REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 13695

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

....
DATE SIGNATURE

In the matter between:

MRS X **Appellant**

and

COMMISSIONER FOR THE **Respondent**

SOUTH AFRICAN REVENUE SERVICE

J U D G M E N T

MASIPA, J:

INTRODUCTION

[1] The appellant is Mrs X. At all relevant times she operated as an estate agent. She was the founder and chief executive officer of X Property Holdings, ('X'), during the years of assessment. The appellant is registered for income tax purposes. This appeal is against the final decision of the respondent relating to the appellant's 2007 to 2010 years of assessment.

[2] The respondent conducted an audit of the appellant's tax affairs and alleged that income was received by the appellant but not declared. Accordingly on 8 August 2012 the respondent issued additional assessments in terms of section 79(1) of the Income Tax Act wherein the appellant's gross income for the years of assessment was adjusted using her bank statements as a basis.

[3] On 5 February 2013 the appellant objected to the assessment and on 24 June 2013 the respondent disallowed the objection. On 11 February 2014 the appellant appealed against the disallowance of the objection.

[4] Although the initial amount which was the subject of the dispute was R16 976 330.24, that assessment was ultimately reduced to R5 760 757.88 which is made out as follows:

2007	R540 050.17
2008	R2 879 437.41
2009	R2 059 270.30
2010	R282 000.00
TOTAL	R5 760 757.88

[5] According to the appellant the disputed income is of a capital nature and not gross income while the respondent contends that the income concerned is gross income.

ISSUES TO BE DECIDED

[6] Exhibit A is the appellant's trial bundle. The first page of the exhibit concerned has a schedule comprising 46 items which initially all formed the basis of the dispute. At the commencement of the trial each party conceded certain items. This curtailed proceedings exceedingly as the total number of disputed item was then reduced to 25 items.

[7] The issue to be decided is whether the disputed income is of a capital nature as alleged by the appellant or whether it is gross income as contended by the respondent.

[8] Because of the nature of this matter it is necessary, at the outset, to mention that many of the transactions referred to in this matter involve the appellant's financial dealings with various entities. Annexure 'B' is a summary of the profiles of the entities referred to during evidence. The entities are:

1. A Trading CC ('A Trading');
2. D Entity (Pty) Ltd ('D Entity');
3. E Trading 308 CC ('E Co');
4. J Entity Building CC ('J Entity');
5. Mrs X Family Trust ('the Trust');
6. Mrs X Property CC ('X CC').

THE APPELLANT'S CASE

[9] The appellant called one witness, Mr Y, her accountant, at all relevant periods. His evidence covered a number of items some of which are related to one another. I proceed to deal with each in turn.

ITEM 4: DEPOSIT OF R2 000 000.00 ON 7 MAY 2008

[10] This transaction concerns A Trading and/or D Entity both wholly owned by the appellant. Y's evidence was that due to the financial distress of the Estate Agency belonging to the appellant, ('X CC'), additional funds were required and such funding was secured through the spare equity of assets owned by A Trading and D Entity.

[11] The initial testimony was that the appellant borrowed money from A Trading and D Entity for injection into X CC. Later Y stated that the appellant did not

borrow money from A Trading, but from D Entity. This evidence was changed once more to the effect that the loan agreement was in fact between X CC and D Entity and not between the appellant and D Entity.

[12] Y's evidence was that funds were transferred from B Bank to the appellant's personal bank account, after which it was transferred into the X CC bank account. From the evidence the basis of such an arrangement was not clear. Under cross examination Y stated that the appellant wanted to "see the money flow". He also stated that the appellant wanted to exercise control.

[13] It was also Y's evidence that the appellant was a 'conduit' through which other entities, not having bank accounts, moved funds. That position is not applicable to this deposit as X CC had its own bank account.

[14] I find the evidence of Y with regard to the flow of funds improbable for a number of reasons. The appellant had full control over both D Entity and the X CC as member or director of both the entities and would have been able to control the flow of funds even if D Entity had made the advance directly to X CC. I, therefore, find it improbable that the deposit would have been made to the appellant if indeed the loan agreement was between X CC and D Entity.

[15] Y referred this court to annual reports of D Entity for the year 2009 financial year. He was unable to provide the source documents relating to the report (i.e. the general ledgers) and could not show that the R2 million formed part of the debtor account in the D Entity report, or that the R2 million was ever repaid to D Entity.

