted by Mr. JJ) would be finalised (TB11 52-53).

(9) On 25 August 1993 Mr. JJ on behalf of UV CC addressed a letter to Mr. K enclosing the deed of settlement for the X Trust, the 'Letter of Wishes' duly signed, copies of the sale of shares agreement between the appellant and MM Limited ('MM Ltd') (to be signed by the appellant), duplicate originals of the shareholders agreement between Mr. N, the appellant and MM Ltd in relation to KL (Pty) Ltd (to be signed by the appellant as soon as possible and sent to MM Ltd) and a share transfer form CM42 in respect of the transfer of 79 107 shares in KL (Pty) Ltd from the appellant to MM Ltd. In the letter Mr. J instructed Mr. K to request MM Ltd to sign the agreements and then transfer a sum of £200 000 to the appellant whereupon Mr. K

should deliver to MM LTD the original share transfer form in respect of the KL (Pty) Ltd shares (TB11 58-59). Mr. N's mother, Mrs N, held the shares in KL (Pty) Ltd. She would donate them to the Y Trust which in turn would transfer them to the appellant which would issue additional shares to the value of the KL (Pty) Ltd shares all of which would be reflected in the accounting records of the trust (TB11 60-61). The appellant then sold the 79 107 shares in KL (Pty) Ltd to MM LTD for £200 000 (TB11 62-63; 90-91; 92).

(10) On 9 September 1993 the X Trust was established. The nominal settlor was Mr. N's mother, Mrs. N, and the purpose of the trust was to make provision for the members of the 'Specified Class' (i.e. the beneficiaries) consisting of Mr. N, his wife, Mrs. NN and their three children (TB11 65-85). The trust deed provided that any other persons could be added to the Specified Class. The Protector was Mr. JJ of BB (TB11 88). On 19 August 1993 Mr. N's mother had signed a 'Letter of Wishes' in which she expressed the wish that during his lifetime the trustees should provide first for the needs of Mr. N (TB11 86-87).

(11) On 9 September 1993 the X Trust became the appellant's sole shareholder. The Y Trust held the shares through two of its nominee companies and appointed two nominee companies as the directors of the company.

(12) On 9 September 1993 the X Trust assets consisted of the shares in the appellant and £1 000. In about September 1993 Mr. N sold his 69 320 shares in KL (Pty) Ltd and in November 1993 his 26 shares in IJ (Pty) Ltd to the appellant for R792 000. In about December 1993 Mr. N sold his 1 438 500 shares (i.e. 52 % of the issued shares) in DD Ltd to the appellant for £4 000 (TB11 126) and in about June 1994 he sold his 15 000 shares in Q plc to the appellant for £14 550 (TB11 131). In July

1994 he transferred to the appellant 100 shares in RR (Pty) Ltd, 100 shares in SS (Pty) Ltd and 49 shares in TT Co (TB11 135, 137-8, 140-141).

(13) During October 1994 and February 1995 Mr. N negotiated with MM LTD the purchase of KL (Pty) Ltd shares from the appellant for a total purchase consideration of £933 000 (TB11 162, 163, 165, 171).

(14) On 15 July 1996 Mr. N sold his 84 % of the shares in DEF Ltd (then called OO (Pty) Ltd) to the appellant for R840 (TB11 195). On the same day DEF Ltd sold and transferred its rights in a computer programme called LIST to WXY plc ('WXY plc') (a company listed on the London Stock Exchange). As consideration for the rights in the computer program DEF Ltd's loan account with WXY plc was credited in the amount of the purchase price. At that stage DEF Ltd conducted a treasury outsourcing business which Mr. N did not regard as viable.

(15) On 2 September 1996, Mr. N, represented by MR Trust Co established the Z Trust, a discretionary trust, in accordance with BB law with a trust fund of £66 020,01 (TB11 196, 197-218). The beneficiaries of the trust were Mr. N, his wife and four children but any other person could be added to the list of beneficiaries. On 6 May 1996 Mr. N had signed a 'Letter of Wishes' in respect of the Z Trust (TB11 219-220). On 5 September 1996 Mr. N instructed the Bank of AA to transfer £440 000 to MR Trust Co, the trustee of the Z Trust, for account of the Z Trust. This was a transfer of funds from the X Trust to the Z Trust (TB11 221).

(16) Early in 1997 Mr. N decided that the appellant should list DEF Ltd on the JSE and in June 1997 he suggested to the Y Trust that the appellant should acquire more of his shares in DEF Ltd (TB11 227, 228). Mr. N wanted to sell 20 % of the shares in DEF

Ltd to the appellant for R3 367 347 (£446 479) which would be set off partly against the amount of £200 000 which Mr. N owed the appellant and the balance (£203 456) to be paid to him (TB11 229, 230).

(17) On 23 September 1997, for the purpose of listing on the JSE, DEF Ltd changed its name from OO (Pty) Ltd to DEF Ltd.

(18) On 29 October 1997 DEF Ltd listed on the JSE. For the purpose of the listing Mr. N had asked for and been given a power of attorney to sign all the necessary documents on behalf of the appellant. At the time of listing DEF Ltd's business was exclusively related to currency management. At that stage the appellant held 79 % of the shares in DEF Ltd: i.e. 32 970 833 shares. Mr. N was appointed CEO of DEF Ltd (TB11 231, 232, 233, 234).

(19) According to the prospectus the issue price of the DEF Ltd shares was R1,20 but the first sale was at R1,70. Thereafter the share price steadily increased.

(20) From 17 February 1998 the appellant started selling its DEF Ltd shares. The first sale, on 17 February 1998, was for 1,8 million shares at R23,00 per share: a total price of R41,4 million (TB11 237: Dossier 31). Thereafter, at intervals, until 10 January 2000 the appellant DEF sold virtually all its DEF Ltd shares. According to the Commissioner the total profit which the appellant made from the sale of the DEF Ltd shares was R1 332 404 039,35 (Dossier 24).

(21) During the three years of assessment the appellant bought and sold the following shares on the JSE:

(i) A INTERNATIONAL (Dossier 34)

From October 1998 to February 1999 the appellant purchased 21 788 800 shares for a total price of R22 009 589,03 which the appellant - sold during the period November 1998 to December 1998 for a total price of R22 750 684,62, thus realising a profit of R741 095,59.

(ii) KK HOLDINGS (Dossier 35)

In March and September 1999 the appellant purchased 9 180 909 shares for a total price of R10 289 542,35 which the appellant - sold during the period February 1999 to February 2000 for a total price of R49 728 598,38: thus realising a profit of R39 439 656,03.

(iii) QQ HOLDINGS (Dossier 36-38)

During the period December 1998 to March 1999 the appellant purchased 36 984 100 shares for R22 370 393,04 of which the appellant - sold 28 674 400 shares during the period December 1998 to June 1999 for a total price of R12 800 183,80. The appellant suffered a loss of R4 548 686,70 on the shares which it - sold.

(iv) BB INVESTORS (Dossier 39)

In December 1998 the appellant purchased 584 000 shares for R6 318 632,46 which the appellant - sold during the period January 1999 to February 1999 for R10 579 963,07: thus realising a profit of R4 261 330,61.

(v) CC HOLDINGS(Dossier 40)

In July 1999 the appellant purchased 256 300 shares for R743 437,29 which the appellant - sold in September 1999 for R1 078 131,14: thus realising a profit of R343 693,85.

(vi) DD HOLDINGS(Dossier 41)

In February 1999 the appellant purchased 5 459 600 shares for R900 688,89 which the appellant - sold in March 1999 for R900 413,92: thus suffering a loss of R247,97.

(vii) FF HOLDINGS (Dossier 42)

In August and September 1998 the appellant purchased 2 091 800 shares for R4 143 553,76 which the appellant - sold in September, October and November 1998 for R4 072 947,71: thus suffering a loss of R7 060,65.

(viii) GG Holdings (Dossier 43)

In December 1998 the appellant purchased 800 shares for R11 483,60 which the appellant - sold in December for R11 483,60, thus breaking even.

(ix) HH Holdings (Dossier 43)

In December 1998 the appellant purchased 800 shares for R1 683,90 which the appellant - sold in December 1998 for R1 396,00: thus suffering a loss of R287,90.

(x) II Holdings (Dossier 43)

In March 1999 the appellant purchased 10 000 shares for R40 099,75 which the appellant - sold in March 1999 for R37 238,96: thus suffering a loss of R2 860,79.

(xi) OP LTD (Dossier 44)

In March 1999 the appellant purchased 10 000 shares for R40 099,75 which the appellant - sold in March 2000 together with another 672 783 shares for R215 097,21.

(22) On 2 March 1999 Mr. N and Mr. G met in Johannesburg to discuss the management of the offshore structure. Mr. G's summary of the meeting reads as follows:

'I met with Mr. N for lunch to discuss the way forward for his structure and to put his mind at ease that he was a valued client. Mr. N has been unhappy of

late at the service he has received. (I believe the details of this are already logged). His biggest concern was that the bank appeared unable to provide him with a value for ABC Ltd at any given time. (ABC Ltd has various investments/cash held outside TOT.) I explained to him that this was entirely down to the bank's systems which YTBB Ltd has to use. I then explained that 4 Series would be able to provide the details he wants once ABC Ltd and X Trust gain "life". He asked when this would be and I told him it would be done by 1 April. Mr N was happy that the Bank would at least be able to do this.

The meeting was extremely pleasant and Mr. N gave a very brief overview of matters. He was concerned about whether things were being done properly in that he was making all the decisions and acting on them. I said that we should be aware of everything that is being done in the company's name. I advised him that we would have no problems with him acting as our "agent" in SA, but stressed that we must be aware of what he is doing. As an example Mr. N mentioned that when he travels he uses ABC Ltd's plane! I asked him about this and he advised that he had bought a $12 m jet in the company's name (we obviously need full details of this!).

Mr.. N explained a little about DEF Ltd being a financial services company. DEF Ltd employs about 70 staff in Randburg and a further 80 or so in the Jo'burg office. The turnover for the company last year was estimated by Mr. N to have been SA R3 trillion.

Mr. N estimated he currently held £50 million in ABC Ltdbut would like an exact figure of cash/investments etc. together with details of interest rates, maturity dates. He currently has SA R300m cash in SA and he will be sending this to this to add to the other funds. After further share sales he anticipates ABC Ltd will have cash of approximately £100 million. I explained to him that currently the funds were split between OR, TOT, PMB and NP among others and that historically I had managed the funds, checking rates on maturity dates and placing funds as necessary. He asked how much was with OR and I said that from memory I believed this to be £18 million. He explained that he had a close relationship with OR in SA and wanted to maintain some funds there as it helped him with the wider picture of his

dealings in SA. I explained that this might represent a problem as I was actually in the process of winding down the funds with RNM. (The reasons are well documented in the file and I briefly explained the problem concerning the bank limits and the fact that I had effectively exceeded them). Mr. N again stated that he would like funds maintained at RNM to help in other areas and acknowledged that it was a large amount to keep in one place. We can treat this as an indemnity from him. Mr. N specifically stated he was happy to maintain a max of £20 million with RNM.

We then moved on to the question of the way forward and Mr. N confirmed that he would be looking to invest the funds into equities/bonds. I suggested the best way forward would be for me to contact a handful of Investment Managers with a view to giving them say £20 million each, to manage. We could then compare the performance of each at any given time. We discussed what level of risk Mr. N was prepared to accept and he advised that he wanted to give this some thought. I suggested that maybe each Manager need not necessarily be working to the same risk guidelines. I also briefed Mr. N on the Tinkers Institutional Money Fund and the Multi-Manager products due out in April. I also mentioned the presentation that had been given by Mr. A of OR locally and the claims for "guaranteed" returns. This interested him and he agreed that it would be an idea to go to them with say £1 million and see what they could "guarantee" over 1 year. Mr. N mentioned that if he could be guaranteed 8 % pa he would be happy.

Lunch was very enjoyable and I mentioned that I had had a bottle of Klein Constantia from the Cape region and Mr. N replied that he knew the label well and was considering buying the vineyard!' (TB11 274-276).

(23) On 29 July 1999 the Y Trust reported to Mr. N that the cash held by the appellant in various banks and other institutions amounted to £93 627 958,18 (TB11 301-303).

(24) In the middle of 1999 it became known in the market that the appellant had disposed of virtually all its DEF Ltd shares and after criticism was expressed in the media Mr. N came under pressure to resign as CEO of DEF Ltd which he did on

16 November 1999. On resignation Mr. N announced that from 16 November 1999 and for a period of at least 12 months he would not sell DEF Ltd shares. He then ceased to have a connection with DEF Ltd. By then the appellant had - sold virtually all its shares in DEF Ltd.

(25) Mr. N appointed JKL Stockbrokers to handle the DEF Ltd share transactions on behalf of the appellant. The proceeds of the sales were paid into the appellant's JKL Bank Limited bank accounts which Mr. N had opened and on which he had signing powers. None of this was known to the appellant. Mr. N arranged for some of the funds to be remitted overseas to the United Kingdom and BB where they was invested in various financial institutions designated by Mr. N. Mr. N utilised the other funds in South Africa to purchase a number of valuable assets. These included shares in companies, residential properties in Johannesburg, 123C and 123D, wine estates, motor vehicles and paintings. Mr. N built a home for himself and his family on three adjoining properties in 123, Johannesburg.

(26) In October 1999 Mr. N became so dissatisfied with the service he was receiving from the Y Trust that he gave instructions that funds held by the Y Trust in the Bank of AA be transferred to YY Private Bank Limited ('YY Bank') in London (TB11 308-9). This caused some consternation in the Y Trust which immediately undertook to improve the level of service in an attempt to retain Mr. N as a client (TB11 306, 310, 313, 314). On 11 November 1999 Mr. N confirmed that the Y Trust would continue to be the administrator of the trust and the appellant (TB11 315) but on 29 November 1999 instructed the Y Trust to transfer the appellant's shares to the Z Trust administered by MR Trust Co. He also instructed the Y Trust to hand over 'with immediate effect' the full balances on the cash and money market portfolio to YY Bank. (TB11 316).

The Y Trust immediately agreed to transfer the trusteeship of the trust and the administration of the appellant ('your company') to MR Trust Co (TB11 320).

(27) On 3 February 2000 Mr. G and Mr. N met in Johannesburg to finalise the transfer of the appellant and the trust administration. Mr. G's summary of the meeting reads as follows:

> 'The meeting was extremely pleasant during which Mr. N discussed what he was planning to do over the coming two years. Basically, he has now sold out entirely in DEF Ltd and bought a small company for R6 million (A. Co.). He said that when the industry heard he had done so the value of the shares increased tenfold. He has formed a new company called B. Co. which will effectively hold the shares in A. Co. in the same way that ABC Ltd held the shares in DEF Ltd. His plan is to then build the company up over the next two years in a similar way to DEF Ltd. The shares in B. Co. are held in the Z Trust which is run by MR Trust Co in BB.
>
> Whilst in the meeting we had a conference call with Mr. P of MR Trust Co concerning the transfer of the ABC Ltd shares to the Z Trust. Mr. N initially only wanted to transfer the shares and not the current administration/directors etc. but as Mr. P (correctly) pointed out they would not be able to act on this basis as they would be taking the liability for ABC Ltd, but would not have any control over the assets. I agreed that this was an unacceptable position for him to be put in and that Mr. N either had to leave things as they were or change Directors etc. Mr. N decided to change the Directors and I asked Mr P to fax Ms AP with details of the nominee shareholders/directors so that we could arrange the transfer without delay. Mr. N mentioned that ABC Ltd had bought another (larger) plane and would sell the one it had bought last year for $12 million.
>
> Mr. N talked about some of the other assets he had bought in ABC Ltd's name of which we were not aware and these include two vineyards, a game ranch and some other "toys" for Mr. N.

> Mr. N stated that he believed the new Company would be worth R600 million within two years.
>
> He asked that I continue to visit him when in South Africa as he might still be in interested in doing some investment business through us and I confirmed that of course I would stay in touch.' (TB11 323-4)

(28) On 15 February 2000 the appellant's board of directors resolved to accept the resignation of the Y Trust and the appointment of MR Trust Co as company secretary and the transfer of the shares from the Y Trust nominees to the MR Trust Co nominees and the nominees of MR Trust Co were appointed as directors (TB12 331).

(29) On 29 February 2000 at a meeting of the Y Trust as trustees of the X Trust it was resolved that as the X Trust no longer had assets or liabilities the X Trust should be disolved with immediate effect (TB12 332).

(30) On 29 February 2000 Mr. N and Mr. P of MR Trust Co met to discuss the administration of the appellant. The relevant parts of the note of the meeting read as follows:

> 'Mr. N outlined the assets presently held in ABC Ltd. As well as the YY Bank cash accounts and investments transferred from Bank of AA, ABC Ltd holds extensive property in South Africa. All this property is held through South African holding companies. TC (Pty) Ltd appears to be the main South African holding company. A rough breakdown of the assets is as follows:-

Aeroplane A	£7.5 million
Aeroplane B	£15 million
Wine farms	£10 million
House 1	£350 000
House 2	£6 million

Game farm £1 million

House 3 £1.4 million

Stud Farm (own 50/50
with another person) £1.3 million

One estate (50/50 with
another person) £1 million

Another Wine Farm –

Interest in a house (on a golf course) joint with
two others £100 000

There is some R60 million in a non-resident account with JKL and there are some 70 million shares in DD Holdings presently held for the account of B Co. (these are currently worth approximately £54 million).

Mr. N passed me some papers regarding certain investments that were held by ABC Ltd and confirmed that he was happy for us to make contact directly and to ensure that further correspondence came to us.

Mr. N requested that ABC Ltd be wound up. All the assets to be transferred to B Co. This is to be completed as soon as possible so that the ABC Ltd's name can "die".

Mr. N agreed to arrange for his local auditors to provide me with a breakdown of South African holding structure and the various assets. All the companies in South Africa are audited. The auditors are WR. Mr. N confirmed that all property holdings were held through companies therefore the shares could easily be transferred to B Co.

I discussed the sale of shares in DD Holdings through local brokers Mr. M. Mr. N confirmed that he had instigated this. He does not have any papers regarding the share account with JKL. It all appears to be in his head.

Of the 60 million shares in DD Holdings presently held for B Co. some may be "gifted" to his business associates effectively Share Option Scheme for senior employees.

Mr. N is presently comfortable with the arrangement with YY Bank London and shows no inclination to change banks at this stage. We discussed investment of the trust funds. Mr. N is not particularly interested in this at the present time.

Mr. N explained that Bank of AA charged him 0,25 % for placing the funds in ABC Ltd on the Money Markets. This amounted to some £250 000 pa. Once Mr. N found out he immediately moved all the funds away from their control. He was extremely unhappy at the disclosure of these fees.

We discussed his Letter of Wishes. Mr. N indicated that he had prepared a comprehensive Letter of Wishes for the X Trust which is with Bank of AA. The X Trust formally held ABC Ltd before the company was transferred across to the Z Trust. I undertook to contact Bank of AA to see if they would let me have his Letter of Wishes so that he would not have to prepare it again.

