IN THE TAX COURT OF SOUTH AFRICA

HELD AT HIGH COURT: KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 14055

In the matter between:

XYZ CC **APPELLANT**

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

J U D G M E N T

Delivered on: Monday, 20 November 2017

OLSEN J

[1] The appellant in this tax appeal is XYZ CC, the sole member of which is a Mr B. The respondent, the Commissioner for the South African Revenue Service, raised an additional assessment against the appellant in respect of the 2013 tax year which recognised an additional R2 million of taxable income in the appellant's hands. The appellant's income tax for the year was adjusted upwards by R560 000,00 and a 100% understatement penalty was imposed. The appellant appeals against the imposition of both the additional tax and the penalty.

[2] The appellant is in the business of supplying what Mr B calls "agricultural inputs" to farmers – such things as lime, gypsum, and so on. Its principal clients are farmers in KwaZulu-Natal. A component of the appellant's business (and profit) arises out of government tenders involving the supply of such products for agricultural purposes.

[3] One of the appellant's customers is E Entity. It is also in the business of tendering for government work in the agricultural sector. It prepares lands and

plants crops. Mr B informed the court that the principal of E Entity is Mr A who, according to Mr B, is a chief for an area which runs from Vryheid down to Melmoth in KwaZulu-Natal. The sum of R2 million which is in dispute in the present appeal features in E Entity's account with the appellant. However nobody from E Entity was called by the appellant to give evidence in the present appeal. For the appellant we heard the evidence of Mr B and the appellant's accountant, Mr C. Ms D, who is employed by South African Revenue Service and described her post as "Functional Specialist in the Investigative Audit Department", was called by the respondent.

[4] It is necessary in this case to furnish an account of the path trodden by the present dispute en route to this court, as it not only provides context and background for the evidence led in this court, but is of assistance in the assessment of the evidence.

[5] During 2015 Ms D was engaged in an investigation concerning the appellant's financial statements for the 2014 tax year when she noticed a peculiar operating expense of R2 million described as "Social Development Expenditure" in the 2013 comparative column of the 2014 statement of comprehensive income. The result was an audit of the 2013 tax year. In the course of the audit Ms D examined the appellant's 2013 financial statements (which recorded the expense), and the tax return submitted by the appellant for that year. She called for supporting documentation. She could not immediately see the R2 million expense claim in the return, but did note that the block headed "Other Expenses" reflected expenses of R2 576 145.00. The form of return requires the tax payer to provide descriptions of the "other expenses" and there the appellant had entered the words "Motor Vehicle Expense Etc". Ms D surmised (correctly, as it turns out) that if the expenditure of R2 million on social development expenditure featured in the tax return (which it appeared to do, because the tax return matched the financial statements) then the expense had to form part of the sum of R2 576 145.00. It was plain then, judging from the tax return, that the appellant regarded the sum of R2 million as a deductible expense for the purposes of taxation.

[6] Ms D issued what she calls a "Findings letter" which conveys to a taxpayer that it is proposed to make certain findings with respect to the matter at hand if representations from the taxpayer delivered within 21 days do not indicate

why that should not be done. The findings letter apparently warned of the proposed disallowance of the deduction of the sum of R2 million from the gross profit declared in the tax return. (That letter was not presented in evidence.)

[7] A "Finalisation of Audit" letter followed recording that the audit of the appellant's return had been finalised and that the decisions made, and recorded in the letter, would be reflected in a notice assessment which would be issued shortly. (Although for some unexplained reason the assessment in question did not make its way into the documents prepared for the appeal, it is undisputed that it exists and its receipt was acknowledged on behalf of the appellant.) The finalisation of audit letter states, with respect to the deduction of R2 million, that the ledger account and other supporting documentation such as invoices were requested to verify the claim to the expense, and to conduct further testing, but that none of this was provided. In the notice of objection which followed Mr C alleged that "correspondence and supporting documentation" were forwarded, and complained that the material was apparently not considered. It appears that Ms D and Mr C may have been at cross purposes. When she was asked to deal with this in evidence, Ms D acknowledged that she had received certain documents to which I will refer shortly, but that in themselves they supported and verified neither the claim that the expenditure had indeed been incurred, nor the claim that it was legitimate to deduct it for the purposes of tax. As to the second of these two issues, she said she really did not go into it because what she was given did not verify or vouch for the proposition that social development expenditure had indeed been made; or how the expenditure had been made.