[16] During re-examination Y stated that he was aware of bank statements showing that other funds, (i.e. not funds currently on appeal), were transferred

from A Trading and D Entity directly into the X CC accounts. In my view, this supports the submission, on behalf of the respondent, that the deviation from the practice to transfer moneys directly to the X CC indicates that deposits into the personal accounts of the appellant were deposits meant for her personally.

[17] Referring to page 4 of Exhibit A, Y alleged that this was a schedule that was issued by B Bank allegedly showing advances made by B Bank.

[18] This is the most unhelpful piece of evidence. Nowhere in this document is there mention of the B Bank. That, however, is not the only problem. Item 4 in the schedule reads:

> Settle initial cash advance: Approved – R2 000 000; Actual – R2 022 561.64; Excess – R22 561.64.

The schedule has no title and does not say what the various figures appearing thereon are or who the author is. Source documents are not identified while, as stated earlier, there is no indication on how the schedule is connected to the B Bank. Most importantly the schedule does not shed light as to how D Entity accounted in its own books for the R2 million 'loan' to the appellant, alternatively to X CC. It simply confirms that a cash advance was made, but does not necessarily establish a nexus between the R2 million in dispute and the advance.

[19] What is interesting is that there was no serious attempt to explain the glaring discrepancy between the money in dispute and the amount in the bank schedule. The amount in dispute is a round number, being R2 million, whereas the advance, according to the bank schedule, was R2 022 561.64. In the absence of a plausible explanation from the appellant, therefore, it

cannot be said that the advance and the deposit in dispute is one and the same transaction.

[20] What weighs heavily with this court is that, notwithstanding that at all relevant times, Y was also the accountant as well as a director of D Entity, he failed to furnish proof to support his version. Instead he made vague and confusing assertions regarding the disputed R2 million deposit. These assertions are impossible to verify as he produced no objective documentation.

[21] Objectively the facts are that a cash amount was advanced from D Entity to the applicant. In my view how she ultimately utilized the cash amount does not change the nature of the receipt, i.e. that of gross income.

ITEM 39, 40 and 45: 'CHEQUE DEPOSITS'

ITEM 5 to 8 BANK REFERENCE '1972047736 Current' AND ITEMS 39 to 46 'X Mr N'

[22] Y gave evidence that items 39, 40 and 45 should be considered with items 5 to 8 and 39 to 46 on the list of disputed deposits, on the basis that they are similar in nature.

[23] According to the appellant deposits in respect of the above items related to Mr M and Mr N. Y gave evidence that an agreement of lease was concluded between K Entity CC (formerly J Entity Trade CC and Mr M & Mr N). That agreement was no longer in his possession. He, however, referred to a copy of the rental renewal agreement on page 9 of Exhibit A.

[24] Evidence was that the deposit amount of R15000 reflected on page 9 of Annexure A, was the rental amount agreed upon. The deposits which appear

on the items under discussion all reflected rental amounts paid by Mr N to the lessor, K Entity.

[25] In her heads of argument counsel for the respondent referred this court to items 39, 40 and 45 in Exhibit D on pages 33, 34 and 39 respectively. All 3 items were described in Exhibit A by the appellant as X Mr N. The bank statement description of these items in Exhibit D, however, is at variance with the description offered by the appellant. No explanation was given in respect of these discrepancies. In view of this the appellant has failed dismally to prove that the deposits should be treated as anything other gross income.

[26] There are more unsatisfactory features in Y's evidence.

[27] Firstly, the Renewal Lease Agreement provides for a bank account of J Entity. When the court asked why the payments were not deposited into this account Y stated that the account was a bond account and that "the banks don't like people using it as a current account".

[28] Secondly, Y referred to page 30 of Exhibit A on which are hand written notes by an unknown author. The hand-written notes show the first deposit allegedly made by Mr N during April 2009. Counsel for the respondent referred Y to item 6, which is a deposit of R15 000 on 3 November 2006, which is well before the renewal lease and the first deposit according to the hand-written notes. Y conceded, during cross examination, that, having regard to the dates, item 6 could relate to something completely different to the Mr N lease.