As to method of communication Mr. N is happy that we communicate through his secretary, Ms B.

As to general wishes Mr. N is keen that no money go in lump sum form to his wife or his children, particularly his children. The trust to ensure that his children are made comfortable however, he is particularly concerned that money does not find its way to any future spouses of his children!

Mr. N does not require any regular reporting and will ask when he needs something.' (TB12 333-4)

(31) On 6 March 2000 Mr. N decided that the administration of the Z Trust was to be transferred to the Y Trust as he was not happy with the fees which MR Trust Co had quoted him (TB12 336, 338, 339). On 10 March 2000 Mr. N informed the trustee that the transfer of the administration had become urgent as he wished to make an investment in A Football Club (TB12 341). Shortly afterwards the appellant invested £20 million in SM Limited the owner of the football club (TB12 342, 344, 350-351).

(32) On 23 March 2000 the transfer of the administration of the Z Trust structure was completed when the Y Trust became the secretary of the appellant and its nominee companies became the shareholders and directors (TB12 347: Mr. G 417 l21-23, 418 l6-15).

(33) On 9 May 2000 Mr. AX of SARS's Johannesburg office commenced a correspondence with Mr. N in connection with Mr. N's income tax. Mr. AX had become aware that Mr. N had purchased a painting for R1,76 million which Mr. AX could not reconcile with Mr. N's declared gross income of R60 000 per annum. Initially Mr. AX was under the impression that Mr. N was the owner of the DEF Ltd shares which had been - sold and he requested Mr. N to furnish reasons why the profit on the sale of the shares should not be taxed. Mr. AX first requested and then demanded that Mr. N submit revised returns of income for the 1998, 1999 and 2000 tax years. During the correspondence Mr. AX became aware that the appellant had sold the DEF Ltd shares and on 28 September 2000 he addressed a letter to Mr. N informing Mr. N that he had been designated the public officer of the appellant in terms of section 101(4) of the Act and requested Mr. N to submit income tax returns for 1997, 1998 and 1999 on behalf of the appellant. By February 2001 Mr. AX was satisfied that Mr. N had contravened a number of provisions of the Act and informed him of this in a letter dated 16 February 2001. In November 2001 Mr. AX and Mr. N agreed that an enquiry in terms of section 74C of the Act would be held so that the Commissioner's legal representatives could question Mr. N about his tax affairs (TB12 359-60, 372, 386-7, 398, 399, 502 and 568).

(34) While he was conducting this correspondence with SARS about his and the appellant's tax affairs Mr. N did not disclose SARS' interest in the appellant's profits from the sale of the DEF Ltd shares (or any other shares) to the Y Trust. In

November 2000 Mr. N instructed the Y Trust to transfer all the assets of the appellant to a new company (i.e. ST Ltd) as a matter of urgency (TB12 409, 446, 448). Mr. N gave the representatives of the Y Trust to understand that the transfer of the assets was so urgent that a failure to complete the transfer by the middle of January 2001 would render the exercise futile. On 9 November 2000 the appellant held £108 626 221,38 in various bank accounts and investments *inter alia* with the Bank of AA and YY Bank (TB12 415-6). The representatives of the Y Trust proceeded to execute Mr. N's instructions to transfer the appellant's assets to ST Ltd (which was registered on 23 November 2001 specifically for the purpose of receiving transfer of the assets from the appellant). The Y Trust's representatives regarded this as a formality. Ownership of the assets would be vested in ST Ltd but the Z Trust would still control the company.

(35) On 15 November 2000 Mr. ZA, a senior trust officer of the Y Trust, gave Mr. ZB a marketing agent of the Y Trust (Isle of Man), a written overview of the offshore structure to help Mr. ZB prepare for a meeting with Mr. N on 21 November 2000. The overview commences:

> 'With the Z Trust at the "head" the Trust wholly owns two underlying companies, ABC and B Co. (ADF Co companies). The attached schedule and fax to Mr. N summarises the assets held and the difficulties the Company has faced in maintaining accurate records. In short, we believe that Mr. N on behalf of ABC Ltd, and without authority has "purchased" assets, which include a vineyard, a plane, game ranches and probably more. Clearly, we need to establish what assets are held in the name of ABC Ltd, any other assets held within the structure and procure supporting documentation. Depending on the nature of the documentation, we can on a case by case basis, prepare minutes authorising Mr. N to sign on behalf of ABC Ltd , and/or provide Nominee Agreements (declaring that Mr. N "purchased" foreign

assets for and on behalf of the Company). Where necessary we may need to seek legal advice.

Apparently Mr. N wishes to “dismantle” current structure and transfer the assets of ABC Ltd into a new Company, as the “tax authorities are chasing him”. To do that, we obviously need to ascertain the assets held and to ensure that ownership is properly formalised. Secondly, we would require tax advice in support of the proposed structure.

Mr. N is either reluctant or simply oblivious to the implications of relinquishing control over the assets. From his point of view maintaining the integrity of the structure should be paramount, keeping management and control at arms length will only safeguard his interests. From TOT’s perspective, we are not protecting the interests of the Directors nor are we satisfying our fiduciary obligations as Trustees. The risks are clear and it should be strongly emphasised to Mr. N that we have to put our house in order before we move forward.

We do feel that in working through this difficult process, Mr. N will have the confidence of having a cast iron structure. In working to that end, we hope that confidence will grow and our relationship develop to a point where he may be interested in TOT investment products. That said, we should of course, discuss his investment requirements and explore the options available.’

After dealing with other matters it concludes as follows:

> 'I hope this helps summarise YYTB Ltd's viewpoint and provides an insight into Mr. N's mind-set. In conclusion, I should also emphasise the extremely low fee base applied to this client, in the hope of enticing Mr. N to utilise our services. I know that you will bear this in mind but realising the onerous nature of the proposed restructuring, I suggest that we will get his agreement to charge on a time spent basis in the interim period.' (TB12 422-424).

(36) On 21 November 2000 Mr. ZB and Mr. ZC met Mr. N to review the current situation and agree on the way forward regarding the future administration of the Trust and underlying entities. The summary of the meeting includes the following:

(i) 'Mr. N began the meeting by providing us with a schedule of assets prepared by his auditors showing the current holdings in ABC Ltd . Mr. N added to the schedule by providing rough costs/values. The schedule shows a number of assets of which we were unaware. There is also a SA company (TC (Pty) Ltd) owned by ABC Ltd which itself holds various other interests. Mr. N has undertaken to have his auditors send to ABC Ltd copies of all the various title documents, acquisition dates, confirmation that they are held to the order of ABC Ltd and up to date financials.

With regards to ABC Ltd, Mr. N still wants this to be closed and the assets "transferred" to a new company. At our suggestion he agreed that B Co. - should be used purely as a vehicle for holding shares in DD Holdings (shortly to be renamed DD B Co.) B Co. owns 49 712 544 shares of DD Holdings through JKL in two accounts – B Co. itself and a B Co. "consortium" account. Contact Ms. AS at JKL (27 11 377 6415) to get confirmation.

Mr. N will provide statements on the PM Ltd portfolios and asks that we have these held through the new underlying company rather than direct by the Trust.

Mr. N advised that the various assets brought by ABC Ltd were funded by ABC Ltd's bank accounts in SA which Mr. N had signing powers on. Query: Do we know where these accounts were/are and have we got statements? If not Mr. N should provide these, and they should be requested.

Mr. N has no tax advisor but is happy there is no problem from his point of view in closing the ABC Ltd company. His intention is just to present a blind alley to any revenue investigation. HRC advised him ABC Ltd will probably need legal advice as to how best to "transfer" its assets. Mr. N is happy to pay for this work but needs a proposal from us as to what the cost will be prior to work being done. He would like to have this all done before 8/12/00 when he goes away on holiday (back on 15/1/01).

In future he accepts that he will have to pay more fees as he accepts that the "flexibility" he has enjoyed in the past must not be repeated. However he wants this charge by way of a fixed fee and then agreed "ad hoc" special fees for specific projects carried out. Proposal needs to be sent to him.'

(ii) 'In summary Mr. N's business and investment philosophy is to sell on success and buy on opportunity. He is not interested in relative out performance *vis-à-vis* markets. He is content with existing cash levels as he views this as a natural counterbalance to his business risk. Furthermore he views Sterling as

a hard currency which will continue to appreciate against the Rand in which the majority of his expenses and liabilities are denominated. He continues to believe that his business ventures will provide the means for significant accumulation of capital and he does not wish to take undue risk within the trusts.

At this point Mr. N would not wish to contemplate additional investment, however when the suggested company restructuring is complete, he will have a clearer picture of any surplus "cash" and he will be happy to give his consideration to investment options.'

(iii) 'Overall the meeting was extremely useful. Mr. N acknowledges that as Directors and Trustees we have had inadequate control and knowledge of "his" affairs but that this suited him at the time; He also commented that prior to Mr. G no-one seemed interested. We assured him we are now very interested and are looking to establish a close working relationship with him. It was agreed we will meet again in February. At this time the new structure will be in place together with new agreed fees.'

The follow up notes emphasised the urgency: 'Arrange incorporation of new company and "transfer" of ABC Ltd's assets. This must be at least underway by 8/12/00 or at best complete' (TB12 427-429).

(37) On 1 December 2000 WR SS Inc, the auditors employed by Mr. N to attend to the appellant's and its subsidiaries affairs, sent Mr. N copies of the share certificates and title deeds. These included the title deed for Portion 2 of Erf 21,for House 2 , which was registered in Mr. N's name (TB12 434-5, 437).

(38) On 7 December 2000 ST Ltd (which was registered on 23 November 2000) held its first directors' meeting. The Y Trust was appointed secretary and its nominee companies were appointed directors and were allotted shares in the company (TB12 441-442).

(39) During December 2000 the Y Trust attempted to expedite the transfer of the appellant's assets to ST Ltd. Mr. N informed Mr. ZC on 18 December 2000 that he was very keen to have all the assets moved out of the appellant by the end of December – if this was not done it would be a 'virtually pointless exercise'. Earlier he had said that it should be underway in December so that it would be finished by the time he returned from vacation on 15 January 2001. Mr. N was particularly keen that all the cash should be moved out of the appellant by the end of the month (TB12 446-7, 448, 453, 454-467. 468-69).

(40) On 9 January 2001 Mr. H, the Bank of AA's senior legal advisor furnished Ms. AP who was attending to the transfer of the assets with his opinion:

> 'I have now reviewed the recent correspondence and restructuring documentation that you left with me.
>
> I support the restructuring as a means of ensuring that we have effective control of, and legal title to, all the assets of the Trust and its underlying companies which, clearly, has not necessarily been the case in the past. I see no objection from a tax perspective; the restructuring is, to my mind, tax-neutral. If anything, and going forward, because we will now have effective control of all assets and their respective income streams it will enable us to identify more precisely the tax liability of those assets in the jurisdictions where they are situated.' (TB12 478).

(41) On 28, 29 and 30 January 2002 Mr. N testified at the section 74C enquiry and answered questions put to him by the Commissioner's legal representatives. Mr. N was represented by senior and junior counsel instructed by an attorney. He was questioned extensively by the Commissioner's legal representatives. (The transcript of the enquiry is contained in AB3).

(42) On 15 February 2002, as a result of the information which Mr. N made available at the section 74C enquiry, the Commissioner issued tax assessments in respect of the 1998, 1999 and 2000 tax years for the appellant (and for Mr. N). The amounts of the appellant's assessments have already been referred to. On 18 February 2002 the Commissioner also launched, *ex parte,* an application for an order to attach Mr. N's and the appellant's assets in South Africa. This was the beginning of large scale litigation between the Commissioner and Mr. N, the appellant and ST Ltd and their subsidiaries.

(43) On 19 February 2002 Mr. N telephoned - Mr. ZA to inform him of these new developments. Mr. ZA was appropriately supportive of Mr. N. Mr. N told Mr. ZA that he, Mr. N, was talking on the basis that the conversation may be monitored, that the tax assessments were substantial, R1,4 billion for the appellant and R900 million for him, and that he wanted to confirm that the appellant had been completely divested of its assets and that it had been wound up. Mr. ZA agreed that the appellant had been divested and that it was in the process of being liquidated and emphasised that Mr. N must stress that he is not the beneficial owner of the appellant or ST Ltd. According to Mr. ZA these companies are stand-alone entities which did not form part of Mr. N's estate. Mr. N said he did know about these entities (TB12 594-597).

(44) On the same day, the appellant (Ms AP) authorised Mr. N to secure and brief counsel on its behalf (TB12 598).

(45) On 21 February 2002 the appellant (Ms. AP) instructed TNA Bank Limited to transfer all the assets held to the order of the appellant (an aeroplane) into the name of ST Ltd with effect from 28 February 2001 (TB12 599).

(46) Mr. N instructed Mr. ZE of attorneys PTE Co (later - PEE Co), Johannesburg, to represent him and the appellant in their tax dispute with SARS. He continued to give instructions regarding the transfer of funds (TB12 606).

(47) On 5 March 2002 the Y Trust (Ms. AP) informed G Trust Company Limited, which had previously been requested to liquidate the appellant, that this was no longer required (TB12 610).

(48) On 5 March 2002 Mr. H attended a meeting with Mr. ZF the managing director of the Y Trust, Ms. AP, ZA and Mr. N and M van der Nest SC, who had been retained to represent ST Ltd in the dispute with SARS. As a result of what they were told Mr. H advised Mr. ZF that ‘these were extremely serious matters of which we had no prior knowledge’ and that it was clear that the Y Trust needed external legal advice. (AB1 28-32: Mr. H 68-69). They decided to consult Trios, a firm of London solicitors, in the person of Mr. ZG, one of the senior partners, who was assisted by another solicitor, Ms. S (Mr. H 69-70). At the first meeting on 14 March 2002 Trios was instructed to write to PTE Co to get the up to date position (AB1 32). On the same day Mr. ZG addressed a letter to PTE Co to obtain this information (AB1 33-35). At that stage it was clear that Mr. N had not kept the Y Trust and the directors of the Z

Trust fully informed about what he had been doing in South Africa with the proceeds from the sale of the appellant's DEF Ltd shares. The representatives of the Y Trust knew that Mr. N was selling the DEF Ltd shares because the appellant received large sums of money and on 3 February 2000 Mr. N told Mr. G that he had - sold out of DEF Ltd entirely and was planning to do the same with A. Co. (TB11 323-324: Mr. G 591-592).

(49) On 12 March 2002 PTE Co on behalf of the appellant requested SARS to furnish reasons for the assessments issued on 15 February 2002 in respect of the appellant. (Dossier 46-47).

(50) On 25 March 2002 the boards of the appellant and ST Ltd resolved to oppose the application against them by SARS and authorised Mr. N to do everything necessary to oppose the application including the instruction of attorney and advocates and the signing of affidavits. The appellant's board also ratified the actions of Mr. N in opposing the application (TB12 618-619).

(51) On 16 April 2002 SARS granted the appellant's request for deferment of payment of the assessments on condition that the appellant replied fully and satisfactorily to SARS questions (set out in the attachment to the SARS letter) (Dossier 58, 59-67).

(52) On 25 April 2002 Mr. H consulted with Ms. S who explained that SARS was seeking - to tax the appellant on the basis that it had been trading in the shares of the public company and that the proceeds were income. She also gave Mr. H a copy of the SARS questions sent to PTE Co on 16 April 2002 which she said the Y Trust should consider and draft replies for her review (AB1 39). On 29 April 2002 Mr. H requested Ms. AP to research the files to find the answers to the SARS questions (AB1 49). At

that stage Mr. H had no knowledge which would enable him to answer the questions (Mr. H 76).

(53) On 28 May 2002 Ms. S conveyed to Mr. H the results of her research (which, according to her, gave rise to a number of questions) (AB1 53-60) and on 12 July 2002 Mr. ZG addressed a letter to PTE Co enclosing the Y Trust's draft response to SARS' questions. Mr. ZG sought Mr. N's input in order to complete the draft (AB1 63). This appears from the draft (AB1 65-68). On 17 July 2002 PTE Co submitted a final answer to the state attorney without further recourse to either Trios or the Y Trust (AB1 77-86). According to Mr. H he was 'extremely surprised, to put it mildly' as he had expected to be consulted further. (For purposes of the appeal and to show the discrepancies between the Y Trust draft and the answers presented to SARS by PTE Co, Mr. H prepared a spread sheet containing the answers.) (Dossier 136-147: Mr. H 85-86).

(54) On 25 July 2002 Mr. H spoke to Mr. N about Mr. ZG and Ms. S visiting South Africa to find out at firsthand how matters stood. Mr. N was receptive to the idea and Mr. H thought it essential because of the discrepancies referred to (AB1 87: Mr. H 86-87). However Mr. N later took the view that there was little virtue in such a visit (Mr. H 88).

(55) On 5 August 2002 PTE Ltd provided Mr. ZG with a copy of the summons in the ST Ltd action in which the Commissioner sought orders *inter alia* that all the assets transferred by the appellant to ST Ltd belonged to Mr. N and that the transfer of the assets by the appellant to ST Ltd be set aside (AB1 88, 89-120). When Mr. H read the summons he was extremely concerned because there was an allegation that Mr. N was the beneficial owner of the assets and that Mr. N, the appellant and ST Ltd

had colluded to frustrate the South African Revenue Service in its collection of tax (Mr. H 88-89).

(56) On 6 August 2002 Mr. ZG informed Mr. H that there was a limited amount of information regarding the whole matter and that when he had spoken to Mr. ZE he had complained about the fact that PTE Co had furnished answers to SARS without first taking instructions and that he and Ms. S should visit South Africa to get information (AB1 151A).

(57) On 2 September 2002 Mr. H received from Trios a memorandum setting out the basis for the assessment: i.e. that the appellant was trading in South African securities rather than simply being an investment company (AB1 154A). The SARS' memo consisted of 45 pages of submissions. When Mr. H read it, it increased ('renewed') the concern he had after reading the summons (Mr. H 92).

(58) On 3 September 2002 Mr. H received from Trios (Ms. S) a letter setting out the issues. It noted that while the transfer of assets from the appellant to ST Ltd was a key issue the only documents available relating to the transfer were the share transfer forms between the appellant and ST Ltd. It stated that the basis of the transfer needed to be finalised and documented (AB1 156-7). According to Mr. H the Y Trust had not been kept up to date as to what exactly was going on in South Africa and it did not know what duties the directors of the appellant or ST Ltd owed to the South African authorities (Mr. H 93-94). They were relying entirely on information obtained from PTE Co (Mr. H 94).

(59) On 4 September 2002 Mr. H met Mr. ZG and Ms. S and they discussed visiting South Africa and SARS' attitude that the whole trust structure was a sham. There

was concern about whether there were minutes of board meetings to record the decision to transfer the assets from the appellant to ST Ltd (AB1 159-60). Mr. H thought that only the two solicitors should go to South Africa. He did not think he should go as he did not want to get caught up in the litigation (Mr. H 96).

