

**IN THE TAX COURT, HELD AT PRETORIA**

CASE NUMBER: VAT471 AND IT12008

In the matter between:

**ABM (PTY) LTD**

**t/a ABT**

**Appellant**

and

**THE COMMISSIONER FOR THE SOUTH  
AFRICAN REVENUE SERVICES**

**Respondent**

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**JUDGMENT**

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**GOODEY AJ:**

[1] **INTRODUCTION:**

(1.1) This is a tax matter. It involves value added tax (**VAT**) as well as income tax (**IT**).

(1.2) I sat with two assessors, namely **Mr Moosa** and **Mr Setshedi**. We came to an unanimous decision.

(1.3) The Taxpayer called two witnesses, namely Dr G and Mr W and Miss V testified on behalf of the Respondent (SARS).

[2] **DISPUTES:**

(2.1) **Ad: VAT**

ABM (PTY) LTD

VALUE ADDED TAX ASSESSMENTS

<u>Tax year</u>	<u>Type</u>	<u>Due date</u>	<u>Tax(VAT) in dispute</u>
29 February 2000	Additional	1 July 2005	5 298 987.33
28 February 2001	Additional	1 July 2005	3 919 129.48
28 February 2002	Additional	1 July 2005	6 378 162.98
28 February 2003	Additional	1 July 2005	7 473 370.82
29 February 2004	Additional	1 July 2005	243 942.72
			<hr/>
			23 313 593.33
			<hr/>

(2.2) **Ad: IT**

INCOME TAX ASSESSMENTS

<u>Tax year</u>	<u>Type</u>	<u>Due date</u>	<u>Tax(IT) in dispute***</u>
29 February 2000	Additional	1 July 2005	640 011.00
28 February 2001	Additional	1 July 2005	7 420 495.00
28 February 2002	Additional	1 July 2005	7 965 187.00
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			16 025 693.00
			<hr/>

\*\*\* These amounts  
include the 200% penalty

(2.3) **Ad: SECONDARY TAX**

SECONDARY TAX ON COMPANIES

<u>Cycle</u>	<u>Type</u>	<u>Due date</u>	<u>Tax (STC) in dispute</u>
20 June 2001	Estimation	31 July 2001	43 976.50

(2.4) **Ad: The disputes in more detail**

[The summary is marked "X" and appears on the following 6 pages]

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ABM (PTY) LTD  
ADDITIONAL ASSESSMENT RAISED IN FEBRUARY 2005

1	Sche	2000	2001	2002	2003	2004	TOTAL	VAT X 14%	IT x 30%	STC x 12.5%
ADDITIONAL VAT ASSESSMENTS		R	R	R	R	R	R	R	R	R

2. VAT RECONCILIATION

2.1 Difference Vat Reports & VAT 201	A		(192 822)	383 338	490 892		681 208	681 208		
2.2 Difference Output and Turnover	B	27 157 662	731 072	4 124 990	3 077 742		35 091 486	4 912 808		
2.3 Deemed Input	C	10 512 768	21 214 389	28 601 385	40 385 366		100 713 875	14 099 943		
2.4 Zero % sales	D		373 059	313 697	489 232	231 291	1 407 279	1 407 279		

3. ADDITIONAL INCOME TAX ASSESSMENTS FOR UNDISCLOSED INCOME

3.1 INCOME

3.1.1 Sales at no consideration	E		3 321 190	2 236 847	466 989	90 268	6 115 294	856 141		
3.1.2 Sales at no consideration	E		3 321 190	2 236 847			5 558 037		1 667 411	

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4. EXPENDITURE DISALLOWED FOR INCOME TAX PURPOSES

4.1 EXPENSES	Sche	2000	2001	2002	2003	2004	TOTAL	VAT X 14%	IT X 30%	STC X 12.5%
4.1.1 Cash & AB Tjeks - IT	F.1		131 240	157 838			289 078		86 723	
4.1.2 Cash & AB Tjeks - VAT	F.1		106 580	147 494	107 007		361 081	50 551		
4.1.3 Insurance	F.2	24 490	25 335	28 739			78 564		23 569	
4.1.4 Rental flat - IT	F.3		15 203	17 332			32 535		9 761	
4.1.5 Rental flat -Vat	F.3		15 203	17 332	16 259		48 794	6 831		
4.1.6 Rental - AB tjeks -IT	F.3		41 551	47 368			88 919		26 676	
4.1.7 Rental - AB tjeks -Vat	F.3		41 551	47 368	45 706		134 625	18 848		
4.1.8 Delivery cost - Charter expenses	F.4	72 000	72 000	72 000			216 000		64 800	
4.1.9 Travelling Cost - Uvongo	F.4	30 057	22 863	33 000			85 920		25 776	
4.1.10 Hanger Fees	F.4	17 058	15 280	15 700			48 038	6 725	14 411	
4.1.11 Entertainment -Credit Cards	F.5	90 569	168 517	103 712			362 798		108 839	
4.1.12 Invoices ask not received yet	F.6			1 410 057			1 410 057	197 408	423 017	