[29] Thirdly, item 8 reflects an amount of R4 000. This amount is substantially different from the other Mr N deposits of R15 000. Y's explanation was that the R4 000 relates to water, electricity and other expenses. He could offer no

reasonable explanation why the service providers' expenses (i.e. municipality etc.) were not paid directly as provided for in the agreement. Clause 35.1(B) of the renewal lease agreement specifically provides for Mr N to make payment of water and electricity expenses to the relevant municipality, and not to the appellant.

[30] In our view the appellant has failed to discharge the onus that rests on her to show that items 5 to 8 and 39 to 46 are not income as defined in the Income Tax Act.

ITEM 10: DEPOSIT OF R12 841.04 ON 4 SEPTEMBER 2007 AND

ITEM 27: RECEIPT OF R1 076 069.76 i.r.o THE 'ZZZ sale'

[31] Y gave evidence that items 10 and 27 ought to be considered together. In respect of item 10 Y stated that he believed "that R12 841 was a refund of some conveyancing fees relating to that transaction where a courtesy was given by the conveyancing attorneys to Mrs X Family Trust . . ."

[32] This statement lacks certainty and cannot be relied on. More importantly, however, there seems to be no basis for such a courtesy. Counsel for the appellant, sought to argue that 'generally' the deposit must be seen within the context of X Family Trust not having a bank account.

[33] Contrary to what was argued on behalf of the appellant, Y's evidence was not lucid, let alone probable. The evidence of Y relating to item 10 is unsatisfactory and is rejected.

[34] In respect of item 27 Y referred this court to page 23 of Exhibit B. This is a summary document that Y stated he prepared the night before the commencement of the trial. It is a purported reconciliation of the cash flow of

the X Family Trust. This entity did not employ Y. It is, therefore, not clear where Y got his information from. Counsel for the respondent, correctly, in my view, submitted that this evidence could not be relied upon. This was a reconstruction of events that took place nearly ten years ago and there was no corroborating evidence in support of the content of the summary. Y conceded that all the documents that relate to the Trust should in fact be in the possession of the appellant as the Trust did not form part of any liquidation proceedings.

[35] Y stated that the Trust held a residential property known as 'ZZZ' which the Trust had sold. From this sale the Trust made a net profit of R1 076 069.76. Y referred this court to a comment in his summary which reads "Deposit – Paid by X personally on behalf of Mrs X Family Trust".

[36] Mr Y gave evidence in chief that this comment relates to a payment made by the appellant of R100 000. He could not, however, show that such payment was indeed made or the date of the alleged payment. Y also referred to a 'special facility' that was allegedly arranged by the appellant with ABSA to assist her cash flow. He did not testify as to whether the Trust was the debtor of the facility or whether the appellant, in her personal capacity, was the debtor of the facility.

[37] The summary that was prepared by the appellant is a reconstruction of the facts and cannot be relied upon.

[38] Y's evidence was that the Trust did not have its own banking account and that no accounting records were kept in respect of the Trust's financial affairs as the appellant did not have the necessary accounting skills to keep such records. The evidence about the banking account is incorrect as the Trust had

a bond account over the property held by it. There is also no merit in the assertion that the appellant lacked the required skills to keep proper records. I say this because in her multi-million enterprise the appellant assisted her clients with the conclusion of sale agreements and arranged financing on their behalf. It seems to me that she had the required skill and business acumen.

[39] While Y referred to the appellant as having been negligent it is clear that she, in addition, lacked respect for the separation of entities. Close corporations, Trusts and herself were viewed as one. In fact she viewed the finances of the entities as an extension of her personal financial affairs.

ITEMS 18 – 20: DEPOSITS FROM MR FG

ITEM 34: CHEQUE DEPOSIT OF R80 000.00 and

ITEM 36: CHEQUE DEPOSIT OF R65 000

[40] Y's evidence was that items 18 – 20, 34 and 36 all relate to Mr FG. Y alleged that the appellant regularly loaned money to Mr FG who was a friend of hers. Mr FG would repay such loans when he received income. During cross examination Y conceded that Mr FG was a business partner of the appellant and that partners share profits.

[41] The deposits from Mr FG were not described fully in the bank statements. Furthermore no other evidence was led on behalf of the appellant to distinguish purported repayments of loans from distribution of profit. Under cross examination Y, however, denied that Mr FG ever shared profit with the appellant as he did not have access to the finances of J Entity. Counsel for the appellant, correctly, submitted that this was another example that Y's evidence could not be relied on as earlier in his evidence he had stated that he was not even aware that Mr FG was a member of J Entity.