(60) At this stage it appeared that Mr. N was showing reluctance to have the Y Trust's legal representatives involved in the litigation and that he had adopted an attitude that he knew nothing or very little about what happened outside South Africa (AB1 188 paras 2-4, 191). Mr. H concluded that Mr. N was trying to keep the information in separate compartments (Mr. H 109-110).

(61) On 16 September 2002 Mr. ZG expressed the view to Mr. H that they were getting near to the stage of having to take independent advice (AB1 204). The purpose of this was to get objective advice as to events in South Africa as they became aware of them (Mr. H 111-112).

(62) On 24 September 2002 Mr. H pointed out to Trios the factual discrepancies he had noticed when reading the judgment of Hartzenberg J (delivered in June 2002 in the application for Mr. N's sequestration and a number of interlocutory applications) particularly the allegation that Mr. N received remuneration from the appellant which funded Mr. N's lifestyle in South Africa (AB1 205). Mr. H had also become aware of a whole series of interlocutory applications and proceedings of which the Y Trust was not aware. He considered it necessary to obtain full transcripts of all proceedings where Mr. N had been questioned. At that stage Mr. H had not seen the transcript of the section 74C enquiry (Mr. H 113-114).

(63) On 27 September 2002 Trios (Ms. S) provided Mr. H with copies of press reports about Mr. N. In these reports there were suggestions that Mr. N had been removed as a director of M Co, that his passport had been confiscated, that this occurred as part of criminal proceedings and that Mr. N was on bail (AB1 207-8, 209-250). These reports reinforced Mr. H's concern about Mr. N (Mr. H 115).

(64) On 25 September 2002 PTE Co informed Trios that the previous week the appellant had a hearing before the SARS special panel (AB1 252). Neither the appellant nor the Y Trust had been asked for input regarding the representations to the panel (Mr. H 115).

(65) On 27 September 2002 Trios (Ms. S) pointed out to Mr. H various factual discrepancies in the Hartzenberg judgment, in particular that Mr. N's mother is the majority shareholder in the appellant and is also involved in ST Ltd. This was contrary to the draft which Trios had sent to PTE Co (AB1 253-255). According to Mr. H, in view of what he and Ms. S had discovered about the trusts and their shareholding in the appellant and ST Ltd there was no possibility of anyone legitimately thinking that Mr. N's mother was a shareholder in the appellant or ST Ltd (Mr. H 116-117).

(66) On 7 October 2002 Mr. N telephoned Ms. AP and informed her of developments in South Africa. After telling her that the case in South Africa was going extremely well Mr. N discussed the case against the appellant and then said he did not think it necessary for the solicitors to go to South Africa, only Mr. H and Ms. AP should go. Regarding the case against the appellant he said –

> 'ABC Ltd has no commercial consequences of this action and indeed Mr. N argued that maybe ABC Ltd should approach SARS stating that they did not

> recognise the action as there is no cross-jurisdictional tax arrangements in place and that we "didn't care what they did". This case does not make any difference to ABC Ltd. ST Ltd was not part of the claim but had been included as one of the associated entities. We had done incredibly well to protect and ensure that ST Ltd was not claimable against. We had set up various loan accounts with TNA Bank Ltd and these protected the assets of ST Ltd going forward. The aeroplane had been protected and had been transferred accordingly.' (AB1 260)

Mr. H did not agree with Mr. N's views on the importance of the litigation and regarded Mr. N's attitude to the solicitors as bactracking (Mr. H 121-122).

(67) On 8 October 2002 a detective inspector in the BB Police, Commercial Fraud and External Affairs Department, addressed a letter to Ms. T, the Bank of AA's money laundering reporting officer, in connection with documents pertaining to Mr. N and the appellant. The letter stated that preliminary enquiries had been undertaken under the Fraud Investigation Law in respect of Mr. N and that this was done to assist the National Prosecuting Authority of South Africa and that the enquiry centred around Mr. N and the appellant (AB1 117-8). Mr. H became aware of the letter at the time (Mr. H 118).

(68) On 9 October 2010 Mr. H spoke to Mr. ZG and Ms. S about the BB police letter. Mr. H told them that he intended to obtain local advice regarding the extent of the discovery sought. Mr. ZG said Mr. N's attitude during his telephone conversation with Ms. AP was unhelpful on Mr. N's part and indicated an urgent need for a visit at least by Mr. H, Ms. AP and possibly Mr. ZG and Ms. S as well. They agreed that 'if Mr.. N was still not prepared to face up to matters realistically our duty as Trustee was to our beneficiaries as a whole and it may well bring us into conflict with Mr. N' (AB1 261).

(69) On 10 October 2002 Mr. H told Trios (Ms. S) that Ms. U of the Y Trust PP10 office was going to visit South Africa in the week of 21 October 2002 and was free to assist on the 23 October 2002 'filling in present gaps in our knowledge'. He also suggested that Ms. S attempt to obtain from Mr. ZE as much of the information required as possible. (AB1 262). Mr. H knew Ms. U to be a very experienced, no nonsense person and regarded her as the perfect person to go with Ms. S to South Africa (Mr. H 124-125). The next day Mr. ZG spoke to Mr. ZE about his and the Y Trust's concerns regarding the lack of information and Mr. N's mother's involvement with the Trust and the potential huge tax for her in the United Kingdom. He was also concerned about the wrong facts being mentioned in Hartzenberg J's judgment. Mr. ZG recorded the trust's misgivings about the failure to be kept up to date –

> 'Currently, the trustees are being provided with information in arrears. This is not appropriate and going forward it is imperative that the trustees are given notice of the various hearings and action to be taken in advance. The trustees must be given sufficient notice so that they have an opportunity to influence the action taken. It is simply not good enough in the light of the comments at the recent hearing for matters to progress as they are of the moment. Mr. N understood this.'

(70) Mention was also made of Mr. N's reluctance to meet Mr. ZG and the fact that Mr. N was on bail (AB1 267-8). Mr. H regarded Mr. N's attitude to providing information as untenable because it was important that the correct and true facts be known (Mr. H 127-8).

(71) On 15 October 2002, when Mr. H spoke to Mr. N, Mr. N indicated that little could be achieved at the meeting the next week (AB1 284). At that stage Mr. H thought Mr. N was trying to put them off (Mr. H 131-2).

(72) On 18 October 2002 Trios (Ms. S) sent Mr. N an agenda for the meeting on 23 October 2002 (AB1 320, 321-322) and prepared a list of questions she intended to hand to Mr. N and Mr. ZE (AB1 323-329). At that stage Mr. H had still not seen the transcript of the panel meeting held in September (Mr. H 133-4).

(73) Ms. U and Ms. S saw Mr. N in Johannesburg on 22 October 2002 and 23 October 2002. The relevant parts of the note recording the discussion on 22 October 2002 are as follows (N is Mr. N, U Ms. U and S Ms. S):

> '1. N was initially unwilling to admit that he had any knowledge whatsoever of the trust structure in Jersey and was reluctant to discuss it and YTBB Ltd's position.
>
> 2. N took U and S through the proceedings. The points set out in the rest of this note were discussed (in no particular order).
>
> 3. When N last spoke to H, H had mentioned that N's mother was a beneficiary of the Z Trust. N thought this comment was wholly inappropriate as he had not been aware until that point that his mother was in fact a beneficiary.
>
> N admitted he was aware that his mother received benefits from the Trust in particular monthly payments and the benefit of rent free occupation of a property owned through the structure. On this basis N must have been aware that she was a beneficiary.
>
> 4. The structure was set up for exchange control purposes. Although N's mother had transferred assets into the structure N confirmed that she was acting as his nominee – "She never had anything". Using his mother in this way obviously enabled N to get around the letter of the Exchange Control Rules.

13. S mentioned the piercing the corporate veil summons and the fact that YTBB Ltd's increased involvement with the present situation could only improve the position. . N was very against any further involvement by YTBB Ltd. In fact, he had been in two minds as to whether ABC Ltd should even defend the matters being alleged by SARS on the basis that South African Revenue laws could not be enforced in ADF Co.

14. . N did not see matters proceeding to a piercing of the corporate veil. In fact, his intention was to settle at any cost before matters got this far.

    By implication, . N seems to acknowledge that this may be a potential area of weakness but this was not stated explicitly.

15. . N acknowledged that in any case the current structure did not achieve its purpose in South Africa anymore. His intention was to review the structure once a settlement had been reached with a view to unwinding it and substituting something more efficient.

20. N is certain that the criminal case will come to nothing. SARS had not yet even set down the charges. He was not taking this seriously although the lack of a passport was extremely inconvenient.

21. N reiterated that his attitude towards YTBB Ltd was that he knew nothing of what was on their files and wanted to keep it that way. S mentioned both the *State of Norway* case and the CJA 1987 by way of example to emphasise the fact that if SARS wanted to get more information from YTBB Ltd they would be able to do so one way or the other. U confirmed that BB law contains similar principles.

    N's attitude to this possibility was very dismissive. There is nothing on the files that would contradict anything he has told SARS. N made it clear that he was not willing to participate in a historical reconstruction of information/records. In particular, N mentioned that the previous trust officer, G, had understood N's requirements in relation to documentation.

22. S tried to get the point across that, in our view, . N's position would be strengthened if the records were complete and comprehensive. N was again dismissive saying that it might be better for YTBB Ltd but it was not better for him.

23. It seems that N is not taking YTBB Ltd's position and requests seriously. He mentioned that YTBB Ltd had not been very interested in him previously and so did not see why things should change now. N specifically mentioned that nobody has visited him in South Africa. U said that this was not entirely true as the offer had been made on numerous occasions and turned down. In fact, S was keen to visit and up until now had been put off.

24. . N "dropped" various names. Particularly, the A Family and Mr A-Z.' (AB1 343-347)

(74) The relevant parts of the discussion on 23 October 2002 are as follows (N is Mr. N, WS Ms. WS, SJ Ms. SJ, ZE Mr. ZE, U Ms. U and S Ms. S. WS and. SJ were both attorneys working with Mr. ZE at PTE Co):

'1. At the outset N made it clear that there was certain aspects of the arrangements overseas which the South African advisors did not need to know about and which it would not be appropriate for them to know about in any case. The overseas arrangements did not impact on the way the South African aspects were to be handled as far as N was concerned.

13. N was arrested and gave up his passport voluntarily in late May 2002. The criminal charges are not yet clear and although indictment had been scheduled for 2 December this had now been postponed. All that has been stated is that the charges relate to "15 contraventions of the Income Tax Act or alternatively fraud". Essentially, the allegations are of non-disclosure. The point had been made that a large part of the

assessments relate to interest and penalties and so cannot possibly amount to fraud even if they are found to be owing.

14. There were various stories in the market place and as a consequence the company M Co lost around R100 million. Mr. N resigned as a director to limit the damage his personal situation had caused the company.

25. The panel hearing for ABC Ltd's assessment was heard three weeks ago. Oral submissions were made and a written record will be provided shortly. The hearing was sympathetic although it was clear that the capital versus revenue argument for ABC Ltd is not clear cut. There are good arguments both ways although . N remains optimistic that ultimately ABC Ltd will be successful. ZE, however, believes that this particular issue will ultimately proceed to a full blown tax case because of the scope for the principle's general application.

35. N confirmed that when he had acted on behalf of ABC Ltd he had always been properly authorised. In particular, he had exercised the voting rights and the powers of attorney. - G had been his contact during the particularly active period and had made sure that everything was in order.

37. In respect of DEF Ltd, N confirmed that the company had been listed when the South African market was at rock bottom. The market had then entered a particularly active period hence the lucrative gains made by ABC Ltd on the sale of its interest in the company.

38. S brought up the need for YTBB Ltd to be given more notice of the various proceedings and an opportunity to comment on the approach being taken. ZE and WS appreciated what was behind this request but the very nature of the applications made this impossible. ZE mentioned in particular one occasion when they had received notice and the papers relating to an application only 4 hours before the scheduled time of the hearing.

ZE and WS clearly understood the need to keep YTBB Ltd as up to date as possible given the constraints and pressures the whole South African legal team are under.

N's reluctance to involve YTBB Ltd further was, however, apparent.' (AB1 348-354).

(75) Ms. S also received answers to the questions she had posed to Mr. ZE and Mr. N before their meetings. (Some of the answers were untrue.) (AB1 355-368).

(76) On 1 November 2002 Trios advised Mr. H that the SARS' panel had disallowed the appellant's objection and that he would shortly receive the transcript of the hearing (AB1 373-4) which he did on 4 November 2002 (AB1 377).

(77) On 7 November 2002 Mr. H spoke to Ms. S about the transcript. Mr. H told her that he was unhappy about the extent to which the evidence given appeared to conflict with the facts as they understood them to be. He pointed out that there was no evidence in the files that there had been any consultation regarding the sale of the DEF Ltd shares. Ms. S commented that she had understood Mr. N to say that he had requested Mr. G not to make a record of these discussions. She also pointed out that the transcript appeared to show that Mrs. N had a controlling interest in the appellant which did not tally with their records. Mr. H and Ms. S agreed that they should obtain a copy of the January (section 74C) hearing at which Mr. N had given evidence. Mr. H indicated his concern as to how the Y Trust should proceed as the trustees certainly could not be a party to any fabrication of evidence that conflicted with what they understood the position to be (AB2 527). Mr. H found the transcript extremely confusing and he had difficulty in understanding and appreciating the arguments being put forward by counsel. He found it confusing because the facts presented seemed to be in complete conflict with the facts as the Y Trust understood

them to be (Mr. H 149) (The transcript indicates that counsel's submissions before the SARS' panel were based on Mr. N's evidence at the section 74C enquiry).

(78) On 19 November 2002 Mr. ZG spoke to Mr. ZE about the transcript and voiced his concerns about the correctness of the evidence. Mr. ZE said that counsel made submissions to the panel on what Mr. N had said in the past. (Mr ZE did not suggest that the transcript of the section 74C enquiry was materially defective). Mr. ZG said:

(i) He was concerned about the way the evidence had been presented and it was not possible to corroborate statements made by Mr. N on behalf of the appellant. The Y Trust was however attempting to get more information and this may involve speaking to Mr. G;

(ii) It was clear that the panel had attached little weight to Mr. N's uncorroborated evidence and the quality of the appellant's evidence was therefore a real concern;

(iii) The evidence of Mr. N was not going to be enough for the case to be won. The appellant would lose the case unless corroboration could be provided;

(iv) He was concerned about the fact that the evidence which had been put forward by the appellant's lawyers was not in accordance with the appellant's instructions. It was inconsistent with the information which Mr. ZG had supplied in answer to the SARS' questions and it was inconsistent with the discussions in South Africa the previous month;

(v) He was aware that Mr. N's evidence was very muddled and it was difficult to see exactly what he was saying. It may be that the evidence was deliberately muddled but he remained of the view that it was inaccurate and this must be rectified;

(vi) He accepted that Mr. N may be of the view that this continued confusion helped his South African position although he queried whether it really made much difference in view of the fact that the income versus capital argument had to be decided before the piercing of the corporate veil question becomes an issue. (AB2 546-547).

(79) On 25 November 2002 Mr. N telephoned Ms. AP and complained about Mr. ZG's investigations:

(i) 'Mr. ZG keeps phoning the legal team here and saying that he is finding inconsistencies between the documentation and the enquiry which is designed to keep the assets out of South Africa and what he knows to be the truth';

(ii) 'And what I don't want is him sharing that information with the legal team locally, because I have tried to keep them out of it and you don't worry because it is a common thing for South African structures obviously and … even the details behind the structures I make sure I don't have access to these details so if someone asks me the question, for example, like previously the … Director of ABC Ltd and I answered I don't know and I genuinely didn't know it until I phoned one day and found that out';

(iii) 'And I wanted to stay like this where I genuinely don't know whereas - Mr. ZG seems to be getting excited by looking at the information our legal team have here which is designed on the South African strategy and he is trying to marry it up with what he knows international and he feels a need apparently to share his information with the local legal team whereas I am trying to keep it completely separate and make sure the local legal team are not compromised by any knowledge of the international structures';

(iv) 'He seems to be saying to … look he is looking at some responses I have given to certain to questions and he is marrying that up with what he knows to be truth and he is saying there are inconsistencies, now of course there have been inconsistencies, that's the whole point of having these structures';

(v) 'If you are speaking to the legal team just get them a little bit conservative … between ourselves and if Mr. ZG hasn't anything he wants to know he is as well speaking to me and I can explain to him what the strategy is because the legal team are really just carrying out my instructions, they are not dealing with an independent man and even the legal teams don't know the whole picture'. (AB2 553-554, 557).

On 25 November 2002 Mr. H spoke to Ms. AP about the conversation and said:

> 'Our difficulty was that we had been provided with copies of the South African proceedings and transcripts of evidence and judgment which clearly show that the legal advisors there were proceeding on a version of the facts that was at variance with what we knew and understood to be the position. I said I expected to see Trios in the next two weeks and would mention Mr. N's comments to them then.' (AB2 557).

According to Mr. ZG, Mr. N's standpoint could not be accepted (Mr. H 165-166) and when he discussed this with Ms. S on 29 November 2002 she told him that that was the line that Mr. N had followed when she met him in Johannesburg (AB2 558).

(80) On 29 November 2002 Mr. H received an e-mail from Mr. G with his comments about Mr. N communicating with him before effecting sales of DEF Ltd shares –

> 'As I remember ABC Ltd had been a small client since its inception carrying balances, and here the mist is a little thicker, of approximately gbp200-300 thousand only. With no prior warning large sums began appearing in the accounts which we ascertained at the time were from the sale of the shares. I believe JKL Securities in Jo'burg were the brokers handling the sale. As an offshore man it grieves me to say that Mr. N was very closed in his dealings with the shares and that I have no recollection of being contacted by Mr. N to obtain agreement to sell the shares. This explains the absence of file notes. I appreciate that this is not what people were hoping to hear but we can but speak our truths and move on. Mr. N and I did speak on the matter when I visited him in South Africa on two occasions. If Mr. N is adamant that we spoke on the telephone then feel free to pass on my e-mail address to him and I would gladly listen to what he has to say.' (AB2 551)

In his evidence in the ST Ltd action Mr. G confirmed that apart from the first sale he never spoke to Mr. N about selling the DEF Ltd shares and that the files do not support Mr. N's allegation (Mr. G A51 line21-22 line23).

(81) On 29 November 2002 Mr. N telephoned Ms. S and complained that their approach was not helpful to the South African litigation. Ms. S pointed out to him that the matter was extremely difficult because of the statements on record in the South African litigation which conflicted with Trios' understanding of the facts (AB2 559).

(82) On 4 December 2002 at a meeting between Mr. H, Mr. ZF and Mr. ZG, it was decided to take advice from a South African barrister practising in London (AB2 564).