5. Incentive bonuses (Finance Income)

5.1 Income Tax	G	162 402	277 246	2 502 402			2 942 050		882 615	
5.2 Output Vat levied	G	162 402	277 246	2 502 402	415 893		3 357 943	470 112		

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	Sche	2000	2001	2002	2003	2004	TOTAL	VAT x 14%	IT x 30%	STC x 12.5%
<b>6. Discount &amp; Over allowance</b>										
6.1 Income Tax	H	983 864	1 475 943			2 459 807		737 942		
6.2 Input Vat disallowed	H	983 864	1 473 943	1 866 801		4 326 608	605 725			
<b>7. Vouchers</b>										
7.1 Demo Expenses Admin	I	314 547	393 414	405 801			1 113 762		334 129	
<b>8. OTHER ADDITIONAL ASSESSMENTS RAISED FOR BALANCE ON THE STATEMENT OF ASSETS AND LIABILITIES</b>										
<b>8.1 Journals</b>										
8.1.1 Year-end Journals added back	J		652 473				652 473		195 742	
<b>8.2 Stock</b>										
8.2.1 Stock reconciled to Creditors	K		1 321 531				1 321 531		396 459	
8.2.2 Journal Drs Income	K		362 680				362 680		108 804	
8.2.3 Diff on Reconciliation	K		237 930				237 930		71 379	
<b>8.3 Creditors</b>										
8.3.1 Accrued Expenses	L		143 603				143 603		43 081	
8.3.2 Provisions Discount	L		36 989				36 989		11 097	

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	Sche	2000	2001	2002	2003	2004	TOTAL	VAT X 14%	IT X 30%	STC X 12.5%
8.4 Debtors										
8.4.1 Credit Deposits	M		19 053				19 053		5 716	
8.4.2 Provisional Salary (Suspense Acc)	M		3 033				3 033		910	
9. STC ON DEBIT LOANS ACCOUNTS										
9.1 Loan Account in debit										
9.1.1 STC Deemed Divided	N		351 812				351 812			43 977
10. DISALLOWANCE OF WAGES CLAIMED										
10.1 Salary & Wages	O			343 469			343 469		103 041	
<b>11. TOTALS</b>		<b>38 543 975</b>	<b>35 468 139</b>	<b>48 698 971</b>	<b>47 361 687</b>	<b>321 559</b>	<b>170 396 331</b>	<b>23 313 579</b>	<b>5 341 898</b>	<b>43 977</b>

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	2000	2001	2002	2003	2004	TOTAL	VAT X 14%	IT X 30%	STC X 12.5%
<b>12. NORMAL TAXATION</b>									
12.1 % TAXATION	x 30%	x 30%	x 30%	x 30%	x 30%	x 30%			
12.2 CAPITAL	711 123	8 244 995	8 850 208	-	-	17 806 326			
12.3 TAXATION	213 337	2 473 499	2 655 062	-	-	5 341 898		5 341 898	
12.4 200% PENALTIES	426 674	4 946 997	5 310 125			10 683 796		10 683 796	
<b>12.5. TOTAL ADDITIONAL ASSESSMENTS</b>	<b>640 011</b>	<b>7 420 496</b>	<b>7 965 187</b>			<b>16 025 693</b>		<b>-</b>	<b>16 025 693</b>

13. VAT

13.1 % TAXATION	x 14%	x 14%	x 14%	x 14%	x 14%	x 14%			
13.2 CAPITAL	37 849 910	26 706 375	40 577 485	46 381 763	90 268	151 607 801			
	5 298 987	3 919 130	6 377 883	7 473 371	243 929	23 313 579	23 313 579		
13.3 TAXATION ON CAPITAL	5 298 987	3 738 893	5 680 848	6 493 447	12 638	21 225 092			
13.4 TAXATION A + C	-	180 237	697 035	979 924	231 291	2 088 487			
13.5 200% PENALTIES	10 597 975	7 838 259	12 755 766	14 946 742	487 857	46 627 158	46 627 158		
13.6 PENALTIES ERROR	Note 15	466 278	466 278	466 278	466 278	2 331 389	2 331 389		
<b>13.7 TOTAL ADDITIONAL ASSESSMENTS</b>	<b>16 363 240</b>	<b>12 223 666</b>	<b>19 599 926</b>	<b>22 886 390</b>	<b>1 198 063</b>	<b>72 272 126</b>	<b>72 272 126</b>		