[42] Y conceded that no proof was available to show the existence of the alleged loans, the terms of repayment or agreement on interest.

ITEM 25: BANK REFERENCE 'NSOO' iro R50 000.00 on 12 March 2007

[43] Y gave evidence that an amount of R50 000 was transferred from one Nedbank account to another Nedbank account, both belonging to the appellant. He could not explain the rationale for the transfer of funds. The appellant did not present evidence to show that on a balance of probabilities the receipt was not income.

ITEM 26 RECEIPT OF R55 000.00 i.r.o THE SALE OF THE T PROPERTY

[44] The money relates to the sale of the property known as 37 FFF owned by Ms T, the appellant's foster child. What is striking about this item is that the money was received by the appellant although she was not a party to the sale of the FFF property. It is, highly improbable that the conveyancer would pay any portion of the proceeds of the sale to the appellant, in circumstances described in the evidence, when the attorneys have a fiduciary duty towards the seller and the purchaser. The appellant presented no evidence to support her averment that this particular receipt is not income.

ITEM 29: RECEIPT OF R20 000.00 WITH BANK REFERENCE '2009259009/1'

[45] The appellant failed to present any evidence in respect of this deposit during the trial or in Exhibit A. No basis, therefore, exist to treat this deposit as anything other than income.

ITEM 31: RECEIPT OF 510 000.00 WITH BANK REFERENCE '36-212-895-2(440035210)'

[46] Y gave evidence that upon receipt of the R510 000 from the Trust, the appellant transferred a total of R350 000 (R180 000 + R70 000 + R100 000) out of her account. Y did not provide an explanation for the balance of R160 000. He sought to link a purported debt due to the appellant by the Trust as per his summary on page 23 of Exhibit B to the receipt of R510 000. Counsel for the respondent correctly referred to this evidence as confusing as on page 23 there is no reference to the receipt of R510 000 at all. Again there was nothing to support Y's *ipse dixit*. The appellant did not present evidence to show that on a balance of probabilities the receipt was not income.

ITEM 38: CREDIT TRANSFER OF R45 297.85 ON 6 March 2006

[47] Y's evidence relating to this deposit was again vague in the extreme. An extract of the evidence reads thus:

> . . . a payment received per the bank statement from . . . I think it is A & A Co . . . It related to, I believe an accident . . .

Y stated that the insurance claim relates to damage to a property belonging to the D Entity close corporation and he was the accountant for D Entity at the time. Y could not explain why an insurance claim for a property belonging to D Entity would be paid to the applicant's personal account where D Entity had its own bank account.

[48] Y could produce no documents to support his averments. What is interesting, however, is that he referred to the scenario he was painting as 'strange' but insisted that the scenario is what the deposit relates to, " . . . as far as I could see".

[49] It is clear that Y did not have personal knowledge of the facts. As a result he reconstructed facts based on bank statements that were presented to him on behalf of the appellant.

PIERCING OR LIFTING THE CORPORATE VEIL

[50] Counsel for the respondent pointed out that the submissions under this heading related to items on the list of disputed deposits: 10, 27, 31, 39 to 46 and items 5 – 8 if the finding of the court is that the list of disputed deposits relate to the Mr N lease.

[51] The respondent is seeking relief from this court on two bases namely:

1. The respondent seeks relief to consider the obligations and liabilities of E Co CC and K Entity CC as that of the appellant personally in terms of section 65 of the Close Corporations Act, 69 of 1984; and
2. The respondent seeks relief to regard the obligations and liabilities of the Trust as that of the appellant personally by 'going behind' the Trust.

[52] Section 65 of the Close Corporations Act provides as follows:

> Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligation of liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration.

[53] There is a similar provision in the Companies Act 71 of 2008 which reads thus:

> (9). If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may—
>
> (*a*) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of any shareholder of the company or, in the case of a non-profit company, a member of the company, or any other person specified in the declaration;
>
> (*b*) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (*a*).