(83) On about 13 December 2002 Trios received the transcript of the section 74C enquiry and on 9 January 2003 Ms. S reported to Mr. H that various facts had been misrepresented by Mr. N at the enquiry and that it appeared that both Ms. WS and Mr. ZE had misled Trios when they said that neither they nor Mr. N had at any time maintained or suggested to SARS that Mrs. N was behind the holding structure and that this was one of the many foundless accusations being made by SARS (AB2 275-6). Mr. H testified that after reading the record –

> 'I think I just felt complete amazement at the statements that had been made. They were in complete contradiction to the facts as we had been able to establish them for ourselves during the previous year' (Mr. H 171).

(84) On 9 January 2003 Ms. S addressed a letter to Mr. N in connection with outstanding issues. In particular, she referred to the fact that the transfer of the assets from the appellant to ST Ltd had not been documented and that Mr. N still had not provided the contract notes for the sales of the DEF Ltd shares (AB4 1084). These contract notes were never received by the Y Trust (Mr. H 172-3).

(85) The Y Trust's attempts to consult with a South African barrister practising in London proved unsuccessful and eventually a telephone consultation was arranged to take place on 7 July 2003 with a South African advocate practising in Johannesburg. The consultation dealt *inter alia* with the Y Trust's obligation to rectify the factual misrepresentations made by Mr. N to SARS on behalf of the appellant. Counsel advised Mr. ZG and Ms. S that there was, at that time, no obligation on the Y Trust to

inform SARS of the true facts. Counsel also advised Mr. ZG and Ms. S that the Y Trust may become obliged to resign as trustee of the Z Trust and as the directors of the appellant if Mr. N continued to be uncooperative. While agreeing, Mr. ZG commented that this step would need to be considered very carefully. The consultation note records that Mr. N was considered to be the appellant's representative in South Africa (AB4 1158-1161: 1164-1167: Mr. H 184-185).

(86) On 14 July 2003 Mr. H and Mr. ZF had a meeting with Mr. N in BB. Mr. N had not provided the contract notes in respect of the sale of the DEF Ltd shares and the transfer of the assets from the appellant to ST Ltd had not been documented (AB4 1168-1170). At the meeting Mr. N said that no-one in South Africa, whether a family member or a member of his staff, had any knowledge of the offshore structure and that he deliberately does not have a precise knowledge of the offshore structures: that he would like to always have assets in fairly accessible form to the value of £50 million and that when he visited again in September 2003 he would suggest ways of restructuring the present structure. Mr. N was reluctant to obtain from the stockbrokers the contract notes (without which the accounts could not be completed) (Mr. H 195-196)) and Mr. H said he would prepare the transfer documentation 'as far as possible' and refer it to Mr. N when Mr. N next visited. Mr. N also confirmed that his mother was not the economic settlor of the X Trust or the Z Trust (AB4 1171-1175).

(87) On 3 November 2003 Mr. ZF informed Mr. N of the impending merger of the Bank of AA with ABCE Bank and Mr. N informed Mr. ZF about current developments in South Africa (AB4 1186: Mr. H 197-8).

(88) On 4 December 2003 Mr. H spoke to Mr. ZG who was concerned about whether the Y Trust wished to keep Mr. N as a client 'with possible reputational risk to the bank'. Mr. H's view was that it was better to make progress on outstanding matters and that he would review his file and consider what was appropriate (AB4 119-2). After reviewing his file Mr. H decided that the Y Trust should continue as trustee because he felt that this was a matter the Y Trust should see through in the interests of the beneficiaries as a whole (Mr. H 201-202).

(89) On 10 February 2004 Mr. H and Mr. ZF had a meeting with Mr. N in London at which the following was discussed:

> 'As regards the resolution of South African tax issues, he said that the Hearing of the Civil Action, as to whether the profit from the sale of the DEF Ltd share sales was taxable as income and so liable to tax or taxable as capital gains and so, at that time, exempt from tax, was still some two years or so away. However the Scorpion (i.e. Special Taxation) team had been investigating the allegations of criminality against Mr. N. Whilst they acknowledged that he had not been guilty of fraud, they were asserting that he was guilty of material non-disclosure of his income for taxation purposes. They had raised 63 individual counts against him; 59 of which were relatively minor and could be settled by payment of a fine of SAR2 000 per count. The remaining 4 they had asked him to make a proposal as to the appropriate fine and he had offered SAR2 million. They would accept the plea acknowledging guilt from him, which he and his advisors could draft. It appeared, however, that SARS were opposed to a settlement of the criminal issues and there was a meeting tomorrow, Wednesday, 11 February, between the Scorpions and SARS to discuss the matter further. It appeared that politics were entering into the debate. Last Autumn SARS had attempted to make an urgent application to a Judge to obtain an injunction and seize the Aeroplane B that was at present based in Paris; this however was declined by the Judge who adjourned the Hearing until the coming July. Mr. N will provide an update at our next meeting.

Dealing with other matters listed on the action plan. He said he had not yet arranged for his mother to have tax advice save that if she did have a problem with the Inland Revenue then there was an advisor who could help her. Her present income levels dictated that she was not liable to UK tax and so she did not file a UK tax return.

Mr. N was one of seven children. His father had been a policeman. His mother's sources of income were extremely modest being her old age pension and her widow's pension from the Police Force, together with the monthly distributions from the Trust supplemented by gifts from Mr. N. He felt that her sources of income hardly exceeded her personal allowance. She is now aged 74.

As regards details of contract notes for the DEF Ltd share sales, in 1999/2000, it would be difficult to obtain these at present. However, if the Civil Hearing proceeds then the Revenue would be furnishing details of the individual sale as part of their case. The treatment of the share sales would need to be considered.

We mentioned that there was outstanding the sale and purchase agreement between ABC Ltd and ST Ltd. This was dependent on our finalising accounts to date.' (AB4 1193-1194).

Before that meeting Mr. H was not aware of any urgent applications or litigation relating to the Aeroplane B (Mr. H 203).

(90) On 13 February 2004 when Ms. S met Mr. N he told her he was experiencing continuing difficulties in obtaining the contract notes for the sale of the DEF Ltd shares (AB4 1196 para 10).

(91) From March 2004 Mr. H and Mr. ZF on behalf of the Y Trust took legal advice about opposing the discovery orders to be sought in respect of the appellant and its subsidiaries and 'tipping off' Mr. N about the orders to be sought (AB4 1198, 1199,

1200, 1201, 1202-1205, 1206, 1208, 1210, 1211-1212, 1214: Mr. H 206-207) and unsuccessfully opposed the grant of the orders (AB6 2113-4: Mr. H 206-229). During this period the Y Trust had little or no contact with Mr. N.

(92) On 29 April 2005 Mr. H informed Mr. N about the Y Trust's unsuccessful attempts to oppose the production orders sought by the BB authorities and of the production order granted. He advised Mr. N that the Y Trust had lobbied the authorities to inform Mr. N of these events since October 2004 to date but had only just received permission to inform him. (AB7 2394-5).

(93) On 18 May 2005 the Y Trust received a copy of the indictment served on Mr. N (Mr. H 231).

(94) On 3 June 2005 PEE Co addressed a letter to the Bank of AA to record Mr. N's concern about the manner in which the authorities obtained information about him from the bank (AB9 3339A-B). On 9 June 2005 Ozannes, a firm of advocates, replied to this letter (AB9 3340).

(95) On 9 August 2005 Mr. H attended a consultation with Mr. ZG regarding Mr. N. Mr. ZG recorded that the question of getting independent advice had come up during a discussion but that this could be left in abeyance for the time being. Mr. ZG thought that this should be monitored, particularly if there were further developments in South Africa. Mr. H's said that there was communication between him and Mr. N regarding administrative matters and developments in South Africa but as far as he, Mr. H, was aware, nothing of significance (AB9 3342).

(96) On 12 August 2005 the Y Trust made further production of documents (AB9 3344).

(97) On 12 September 2005 PEE Co informed Trios that the Commissioner had appointed a new attorney, Mahlangu Inc., as the Commissioner's attorney of record and it appeared that Mahlangu Inc had applied to the registrar of the Tax Court to set down the appeal (AB9 3346-3349).

(98) On 13 September 2005 Mr. H spoke to Mr. N and recorded the following:

> 'Receiving a telephone call from Mr. N. He said his solicitors, PEE Co, were very concerned because they had just received details of a further bundle that had been produced to the BB authorities in August and couldn't quite understand why they had not been informed at the time. I explained to Mr. N that there was nothing mysterious about this. That it had always been my intention that they should have been provided with details at exactly the same time but, unfortunately, the person concerned in the BB Law Firm had been on leave and, therefore, notification to PEE Ltd had been delayed.
>
> I further explained to Mr. N that the reason we had had to disclose these further papers was that at the time of the original disclosure, it was made known to the South African authorities that papers had been retained pending the outcome of the House of Lords Three Rivers case on legal privilege. As a result of that case, we had taken further legal advice, in particular from a barrister specialising in matters of privilege. The advice was that the papers now disclosed had to be disclosed and we had no alternative (AB9 3359).

(99) On 19 September 2005 Mr. H spoke to Mr. N who informed him that the South African authorities had taken steps to freeze assets in South Africa under Exchange Control provisions using powers delegated to the Revenue in this respect so that it was not necessary to apply to the court for seizing orders (AB9 3360).

(100) On 18 January 2006 Mr. H spoke to Mr. N and Mr. N said that there were two outstanding matters as far as the civil tax claim of the South African Revenue Service (SARS), was concerned, and that they were:

a) Is it right to deem ABC Ltd as resident in South Africa and so subject to taxation there?

b) If the answer to a) is 'yes', then the issues are outstanding, on the sale of the DEF Ltd shares is whether the profit was a capital profit, in which case no liability to tax as, at that time, there was no capital gains tax in South Africa, or is it a trading profit and so subject to income tax.

The Commissioner is speculating and claiming that Mr. N was aware, in advance, that DEF Ltd would, in the future, be so profitable that, at a very early stage, he set up the Trust structure to enable profits to be distributed out of South Africa. Mr. N told us that this was never in contemplation by him. Unfortunately, in the various Court proceedings etc. since 2002, he had not yet been able to give his side of the matter. He had, in the past, sought a meeting with the Commissioner but this had not taken place.

Mr. N told us that, starting in 1982, he had managed a very small portfolio for his mother, Mrs. N, which had a commencing value of some £400. By 1990 this had grown in value to £6 000. At that time, Mr. N was entering into arbitrage opportunities in SA, both as regards FX and commodities. The result of this was that he was able to generate for Mrs. N a profit of some £230 000. Mrs. N was concerned that her profit attained in this way, should accrue, in due course, for the benefit of not just herself but for Mr. N and his family, as he had generated it for her.

It was during a visit by Mr. K to South Africa that Mr. N was introduced to Mr. K who suggested to Mr. N a trust structure. It needs to be borne in mind that if Mrs. N had done nothing at all, then this, together with her other assets, owned at the time of her death, would fall to be divided between her 7 children, of which Mr. N is one.' (AB9 3362).

According to Mr. H this was the first time that Mr. N had told him about his mother and the accumulation of a nest egg and the files did not show that this was correct (Mr. H 240-241).

(101) On 20 February 2006, during a meeting with Mr. N, Mr. H discovered that the appellant was applying to the Tax Court for a postponement of the hearing of the appeal because it would be prejudicial for Mr. N if the appeal was heard before his criminal trial (AB9 3363A). This was the first time the Y Trust or any of its solicitors had heard about the application and they were never provided with copies of the papers (Mr. H 241-2).

(102) On 9 June 2006 the Royal Court of BB issued an order freezing the trust assets held in BB (AB9 3364: Mr. H 243) and on 16 June 2006 the court issued a protection order (AB9 3367: Mr. H 244).

(103) Some time after the order of 9 June 2006 the trustee (now ABCE trustee) decided to change its legal representation in South Africa. Following a review of proceedings in South Africa it was realised that it was imperative that the trustee now have independent legal advice and representation in South Africa. It took until 20 June 2007 before the trust's new attorney, Bell Dewar and Hall, could proceed with the case on behalf of the trustee.

[14] The appellant relies on the evidence of three witnesses: Mr. G, whose evidence in the ST Ltd action was placed before this court by agreement; Mr. H, the chief legal advisor of the Y Trust and, after the merger between the Bank of AA and the ABCE Bank, of ABCE Trust Company Ltd and Mr. N. Mr. N is the key witness as far as the capital/revenue issue is concerned. Mr. H was called to testify about matters relevant to the additional tax imposed in terms of section 76(1) of the Act. Accordingly he testified primarily about the Y Trust's role in managing the operations of the appellant in South Africa and in particular its conduct in relation to the submission of income tax returns. Mr. N's evidence will be dealt with in detail later. Mr. G was not seen by this court but from the transcript there is no reason to doubt his honesty even if the interpretation he placed on some of the documents cannot be accepted. Mr. H is an elderly and very dignified senior professional man. He qualified as a solicitor in London and became the senior partner in a London firm of solicitors. When he retired from the firm he started working as a legal advisor in the offshore trust industry and has done so for a number of years. Mr. H was obviously presented as the face of the Y Trust and he made a good impression. He testified with reference to the detailed history set out in the documents referred to. Although it is difficult to accept that he did not have knowledge of the Y Trust's role in dismantling the X Trust/ABC Ltd structure and transferring the appellant's assets to ST Ltd – he said that he had reviewed the file before he gave his opinion that the transfer of the assets was tax neutral – it is not necessary to make a finding in that regard. The relevant facts are before the court and the necessary inferences can be drawn from those facts.

[15] The primary issue is whether or not the proceeds of the sale of the shares were of a capital or revenue nature. The appellant's case is that the appellant is an investment holding company which acquired all the shares with the purpose and intention of holding them as a capital investment: that the sale of the DEF Ltd shares was to satisfy a sudden unexpected,

fortuitous demand particularly from institutions at windfall prices unlikely ever to be realised again: and that the other shares were disposed of for commercial reasons and as part of a process of disinvestment. The Commissioner's case is that all the proceeds of the sales of the shares were received pursuant to a scheme of profit making.

[16] In their written heads of argument, the appellant's counsel, without commenting on Mr. N's credibility, simply relied on various pieces of his evidence which could support the appellant's case. In argument before this court the appellant's counsel readily conceded that Mr. N was not honest and was not credible but argued that on the crucial issues he was not properly challenged and should be believed. For this argument they rely on ***President of the Republic of South Africa v South African Rugby Football Union*** **2000 (1) SA 1 (CC)** paras 61-65. On the assumption that the court accepts this evidence the appellant relies upon the principles set out in ***Silke on South African Income Tax*** **('Silke') Vol 1** para 3.1, 3.12 and 3.33 and the decisions in ***Constantia Heights (Pty) Ltd v SIR*** **1975 (3) SA 768 (A)** at 783D-F; ***CIR v Richmond Estates (Pty) Ltd*** **1956 (1) SA 602 (A)** at 607H-608A and ***Bloch v SIR*** **1980 (2) SA 401 (A)** at 408A-B and 409B-C.

[17] The Commissioner contends that the court should reject Mr. N's evidence because he is a completely dishonest person who says whatever he thinks will be useful to him. The Commissioner has analysed Mr. N's evidence in the section 74C enquiry and the appeal as well as all the statements he has made to SARS, the Y Trust's representatives and the Y Trust's legal representatives and demonstrated that Mr. N has been anything but consistent on many important issues.

[18] Section 82 of the Act provides that the burden of proof that any amount is not liable to any tax chargeable under the Act shall be upon the person claiming such non-liability and that upon the hearing of an appeal from any decision of the Commissioner the decision shall not

be reversed or altered unless it is shown by the appellant that the decision is wrong. The appellant must therefore prove on a balance of probabilities that the facts alleged by it in the consolidated statement are correct. The appellant relied solely on the evidence given by Mr. N who is the only person who can testify as to the relevant state of mind when acquiring and selling the shares.

[19] Evidence does not have to be accepted as the truth simply because it is not contradicted. It will not be accepted where it is improbable or vague or contradictory – see ***Siffman v Kriel*** **1909 TS 538;** ***Shenker Brothers v Bester*** **1952 (3) SA 664 (A)** at 670E-G and obviously it will not be accepted where the witness has been shown to be mendacious or otherwise unreliable. Where the evidence relates to the intention of the witness it is extremely difficult to obtain evidence to the contrary unless the witness himself provides such evidence. In tax cases it has long been established that the court is not bound to accept the *ipse dixit* of the taxpayer. In ***Malan v Kommissaris van Binnelandse Inkomste*** **1983 (3) SA 1 (A)** at 18B-H the court said that:

(1) Because of the disadvantageous position of a taxpayer as a result of the onus in section 82 of the Act it is in the interests of justice that the taxpayer's evidence and his credibility be carefully considered;

(2) Depending on the facts of the case a finding of credibility can be a factor of decisive importance; and

(3) A taxpayer's *ipse dixit* with regard to the question of his intention does not necessarily have to be accepted by the court. The taxpayer's credibility must be considered in the light of all the evidence and the probabilities.

See also ***Commissioner for Inland Revenue v Nedbank Ltd*** **1986 (3) SA 591 (A)** at 600B-601A.

[20] Mr. N is a tall, slim man in his 50s. He appeared to be very confident and not in the slightest uncomfortable about giving evidence and being cross-examined. He is intelligent and articulate and appears to be well-versed in the intricacies of the financial world and the purchasing and selling of shares on the JSE. Notwithstanding these advantages he made a very poor impression as a witness. He is extremely arrogant and obviously thinks that whatever he says is so. It was demonstrated that he deliberately misrepresented the facts of the case to his legal representatives, to SARS in correspondence and at the section 74C enquiry and to the representatives and solicitors of the Y Trust. As his evidence progressed it became clear that he has no respect for the truth and does not hesitate to lie or at least misrepresent the facts if he thinks it will be to his advantage. There can be little doubt that on most occasions Mr. N lied as he knew the correct facts and obviously decided to misrepresent these facts. In cross-examination Mr. N often avoided giving a proper answer to the questions. Sometimes he simply ignored the point of the question and gave a long rambling answer. On other occasions he resorted to bluster or to attacking the integrity of the cross-examiner, accusing him of misrepresenting the facts to the court. He also attacked the integrity of the Commissioner's attorney, accusing him of presenting facts to the court knowing them to be untrue. It is significant that the appellant's counsel have not attempted to make anything of these allegations. They clearly consider that there is no merit in these allegations. We saw Mr. N testify in chief and in cross-examination for four days and are unanimous in finding that he is a mendacious witness whose evidence should not be accepted on any issue unless it is supported by documents or other objective evidence. It was remarkable that Mr. N showed no sign of embarrassment or any emotion when he conceded that he had lied to the Commissioner in a number of his income tax returns. In our assessment he is a glib and shameless liar.