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	2000	2001	2002	2003	2004	TOTAL	VAT X 14%	IT X 30%	STC X 12.5%
14. STC									
14.1 % TAXATION	x 12.5%	x 12.5%	x 12.5%	x12.5%	x12.5%	x 12.5%			
14.2 CAPITAL	-	351 812	-	-	-	351 812			
14.3 TAXATION	-	43 977	-	-	-	43 977	-	-	43 977
14.4 200% PENALTIES	-	-	-	-	-	-	-	-	-
14.5 TOTAL ADDITIONAL ASSESSMENTS	-	43 977	-	-	-	43 977	-	-	43 977
GRAND TOTAL									88 341 796

15. Notes

1: Penalties calculated at R48 958 546 is incorrect. If it calculated correctly the amount should be R46 157 which is two times 23 313 580

**[3] EVIDENCE ON BEHALF OF THE APPELLANT (TAXPAYER):**

**(3.1) Dr G**

3.1.1 His qualifications and experience were not in dispute and can briefly be summarized as follows:

(a) He has various academic qualifications:

- Bachelor of Commerce – 1964 (Potchefstroom University)
  
- Honors Bachelor of Commerce – 1966 (Potchefstroom University)
  
- Masters of Commerce/Accounting – 1968 (Potchefstroom University)
  
- Doctor of Commerce/Accounting – 1972 (Potchefstroom University)

(b) He has also lectured in advanced Accounting/Cost at:

- Potchefstroom University
  
- Johannesburg Technikon
  
- Westville University / School of Business Administration

(c) He also has professional qualifications:

- Certificate for the Theory in Accounting – 1966
  
- Registered Practicing Chartered Accountant – 1968
  
- Registered Practicing Commercial and Financial Accountant – 1969

(d) He was, at least partially, instrumental in regard to the introduction of VAT and in fact the first regulations regarding VAT were drafted by him and Adv Vuka Tshabalala (Chief Justice in Kwa-Zulu Natal) with the assistance of SARS when the first VAT regulations were issued to govern the liquor trade in South Africa.

(e) He has, for many years, been involved in furnishing expert opinion in respect of profit calculations in various disputes and/or matters.

3.1.2 He was not called, as an expert witness, although the indication was initially that he would be called as such. The reason for this was never explained.

3.1.3 Although, to some extent, he gave opinion evidence, which he conceded under cross-examination, he also gave direct evidence. In this regard the following should be mentioned:

(a) Meetings and conversations he had with Miss V;

(b) His invitation at his offices to SARS to inspect / peruse files, documents etc.

- 3.1.4 Dr G did not prepare the Appellant's books of account. However, he expressed an opinion in this court that same was correct. The people who prepared the books were not called in to testify as to the correctness thereof as well as to answer SARS questions in that regard.
- 3.1.5 On quite a number of occasions when asked about the contents of books and how and why certain entries were made, this witness responded by saying that things were done by the previous auditors and therefore he could not give an answer. For instance when asked why there was an entry for cost of sales amounting to R27m he stated that he did not know why the amount was there. He conceded under cross-examination and upon examination by the court that it appeared that the directors in certain instances used estimates in their books. Therefore, as an analyst he has accepted such estimates as correct and wants SARS to do same. When asked whether he has investigated the sources for the vat reports he responded by saying that he did not check comprehensively because it would have been a long process. He only took the result and applied his theory or analysis thereto.
- 3.1.6 However, in some respects his evidence was not challenged, for instance when he made it clear that the (over 3 000) files concerning purchases (of second hand vehicles) from vendors and non-vendors were available but (apart from random perusal by SARS) these files were never scrutinized by SARS (Respondent).

3.1.7 The Respondent submits that his evidence is in admissible and the Court should not place any reliance thereon or on any document he has submitted to the Court. I do not agree that **all** of his evidence is of such nature, so not to place any reliance thereon for the reasons set out in **paragraphs 3.1.3 and 3.1.6 above**.