[54] A Tax Court trial (or appeal) qualifies as 'any proceedings' referred to in section 65 and the respondent qualifies as an interested party on the basis that the manner in which the appellant had conducted the affairs of the close corporations and the Trust has a direct negative impact on the tax collectible by the respondent.

[55] In *Ex Parte: Gore NO and Others* 2013 2 All SA 437 (WCC) the court spelt out the purpose of piercing or lifting the corporate veil as to:

> disregard some or all of the characteristics of separate legal personality that statute law ordinarily attributes to a duly incorporated company.

In the same decision the court stated the following:

> Juristic personality is a legal fiction (or a 'figment of law' as it has on occasion been referred to) and thus, when circumstances of a particular case make it appropriate to do so – inevitably in matters in which the concept has been

> used improperly, in a manner inconsistent with the rationale for the creation and maintenance of the legal fiction - courts will disregard it.

[56] In the *Gore* matter the applicants relied on the fact that the administration of a group of companies was dishonest and chaotic. The documents relating to the affairs of the group differed from the actual flow of funds. Moreover, the flow of funds was dictated largely by cash flow difficulties in the various entities.

[57] In the appellant's supplementary heads of argument Counsel for the appellant insisted that there was no veil to be pierced. He submitted that the principles pertaining to piercing or lifting the corporate veil do not apply in this matter and were irrelevant. His submission was that in item 10, the amount of R12 841.04, constituted a simple and basic transaction – a refund by a seller to the X Family Trust. That amount, however, had to be deposited into the appellant's account as the Trust did not have a bank account.

[58] I disagree that the principles pertaining to piercing or lifting the corporate veil do not apply or that the concept in this matter is irrelevant. On the contrary I am of the view that piercing or lifting the veil in this matter is warranted. It is so that courts will never 'lightly disregard' a corporation's separate identity or lightly find recklessness. (See *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995(4) SA 790 (A) at 803H; *Philotex (Pty) Ltd v Snyman* 1998 (2) SA 138 (SCA) 143F and 142H-I). Both these cases were cited with approval in *Ebrahim v Airports Cold Storage (Pty) Ltd* [2008] ZASCA 113, at para [22]. However, where there is evidence that there is unconscionable abuse of a juristic entity, as it appears in this matter, the court will act to avoid potential prejudice to interested parties.

[59] In *Ebrahim* the member used a number of close corporations to essentially run one business or trade. Many of the close corporations used by the member failed to submit the required tax returns to SARS. There was also no proper bookkeeping done to distinguish the finances of one entity from another. Cameron JA, as he then was, found that the fact that no record of VAT collected by any of the corporations was kept was "suggestive (if not compelling) inference is that there was never any intention to pay VAT". (See para [9].)

[60] In the present case Y conceded that the appellant was "remiss" in the manner in which she administered the affairs of E Co and J Entity. It was established during the trial that the appellant used her personal bank accounts to administer the finances of the corporations and the Trust. Y also conceded that the appellant kept no records to distinguish the finances of each of these entities from her own. The appellant did not provide evidence in contradiction of the respondent's statement that the appellant evaded her tax obligations by directly receiving rental and other income from the Family Trust and close corporations which she controlled.

[61] Ms H, who gave evidence on behalf of the respondent, told this court that the following entities failed to submit annual income tax returns, failed to declare any income and failed to pay income tax to SARS during 2007 to 2010:

1. E Co CC;
2. K Entity Building CC;
3. X.

[62] It is common cause that the income earned by the close corporations was to be declared to SARS as gross income and that that was not done.

The respondent merely seeks, as it is entitled, to collect the tax due on income earned. It could not collect from the close corporations due to the lack of accounting records. I am of the view that this is a proper case for the piercing or lifting the veil.

LOOKING BEHIND THE TRUST

[63] Y testified that funds belonging to the Trust were transferred through the appellant's personal bank accounts. The appellant, through her witness, Y, stated that the rationale for this *modus operandi* was that the Trust did not have its own bank account. It was established, however, that the Trust in fact held a bond account to which funds could have been paid.

[64] The appellant contravened her legislative duties as trustee when she failed to deposit funds belonging to the Trust into a separate account.

[65] Section 10 of the Trust Property Control Act 57 of 1988 provides as follows:

> 10. Trust Account. Whenever a person receives money in his capacity as trustee, he shall deposit such money in a separate trust account at a banking institution or building society.