[21] In assessing Mr. N's credibility it must be borne in mind that Mr. N is the person who decided to set up the offshore structure of a discretionary trust in BB and a holding

company incorporated in the Sunshine Islands and that he did this on two occasions. After obtaining advice on how to arrange for his assets to be held by an offshore structure Mr. N immediately proceeded to incorporate the appellant in the Sunshine Islands on 16 July 1993 and arrange for the establishment of the X Trust in BB on 9 September 1993. Mr. N knew that in name his mother was the settlor of the trust and he provided the funds for both the costs involved in the establishment of the trust and the capital of the trust itself. He obviously knew who the beneficiaries of the trust were and that he was one. Either he or his financial advisor, Mr. J, prepared the 'Letter of Wishes' signed by his mother in terms of which the trustees were required to provide primarily for his requirements before providing for those of the other beneficiaries. In July 1996 Mr. N sold 84 % of the shares which he held in DEF Ltd to the appellant and in June 1997 sold another 20 % of the DEF Ltd shares (they had been reorganised) which he held to the appellant. When DEF Ltd was listed on the JSE on 29 October 1997 Mr. N knew that the appellant held 79 % of all the issued shares in DEF Ltd. He also knew that his mother did not have shares in the appellant or exercise any control over the appellant either directly or indirectly through the X Trust. He knew that no other person exercised control of the appellant directly or indirectly and he knew that he had *de facto* control over the appellant. At all times the trustees of the trust and/or the appellant's directors did his bidding. Mr. N also established the Z Trust on 3 September 1996 and provided it with capital of £66 000,01. The first trustee of the Z Trust was MR Trust Co. In about November 1999 Mr. N instructed the Y Trust to transfer all the assets of the X Trust to the Z Trust administered by MR Trust Co because he, Mr. N, was dissatisfied with the quality of the service he, Mr. N, was receiving. The Y Trust complied with this instruction and transferred all the assets of the X Trust to the Z Trust. These consisted of the shares in the appellant. The transfer divested the X Trust of all its assets and had the effect of dissolving the trust. In March 2000 Mr. N instructed MR Trust Co to resign as trustees of the Z Trust and appointed the Y Trust to administer the trust. He did this because he was dissatisfied about the fees which MR Trust Co proposed to charge

for administering the trust. MR Trust Co and the Y Trust complied with Mr. N's instructions and in March 2000 the Y Trust commenced administering the Z Trust. In November 2000, when he became concerned about SARS taxing the appellant on the proceeds from the sale of the DEF Ltd shares Mr. N instructed the Y Trust to transfer, as a matter of urgency, all the assets held by the appellant to ST Ltd, a new company which he had incorporated on 23 November 2000. The Y Trust immediately undertook to carry out Mr. N's instructions and began taking steps to transfer all the appellant's assets to ST Ltd. The transfer of the assets was not effected as quickly as Mr. N had instructed or anticipated (initially he wanted the transfer to be completed by 8 December 2000 and then by 15 January 2001) and was not completed until about June 2001. The correspondence and attendance notes of the Y Trust employees (particularly Ms. AP and Mr. ZA) show that Mr. N was intimately involved in all these matters. There can be no doubt that he knew what the correct facts were.

SARS correspondence with Mr. N

[22] During the period May 2000 to November 2001 SARS (Mr AX) conducted correspondence with Mr. N regarding his income and his income tax returns. Initially Mr. AX was under the impression that Mr. N had sold the DEF Ltd shares and realised a profit of R1 billion. Mr. N's answers to Mr. AX' questions were evasive and in some cases completely untrue. At no stage did Mr. N disclose to SARS that the appellant was part of an offshore structure which he had established to hold his assets and what his relationship with that structure was.

(1) On 29 May 2000 Mr. AX addressed the first letter to Mr. N in which he asked why the profit on the sale of the shares should not be taxed. He also asked questions about Mr. N's purchases and sales of fixed property and the income disclosed in Mr. N's

returns for the 1997, 1998 and 1999 years of assessment. He requested Mr. N to furnish statements of his assets and liabilities, domestic and private expenses and Mr. N's and Mr. N's wife's bank and credit card statements (TB12 359-60). Mr. N's reply on 29 June 2000 was at best disingenuous, if not clearly dishonest. The honest taxpayer would have disclosed the correct position relating to the shareholder and the purchase and sale of the DEF Ltd shares and would have acknowledged that he owned fixed property and explained why he had not disclosed this. Mr. N simply denied owing the DEF Ltd shares and fixed property. He failed to provide the statements requested. Mr. N also requested to meet Mr. AX (a request he made repeatedly in the correspondence) to explain the true position to him. Remarkably he did not set this out in his letter (TB12 371). (Mr. N obviously knew that he was the registered owner of fixed property. On 31 July 2000 he instructed attorneys to transfer portion 2 of Erf 21 in 123 from his name into the name of the appellant's subsidiary, TC (Pty) Ltd (TB12 374 and 376). At that time Mr. N was the registered owner of three properties at 123B Erven 152, 153 and 154, which he had purchased on 4 July 1995 for R200 000 each (TB12 392-4) and portion 2 of Erf 21 123B which he purchased on 12 March 1998 for R4,8 million (TB12 391 and 437).)

(2) On 4 September 2000 Mr. AX addressed a more detailed request for information to Mr. N. Mr. AX asked questions about Mr. N's stake in WXY plc, when, by whom and at what cost Mr. N's wine farm and properties in 123, 123A 123B and 123C were purchased, who owned the painting 'Cape Girl with Fruit' purchased for R1,76 million and by whom it was financed and requested a certified copy of the X Trust deed and copies of its financial statements and details of the bank or other accounts into which the proceeds of the DEF Ltd shares had been paid (TB12 366-7). In his reply on 5 September 2000 Mr. N once again did not set out the correct facts. Instead he obfuscated and in some instances lied. He denied owning fixed property in 123 and

123B but did not disclose who owned the properties in 123A and 123C. He denied owning the painting but did not disclose who did. He alleged that any information SARS required regarding the appellant and the X Trust would have to come from them. He clearly had the relevant information and was in control of the appellant's operations in South Africa.

(3) On 19 September 2000 and again on 18 October 2000 Mr. AX sought Mr. N's corrected income tax returns for 1997 to 1999 and in the second letter requested Mr. N to provide a copy of the X Trust trust deed 'of which you are stated to be a beneficiary' and the names and addresses of the owners of the assets which Mr. N had not disclosed (TB12 397 and 399). In his reply on 18 October 2000 Mr. N stated that his returns had been sent on 3 October 2000 and –

> 'The assets referred to are not held by me on anyone's behalf and I have never been stated as a beneficiary of the X Trust'

The first part of the sentence is disingenuous and the last part is a blatant lie. (On the same day Mr. N telephoned Ms RK of the Y Trust to get confirmation that the X Trust was 'dead' and told her that the South African taxman was looking into his holdings in the appellant and that he intended to get rid of the appellant and transfer all its assets to B Co. (TB12 401).)

(4) On 28 September 2000 Mr. AX addressed a letter to Mr. N in connection with the appellant in which SARS appointed Mr. N the public officer of the appellant in terms of section 101(4) of the Act, advised Mr. N of the appellant's reference number and requested Mr. N to submit income tax returns for the 1998, 1999 and 2000 tax years (TB12 398).

(5) On 18 October 2000 Mr. N addressed a letter to Mr. AX to tell him that the X Trust had been wound up some time ago and that he had not received a benefit when it was wound up. He did not disclose that the shares in the appellant were now held by the Z Trust (TB12 402).

(6) On 27 October 2000 Mr. N addressed a further letter to Mr. AX regarding the appellant. He said that he had been authorised from time to time (by specific power of attorney) to sign documentation on behalf of the appellant but he had never been given authority to act on its behalf outside of these specific briefs. At that stage Mr. N knew that he had been allowed to conduct all the appellant's operations in South Africa whether in terms of a power of attorney or not. He considered himself to be in control of the appellant's affairs in South Africa and referred to himself as the CEO. He also told Mr. AX that 'they contend that they have never operated a business in South Africa and are consequently not subject to South African tax jurisdiction'. This was blatantly untrue. At that stage Mr. N knew that the appellant did not know about SARS' investigation and could not have raised such a contention. He offered his services as a go-between (TB12 404).

(7) On 1 November 2000 Mr. N addressed another letter to Mr. AX in connection with the appellant. He repeated that he had no authority to act on behalf of the appellant and said that he had no information to supply to Mr. AX. Both statements were blatantly untrue. (TB12 405). While conducting this correspondence Mr. N instructed the Y Trust, now the trustee of the Z Trust, to transfer all the appellant's assets to B Co. or another company held by the Z Trust and specially incorporated for the purpose (TB12 409, 410-417, 422-424, 426 and 429). Mr. N told the Y Trust that he wanted the transfer completed by 8 December 2000, that he wanted to 'dismantle' the current structure and transfer the appellant's assets to a new

company. He said his intention was to present a 'blind alley' to any revenue investigation (TB12 422 and 427). It is remarkable that Mr. N did not tell the Y Trust that there was a revenue investigation underway in respect of the proceeds of the sale of the appellant's DEF Ltd shares and that no Y Trust official to whom he spoke requested information about the revenue authorities' interest in the sale of the DEF Ltd shares. As Mr. N had control of the appellant's assets in South Africa and had knowledge of the listing of DEF Ltd and the sale of the appellant's DEF Ltd shares it would be expected that Mr. N would have informed the trustees about SARS' interest in the profits made on the sale of the shares and that the Y Trusts' representatives would have sought full details. Nevertheless, It is clear that the Y Trust employees (particularly Mr. ZA and Ms. AP) were only too happy to carry out Mr. N's instructions, that they advised Mr. N as to the transfer of the assets and that they regarded the situation as an opportunity to market the Y Trust's investment products.

(8) On 16 February 2001 Mr. AY of SARS' Special Investigations Division addressed a letter to Mr. N in which he stated that Mr. N had contravened the Act in a number of respects and required for the period 1 March 1989 to 29 February 2000 details of Mr. N's directorships, shareholdings and bank accounts. He also pointed out that the information provided by Mr. N was incomplete and requested that this be rectified. He reminded Mr. N of his obligations in terms of the Act:

> 'The proper administration of this Act relies on the integrity of every taxpayer to disclose fully all information relating to his or her tax matters. Non-disclosure is viewed in a very serious light.' (TB12 502-3)

This letter was delivered on 1 March 2001 (TB12 510). On 12 March 2001 Mr. N replied to this letter and furnished some of the information requested (TB12 515-7). On 14 March 2001 Mr. AY demanded that Mr. N comply with SARS demand of 16

February 2001 and also that Mr. N submit proper income tax returns for 1990, 1991, 1992, 1993, 1994 and 1999. On 30 May 2001 Merry & Perry, at Mr. N's request, provided SARS with the appellant's details (TB12 520). This was the first time that Mr. N provided SARS with information about the appellant.

(9) On 16 May 2001 Mr. AY sent Mr. N a final demand for the information requested by SARS (TB12 534). After that there was further correspondence between SARS and Mr. N and Merry & Perry to ensure that SARS received the documents and information which it required. At no time did Mr. N disclose to SARS that the appellant had transferred all its assets to ST Ltd. (On 19 September 2001 Mr. N addressed a letter to the Y Trust requesting a letter confirming that ST Ltd had purchased all the appellant's shares and paid the purchase price directly to the appellant, something which had not happened. Mr. N sought this letter so that the ST Ltd shares could be stamped 'non-resident'.) (TB12 551).

(10) Eventually Mr. AX took Mr. N up on his many offers to provide information and be of assistance and invited Mr. N to participate in an enquiry in terms of section 74C of the Act (TB12 568-9). Mr. N accepted this offer and an external Advocate was appointed the presiding officer.

Section 74C enquiry

[23] (1) The enquiry was held on 28, 29 and 30 January 2001. Mr. N was legally represented by two counsel and an attorney and was questioned by the Commissioner's representative. A transcript of the evidence was prepared and the revised and corrected transcript is contained in TB3. During the appeal the Commissioner's counsel used the transcript to cross-examine Mr. N.

(2) It is not in dispute that Mr. N's evidence at the section 74C enquiry was materially false and in certain respects was a complete fabrication. Both Mr. G when he testified at the ST Ltd trial and Mr. H when he testified in this appeal said that much of what Mr. N said was simply untrue (see Mr. G's evidence A39-A68 and Mr. H's evidence at 116-117, 149-152, 169-171, 174-176 and 204).

(3) The extent of Mr. N's fabrication at the enquiry appears from the following –

(a) Regarding his mother Mrs. N

Mr. N testified that all his wealth originated from his extremely wealthy mother, Mrs. N. He had no assets of note after he had lost everything by about 1995. He testified that he had no direct or indirect interest in the appellant. According to Mr. N, at all stages his mother held a controlling interest in ABC Ltd through her trust structures of which he had little knowledge. He described her as ultimately the beneficial shareholder of 50 % (or more) in the appellant (he did not know the precise percentage, but knew that it was more than 50 % at all stages: i.e. a controlling interest). According to Mr. N, Mrs. N was also, on an ultimate beneficial basis, the owner of ST Ltd, of which he also had very little knowledge. According to Mr. N his mother would have set it up using her advisor in Glasgow.

(b) Regarding the appellant

Mr. N testified that the appellant was incorporated in 1993 by one Mr. XXX, at the time he could not remember his exact name, and his mother, Mrs. N, who was a very wealthy woman and lived in Scotland. According to Mr. N the purpose of incorporating the appellant was that it would be the financial partner of Mr. N's company, IJ (Pty) Ltd in order to fund the development of LIST computer software programme. It was originally estimated that about R1-2 million would be required to complete this project after which it would hopefully be taken to the international markets.

(c) Regarding Mr. XXX

Mr. N testified that there were a number of investors in the appellant. Mr. XXX represented a consortium (Mr. N did not know the identities of the members) which held a minority interest and Mrs. N held a 50 % or more interest through a trust. Mr. N had contact with Mr. XXX in respect of the sale of DEF Ltd shares held by the appellant by means of the Bank of AA.

(d) Regarding Mr. N

Mr. N testified that he had no direct or indirect interest in the appellant. His role was merely that he represented the appellant in South Africa.

(e) Regarding the shareholding in the appellant and the interests in the appellant's assets

Mr. N testified that the appellant held certain assets specifically for Mrs. N's benefit and at her risk and gave as an example her holiday home in 123C. The XXX consortium had no interest therein. Mr. N also testified that this held true for the appellant's other property investments in South Africa. Mr. N also testified that the appellant's shareholding in DEF Ltd was for a specific percentage for the benefit and risk of his mother although he was not aware of the specific percentage although he knew it would always have been 50 % or more. For the rest the DEF Ltd shares were held by ABC Ltd for the benefit and risk of the XXX consortium. Consequently his mother could consent to DEF Ltd shares being sold at a certain price (which would then be solely for her benefit or loss) while the XXX consortium may not have been willing to

sell their DEF Ltd shares on that occasion. In practice, according to Mr. N, if there was an institutional investor which wanted to purchase DEF Ltd shares Mr. N would phone the Bank of AA in BB and they would then find out whether the consortium members would want to sell the DEF Ltd shares or not. Mr. N would decide on behalf of his mother whether she would take part in the proposed sale. According to Mr. N he would consult her but invariably she would let him guide her as to what should be done. Consequently it was not always necessary to phone her. Mr. N said that he cost his mother a lot of money by selling her DEF Ltd shares too cheaply.

(f) Regarding the Internet interview

Mr. N testified that when he was interviewed by Internet in February 2000 he confirmed an underking which he had given on 16 November 1999 when he resigned as CEO of DEF Ltd that the appellant would not dispose of the balance of the DEF Ltd shares which it still held for a period of one year from the date of his resignation. According to Mr. N this was to demonstrate that he, Mr. N, still had faith in DEF Ltd. (This was a hollow undertaking as almost all the DEF Ltd shares held by the appellant had already been sold.) According to Mr. N this undertaking was binding on his mother's portion of the DEF Ltd shares which the appellant held for her benefit but was not binding on the XXX consortium. He continued that in any event the consortium had already transferred their portion of the remaining DEF Ltd shares to other entities the identity of which he had no knowledge.

(g) Regarding the transfer of assets from the appellant to ST Ltd

Mr. N testified that the appellant had sold its South African assets to ST Ltd as a result of the ‘weird enquiries’ which SARS had directed to the appellant. However he said this was not because the appellant was concerned about its possible tax liability but rather concerns about foreign exchange issues. According to Mr. N as a result of these enquiries the consortium members did not want to continue with investment in South Africa. However, he succeeded in persuading his mother to continue to have investments in South Africa. Consequently the appellant transferred all its South African investments to ST Ltd in which the consortium members did not have an interest. Mr. N also testified that he did not know who owned ST Ltd except that his mother would be the ultimate beneficial owner and controller thereof.

(h) Regarding Mr. N’s knowledge of the trust structures

Mr. N attempted to create the impression that he knew very little about the trust structures of his mother which were beneficial owners of the interests in the appellant, ST Ltd and B Co..

Mr. N’s evidence at the section 74C enquiry is a tissue of lies. Mr. N obviously had full knowledge of the offshore structures which he had established in 1993 and 1996. He knew who the appellant’s shareholder was and how and for what reason the appellant’s assets were transferred to ST Ltd. They were not sold by the appellant to ST Ltd. They were transferred for no consideration and the transfer was effected simply to prevent the South African Revenue authorities from recovering tax from the appellant: in Mr. N’s words, to create a ‘blind alley’. He obtained permission to sell the shares on only one occasion (on 17 February 1998 when he requested permission to sell 1,8 million DEF Ltd shares for R22

500 000). Thereafter he never approached either the Y Trust or the appellant for permission to sell DEF Ltd shares. There are no records reflecting that Mr. N sought permission after 17 February 1998 and when Mr. H questioned Mr. G about this Mr. G told him that he, Mr. G, had no recollection of being contacted by Mr. N to obtain agreement to sell the shares and that this explained the absence of file notes (Mr. H 161-162). Mr. G confirmed this in his evidence in the ST Ltd trial.

Transcript of the section 74C enquiry

[24] When the Commissioner's counsel cross-examined Mr. N on what he had said at the enquiry Mr. N repeatedly alleged that the transcript was materially defective and repeatedly accused counsel of being dishonest in relying on the contents of the transcript. In doing this Mr. N was himself being dishonest. After the enquiry a transcript was prepared and was found to be defective. Thereafter a corrected transcript was prepared and was sent, together with the tapes of the proceedings, to Mr. N's attorneys, PTE Co, with an invitation to point out where the transcript was wrong. Neither PTE Co nor Mr. N accepted the invitation to point out mistakes in the transcript. Furthermore, in September 2002 when Mr. N's legal representatives appeared before the special panel convened by SARS to consider the appellant's objection to the tax assessments they made submissions based on the contents of the transcript. In making representations on behalf of the appellant Mr. N's senior counsel relied on the transcript of what Mr. N had said at the enquiry. Although aware of the fact that the transcript contained errors Mr. N and his legal representatives obviously considered that these errors in the transcript were not material and regarded the transcript as substantially correct.