(3.2) **Mr W**

- 3.2.1 He testified that he was one of the directors of the Appellant.
- 3.2.2 He testified that they used a T prescribed system which he personally did not understand how it works as he was “computer illiterate”.
- 3.2.3 He mainly testified in relation to the running of the business. Further he only testified in relation to Income Tax portion of the dispute. His evidence was essentially that he had nothing to do with the books of the business as that was done by the auditors. He would only come in about two or three days a week.
- 3.2.4 He also testified that SARS did an audit on his premises for a period of ±6 weeks during which period everything was at the Respondent’s disposal – a fact never denied by SARS and in fact confirmed by Miss V.

3.2.5 He further testified that they rented a parking, they used petrol vouchers, certain cheques were made payable to ABT, they also paid for some charter fees for the rental of an aircraft which the taxpayer paid for and claimed the expenditure thereof as well as some entertainment expenses for tax purposes.

[4] **EVIDENCE ON BEHALF OF THE RESPONDENT (SARS):**

(4.1) Only **Miss V** testified.

(4.2) She testified to the effect that they (SARS audit team) notified the Appellant about the impending audit and also stated what information the Appellant should make available to them on arrival. They spent six weeks at the Appellant's premises trying to conduct the audit but not all information was made available to them. However, under cross-examination she conceded that she saw the parking and had access to all documentation which was made available to her and nothing was ever withheld while she was on the premises.

(4.3) She clearly wanted to water down the **accessibility** to everything in favour of emphasising that everything was not given/handed to her/them being the audit team. Yet, the evidence of neither Dr G nor Mr W in this regard (that everything was at their disposal) was never challenged.

(4.4) As to her testimony that Mr W and Dr G worked on certain presumptions, they made certain concessions in this regard.

[5] **THE RELEVANT LAW:**

(5.1) **General**

5.1.1 Reference is only made to the most important aspects.

(5.2) **Looking at what the Legislature seeks to address**

5.2.1 The approach was already to seek and determine the intention of the Legislature. This is still the case, but now there is at least a subtle change in the approach in that one now has to look at what the Legislature seeks to address.

5.2.2 See in this regard **Commissioner, SARS v Arirworld CC 2008(3) SA 335 SCA at 345 and 346**

*“Most of the rules of interpretation have been devised for the purpose of resolving apparent ambiguity and arriving at an interpretation which accords as well as possible both with the language which the legislature has used and with the apparent intention with which the legislature has used it. In recent years courts have placed emphasis on the purpose with which the legislature has enacted the relevant provision. The interpreter must endeavour to arrive at an interpretation which gives effect to such purpose. The purpose (which is usually clear or easily discernible) is used, in conjunction with the appropriate meaning of the language of the provision, as a guide in order to ascertain the legislator’s intention. Thus, in Standard General Insurance Co Ltd v Commissioner for Customs and Excise, Nugent and Lewis JJA said:*

*Rather than attempting to draw inference as to the drafter’s intention from an uncertain premise we have found greater assistance in reaching our conclusion from considering the extent to defeats the apparent scope and purpose of the legislation. As pointed out by Nienaber JA in De Beer Marine...when dealing with the meaning of ‘ export’ for the purpose of s 20(4)- which draws a distinction between export and home consumption- the word ‘take its colour, like a chameleon, from its setting and surrounds in the Act.”*

(5.3) **Penalty imposed – act or omission by the taxpayer with the intent to deceive.**

5.3.1 **SEE: COMMISSIONER OF INLAND REVENUE v DA COSTA 1985(3) SA 768 AD AT 776 - 777**

*“It will be recalled that in terms of s 76 (2) (a) the Commissioner may not remit the penalty imposed under ss (1), or any part thereof, if he is satisfied that any act or omission of the taxpayer referred to in that subsection was done with intent to evade taxation, unless he is of the opinion that there were extenuating circumstances. The Special Court’s approach was clearly that, because in its view the respondent’s agents had acted with intent to evade taxation, the penalty could not be remitted unless extenuation existed. Assuming that such intent can be ascribed to the aforesaid firm, I am not satisfied that the Court a quo adopted the correct approach. The key words of s 76 (2) (a) are “any act or omission of the taxpayer ... done with the intent to deceive”, and it is certainly arguable that this phrase applies only to an actual – and not also an imputed - intention of the taxpayer. However, in view of the conclusion at which I have arrived, I find it unnecessary to decide this point. I shall thereto assume in favour of the appellant that the penalty could not be remitted unless extenuating circumstances were present.”*