[66] From the evidence it seems to me that the appellant used the Trust for a purpose other than the one for which it was created. The Trust was used to advance the appellant's personal financial position.

[67] The respondent contends, correctly in my view, that the profit made from trading within the Trust, (as opposed to her personal capacity), should be included as gross income of the appellant.

RELEVANT PROVISIONS OF THE INCOME TAX ACT

[68] Section 5 of the Income Tax Act provides:

> **5. Levy of normal tax and rates thereof.—**(1) Subject to the provisions of the Fourth Schedule there shall be paid annually for the benefit of the National Revenue Fund, an income tax (in this Act referred to as the normal tax) in respect of the taxable income received by or accrued to of in favour of—
>
> (*c*) any person (other than a company) during the year of assessment ended the last day of February each year . . .

[69] Taxable income is defined in section 1 as follows:

> **"taxable income"** means the aggregate of—
>
> the amount remaining after deducting from the income of any person all the amounts allowed under Part 1 of Chapter II to be deducted from or set off against such income; and all amounts to be included or deemed to be included in the taxable income of any person in terms of this Act;

[70] "Income" means the amount remaining of the gross income of any person for any year or period of assessment after deducting therefrom any amounts exempt from normal tax under Part 1 of Chapter II.

[71] "Gross income" is defined in section 1 of the Income Tax Act as follows:

> **"gross income"**, in relation to any year of period of assessment,
>
> means—
>
> (i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; . . .
>
> during such year or period of assessment, excluding receipts or accruals of a capital nature . . .

[72] For purposes of this particular case, the total cash amount received by the appellant, who is a resident, constitutes gross income.

[73] Section 66(13) creates a statutory obligation on taxpayers to submit annual returns and that such returns must contain a full and truthful disclosure of income. The section reads as follows:

> (13) The return for normal tax to be made by any person in respect of any year of assessment shall be a return—
>
> . . . The return of income to be made by any person in respect of any year of assessment shall be a full and true return.

APPLICATION OF THE LAW TO THE FACTS

[74] It is common cause that the appellant received various deposits through two bank accounts belonging to her personally. The appellant alleges in her rule 32 statement that the receipts are capital in nature on the basis that they were repayments of loans by borrowers. Y referred to the appellant as a conduit for various entities.

[75] The appellant failed to prove on a balance of probabilities that the receipts are repayment of loans by borrowers. I say this because there was not a shred of evidence showing the names of the borrowers; the date upon which the loan agreements were entered into; the amount that was borrowed from the appellant; the date upon which the loan amount was advanced to the borrowers and the terms of repayment.

[76] The appellant has produced no evidence to support her allegation that the receipts were repayments of loans and, therefore, capital in nature.

[77] The best evidence to prove income is through the use of bank accounts and IRP5 certificates. In the matter of *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) the court stated that:

> The Court, in drawing inferences from the proved facts, acts on a preponderance of probability . . . if the facts permit of more than one inference, the court must select the most 'plausible' inference.

[78] The only objective and reliable evidence at the disposal of this court are two sets of bank statements from C Bank and D Bank. These statements prove that:

1. The appellant received various deposits over and above the salaries received by her;
2. That the receipts are gross income as defined in the Act;
3. That the receipts were received during the years of assessment.

ONUS OF PROOF

[79] In her grounds of appeal, dated 11 February 2014, the appellant alleges that the amounts received by her and referred to in Annexure "A", are of a capital nature. The burden to prove this allegation is upon the appellant. This is in terms of section 102 of TAA which provides that:

> (1) A taxpayer bears the onus of proving—
>
> (*a*) that an amount, transaction, event or item is exempt or otherwise not taxable;
>
> (*b*) that an amount or item is deductible or may be set off;
>
> (*c*) the rate of tax applicable to a transaction, event, item or class of taxpayer;
>
> (*d*) that an amount qualifies as a reduction of tax payable;
>
> (*e*) that a valuation is correct; or

(*f*) whether a 'decision' that is subject to objection and appeal under a tax Act, is incorrect.

[80] The above-mentioned section raises a statutory presumption in favour of the validity of an assessment issued by the Commissioner, and the onus is placed on the appellant to show that an amount included in the assessment is not taxable. This approach was adopted in *Commissioner for Inland Revenue v Goodrick* 1942 OPD 1, 12 SATC 279, where it was held, at 296, that what is required of the taxpayer to discharge this onus is affirmative evidence that satisfies a court upon a preponderance of probability, that the amount is not taxable.