Answers furnished to SARS when the appellant sought a deferment of payment

[25] (1) Shortly after the section 74C enquiry, SARS, on 15 February 2002, issued assessments to the appellant on the profits on its share dealings during the 1998, 1999 and 2000 years of assessment. SARS also issued assessments to Mr. N personally for the income he received, particularly from the appellant, during the 1990-2001 years of assessment. SARS served the appellant's assessments on Mr. N as part of an application for a specific type relief against Mr. N, his wife, his mother, the appellant, ST Ltd and their South African subsidiaries. On 19 February 2002 Mr. N informed the appellant's representatives about the assessments and the application and they immediately authorised Mr. N to act on behalf of the appellant and ST Ltd in opposing the application. Thereafter Mr. N and his attorneys, PTE Ltd, formulated the appellant's objection to the assessments and the answers to the questions put by SARS. Mr. H prepared a spread sheet to show the answers given by the appellant's directors differed from the answers prepared by Mr. N and his legal advisors (D136-147).

(2) In the letter of objection dated 15 March 2002 it was alleged that at all relevant times the appellant was an investment holding company and that all sales of shares giving rise to the profits sought to be assessed to tax were effected on the insistence of institutional investors. These statements were untrue to the knowledge of Mr. N. He testified in this appeal that the purchase and sale of shares in a number of Johannesburg JSE listed companies took place because he thought there was an opportunity to make a quick profit – they were obviously taxable - and he could not even remember a number of the transactions.

(3) SARS was prepared to grant deferment of payment of the amounts reflected in the assessments on condition that the appellant replied fully and satisfactorily to SARS' questions (Dossier 58). The questions and answers are to be found in the dossier (Dossier 59-67 and 71-80):

(i) To the question, whether the appellant is still an investment holding company (1.1) the answer given was 'yes';

(ii) To the question, on precisely what basis is it alleged that the appellant was never a company as defined in section 1 of the Income Tax Act 58 of 1962 (1.1.6) the answer given was:

> 'ABC Ltd is an investment holding company and has not carried on business in the RSA. Neither has it had an office or place of business in the RSA. Neither did it derive income as defined in the South African Income Tax Act, 58 of 1962 ('the Act') from any source within or deemed to be within the RSA. No person ordinarily resident in the RSA or carrying on business in the RSA was a shareholder or member of ABC Ltd. No dividends were received by or accrued to ABC Ltd on or after 23 February 2000';

(iii) To the question, on what legal basis is it asserted that the 'profit on the sale of shares' constituted a receipt of a capital nature (2.4), the answer given was:

> 'ABC Ltd is an investment holding company which at no time purchased and/or sold shares with anything other than an investment intention. All sales of shares giving rise to the profits sought to be taxed were made at the insistence of institutional investors and not as part of a scheme of profit making. ABC Ltd did not acquire or hold the shares in question pursuant to a scheme of profit making';

(iv) To the question, in respect of the share dealings of ABC Ltd in A International, KK Holdings, QQ Holdings, BB Investors, CC Holdings, DD Holdings, FF Holdings, GG Holdings and OP Ltd, ABC Ltd is requested to furnish particulars of the reason why the dealings in above shares should not be regarded as indicative of an intention to make profit from the purchase and sale of shares (6.3), the answer given was:

> 'ABC Ltd is an investment holding company which at no time purchased and/or sold shares with anything other than an investment intention. ABC Ltd did not acquire or hold the shares in question pursuant to a scheme of profit making';

(v) To the request, full particulars are required of all advice in respect of the purchase and sale of shares in South Africa furnished to ABC Ltd by Mr. N and/or other advisors (6.4), the answer given was:

> 'ABC Ltd acted on the advice of its professional team of advisors located in BB, taking into account the recommendations of Mr. N from time to time. The advice and recommendations were orally communicated to the directors who only accepted and acted upon it if it was consistent with the investment strategy of ABC Ltd.';

(vi) To the question, what was the motivation of ABC Ltd to sell its South African assets to ST Ltd (7.1), the answer given was:

> 'To disinvest from the RSA'

In the light of Mr. N's evidence at this appeal (92-113) the answers given that the appellant is an investment holding company; that the appellant at no time purchased and/or sold shares with anything other than an investment intention and that all sales of shares giving

rise to the profit sought to be taxed were made at the insistence of institutional investors were blatantly untrue. So too were the statements that when selling the shares the appellant acted on the advice of its professional team of advisors located in BB (there was no communication with anyone inBB, Mr. N took all the decisions) and that the appellant sold all its assets to ST Ltd to disinvest from South Africa (there was no sale, the assets were transferred for no consideration and the transfer was effected to prevent the South African Revenue Service from recovering any tax from the appellant: to create a 'blind alley').

Use of the section 74C enquiry transcript before SARS panel

[26] Mr. N allowed the transcript of the evidence at the section 74C enquiry to be used before the SARS panel when he obviously knew that much of the relevant evidence was a fabrication.

Interview with Internet on 16 February 2000

[27] On 16 February 2000, after the appellant had disposed of all or virtually all of its shares in DEF Ltd Mr. N gave an interview to Internet. This was after the appellant had realised a profit of more than R1 billion on the DEF Ltd shares and before Mr. AX had commenced his investigation into Mr. N's and the appellant's tax affairs. Mr. N was expansive about his investment/business philosophy and said a number of things which relate to his intention regarding the DEF Ltd shares. (The transcript of the interview is contained in TB2 396-414). Mr. N said *inter alia* –

(i) He is a serial entrepreneur: i.e. according to his definition, a person who loves to create businesses and to dispose thereof at a profit, quickly, as soon as the business is a success and before it develops or encounters problems;

(ii) He considered that the best way of disposing of a business was to take the shareholding of the vehicle in which the business is held to the Stock Exchange as stock exchanges tend to overprice this type of business: i.e. the type of business which he creates. Put differently, he regards the markets as an opportunity to make money;

(iii) He did not regard IP companies as an investment. He would rather create an IP business, sell it and keep the cash;

(iv) He loves to make money. His aim is to 'sell maximum potential, minimum delivery'. He also said sell the vision and don't wait too long. His view was you are not a true entrepreneur if you cannot actualise the vision;

(v) He would not create a new business if the share price would not rise;

(vi) His intention was never to remain for a long time in DEF Ltd. In the light of his history, everyone knew and could expect that he would only remain there for a short period, in this case five years;

(vii) His initial estimate was that he would remain in DEF Ltd for a period of approximately five years and it was a pleasant surprise when the market conditions enabled him to market the shares in an even shorter period of time;

(viii) He is not a long term player and everyone who has followed his track record knows that he is not a long term player. In this regard he referred to his history with KL (Pty) Ltd and WXY plc.

(ix) There is no moral or other obstacle or reason for him not to dispose of the total shareholding in a company created by him;

(x) He will always ensure that he leaves behind him a business which is sold because otherwise people will not continue to support him in his next venture; and

(xi) He regards the JSE as an opportunity to make money not to invest. Once you have the money keep it in cash.

It is significant that at no stage during the interview did Mr. N qualify his statements by saying that he had discovered this or learnt this as a result of his experience with DEF Ltd. In his evidence he attempted to qualify this by saying that he was talking about something he had learnt from his experience with DEF Ltd.

<u>Mr. N's evidence in the appeal</u>

[28] Mr. N's evidence on a number of issues was not satisfactory. For example:

(1) <u>The sale of the DEF Ltd shares</u>

(i) According to the dossier the purchases and sales of the appellant's DEF Ltd shares are 'Per Transfer Secretaries Report' (Dossier 31). (For purposes of the appeal the appellant does not dispute the particulars of the sales reflected

in the schedules contained in the dossier – Dossier 126 para 2 and 129 para 2). Without producing any documents to support his evidence Mr. N testified that the particulars of the sales (which took place more than 10 years ago over a period of three years) are wrong (Mr. N 42 and 48-49). Although he claimed that this was common cause and that he had documents to prove this (Mr. N 43-44) he failed to produce such documents. He also claimed that SARS had refused his assistance to carry out a reconciliation of the figures (Mr. N 44).

(ii) Mr. N was able to identify only two transactions: one where PM Ltd wanted to purchase 4 million shares at R10 a share (R40 million) and he arranged for Ms. V to sell 4 million of her shares (Mr. N 39): the other where JKL insisted on getting shares and he (on behalf of the appellant) sold 1,8 million shares for R12,50 per share (R22 500 000). (This is contradicted by the schedule which reflects that 1,8 million shares were sold for R23 per share (i.e. R41,4 million). Since Mr. N was authorised to sell the shares for R22,5 million (TB11 236-237) he obviously did not disclose the difference to the appellant or the trustees).

(iii) He testified that he could only answer in general terms (Mr. N 49). On each occasion – he did not identify which – a broker approached him to buy shares on behalf of an institution (Mr. N 53-54). He had discussions with the Y Trust about what was happening in the market and placing more shares with institutions but he could not remember who he spoke to (‘a whole bunch of people’) on any one occasion (Mr. N 55-56). He was not able to identify one of the institutions which bought large parcels of shares between February and April 1999 (Mr. N 67-68). All he could say was that it must be institutions

because of the volumes involved. He did not testify about the smaller transactions.

(iv) He testified that he could not testify about each transaction because the transactions reflected in the schedules are incorrect (Mr. N 49 and 53). When asked to testify about specific transactions he clearly could not recall any one transaction. He said he may have it at home (Mr. N 49) but he did not produce any document to support the evidence. He was not able to identify any cases where an institution had purchased the appellant's DEF Ltd shares (Mr. N 49).

(2) Purchase of DEF Ltd shares

Mr. N testified that he gave the instruction to purchase DEF Ltd shares during the period 28 August 1998 to 28 March 1999 (Mr. N 81). The appellant purchased shares from DEF Ltd employees who wanted to cash in their shares and from certain individuals who needed to liquidate their shareholding (Mr. N 82-83). Not only is the evidence vague and unsubstantiated but it makes no sense and is improbable. If any individuals wished to sell their shares they could do this on the JSE. (Significantly these purchases took place during the period when the appellant was selling very large numbers of shares).

(3) Getting authority to sell

Mr. N testified that every time he sold shares he discussed this with the Y Trust. He then qualified this by saying that this was not necessary in every case: it happened less than half the time. He then qualified this further by saying that if it had been pre-

discussed he did not discuss this with the appellant (Mr. N 292-293). At no stage did he mention that he spoke to the appellant's professional team of advisors located in BB (as alleged in the further particulars furnished to SARS (Dossier 78 para 6.4)).

(4) Profit making scheme

Mr. N testified that he purchased and sold A International, BB Investors, , CC Holdings and FF Holdings shares for the purpose of making a quick profit (Mr. N 92-110). This was contrary to the letter of objection which stated that at all times the appellant was an investment holding company and Mr. N's evidence at the section 74C enquiry that all sales of shares giving rise to the profits sought to be assessed to tax were made at the insistence of institutional investors and not as a part of a scheme of profit making (Dossier 52 paras 2.1 and 2.5). When questioned about this contradiction Mr. N first said that his position at the time of the objection was no different from what it was now and then said that the sale of the shares was inconsequential (Mr. N 274-277). Finally he conceded that if he gave the answer today it would be different (Mr. N 278-281).

(5) Accounting to the appellant/Y Trust

Mr. N testified that he provided the appellant with a statement of all the transactions (i.e. the shares sold and the money received) and that he had seen the detailed schedule many times in the court papers (Mr. N 286-287). (This is contrary to all the evidence and Mr. N did not point out the document).

(6) Mr. N's sale of 20 % of the DEF Ltd shares to the appellant

Mr. N denied that he had testified that he did this (Mr. N 376) when it is clear that he did (Mr. N 21-22).

(7) Mr. N's loan account against DEF Ltd

Mr. N contradicted himself about whether he had a loan account in DEF Ltd (Mr. N 378-379).

(8) Appellant's interest in C

Mr. N's evidence makes no sense at all. The fact that funds from C went into the appellant would not give the appellant an interest in C (Mr. N 381-384).

(9) Payment of R40-60 million to Mr. XXX

Mr. N testified that the appellant paid between R40 and R60 million to Mr. XXX from the proceeds of the sale of the DEF Ltd shares. This was because Mr. XXX and his consortium invested in the LIST project. He did not know how much this was. Mr. N paid Mr. XXX by transferring the money from one bank account to another. Neither was identified. He was vague about the payments and the identity of the recipient bank. He never informed the appellant's directors of these payments because the appellant had access to the bank account records. He then said he had informed a representative of the directors. He could not remember who it was. He avoided the question of whether Mr. XXX had shares in DEF Ltd (Mr. N 388-401). He conceded that during the ST Ltd action he never put on record that Mr. G was lying about there being no evidence of Mr. XXX's evidence (Mr. N 402-403).

(10) False statements to SARS in his tax returns

Mr. N testified that over a lengthy period he had falsely stated in his tax returns that neither he nor his children were beneficiaries of a trust whether inside or outside South Africa. At all times he and his children were beneficiaries of the X Trust. He did this in his returns for 1994-2001. He said he did this because he feared that SARS would disclose this to the Reserve Bank. He conceded that he made an intentional false statement because it suited him. (Mr. N 415-418). For the same reason he did not disclose in his returns the proceeds of the sale of the JJR Ltd shares to the appellant and then to MM Ltd (Mr. N 418-419). Ever since 2002 he has refused to file tax returns (Mr. N 417).

Mention has already been made of the fact that when giving this evidence Mr. N showed no sense of embarrassment or emotion and he did not attempt to justify his conduct.

(11) Omission of JJR Ltd shares from the schedule

Mr. N was unable to explain why the JJR Ltd shares were omitted from the information requested by SARS (Mr. N 428-437).

(12) Withholding facts from the appellant's legal representatives

Mr. N agreed that he had told Ms. S at their meeting in October 2002 that he did not want the South African legal representatives to know all the facts. He said this was not necessary (Mr. N 445).

(13) Funds from the TC (Pty) Ltd Account

Mr. N contradicted himself about whether the funds for the X Trust came from his mother (Mr. N 470-474). He then claimed that he had no recollection of his meeting with Ms. S but did not dispute that her note of the meeting was correct and that he had told Ms. S that the money was not his mother's (Mr. N 471-472).

(14) Evidence at section 74C enquiry

(i) When confronted by what he said at the enquiry Mr. N contended that the record was materially defective and did not correctly reflect what he had said. He then conceded that he had been furnished with a copy of the recording, that he had been invited to point out where the transcript was wrong and that he (and presumably his attorney) had not done so (Mr. N 477-483). Later he testified that he was broadly happy with the transcript and that his evidence there was the same as he was giving in the appeal (Mr. N 522-523).

(ii) Mr. N claimed that the court has already ruled that the section 74C evidence cannot be relied upon because it is materially defective and the Commissioner has agreed that this is so – but could not say which court had made the ruling

(Mr. N 481). No such ruling was produced by the appellant's legal representatives and no such ruling was referred to in argument.

(iii) Mr. N disputed that he said at the enquiry that the appellant was going to be the financial partner (of IJ Ltd) (Mr. N 479-480).

(iv) Mr. N disputed that he said that the appellant agreed to provide the financial capital (to develop the software) (Mr. N 480-481).

(v) Mr. N testified that he could not confirm from the transcript whether Mr. XXX was an investor in the appellant – but then conceded that if he said at the enquiry that Mr. XXX was an investor in the appellant that would be incorrect (Mr. N 483-485).

(vi) Mr. N testified that his mother through a trust was the key investor in the appellant – she was the main founder – all the money came from her (Mr. N 485). She held 50 % interest in the appellant (Mr. N 485-488).

(vii) Mr. N disputed that his mother's only interest in the appellant was as a minor discretionary beneficiary of the X Trust (Mr. N 488-489).

(viii) Mr. N explained the differing statements in the transcript by saying that he had been speaking in a casual way (Mr. N 493-494 and 510-511).

(ix) Mr. N disputed that he said that when he needed to get approval for his recommendations to the appellant with regard to its South African operations he would go through his mother who had her own legal representative in

Glasgow. He said there was an error in the transcript (Mr. N 496-497). He testified that he had had at least two meetings with his mother and her attorneys in Glasgow (Mr. N 497).

(x) Mr. N agreed that when it came to the intention of the appellant two sets of interest holders had to be taken into account, his mother's and the consortium's (Mr. N 514-515).

(xi) Mr. N did not explain why he said what he said to Internet if, in fact, it represented what he had learned as a result of his DEF Ltd experience (Mr. N 547-615).

(xii) Mr. N testified that he did not answer Mr. AX' questions properly because he was being 'targeted' by SARS (Mr. N 619-625) and Mr. AX was saying that the appellant was his *alter ego*. (There is no suggestion in the correspondence that Mr. N was being singled out and Mr. AX nowhere alleged that the appellant was Mr. N's *alter ego*.)

(xiii) Mr. N testified that he 'never even remotely took the ABC Ltd tax case seriously' and consequently did not know that there was a potentially large amount of tax involved (Mr. N 630).

(xiv) Mr. N testified that he could not say who owned ST Ltd (i.e. that it was the Z Trust) because he did not know at the time that it was the Z Trust (Mr. N 638-640).

(xv) Mr. N testified that his mother was the ultimate controller of ST Ltd (Mr. N 640-641).

Capital/revenue issue

[29] With regard to the A International BB Investors, CC Holdings and FF Holdings shares, Mr. N testified that he, (i.e. the appellant) had bought and sold the shares for the purpose of making a quick profit. He conceded that the proceeds of the sale are receipts of a revenue nature.

[30] With regard to the WA shares Mr. N testified that the acquisition of the shares was part of a BEE transaction and that when this proved unsuccessful he disposed of the shares. This evidence is contrary to the facts in the dossier and neither the appellant nor Mr. N produced any documents or other evidence to support his evidence. The absence of such evidence is significant. We find that Mr. N's evidence is vague and improbable and in view of our finding about Mr. N's honesty and credibility we do not accept it. The same applies to Mr. N's evidence regarding the QQ Holdings shares.

[31] With regard to the other shares (apart from the DEF Ltd shares) Mr. N testified that he had no recollection of these shares. Accordingly there is no evidence about the nature of the proceeds if any.

[32] With regard to the DEF Ltd shares, Mr. N testified that his intention was to hold the shares 'for the long haul' but that he decided to sell the shares when institutions brought pressure to bear on him to sell DEF Ltd shares to them and he realised he could make very large profits on the sale of the shares. He described the institutional interest as a 'feeding frenzy'. Despite the fact that this is a crucial issue which requires corroboration neither the

appellant nor Mr. N produced any documentary evidence to corroborate that of Mr. N. In this regard it is significant that despite the Y Trust's repeated requests over a lengthy period that Mr. N furnish them with the contract notes (all of them unsuccessful because Mr. N obviously did not want to get them) the appellant has produced no evidence that it unsuccessfully attempted to obtain the relevant contract notes from JKL Stockbrokers.