[8] Mr C, in his capacity as the firm's accountant, then lodged a notice of objection. It is hardly a model of transparency and openness. It is as well in this judgment to quote the material portion of the text which appears under the heading "Section 11(*a*) – Expenses claimed without supporting documentation R560 000.00". It reads as follows:

> "Please note that during the year of assessment the taxpayer supplied goods to a customer for the benefit of a rural community. During discussions prior to the transaction, comments were made by the customer that certain benefits

would have to be passed back to the community as a form of upliftment or social responsibility expenditure. An amount of R2m was discussed.

When the company invoiced the goods, it was told that the amount that was to be settled was R2m less than the amount that had been invoiced. The company therefore passed a credit note against the various invoices and receipted an amount equal to the sum of the invoices raised less the agreed credit note."

The letter of objection, having stated those facts, then recorded further that "for the purposes of disclosure" in the financial statements the company decided to show sales as the amount invoiced, and disclosed the credit note as corporate social expenditure. It was alleged and argued, then, that the R2 million was "never received or accrued" and was therefore neither recorded in taxable income nor claimed under section 11(*a*) of the Income Tax Act.

[9] Of the documents given to Ms D in support of this explanation only the crucial credit note and the ledger account for E Entity need be mentioned. (The statement of E Entity's account with the appellant reflects the same information as its ledger account.)

[10] The credit note is identified as document number IC100477. It is dated 30 April 2012 and reflects a credit of the price excluding tax of goods sold by the appellant to E Entity of R1 754 385.96 and a corresponding credit of value added tax in an amount of R245 614.04. The sum of those two items may be R2 million, but, as was common cause during the appeal, the credit note could not possibly support nor even be a reflection of

(a) a claim that the appellant had expended an amount of R2 million; nor

(b) a reduction of the appellant's gross income from sales of R2 million (i.e. a reduction in accruals of R2 million) as argued by Mr C in the notice of objection.

[11] The credit note carries the legend

"XYZ
In lieu of donation V Trust"

[12] The version of E Entity's customer ledger account with the appellant which was presented by Mr C to the respondent was downloaded from the appellant's bookkeeping system in excel format so that he could add a note, and strike out two entries with lines, in an attempt to illustrate his contentions set out in the letter of objection. Presumably because it was realised that the credit note could not support a reduction in taxable income of R2 million, the ledger reveals two other entries dated 30 April 2012, being journal entries. Journal entry JAPR01 is described as "reversal of credit note" and reflects an amount of R2 million. The only credit note reflected in the customer ledger account in that amount which could be reversed was number IC100477. It is the one relied upon in the objection (and, according to Mr C, in the appeal) as justifying the assertion that it was legitimate to reduce the appellant's sales and gross turnover by R2 million (despite the fact that the credit note itself did not reach that amount). The other journal entry bearing the same date, JAPR02 is described as "Donation to V community" and is also in the amount of R2 million. It is a credit to the account unallocated to any particular invoice presumably because it is not generated by a credit note at all. It is reflected as would be an unallocated payment, or a credit to the account which might have been made by the appellant in order to implement a set off of an amount owed by the appellant to the customer, E Entity. Presumably in an attempt to address the enevitable confusion these ledger entries would generate, Mr C struck out the two journal entries as though they cancel each other out, and wrote a note next to the entry for the credit note IC100477 that this was the credit which was shown as social development expenditure (in the tax return, and also the financial statements). He offered no explanations as to how that could be so given that (a) the credit note did not reach R2 million; and (b) journal entry JAPR01 reversed the credit note.