[81] Statements not corroborated by evidence are not sufficient to discharge the onus. (See *Silke, South African Income Tax*, Memorial edition, par 18. 27 at 18.63; ITC 1283, 41, SATC 36 at 37. In *Reliance Land and Investment Co. (Pty) Ltd v Commissioner for Inland Revenue* 1946 WLD 171 (14 SACT 47 at 56-7), the court held that where the probabilities are evenly balanced, if it impossible to say affirmatively that the facts upon which the taxpayer relies to prove his case are correct, then it is impossible to say that the Commissioner's discretion to the contrary is wrong, and the taxpayer had not discharged the onus on him.

[82] The mere fact that the taxpayer has placed evidence before court and that this evidence has not been contradicted does not necessarily mean that the evidence concerned should be accepted as such. The evidence of a person on whom the onus rests can be so improbable that the onus has not been discharged.

[83 In *Auto Protection Insurance Co. Ltd v Hanmersstrudwick* 1964 (1) SA 349 (A), Steyn CJ, at 359H, held as follows:

> The mere circumstance that evidence, even 'expert' evidence, is un contradicted will not necessarily suffice to discharge an onus (S*henker Brothers v Bester* 1952 (3) SA 664 (A.D.) at p. 670 and *R. H v. Vilbro and Another* 1957 (3) SA 223 (A.D.) at p. 288.

[84] The appellant's version as outlined in her grounds of appeal is improbable. The many versions outlined by Y are also improbable and cannot be relied upon.

[85] In the absence of evidence to the contrary this court finds that the bank deposits constitute gross income, which should have been declared by the appellant as such. The appellant failed to declare such income and the respondent was justified in adjusting the appellant's income tax liability in this regard.

ADDITIONAL TAX AND INTEREST

[86] Ms H testified that the appellant failed to submit annual income returns in respect of 2007 to 2010 despite demands by the respondent on two separate occasions. The appellant only submitted returns for 2007 to 2010 after the audit findings were issued to her.

[87] The imposition of additional tax is governed by section 76 of the Income Tax Act that reads as follows:

> **Additional tax in the event of default or omission.—**(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; or
>
> (*b*) if he omits from his return any amount which ought to have been included therein, an amount equal to twice the difference between the tax as calculated in respect of the taxable income returned by him and the tax properly chargeable in respect of his taxable income as determined after including the amount omitted. . .

[88] Section 76(2) of the Income Tax Act prohibits the remission of additional tax in the case of intentional tax evasion; unless the Commissioner is satisfied that extenuating circumstances exist.

[89] In the present case the appellant only submitted the outstanding returns in respect of the years concerned on 29 May 2012, which was 5 years late in respect of the 2007, 4 years late in respect of the 2008 year, 3 years late in respect of 2009 year and 2 years late in respect of 2010.

[90] In the matter of INCOME TAX CASE NO 1461 the court referred to the matter of INCOME TAX CASE NO 1430, at p 54 wherein it is stated that:

> . . . The main purpose of such additional charges is to ensure the accuracy of returns, upon which the whole income tax system is based, and to thereby avoid the loss of revenue to the fiscus.

[91] In *Israelsohn v CIR* 1952 (3) SA 529 (AD) at 5391 and *CIR v McNeil* 1959 (1) SA 481 (AD) at 4872 it was held that the amount of additional tax claimed under the section was a penalty.

[92] In Income Tax Case No 1430 at p 52 it was held that:

> inasmuch as the additional charges referred to in s 76 are – as stated in *Israelsohn v CIR* 1952 (3) SA 529 (A) at 539-540; 18 SATC 247 at 257 – in essence a penalty whose main purpose is to ensure the accuracy of returns of income, the imposition of such additional charges, as well as any decision to remit portion thereof, involves three factors: Punishment to the taxpayer, the deterrent effect upon him and the deterrent effect on other taxpayers.

[93] The appellant must show that 'special circumstances' exist that will reduce the moral blameworthiness of the appellant when such an appellant has under declared his or her taxable income (See *GK Goldswain Tax Planning – Corporate and Personal* Vol. (No. 6) Dec 2005).