[33] Apart from this lack of evidence there is direct evidence which contradicts Mr. N's evidence about his intention to hold the DEF Ltd shares as a capital asset and his reasons for selling them. The transcript of the interview which Internet had with Mr. N on 16 February 2000 tends to show that the appellant's acquisition and disposal of the DEF Ltd shares was part of a profit making scheme. According to Mr. N's answers during the interview his intention was to dispose of the shares as soon as it was profitable to do so. Mr. N thought it might take five years and he was pleasantly surprised when he was able to dispose of virtually all the shares at a huge profit in the space of 18 to 20 months. In argument Mr. Slomowitz frankly conceded that the transcript is not good for the appellant's case but submitted that the statements recorded in the transcript were made by a braggart who was unashamedly trumpeting his success and taking all the credit for a financial 'killing'. Mr. Slomowitz argued that the court has seen Mr. N in the witness box and could see what type of person he is and should understand his comments in that context. Mr. Slomowitz contended that Mr. N's explanation of the comments he made in the interview: that he was talking about a business/investment philosophy which he developed as a result of his experience with the DEF Ltd shares, is credible and should be accepted by the court.

[34] The members of the court are asked to accept the explanation of an acknowledged mendacious witness who is the person who will benefit most if the explanation is accepted. We have given careful consideration to the argument and cannot accept it. In the first place

we regard Mr. N as a person who will lie whenever he considers that it will be to his advantage. In the second place the actual sales of the DEF Ltd shares by Mr. N are consistent with his description of his conduct in the interview. In the third place there is not the slightest indication in the transcript that Mr. N was describing a philosophy which had evolved as a result of his DEF Ltd experience. (In argument Mr. Slomowitz did not rely on any such indication.) In the fourth place there are other indications in the documents reviewed in paragraph 13 that the sale of the shares was part of a scheme of profit making. On 2 March 1999 when he spoke to Mr. G Mr. N told him about the further sales of DEF Ltd shares. (Para 13(22)). The sales figures (Dossier 32-33) show that large numbers of shares were sold in April 1999 for very large sums of money. Obviously, when he spoke to Mr. G on 2 March 1999, Mr. N had already decided to sell these shares. On 3 February 2000 when Mr. N spoke to Mr. G after the appellant had disposed of virtually all its shares he told Mr. G how he was going to build up A. Co. shares over the next two years in a similar way to DEF Ltd (para 13(27)). We therefore do not accept Mr. N's explanation for the comments he made during the Internet interview and regard this as important evidence to show that Mr. N's evidence about why he acquired and disposed of the shares is not true.

[35] The general principles applicable are set out in ***Silke Volume 1*** para 3.1 and ***Elandsheuwel Farming (Edms) Bpk v Secretaris vir Binnelandse Inkomste*** **1978 (1) SA 101 (A)** at 118A-119F. There is no dispute that where a taxpayer wishes to realise a capital asset he may do so to best advantage and the fact that he does this cannot convert what is a capital realisation into a business or profit making scheme – see ***John Bell & Co (Pty) Ltd v Secretary for Inland Revenue*** **1976 (4) SA 415 (A)** at 428A-F; ***Natal Estates Ltd v Secretary for Inland Revenue*** **1975 (4) SA 177 (A)** at 201A; ***Commissioner for Inland Revenue v Stott*** **1928 AD 252** at 263. It is also clear that if a taxpayer sells a capital asset as a result of an unsolicited and fortuitous offer for a substantial sum that,

alone, will not change the nature of the asset or render the proceeds gross income – see ***Constantia Heights (Pty) Ltd v Secretary for Inland Revenue* 1979 (3) SA 768 (A)** at 783D-F; and the same applies where the taxpayer decides to sell because there had been a boom in prices resulting in a 'fantastic' offer at a 'phenomenal' price – see ***Bloch v Secretary for Inland Revenue* 1980 (2) SA 401 (A)** at 409B-C.

[36] In the oft-quoted case of ***Californian Copper Syndicate v Inland Revenue* 1904, 41Sc. LR** at 691 the general principle was succinctly stated as follows:

> 'It is quite a well-settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realise it, and obtains a greater price than he originally acquired it at, the enhanced price is not profit … assessable to tax. But it is equally well-established that enhanced values obtained from realisation or conversion of securities may be so assessable where what is done is not merely a realisation or change of investment, but *an act done in what is truly the carrying-out of a business*.'

See ***Commissioner of Taxes v Booysens Estates Ltd* 1918 AD 576** at 595: ***John Bell & Co (Pty) Ltd v Secretary for Inland Revenue supra*** at 428G-H. While the rule is straightforward it may be difficult to apply to the facts of a given case – see ***John Bell & Co (Pty) Ltd v Secretary for Inland Revenue supra*** at 428H.

[37] In applying the legal principles to the facts it is important to remember the features of the asset involved. Generally, a share produces a dividend for the shareholder and, when sold at an enhanced price, a profit. If a taxpayer acquires shares for the purpose of making a profit out of them it makes no difference in principle whether the profit is obtained by selling the shares or holding them. These are merely alternative methods of dealing with the shares for the purpose of making a profit out of them. In either event there is 'a productive

use of capital employed to earn profits' – see ***Overseas Trust Corporation Ltd v Commissioner for Inland Revenue*** **1926 AD 444** at 456-7.

[38] The appellant's primary contention is that it acquired the shares in DEF Ltd to hold and that it only sold them because of institutional pressure and the prices which could be achieved. The person who gives this evidence is an acknowledged 'serial entrepreneur' who loves to make money and regards the JSE as an opportunity to do so. Taking into account his activities before and after the listing of DEF Ltd the description 'serial entrepreneur' is apt. Having seen the witness in the witness box we are satisfied that he is an opportunist who would not miss a chance to make money. We are satisfied that Mr. N acquired and disposed of the shares in DEF Ltd as part of a scheme of profit making. At best for the appellant he had mixed purposes in acquiring and holding the DEF Ltd shares and neither purpose was dominant. In ***African Life Investment Corp v Secretary for Inland Revenue*** **1969 (4) SA 259 (A)** the court considered such as a situation at 269E-270A:

> 'Whether or not a purpose is dominant in the sense that another co-existing purpose may be effected at a profit without attracting liability for tax, is a matter of degree depending on the circumstances of the case. A purpose may be a main purpose without being dominant in this sense. I shall not attempt a precise definition of the distinction, but there would, I consider, be such a main purpose where there is a further purpose simultaneously pursued by way of an additional, albeit subsidiary, activity calculated and intended to yield a profit. Where for instance, a company whose main concern as an investor is an income from dividends, confines its purchases to sound equities with the highest dividend yield, but, at the same time, intends in order to increase its income, to sell whenever it is able to do so at a substantial profit, that intention, although so closely connected with its main object that it may be said to be inseparable from it, would not ordinarily rank as merely incidental to such a dominant purpose. As far back as in ***Commissioner of Taxes v Booysens Estates Ltd*** **1918 AD 576** at p602 and 604, it was pointed out that, whatever the primary objects of a company may be, it is quite possible that it may derive income in the ordinary course of business from carrying out its secondary

objects. Where the sale of shares held as an investment is in fact contemplated as an alternative method of dealing with them for the purpose of making a profit out of them, or, in the case of a company, where it is one of the "appointed means of the company's gains" (cf ***Overseas Trust Corporation Ltd v Commissioner for Inland Revenue,*** **1926 AD 444** at p456i.f.; ***L.H.C. Corporation of S.A. (Pty) Ltd v Commissioner for Inland Revenue,*** **1950 (4) SA 640 (AD)** at p646) it can make no difference, I consider, that it is a secondary or subsidiary purpose of their acquisition. It would nevertheless be part of the business operations contemplated for the production of income, and the profit gained would be "revenue derived from capital productively employed". In such a case it could not be said that the pursuit of an overriding main objective of securing a dividend income merely provides the occasion for what is no more than a purely incidental change of investment, even though it be a profitable one. There would be no absolving dominant purpose.'

See also ***Commissioner for Inland Revenue v Nussbaum*** **1996 (4) SA 1156 (A)** at 1162H-1164B.

[39] The objective facts and probabilities point to the fact that the sale of the shares was part of a scheme of profit making and not the sale of a capital asset.

(1) The appellant's objects clause expressly provides that the appellant may engage in any business or businesses whatsoever and that it may buy and turn to account (i.e. 'make use of for one's profit and advantage') shares. The appellant was therefore authorised to purchase and sell shares with a view to making a profit. It was not formally an investment holding company.

(2) After selling his 840 DEF Ltd shares (which represented 84 % of the total) to the appellant Mr. N on behalf of the appellant decided to list DEF Ltd on the JSE. For the purposes of listing, the DEF Ltd shares were reorganised, after which Mr. N held 20 % of the shares. In June 1997 Mr. N sold his 20 % of the DEF Ltd shares to the appellant for the sum of R3 367 347 (£446 479).

(3) The purpose of listing a company on the JSE is to enable the public to purchase the shares. Where the shareholder holding 79 % of the shares seeks to list the company the overwhelming probability is that the shareholder intends to sell the shares as soon as it is profitable to do so.

(4) Within a very short space of time (approximately $3^1/_2$ months) after listing the appellant (Mr. N) started selling large numbers/parcels of the appellant's DEF Ltd shares at greatly increased prices and continued to do so until it (Mr. N) had sold virtually all its shares. The appellant (Mr. N) sold most of its DEF Ltd shares in the space of 14 months (between February 1998 and April 1999) and completed selling the shares in February 2000. Apart from 17 February 1998 Mr. N had no discussion with the appellant's directors or the Y Trust about whether the shares should be sold or held.

(5) During the time the appellant (Mr. N) was selling the appellant's shares the appellant (Mr. N) also purchased DEF Ltd shares on the JSE. In the absence of a proper and acceptable explanation for these purchases these purchases would have the effect of stabilising or increasing the market price.

(6) Mr. N regarded the selling of the shares as an ongoing process. When he spoke to Mr. ZA in March 1999 he told him about further sales to take place. The next month there were very large sales.

(7) During the period when the appellant (Mr. N) was purchasing and selling DEF Ltd shares for the appellant the appellant (Mr. N) bought and sold shares in a number of

other companies listed on the JSE. The purpose of these purchases and sales was to make a profit.

(8) Listing the DEF Ltd shares when prices were generally depressed would enhance the likelihood that large profits would be made when the market recovered.

(9) The appellant (Mr. N) never refused to sell any of the appellant’s DEF Ltd shares.

(10) There is no documentary or other objective evidence that all the appellant’s large sales of DEF Ltd shares were to institutional investors and that the appellant was pressed to sell its DEF Ltd shares by institutional investors.

(11) Mr. N concealed the fact that the appellant had been selling shares on the JSE from SARS by not submitting tax returns for the appellant for the 1998, 1999 and 2000 years of assessment. The most plausible inference is that he knew that the proceeds were taxable.

(12) As soon as he had sold the appellant’s DEF Ltd and other shares Mr. N began remitting the proceeds to the offshore structure which he had established. Again the most plausible inference is that he wished to put the proceeds out of reach of the South African tax authorities.

(13) On 29 February 2000 (i.e. before Mr. AX started his investigation) Mr. N told Mr. P of MR Trust Co that the appellant must be wound up and all its assets transferred to B Co.. He wanted this to be completed as soon as possible so that the ABC Ltd name can ‘die’. Mr. N obviously wanted to make it impossible for the South African tax

authorities to recover any tax and the most plausible inference is that Mr. N knew that the proceeds from the sales of the shares were taxable.

(14) In his correspondence with SARS in 2000 and 2001 Mr. N dishonestly concealed the facts relating to the appellant and his relationship with the appellant. Once again the most plausible inference is that he did so because he knew that the proceeds from the sale of the shares were taxable.

(15) In November 2000 when Mr. AX' investigation into the appellant intensified Mr. N instructed the Y Trust to urgently transfer all the appellant's assets to ST Ltd. Mr. N had told Mr. ZA that he wished to 'dismantle' the current structure and transfer the appellant's assets to a new company as the 'tax authorities are chasing him'. On 21 November 2000 when Mr. N met the Y Trust's representatives he confirmed that this was his intention.

(16) Mr. N falsely denied that the appellant had ever purchased and sold any shares to make a profit and falsely alleged that the appellant was a holding company which acquired all its shares with the purpose and intention of holding them as a capital investment. Once again the most plausible inference is that he knew that the proceeds from the sale of the shares were taxable.

[40] The objective facts and probabilities therefore do not assist the appellant. Neither does any failure to challenge Mr. N's evidence. Against the background of all the litigation it is clear that the Commissioner did not accept anything which Mr. N said which was not corroborated. Accordingly the appellant has not discharged the onus of proving that it acquired and held the DEF Ltd shares as capital assets and that it sold them in the circumstances described by Mr. N.

[41] The appellant has failed to prove that the Commissioner's decision to tax the profits on the sale of the DEF Ltd shares (and the other shares) was wrong and it is accepted that the profits were made as part of a scheme of profit making. All these profits are therefore taxable.

Additional tax in terms of section 76(1) of the Act

[42] The appellant was not registered as a taxpayer and failed to submit income tax returns for the 1998, 1999 and 2000 tax years. In September 2000 the Commissioner appointed Mr. N as the public officer of the appellant in terms of section 101(4) of the Act and requested Mr. N to submit income tax returns on behalf of the appellant for the 1998, 1999 and 2000 years of assessment. Mr. N refused to do this. In November 2001 the Commissioner (Mr. AX) invited Mr. N to participate in an enquiry to be held in terms of section 74C of the Act. Mr. N agreed and an enquiry was held on 28, 29 and 30 January 2002. Mr. N testified at the enquiry and was cross-examined by the Commissioner's legal representative. Mr. N testified in some detail about the appellant and its operations in South Africa and who held the shares in the appellant. As a result of the information which Mr. N made available at the enquiry the Commissioner decided to issue assessments for the appellant for the 1998, 1999 and 2000 years of assessments. The Commissioner concluded that the profits from the sale of the shares by the appellant during the three years were of a revenue nature and not a capital nature and that the interest which the appellant earned on its banking accounts during the 1999 and 2000 years of assessments was interest from the amounts which the appellant used for its business activities. The Commissioner also imposed additional tax equal to twice the tax chargeable in respect of the appellant's taxable income for each year of assessment (i.e. R27 774 768 in respect of the 1998 year of assessment; R474 483

523,50 in respect of the 1999 year of assessment and R269 406 543,60 in respect of the 2000 year of assessment).

[43] In 2002 the relevant parts of section 76 read as follows:

> ‘(1) A taxpayer shall be required to pay in addition to the tax chargeable in respect of his taxable income –
>
> (a) if he makes default in rendering a return in respect of any year of assessment, an amount equal to twice the tax chargeable in respect of his taxable income for that year of assessment;
>
> (2) (a) The Commissioner may remit the additional charge imposed under subsection (1) or any part thereof as he may think fit: Provided that, unless he is of the opinion that there were extenuating circumstances, he shall not so remit if he is satisfied that any act or omission of the taxpayer referred to in paragraph (a) … of sub-section (1) was done with intent to evade taxation.
>
> (b) In the event of the Commissioner deciding not to remit the whole of the additional charge imposed under sub-section (1), his decision shall be subject to objection and appeal.
>
> (c) …
>
> (3) The additional amounts of tax for which provision is made under this section shall be chargeable in cases where the taxable income or any part thereof is estimated by the Commissioner in terms of section 78 …’

In 2002 the relevant part of section 78 read as follows:

> ‘(1) In every case in which any person makes default in furnishing any return or information or a Commissioner is not satisfied with the return or information furnished by any person the Commissioner may estimate either in whole or in

part the taxable income in relation to which the return or information is required.'

[44] This case is concerned with the provisions of subsection 76(2) as the Commissioner failed to remit any part of the additional charge to be imposed under subsection 76(1). It is clear from the wording of the subsection that the Commissioner has a general discretion to remit any part of the additional charge as he may think fit and that this general discretion is qualified in that he may not so remit if he is satisfied that the act or omission of the taxpayer was done with intent to evade taxation. However this qualification is itself qualified in that the Commission may do so if he is satisfied that there were extenuating circumstances.

[45] It has long been accepted that, in an appeal against the additional charge imposed under section 76(1), the legislature intended that there should be a rehearing of the whole matter by the Tax Court and that the Tax Court can substitute its own decision for that of the Commissioner: i.e. the Tax Court on appeal to it is called upon to exercise its own original discretion – see ***Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue*** **1944 AD 142** at 150; ***Commissioner of Inland Revenue v Da Costa*** **1985 (3) SA 768 (A)** at 774G-J: ***Meyerowitz on Income Tax*** **2002.2003** para 32.40. This court must therefore decide –

(1) whether it is satisfied that the accused's failure to submit the returns for the 1998, 1999 and 2000 years of assessment was done with intent to evade taxation; and if so

(2) whether it is satisfied ('of the opinion') that there were extenuating circumstances.

It is common cause that the appellant did not submit returns for the 1998, 1999 and 2000 years of assessment and that the Commissioner estimated the appellant's taxable income for the purpose of issuing the assessments. Furthermore, the Commissioner's calculation

of the normal tax and additional tax, based on his estimate of the appellant's taxable income is not in dispute.

[46] The appellant advances three arguments –

(1) The Commissioner is advancing the *alter ego* argument which the Commissioner advanced in previous proceedings and then abandoned and undertook not to put forward again.

(2) It cannot be found that the appellant had the necessary intent for the purposes of section 76 as Mr. N was the person who failed to submit the returns and he was not an authorised representative of the appellant. The appellant contends that only Mr. N could have had the necessary intent and that Mr. N's failure cannot be attributed to the appellant. For this argument the appellant relies on ***Tesco Supermarkets Ltd v Nattrass*** **[1971] 2 All ER 127 (HL); LAWSA First Re-Issue Vol 4 Part I** para 35; ***Ensor NO v Syfrets Trust and Executor Co (Natal) Ltd*** **1976 (3) SA 762 (D)** at 764 and 766; **Blackman *et al Companies*** Vol 3 p14-544-3 (2006 revision);

(3) Even if the appellant had the necessary intent this court should find that there are extenuating circumstances. According to the argument these are –

(i) The appellant changed its approach to the litigation in June 2007 after it employed Ozannes and Bell Dewar Inc. to act for it and dispensed with the services of the attorneys appointed by Mr. N;

(ii) The appellant's directors' inability to obtain from Mr. N the contract notes relating to the sale of the DEF Ltd shares in the absence of which the appellant cannot submit tax returns.

[47] The first argument can be quickly disposed of. The Commissioner does not contend that the appellant is the *alter ego* of Mr. N. The Commissioner contends that Mr. N was the directing mind of the appellant and accordingly that he was acting as the company when he made default in rendering the returns (see e.g. ***Tesco Supermarkets Ltd v Nattrass*** **[1971] 2 All ER 127 (HL)** at 132i-133a …..