[13] According to the evidence before us the credit to E Entity's account of R2 million via the journal entry allowed for a balancing entry of R2 million in the general ledger account which the accountant said was entitled "General Expenses: Gifts and Donations". That in turn appeared in the trial balance which was used, according to Mr C, to draw the financial statements where the expense got the name "social development expenditure". According to Ms D's evidence before she sent the "finalisation of audit" letter she asked for a copy of the general ledger account and was told there was no account as

there was only one item in it. (Perhaps she meant to say that she was told there was no point in examining it because it only had one item in it.) The appellant did not produce a copy of the account in the appeal proceedings.

[14] By letter dated 7 July 2015 the respondent advised the appellant that the objection was disallowed. The reason given was that the expense of R2 million was neither incurred in the production of income nor a donation: no proper documentation was submitted to substantiate the expense. The understatement penalty was retained.

[15] A notice of appeal followed with a letter dated 17 July 2015 explaining why the appellant insisted that no adjustment to the original assessment was necessary. The following may be noted from this letter:

(a) The accountants (represented by Mr C) now said that "a price reduction was done".

(b) It was said that the credit note (upon which the accountant continued to rely in his submissions) was allocated to social development expenditure in the financial statements "purely for BEE disclosure purposes".

(c) It was contended that the R2 million was never received and never accrued and therefore was in fact not claimed under section 11(*a*) of the Income Tax Act because it never form part of taxable income.

[16] As required by Rule 32 the appellant delivered its statement of grounds of appeal. The description of the transaction contained in the statement undermines, and in some respects contradicts the contents of the earlier letters written on behalf of the appellant by its accountants (dated 4 June 2015 and 17 July 2015). Two features should be mentioned:

(a) It was no longer contended that when the appellant invoiced for certain goods it was told "that the amount that was to be settled was R2 million less than the amount that had been invoiced".

(b) There was no talk of a price reduction according to the statement of the grounds of appeal.

[17] The statement of grounds of appeal went along the following lines. During or about February 2012 E Entity approached the appellant for the purposes of

making a donation to a community upliftment initiative called the V Trust. The appellant decided that it was prepared to make a cash donation if it got bank account details and it was established that the Trust was a "section 18(A) approved organisation". But neither of those conditions was satisfied. It was accordingly proposed by E Entity "that the amount of R2 million be gifted to the initiative by passing a credit note to E Entity and E Entity making the necessary arrangements to transfer the R2 million to the initiative through whatever means was appropriate". It is to that end that the credit note was passed.

[18] It will be noted that on what I consider to be the only proper construction of the statement of grounds of appeal delivered in terms of the rules, the arrangement involved the appellant making a gift to the Trust (or the body alleged to be a trust) and E Entity implementing that decision for the appellant.

[19] On the first day of the appeal hearing the appellant sought leave to amend its statement of grounds of appeal, which was granted in the absence of opposition from the respondent. The description of the transaction was modified, apparently with a view to avoiding the proposition that in agreeing to the scheme the appellant intended itself to make a donation to the Trust. It was now said that what was agreed to was proposed by E Entity and that it was to work as follows:

> "(a) The amount of R2 million be deducted from the purchase price of products sold by the appellant to the buyer;
>
> (b) A credit note be issued to the buyer to reflect such price reduction;
>
> (c) The buyer would make arrangements to pass on this benefit to the V Trust through whatever means it considered appropriate."

[20] The reason for this particular amendment appears to be the fact that, as it had done during the objection process, the appellant intended to make no attempt in the appeal to justify the classification of the R2 million as a deductible expense in both its financial statements and its tax return. (That is to say it intended to make no attempt to establish that the deduction passed muster under section 11(*a*) of the Income Tax Act.) It intended to persist with the proposition that the credit note it relied on served to reduce the accrual of

income to the appellant from its business with E Entity by R2 million. Indeed, both the amended and un-amended statements of grounds of appeal contain this statement:

> "The R2 million which did not constitute gross income as defined, was excluded from gross income for the purposes of determining tax or income and therefore could not have been, and was not, deducted in terms of s11(*a*)."