[94] Goldswain explains that:

> If the taxpayer had no intention to evade taxes, the Commissioner has the discretion to remit the whole or part of the 200% additional tax which has been imposed, but he is not obliged to remit the penalty even if there was no intention to evade taxes. Nestadt J in *CIR v Di Ciccio* 1985 (3) SA 989 (T) stated that the intention to evade is not a sine qua non for the operation of s 76(1).

[95] In *Commissioner for Inland Revenue v Di Ciccio* 1985 (4) All SA 201 (T) the Court stated the following:

> It relates specifically to facts (which should be disclosed) as distinct from "any amount" referred to in s 76(1)(*b*). In other words, then, no particular form of *mens rea* is required. The question is simply whether, objectively considered,

there was an omission of an amount which ought to have been included or an incorrect statement.

[96] Where there has been an intention to evade tax, the Commissioner may not remit any portion of the additional tax unless he is satisfied that extenuating circumstances exist.

[97] In casu the appellant offered no evidence to show that the respondent was wrong in his decision not to remit any portion of the additional tax imposed on her. She failed to submit her income tax returns even when she was reminded more than once. In addition she omitted to include deposits in her bank accounts received over and above her income as per the IRP5 certificates.

[98] Whether intention on the part of the taxpayer has been proved or not, the Commissioner is still not obliged to remit the penalty. This is a matter of discretion on his part. In the circumstances the respondent was correct to impose 200% additional tax and was also correct not to remit and portion thereof.

CONCLUSION

[99] Counsel for the appellant sought to argue that the inability of the appellant to furnish documentary proof of her case was due to events beyond her control. In paragraph [18] of the appellant's heads of argument he stated the following:

> The single most decisive factor in considering section 102 of the Tax Administration Acts that this appeal predates the first assessment appeal by almost nine years. The disputed deposits range from 2007 to 2010. The Appellant has been called by the Respondent not only to provide documents relating to some 46 items, and which appear in three different bank accounts, but is also being called upon by the Respondent to have a

> vivid and clear recollection of what these deposits are. Thus (*'sic'*), notwithstanding, and to the knowledge of the Respondent, when the Appellant's company was wound up many of the documents were in the possession of the liquidators.

[100] This court is alive to the fact that memories fade with time and it would be unreasonable to expect a witness to have a clear and vivid recollection of events that happened over a decade ago. This court is also well aware of the fact that when the Appellant's company was wound up many of the relevant documents were in the liquidators' possession and that it was impossible for the appellant to lay her hands on them. Y was not expected to do the impossible and produce documents which the appellant was unable to get hold of. He was also not expected to have a perfect memory. All that was required of him was to provide a plausible explanation where such an explanation was warranted. In many cases he failed to do so. Item 8, with an amount of R4000, for example, was said to relate to water, electricity and other expenses. No proof was in fact provided to support this assertion. In some cases where Y produced documentation, such documentation failed to meet the required standard. I have previously referred to hand written schedules of unknown origin or unknown author. In our view the appellant failed to discharge the onus placed on her.

[101] In the result I grant the following order:

1. The appeal, in respect of the adjusted income tax assessments, for the 2007 to 2010 years of assessment is dismissed.
2. The respondent is ordered to adjust the appellant's annual gross income in respect of the 2007 to 2008 years of assessment to the total amount

received by the appellant according to her IRP5 certificates and cash receipts according to her bank statements (Annexure 'C') as follows:

	2007	2008	2009	2010
IRP5	R128 000.00	143 060.00	R 255 910.00	R 283 077.00
Accepted deposits	R24 324.00	R 123 492.61	R 29 270.30	Nil
Disputed deposits	R75 297.85	R 1824 911.00	R 2 03 000.00	R 282 000.00
Total Gross Income per year	R227 621.85	R 2 091 463.61	R 2 315 180.30	R 565 077.00

3. The imposition of additional tax of 200% and interest on the total annual gross income as per the table in paragraph 2 above is confirmed.
4. The appellant is ordered to pay costs.

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T M MASIPA

JUDGE OF THE HIGH COURT IN SOUTH AFRICA

GAUTENG LOCAL DIVISION (JOHANNESBURG)

DATE OF HEARING: 29/08/2016

DATE OF JUDGMENT: 01/03/2017