[48] The question is whether in law Mr. N was acting as the appellant when he made default in making the returns. Although he was not an officer of the appellant and he held no other formal position which would normally entitle him to act on its behalf he clearly controlled the appellant as if he was its managing director and was acting with all the powers of the board. The facts may be briefly summarised. Mr. N established the X Trust which held the appellant's shares by means of two nominee companies. The X Trust was administered by the Y Trust which was appointed by Mr. N and the Y Trust appointed two nominee companies as the directors of the appellant. From the time that the appellant was incorporated on 16 July 1993 Mr. N took all the decisions affecting the appellant. He purchased and sold shares for the appellant, he acquired the DEF Ltd shares for the appellant and he decided that DEF Ltd would be listed on the JSE. He decided to sell the appellant's DEF Ltd shares and he continued to sell the shares until virtually all the shares had been sold. Mr. N decided what to do with the proceeds of the DEF Ltd shares. He remitted approximately £108 million to BB and the United Kingdom and he decided where these funds should be invested. He retained a similar amount in South Africa and he utilised these funds to acquire shares in companies that owned residential properties, wine estates, game farms, expensive motor vehicles and paintings. He did all this without

consulting the directors of the appellant or the Y Trust. In most cases the directors and the trust became aware of what Mr. N had done after the event. When Mr. N had sold all the appellant's DEF Ltd shares he acquired shares in A. Co. which were held by B Co. Mr. N intended to build up the A. Co. business as he had done with the DEF Ltd business and then, presumably, sell the shares as he had done with DEF Ltd. Neither the appellant nor the Y Trust ever refused to do what Mr. N asked or instructed. On the occasions when the appellant formally authorised Mr. N to act on its behalf (for example list DEF Ltd on the JSE or sell 1,8 million DEF Ltd shares on 17 February 1998) the appellant simply complied with Mr. N's request that he be formally authorised. Whatever Mr. N did with the appellant in South Africa was accepted by the appellant and the Y Trust and he was impliedly, if not expressly, authorised to act on behalf of the appellant in doing whatever he thought fit both inside and outside South Africa. When Mr. N decided in late 1999 that the shares in the appellant held by the X Trust and administered by the Y Trust should be transferred to the Z Trust administered by MR Trust Co both trust companies immediately complied with his request to do so. And when he decided in March 2000 that the administration of the Z Trust should be transferred to the Y Trust both companies immediately complied with his request. When Mr. N decided in November 2000 that the appellant's assets must be transferred to ST Ltd as a matter of urgency this was also attended to without any question by the directors of the companies or the Y Trust. In short, Mr. N conducted himself with regard to the appellant's assets and business as if they were his, notwithstanding the formal offshore structures which he had established to hold the appellant's shares and manage the appellant. The authorised representatives of the structures, the directors of the companies and the trustees of the trusts never objected to Mr. N doing so.

[49] (1) The courts have come to recognise that a company can act even when the person who acts on its behalf is not an authorised representative of the company. This is in accordance with the 'alter ego' or 'directing mind' doctrine.

(2) In **LAWSA First Reissue Vol 4 Part 1** para 35, the 'alter ego' or 'directing mind' doctrine is discussed with reference to the case law, including ***Lennards Carrying Company Ltd v Asiatic Petroleum Company Ltd*** **1915 AC 705,** ***Tesco Supermarkets Ltd v Nattrass*** **[1971] 2 All ER 127 (HL)** and ***El Ajou v Dollar Land Holdings plc*** **[1994] 2 All ER 685 (CA)**. **LAWSA** says the following:

(i) 'The acts and omissions, intentions, purposes and knowledge of certain persons are the company's acts and omissions, intentions, purposes and knowledge. That is to say, because the company as such – as a mere legal *persona* – has no physical existence and hence cannot act and has no mind or will of its own, the law attributes acts and states of mind of certain persons to the company. Such persons do not act or think on behalf of, or for, the company, that is as representatives, agents or delegates or servants. Rather, within their appropriate sphere they are an embodiment of the company: they act and know and form intentions through the *persona* of the company. Their minds are its minds; their knowledge is its knowledge; their intention its intention. This, the "directing mind" or "*alter ego*" doctrine has been developed with no diversions of approach, in both civil and criminal jurisdictions, the authorities in each being cited indifferently in the other'.

(ii) 'The need for the doctrine always arises where the law requires personal fault as a condition for liability. Whenever liability depends upon the performance of an act or an omission by the company itself, or possession by the company of a particular state of mind, the law treats the acts or states of mind of those who represent and control the company as the acts and states of mind of the company itself. Thus the doctrine applies where the civil law requires

intention or knowledge as an ingredient of the cause of action or defence, and where the criminal law requires *mens rea* as a constituent of the crime. In such cases the mind of the person is the mind of the company itself, and, if it is a guilty mind, that guilt is the guilt of the company, there being no question of vicarious liability.'

(iii) 'The doctrine is however not limited to questions of criminal or delictual liability. It is a perfectly general one, applying whenever it is necessary to attribute acts and states of mind to a company.'

(iv) 'What must be sought is the person or body "who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation". That is to say, it must be determined who is (or who are) in actual control of the operations of the company, or part of them, and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under the other's orders. Thus the doctrine distinguishes between someone whose action or knowledge is that of the company itself and someone who is merely a servant or agent. Control in this context does not mean having the power to control the company in the sense of holding the levers of power in the company; it connotes the *de facto* control of what the company does, of its day to day activities, exercised by the persons through whom it acts.'

(3) These principles are illustrated by the discussion in the three English cases referred to.

(i) In ***Lennards Carrying Company Ltd v Asiatic Petroleum Company Ltd*** **1915 AC 705** the court considered a situation where a person had conducted the affairs of a company without being a representative. The court said at 718:

> 'My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. My Lords, whatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr. Lennard therefore was the natural person to come on behalf of the owners and give full evidence not only about the events of which I have spoken, and which related to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of section 502.'

(ii) In ***Tesco Supermarkets Ltd v Nattrass supra*** Lord Reid said at 132G:

> 'Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of a delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn. ***Lennards case*** was one of them.'

(iii) In ***El Ajou v Dollar Land Holdings plc supra*** at 705, Hoffmann LJ considered the 'directing mind and will' theory propounded in ***Lennards Carrying Company Ltd v Asiatic Petroleum Company Ltd supra*** which distinguishes between someone who is 'merely a servant or agent' and someone whose action (or knowledge) is that of the company itself and concluded that the question of who is the directing mind and will is not limited by the powers entrusted to a person by the articles of association. The learned Judge said:

> 'The last sentence about Mr. Lennard's position shows that the position as reflected in the articles may have to be supplemented by looking at the actual exercise of the company's powers. A person held out by the company as having plenary authority or in whose exercise of such authority the company acquiesces, may be treated as its directing mind.'

[50] It is clear that the appellant and the Y Trust which controlled the appellant acquiesced in the plenary authority exercised by Mr. N in respect of the appellant's activities both inside and outside South Africa and that he must be regarded as its directing mind. By making default in submitting the returns on behalf of the appellant Mr. N clearly acted with intent to evade taxation and that must be attributed to the appellant. The appellant's second argument therefore cannot be upheld.

[51] With regard to the issue of extenuating circumstances it is clear that the court must exercise its own judgment, after a rehearing, in deciding whether there are such circumstances. Furthermore, the court is required to have regard to all the facts, even those which arose after the failure to render the returns (see ***ITC* 1430 (1987) 50 SATC 51** at 56). In the appellant's heads of argument reference was made to the appellant's changed approach to the litigation since June 2007 after it employed Ozannes and Bell Dewar Inc. to act for it in the place of the attorneys appointed by Mr. N and the fact that the continuing failure to render returns ought not to be laid at the door of the appellant's directors because they had never been able to obtain from Mr. N the contract notes relating to the sale of the shares which gave rise to the imposition of tax. It is contended that in the absence of such contract notes the appellant cannot render the returns.

[52] As to the first contention, under BB law the trustees of a trust are required, in the exercise of their functions, to observe the utmost good faith and act like a *bonus paterfamilias* ('bon père de famille') in conducting the affairs of the trust and to act only in the best interests of the beneficiaries and must ensure that the trust property is held by or vested in them or is otherwise under their control (Dossier 148-152). While it is true that after Ozannes and Bell Dewar Inc. were appointed to act on behalf of the appellant in June 2007 the litigation with the Commissioner proceeded in an honest and straightforward manner, in the light of all the evidence it cannot be said to have anything to do with the failure to submit tax returns. The

conduct of this case and the presentation of Mr. H's evidence was essentially a face-saving exercise for the Y Trust/ABCE Trust in particular and possibly for the whole offshore trust industry. The facts show that the trustees did not always observe the utmost good faith and exercise proper control over the trust assets. They knew that Mr. N was using the appellant to acquire assets in South Africa, particularly shares in DEF Ltd; that he arranged for DEF Ltd to be listed; that within a very short space of time Mr. N started to sell the appellant's DEF Ltd shares and remit the proceeds (very large sums of money) to the Y Trust; that Mr. N continued to sell the DEF Ltd shares over a period of about 18-20 months (particularly the first 14) and remit the proceeds to the Y Trust and banks in the United Kingdom and that Mr. N never accounted to them for the sale of the shares or the proceeds received. Despite all this the trustees (and consequently the appellant) never objected to Mr. N's activities and never made any enquiries about the tax implications of selling the shares and receiving such large amounts of money. Even before SARS started its investigation Mr. N told the Y Trust representatives that he wished to dismantle the offshore structure and transfer the appellant's assets to another company as the tax authorities are chasing him. Even this evidence of wrongdoing did not deter the trustees' representatives from immediately undertaking to assist Mr. N. Again when Mr. N reported to the trustees on 19 February 2002 that he had received very large assessments for the appellant from SARS the trustees did not immediately take control of the appellant and deal with its legal problems. The facts show that Mr. N could not be trusted and that in his dealings with SARS he was putting forward a version of the facts which the Y Trust knew to be untrue and that he was dishonestly attempting to thwart the South African tax authorities. They also show that Mr. N's attorney could not be relied upon to represent the Y Trust's and the appellant's best interest. The evidence showing this accumulated during 2002 and a *bonus paterfamilias* would have taken steps to assert his powers as trustee and take control of the litigation and the appellant's/ST Ltd's assets. The failure to do so, when it was clearly indicated from the time that the Y Trust discovered that assessments had

been issued and serious legal steps taken is inexplicable on any other basis than that the Y Trust did not want to lose Mr. N as a client and a very lucrative source of income. If the Y Trust had taken steps earlier – investigated the facts pertaining to the assessments and obtained legal opinion as to the correctness of the assessments, it could have determined that the appellant was obliged to furnish returns for the years in question, it could have furnished returns either based on the actual contract notes or information obtained from the transfer secretaries and it could have properly formulated the issues in dispute. Instead it did none of these things and assisted Mr. N, the apparent wrongdoer, to hide the appellant's assets to obstruct the South African tax authorities and prolong the tax collection process. These are all aggravating circumstances and heavily outweigh anything which happened after June 2007.

[53] The trustees attempted to obtain the contract notes from Mr. N for about three years and when he did not produce them and fobbed them off with transparent excuses the trustees did not approach JKL Stockbrokers directly to obtain the copies of the contract notes which they required. The trustees also did not approach the transfer secretaries to obtain the information they needed. According to the evidence they needed the contract notes to complete the accounts of the appellant and they obviously needed the copies so that they could satisfy themselves about the correctness of the assessments and corroborate Mr. N's evidence that he sold off-market to financial institutions. It is significant that the appellant led no evidence to show that it was not possible to obtain all the necessary records for these purposes. In the circumstances the failure to even try to obtain the records justifies an inference that the appellant did not want to place the full story before this court.

[54] In terms of section 76(1) the additional tax shall be imposed unless the Commissioner (or the Tax Court) decides to remit the additional tax wholly or in part. As already pointed out the Commissioner (or the Tax Court) may not remit any part of the additional tax if he or it is

satisfied that the failure to submit the returns was done with intent to avoid taxation unless the court is 'of the opinion' that there are exceptional circumstances. In the light of the court's finding on these issues the court cannot remit any part of the additional tax.

Section 89*quat*(2) Interest

[55] Section 89*quat* provides for interest on underpayments and overpayments of provisional tax. In 2002 the relevant parts of the section provided as follows:

> '(2) If the taxable income of any provisional taxpayer as finally determined for any year of assessment exceeds –
>
> (a) R20 000 in the case of a company; or
>
> (b) R50 000 in the case of any person other than a company,
>
> and the normal tax payable by him in respect of such taxable income exceeds the credit amount in relation to such year, interest shall, subject to the provisions of subsection (3), be payable by the taxpayer at the prescribed rate on the amount by which such normal tax exceeds the credit amount, such interest being calculated from the effective date in relation to the said year until the date of assessment of such normal tax.
>
> (3) Where the Commissioner having regard to the circumstances of the case is satisfied that an amount has been included in the taxpayer's taxable income or that any deduction, allowance, disregarding or exclusion claimed by the taxpayer has not been allowed, and the taxpayer has on reasonable grounds contended that such amount should not have been so included or that such deduction, allowance, disregarding or exclusion should have been allowed, the Commissioner may, subject to the provisions of section 103(6), direct that interest shall not be paid by the taxpayer on so much of the said normal tax as is attributable to the inclusion of such amount or the disallowance of such deduction, allowance, disregarding or exclusion.

(5) Any decision of the Commissioner in the exercise of his discretion under subsection (3) … shall be subject to objection and appeal.'

[56] In the absence of any contention to the contrary it is accepted that section 89quat of the Act applies.

[57] The Commissioner calculated section 89*quat*(2) interest for the 1998, 1999 and 2000 years of assessment in the amounts of R19 963 093,15, R220 338 286,20 and R70 045 701,34 respectively. The appellant's only ground of objection is based on section 89*quat*(3): i.e. that the appellant on reasonable grounds contends that it is not liable to tax in the amounts assessed or at all. The appellant relied on all the facts set out in the Consolidated Statement as well as the fact that it had been unable to obtain information from Mr. N other than what is contained in the section 74C enquiry record and the record of the proceedings before the special panel and the fact that it had not been able to consult with Mr. N.

[58] In their heads of argument the appellant's counsel make one submission: that the appellant had reasonable grounds for contending that the profits earned on the sale of the DEF Ltd shares were capital in nature and, in any event, the appellant was not a taxpayer, having received advice to that effect. In argument before this court no further submissions were made.

[59] On the face of it the Commissioner decided that no reasonable grounds existed for a contention that the amount of taxable income included in the assessments should not have been included. The parties accept that the statements in ***Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue* 1944 AD 142** at 150 and ***Commissioner for Inland Revenue v Da Costa* 1985 (3) SA 768 (A)** at 774H-J are also applicable to an appeal in

terms of section 89*quat*(3): i.e. on appeal the tax court rehears the matter and can substitute its own decision for that of the Commissioner.

[60] The Commissioner issued the three assessments on 15 February 2002 and they were payable on 19 February 2002 (Dossier 9, 11 and 13). On 15 March 2002 PTE Co delivered a letter containing the appellant's objection to the assessments. The notice of objection raised four issues: (1) that the appellant is not a company as defined in the Act and, accordingly, that it is not liable to pay income tax under section 5 of the Act; (2) that the Commissioner had failed to take any legal and binding steps, whether under section 101 of the Act or otherwise, to appoint a representative of the appellant for purposes of the Act; (3) that the Commissioner had failed to properly or validly serve the assessments on the appellant; (4) that the profits on the sale of the shares reflected in the assessment were receipts of a capital nature and therefore not gross income and subject to tax: because the appellant did not acquire or hold the shares pursuant to a scheme of profit making and the sales took place to satisfy institutional demand for the shares.

[61] The appellant did not persist in grounds (1), (2) and (3). These grounds are not even referred to in the Consolidated Statement and obviously no submissions were made in support of these grounds at the hearing. Consequently it is found that even before Mr. N testified in the appeal there were no reasonable grounds for these contentions.

[62] It seems that the tax court's assessment of whether there were reasonable grounds for the appellant's contention that the profits on the sale of the shares should not have been included in the assessments must depend upon all the facts placed before the court. Although the Act does not stipulate when the contention must be raised it is clear that the Commissioner issued the assessments before any formal contention was raised. The Commissioner's knowledge about the sale of the shares was based on Mr. N's evidence at

the section 74C enquiry which was vague, contradictory and incoherent about the acquisition and disposal of the shares. There is no suggestion in the record that PTE Co sought clarification on this issue from the appellant or the Y Trust or attempted to obtain corroboration from any other source. Obviously the contract notes for the transactions and a statement from the broker concerned would have assisted. Later, when Mr. H and Mr. ZG had read the record of the proceedings before the panel and the transcript of the section 74C enquiry they were at a loss to understand the version put up by Mr. N not only because of the untruths but because of the version itself. Mr. ZG's view - expressed very trenchantly - was that Mr. N's evidence would not enable the appellant to discharge the onus and that to do so corroboration was required. In these circumstances the conclusion is irresistible that whatever Mr. N told PTE Co was also vague and improbable, and it is clear that without corroboration, which they clearly did not have at that time, it would not stand up in court. It seems that the requirement of 'reasonable grounds' for the contention implies at least a *prima facie* case, some objective and reliable evidence to support the contention. In the absence of documents or other evidence to support Mr. N there were no reasonable grounds.

[63] We are therefore not satisfied that the appellant had reasonable grounds for contending that the profits on the sale of the shares should not have been included in the appellant's taxable income. Accordingly, the appellant's appeal against the imposition of section 89quat(2) interest cannot be upheld.

[64] There was no request for a costs order.

[65] The Commissioner contends that the 2000 tax assessment should not be referred back to the Commissioner for adjustment as the appellant had been under assessed. We cannot

agree. The profit on the sale of the OP Ltd shares was wrongly included in the appellant's gross income and this must be rectified.

[66] The following order is made:

I The appeal against the appellant's 1998 and 1999 tax assessments is dismissed and the assessments are confirmed.

II The appeal against the appellant's 2000 tax assessment is upheld only insofar as the profit on the sale of the OP Ltd shares should not have been included in the appellant's gross and taxable income.

III The appellant's 2000 tax assessment is referred back to the Commissioner for recalculation of the assessment in the light of the previous order.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

N.A. MATLALA

I agree

J.L. KILANI

CASE NO: 11038/2006

HEARD ON: 7 June 2010 to 18 June 2010 and 9 and 10 September 2010

FOR MR. N: ADV. G. MARCUS SC
ADV. M. CHASKALSON SC
ADV. A. FRIEDMAN

FOR THE APPELLANT: ADV. H.Z. SLOMOWITZ SC
ADV. R HUTTON SC
ADV. S. STEIN

INSTRUCTED BY: Mr. A. Leontsinis of Bell Dewar Inc.

FOR THE RESPONDENT: ADV. J.L. VAN DER MERWE SC
ADV. N.G.D. MARITZ SC
ADV. H.A. SNYMAN
ADV. S. BUDLENDER

INSTRUCTED BY: G.K. Hay of Mahlangu Incorporated

DATE OF JUDGMENT: 6 October 2010