[6] **DISCUSSION:**

**(6.1) VAT Reconciliations – Differences Vat reports and VAT 201 liability amount R 681 208**

**(CASE NO: VAT 471 p 207)(EXHIBIT A-Schedule A: Annexure 12).** [X – par 2.1]

The taxpayer could not explain the differences nor provide any evidence that reconciliation was done and how this variance arose. Normally as an internal control check in practice one normally compares your **month end vat** control account to that of

the **vat form** for audit purposes in order to ensure that one is not over or under paying. If the taxpayer does not pay the liability or claim the amount per the vat control account, then the taxpayer would work out the correct amount, but notes and evidence must be on hand to support this correction. When the witness for the taxpayer being the financial director (Mr W) was questioned about this variance he did not, nor could he provide either a reasonable explanation or documentation explaining this variance. Consequently, **I agree with SARS** on their raising this additional vat of R 681 208.

**(6.2) Difference output and turnover (GL & VAT Reports) liability amount R 4 912 808 (CASE NO: VAT 471 p 209)(EXHIBIT A: Annexure 13 par 7.4) [X – par 2.2]**

The taxpayer could not explain the differences between the GL accounts relating to sales, compared to that reflected on the vat 201 form. When examining the documents that were prepared by the taxpayers witness and put before the court we found the following discrepancies:

6.2.1 The taxpayer in the year 2001 did not deduct the SO CALLED “**SWOPPINGS**” amounting to R 11 859 231 from the gross turnover figure of R 81 732 960 but rather added this amount to the R 81 732 960;

6.2.2 When we looked at the 2002 tax year we noticed that there was a total of R 33 139 172 that should be deducted. However, only R 17 647 004 was deducted;

6.2.3 When the court looked at the 2003 tax year we noticed that the entire amount of R 26 783 661 was deducted and when the witness for the taxpayer was questioned on this he **merely indicated that he did not know**.

It was not possible to ascertain whether these adjustments are accurate and should be adjusted, as NO supporting documentation was provided to disallow this assessment.

In conclusion **I agree with SARS** on raising the liability of R 4 912 808.

**(6.3) Deemed Input total liability R 14 099 943**  
**(CASE NO: VAT 471 p 210)** [X – par 2.3]

6.3.1 SARS has disallowed the deemed vat input on **ALL purchases of second hand vehicles that the taxpayer has purchased**, be it from a registered vat vendor or a private individual. The argument of SARS in this regard is that they insist on a so-called “**declaration**”. The further argument of SARS is that they did not receive all the files in this regard;

6.3.2 The argument of SARS is contained in paragraphs 3 to 31 of the heads filed on behalf of SARS;

6.3.3 The **gist** thereof is as follows:

(a) In paragraphs 4 to 6 of its heads the Respondent submits as follows:

*"4. In terms of the Value Added Tax Act, 89 of 1991 ('the Act') the VAT vendor is entitled to claim a VAT input refund from the Commissioner where the vendor has received a supply of goods in the course of its enterprise or trade. For the vendor to be able to successfully claim its VAT input refund the vendor must produce an **invoice** depicting the transaction which entitled it to the refund.*

*5. In the absence of an invoice no input tax can be claimed by a VAT vendor. This fact is clearly stated in s16(2) of the Act which reads: "No deduction of input tax shall be made in terms of this Act in respect in terms of a supply or the importation of any goods into the Republic, unless – (a) a tax invoice... in relation to that supply has been provided in accordance with section 20 or 21 and is held by the vendor making that deduction at the time that any return in respect of that supply is finished."*

6. *The law is therefore very simply. No invoice, no input tax deduction or claim. This is a cardinal rule in the VAT legislation and is the basics of the operation of the VAT system.”*

(b) The Respondent emphasizes that the Appellant failed to comply with VAT News No. 15 and VAT News No. 20.