However, as a matter of fact in both the tax return and the financial statements of the appellant the R2 million was included in gross income, and was reflected as an expense. Given its declared type, the expense had to pass muster under section 11(*a*) of the Income Tax Act. Even assuming that the credit note still operated (i.e. it had not been reversed by a journal entry), and that it was of the type which could validly be regarded as reducing accruals, the fact that it could only justify a reduction of accruals of R1 754 385.96 was simply ignored.

[21] When he gave evidence Mr C continued to support these arguments without offering any solution to the problems. Indeed he persisted in claiming that the credit note was the product of agreed price reductions, claiming that he got this from his discussion with Mr B and perhaps also an employee of the appellant, Mr F, who appears to have been responsible for the appellant's bookkeeping. Mr F did not give evidence. As will be seen Mr B's evidence left no room at all for a finding that there had been agreement on price reductions. I find it difficult to accept that Mr C genuinely believed that there had been an agreement on price reductions. He made no attempt to identify the prices in question and the reduction agreed upon. It is not without significance that classifying the *causa* for the credit note as "price reductions" opens the way to the argument that the effect of the credit note was to reduce the accruals forming part of gross income for the year.

[22] Mr B's evidence may be summarised as follows:

(a) He had previously done mentorship in the Black Umfolozi area, being the area which he understood to be occupied by the members of the community served by the V Trust. Mr A of E Entity was their leader. He told Mr B about the Trust and Mr B told him that he wanted to make a

donation to it. Mr A's accountant told Mr B that the Trust had a section 18A certificate but that turned out not to be true.

(b) Mr B himself then suggested an alternative arrangement the implementation of which was ultimately his own decision. He would credit E Entity's account with R2 million and E Entity would pass this gift on to the community. The community were to be told through the Trust that the appellant (and presumably Mr B) had done this thing for them. There was no particular agreement as to the mechanism by which E Entity would implement its side of this bargain.

(c) On a subsequent visit to the area Mr B said that he was put on a pedestal and Mr A told the community "that I had helped develop all these little farms around there". As Mr B said, he had no idea about how that was actually achieved.

(d) Mr B confirmed that he wanted to get BEE points out of this arrangement. He therefore asked for confirmation from the Trust that the money went to the community, and a letter (undated) was provided to him by Mr A's accountant. The letter was produced in the appeal, but had not previously been given to Ms D. The material part reads as follows:

> "V Trust would like to thank XYZ for the donation made to the community projects of R2 million rand."

(e) Mr B used that letter, and his financial statements reflecting R2 million expended on social development expenditure, in his application for BEE points. He confirmed that he intended the decision maker to rely on the truth of those statements. He got what he called "some BEE points" in the 2013 year.

(f) Ultimately, when questioned by the court, Mr B accepted the proposition that what was intended was that E Entity would pay the community R2 million (or perhaps give R2 million worth of something or other to the community) on behalf of the appellant, in exchange for which a sum of R2 million was to be credited to E Entity's account with the appellant.

[23] Mr B's evidence appears substantially credible and reliable to the extent that it concerns matters which were actually within Mr B's knowledge. Referring to

Warner Lambert SA (Pty) Limited v Commissioner, South African Revenue Service 2003 (5) SA 344 (SCA) counsel for the respondent conceded there are circumstances in which social development expenditure may legitimately be claimed as an expense deductible from gross income for tax purposes. However Mr B's evidence was not expanded upon in an attempt to make a case for the proposition that such a deduction would be permissible in this case. On the contrary, despite Mr B's evidence, this appeal was pursued to the end upon the basis that Mr C's argument is correct. In my view it is not.