6.3.4 Fact is that the aforesaid news letters can never be more authoritative than **section 20(8)** of the VAT Act which reads as follows:

*“Notwithstanding anything in this section, where a supplier makes a supply (not being taxable supply) of second hand goods or of goods as contemplated in section 8(10) to a recipient, being a registered vendor, **the recipient shall**, in the form as the Commissioner may prescribe, where the value of the supply is R1000 or more, **obtain and maintain a declaration** by the supplier stating whether the supply is a taxable supply or not and **shall** further maintain sufficient records to enable the following particulars to be ascertained:*

*(a) (i) **The name of the supplier and-***

*(aa) where the supplier is a natural person, his identity number...*

*(bb)*

*Provided that the recipient-*

*(A) Shall verify such name and identity number of any such natural person with reference to his identity document,... and where the value of the supply is R1000 or more, retain a photocopy of such name and identity number appearing in such identity document...*

*(ii) **the address of the supplier...**”*

(My emphasis)

- 6.3.5 There was evidence put before the court where the taxpayer produced VAT INVOICES from other traders that charged vat on their sales to the taxpayer, on which Miss V from SARS could not deny and merely said it was not all the invoices, despite the fact that the counsel for SARS was invited by the taxpayer to come and view ALL the files. Counsel said that **samples** thereof will be sufficient. Counsel for SARS however, did not object to the statement made by the taxpayer;
- 6.3.6 Further deemed input relating to trade in's were also disallowed by SARS based on the principle that the taxpayer did not comply with the requirements of section 20 (8) of the VAT Act. It is SARS insistence that a **declaration** could not be found, nor were there accurate and complete records so as to make a decision. As mentioned, evidence was put to the court reflecting contrary statements alleged by SARS. The court randomly requested 3 files from the taxpayer where trade inn's were done and the taxpayer was able to provide the essence of the information as required by section 20 (8). Counsel for the taxpayer also showed the SARS official during the hearings a spreadsheet of ALL trade-ins with name's , ID numbers on file , invoices etc and she confirmed that the spreadsheet box for the ID column was comprehensive with only a few not ticked;
- 6.3.7 In conclusion, I am not satisfied that SARS had done enough to raise this assessment and hence conclude that this assessment be reversed.

**(6.4) Zero % (Vat amounts) R 1 407 279 (CASE NO: VAT 471 p 212) [x – par 2.4]**

6.4.1 The taxpayer had supplied various journal entries to SARS explaining how the transactions flow from the floor plan to the stock item in the general ledger. Admittedly one of the accounts that are credited is the credit sales account. The question that needs to be asked is that if this is not a sale, why then credit sales? When the variances between the accounting records for sales did not reconcile to the Vat 201, surely the taxpayer could easily show or prepare a recon that these were not sales, but rather incorrect account bookings to the sales account. Amongst all the reconciliations and vat queries raised on sales variances, the court could not find any reconciliation reflecting this adjustment;

6.4.2 In conclusion we were not provided with any documents that SARS was not correct in their assessment;

6.4.3 Consequently, I agree with SARS pertaining to the additional assessment raised on zero rated transactions.

**(6.5) Sales at no consideration vat liability of R 856 141 and income tax of R 1 667 411**

**(CASE NO: VAT 471 p 214) [X – par 3.1]**

- 6.5.1 The taxpayer had supplied the court with journal entries that show that some vehicles were brought into stock by debiting stock and crediting a creditor, and later would invoice these vehicles at zero consideration; the taxpayer's reason was that this was done to cancel the transaction. In practice when stock is purchased **the supplier** would issue a credit note and this would cancel the purchases **and NOT a sales invoice**, as these two transaction types are different and have the opposite effect on the stock;
- 6.5.2 The taxpayer's reply to SARS's query and the journals supplied do not make any logical sense and the explanation seems misleading at best;
- 6.5.3 As both the vat and the income tax accounts are affected I would agree with SARS on the assessment on both vat and income tax.

**(6.6) Incentive bonuses – vat liability R 470 112 and income tax R 882 615**

**(CASE NO: VAT 471 p 216)** [X – par 5]

- 6.6.1 As the taxpayer is a vat vendor, the 'kick backs' which are neither an exemption nor zero rated supply has to have a vat element to it. It would also be part of the taxpayer's income. The taxpayer has acknowledged and agreed to the assessment raised, however they disputed that the debtors in credit balances of R 2 258 897 (2002) not be taken into

the calculation. The taxpayer, when asked about the nature of this credit balance could not supply an adequate explanation or documentary proof on why these debtors were in credit. The taxpayer on NUMEROUS occasions stated that their computer system was not accurate and at best estimates were used. This statement in my view is not acceptable (let alone convincing) as the system (as the taxpayer mentioned) was supplied by T SA and I am not sure if an international company of that stature would put its clients in jeopardy;

6.6.2 The taxpayer and the witness for the taxpayer on various occasions mentioned to the court that they did not understand how some of the transactions happened or why they were adjusted;

6.6.3 Due to the inadequate explanation by the taxpayer, I agree with SARS on the assessment.

**(6.7) Discount and over allowance vat liability R 605 725 and income tax liability R 737 942  
(CASE NO: VAT 471 p 217) [X – par 6]**

6.7.1 The taxpayer alleged (when questioned by the court how this transaction happens) that clients were given discounts on new purchases, but due to strict rules by the supplier that a maximum discount threshold be allowed, they would normally bypass this by giving clients cheques that would be cash at “**the front desk**”. **These** cheques would either be made out to the taxpayer / cash / the client. When the financial director was asked why he did this, and why he did

not think it prudent that all that the taxpayer had to do was increase the trade in's value, he concurred and accepted that what they did was not correct;

6.7.2 It was difficult for the court to establish if these were *bona fide* discounts as NO documentary evidence could be provided to this effect;

6.7.3 The Respondent in his heads of argument claim that the expenses were disallowed, because there were not invoices to support this claim. There was no dispute as to the deductibility of these expenses. The Respondent requested that the expenses were actually incurred as required in terms of section 11(a). The Appellant testified that there was an analysis of these expenses. He referred to Schedule C. This Schedule (i.e. Schedule C) was never presented in Court. Considering that the witness knew that the onus was on the taxpayer to proof deductibility, it is therefore trite to refer to a document and not produce it;

6.7.4 Hence, I agree with SARS on the vat and income tax raised.

**(6.8) Demo expenses admin. Income tax liability R 334 129  
(CASE NO: VAT 471 p 218) [X – par 7.1]**

- 6.8.1 SARS disallowed the taxpayers claim for fuel which was in the form of a coupon system. The taxpayer has provided a reasonable explanation and has produced evidence to the effect that these coupons were pre numbered, and, from a control point of view, was administered by one of the directors;
- 6.8.2 The reason for these coupons and why this expense was claimed is reasonably justified, and in my view SARS's argument, when asked why they disallowed it, the SARS witness mentioned that anyone can covert the coupons to cash;
- 6.8.3 This explanation was of no foundation, hence, I do not agree with this assessment raised.

**(6.9) Journals at year end added back – income tax liability R195 742**

**(CASE NO: VAT 471 p 219)** [X – par 8.1]

- 6.9.1 SARS has raised the income tax liability due to the fact that there were entries that were reallocated and the taxpayer alleged that this was done by the auditors;
- 6.9.2 The taxpayer up to the day of the hearing could not produce ANY evidence that could convince us that these entries were justified;

6.9.3 It is puzzling that the taxpayer accepted the auditor's journal without actually getting the information as this may affect the next year's opening balance. The taxpayer merely stated that they were waiting for information, this is not reasonable for allowing these expenses;

6.9.4 In passing, it should be mentioned that I cannot see any correlation between entertainment, transport, repairs, advertising and subscriptions in this journal and neither has any proof been produced in this regard;

6.9.5 I agree with the assessment raised.

**(6.10) Stock - income tax liability R 576 642**  
**(CASE NO: VAT 471 p 220) [X – par 8.2]**

6.10.1 From what SARS has produced on the under declaration of stock and journals affecting the stock items as stated in the taxpayers financial statements, I would agree with their calculations. Under cross examination the witness for the taxpayer agreed with the court that purchases not sold at year end, but recorded before year end should be included as stock. When asked why his client had not done so he merely said he does not know;

6.10.2 The witness for the taxpayer gave replies which were totally unacceptable and/or misleading;

6.10.3 However, SARS had obtained these stock sheets from the taxpayer's auditors;

6.10.4 In conclusion, I agree with SARS on their assessment.

**(6.11) Creditors, accrued expenses and provision account. Tax**

**raised R 54 178**

**(CASE NO: VAT 471 p 220) [X – par 8.3]**

6.11.1 The taxpayer, during cross examination, admitted that estimates were used to claim these expenses;

6.11.2 However, when asked if, after year end, invoices totalling these expenses were supplied to SARS at the time of the audit, which was SOME TIME AFTER, the reply was merely that it was an estimate;

6.11.3 We were not convinced with this explanation and henceforth agree with SARS on their assessment.

**(6.12) Debtors – Credit deposits and provisional salary. Income tax liability R 6 625.80**

**(CASE NO: VAT 471 p 221) [X – par 8.4]**

6.12.1 We read the response to SARS's assessment and the taxpayer conceded on the correctness of the assessment and we concur with SARS as to this assessment.

**(6.13) Loan account in debit. STC Liability R 43 976.50**

**(CASE NO: VAT 471 p 221)** [X – par 9.1]

6.13.1 The taxpayer, under cross examination, indicated that there was a repayment of R 130 000;

6.13.2 No documentary proof in the form of either an EFT / returned cheque/**Bank statement entry** was produced;

6.13.3 Though the taxpayer indicated that interest was raised, there was no evidence supplied by the taxpayer to the court;

6.13.4 Due to this lack of information and journals/ audit trails to establish the interest raised, we concur with SARS on the assessment raised.

**(6.14) Expenses. Vat liability R 280 363 and income tax liability**

**R783 572**

**(CASE NO: VAT 471 p 222)** [X – par 4.1]

6.14.1 As numerous accounts were identified and disallowed for tax and vat we would in short identify these accounts and conclude whether SARS was correct or not:

- A. **AB cheques.** We agree with SARS as no evidence contrary to SARS's assessment was supplied;
- B. **Insurance.** The taxpayer had conceded to the finding of SARS;
- C. **Rental flat.** The taxpayer had explained this expense. However no invoice, signed lease agreement or returned cheque or any other information were supplied to convince the court if this was a business expense;
- D. **Rental parking.** The court found that SARS had admitted under cross examination that there was a parking area. However, she (V) was not provided with relevant information; she also testified that there were cars belonging to clients or the taxpayer.

We find that SARS was not correct on this assessment.

**Thus in this category the amount of Income tax R26 676 and VAT R18 848 should be allowed;**

- E. **Travel costs Uvongo.** The director testified that the flat was used when employees attended training in the area. However, the company paid rental for the whole year (i.e. even when the flat was not used by the taxpayer).

The court is not convinced that it was genuine as no documentary proof could be supplied, hence the court agrees with SARS's assessment;

- F. **Hanger costs.** The taxpayer testified that drivers were sent to the factory to bring stock back to the showroom. Hence, this expense is for business purpose. However, the court feels that the taxpayer did not discharge its burden of proof as NO documentary evidence could be supplied e.g. passenger details, dates, stock number drove by driver, invoice etc;

- G. **Entertainment expenses.** The taxpayer could not provide invoices and merely indicated that this was for business. We concur with SARS;

- H. **General expenses.** The taxpayer neither disputed nor provided information to the contrary. Hence, we agree with the assessment.

**(6.15) Salaries and wages – Income tax R 103 041**

**(CASE NO: VAT 471 p 223) [X – par 10.1]**

6.15.1 SARS had tried to reconcile the salaries and wages per the financials to that reflected on the IRP 5 and the wages records, and found per their calculations that there was an overstatement of salaries claimed;

6.15.2 The taxpayer's witness denied the overstatement and supplied the court with his own reconciliation. The court had questioned the witness of the taxpayer as to why he had not shown the employer contribution to a pension fund/ provident fund and UIF and the witness was not able to justify / explain that;

6.15.3 Hence, it brought his reconciliation to doubt and the accuracy thereof. I am of the view that though SARS had also eliminated the employer contributions, it was up to the taxpayer to provide an accurate recon. Hence, we find in favour of SARS.

**(6.16) In conclusion, taking everything into account, including that the witness for taxpayer was before the trial commenced, called an expert witness and for some or other reason it was mentioned to the court that he will be referred to as a witness. During the trial there was a pattern where the witness for the taxpayer made contradictory statements. Therefore, the INTEREST AND PENALTIES as raised by SARS be allowed.**

**[7] COSTS:**

(7.1) The taxpayer was substantively successful and is entitled to costs.

[8] **ORDER:**

I make the following order:

1. *The appeal is upheld;*
2. *The tax raised by SARS as per paragraph 6.3 and 6.8 above are set aside / reversed;*
3. *The tax raised by SARS as per paragraph 6.14 are confirmed / allowed with the exception of the amount of income tax R26 676,00 and VAT R18 848,00;*
4. *The tax raised by SARS as per paragraphs 6.1, 6.2, 6.4, 6.5, 6.6, 6.7, 6.9, 6.10, 6.11, 6.12, 6.13 and 6.15 are confirmed / allowed;*
5. *The penalties and interest raised by SARS are confirmed as to the items / VAT / income tax which are confirmed;*
6. *The Respondent is ordered to pay the costs of this appeal.*

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**GOODEY AJ**

Date heard:

Date of Judgment:

Counsel for the Appellant:           Adv D Cloete  
  Pretoria

Legal representatives for SARS:       SARS