[24] It will be recalled that Ms D was not satisfied when her audit was complete either that the community trust exists or that there had been any social development expenditure made at all, as claimed in the tax return and the financial statements. No evidence was led in this appeal to establish that such expenditure had been made. E Entity could have been called to state and prove how it had expended the R2 million which it would have had to pay the appellant but for the credit in that amount passed on its account with the appellant. That was not done. In the result, on every score, we are in the same position as was Ms D at the end of the audit. The taxpayer has failed to discharge the burden placed upon it in terms of section 102 of the Tax Administration Act, 2011, of proving

(a) that the sum of R2 million was spent and was deductible, as suggested by the financial statements and tax return of the appellant; or

(b) that the sum of R2 million may be set off against the accruals enjoyed by the appellant by reason of the invoices rendered to E Entity, as suggested by the appellant's accountant.

[25] In our view Mr B's evidence reveals the "real substance and purpose" of the transaction. (See *Commissioner for the South African Revenue Service v NWK Limited* 2011 (2) SA 27 (SCA) at para 55.) It is plain that the undertaking by E Entity to pass the R2 million, or the benefit of it, to the community was intended to substitute for payment of R2 million of the debt accumulated by E Entity in its dealings with the appellant. The amount was made available by passing the journal credit (as opposed to any credit note which might be passed, for instance, to reflect an agreed discount or a price reduction) on E Entity's account. R2 million of the debt which had accrued in favour of the appellant was thereby discharged. It was in effect paid by set-off. It did not

disturb any of the accruals in favour of the appellant generated by its business with E Entity.

[26] The appeal against the additional assessment for tax must accordingly fail. The remaining issue is the appeal against the understatement penalty.

[27] Section 222 of the Tax Administration Act requires that, when there is an understatement, a penalty in an amount derived by applying the highest applicable understatement penalty percentage set out in section 223 is to be paid. Section 223(1) comprises a penalty percentage table which contains the percentages applicable in various circumstances. This case is a so-called "standard case" which means that the percentages set out in the third column apply. The respondent determined that the understatement in this case was the product of "gross negligence", which generates a penalty of 100% of the tax raised in the additional assessment. The respondent accordingly discounted a conclusion that this was intentional tax evasion, carrying a penalty of 150%.

[28] The next lowest penalty percentage is 50%. It applies when there are "no reasonable grounds for 'tax position' taken". The next lowest percentage is 25% which applies when reasonable care was not taken in completing the return. The circumstances in which the penalties of 25% and 100% are to be applied are accordingly defined in terms of fault. The circumstances which give rise to a penalty of 50% are not defined in terms of fault, but rather with respect to the existence of a certain state of affairs, namely the absence of reasonable grounds for the tax position taken by the tax payer.

[29] It will be seen from what has already been said concerning the appeal against the imposition of the tax, that this court has not been able to discern reasonable grounds for the tax position taken by the appellant with regard to the sum of R2 million. The tax position taken by the appellant in its return was not sought to be supported through an attempt to establish not only that the social expenditure was actually made, but also that it satisfied the test stated in section 11(*a*) (and did not offend section 23(*g*)) of the Income Tax Act. The tax positions taken at the objection stage and during the appeal were essentially those of the accountant Mr C. The position not only lacks a requisite factual foundation (such as, for instance, agreed price reductions as

contended by Mr C, but is indeed contradicted by Mr B's own evidence, as discussed above. Accordingly, if we overturn the respondent's decision that this case is one of gross negligence, a reduction of the penalty to 50% of the tax is called for.

[30] The first question to be considered is the approach to be adopted by this court in an appeal against a decision made by the respondent with regard to an understatement penalty. Section 129(3) of the Tax Administration Act provides that in such an appeal "the tax court must decide the matter on the basis that the burden of proof is upon SARS and may reduce, confirm or increase the understatement penalty." On enquiring of counsel as to the proper approach to be adopted by the tax court in considering whether to interfere with a decision made by the respondent with regard to a penalty, we were told that there are no reported cases under the provisions now contained in the Tax Administration Act. However, Counsel for the respondent referred us to *Commissioner for Inland Revenue v Da Costa* 1985 (3) SA 768 (A). *Da Costa's* case concerned the then s76 of the Income Tax Act which provided for a penalty, and also for a discretion on the part of the commissioner to remit it in whole or in part, and for an appeal against his decision if he should decide not to do so. The question arose as to whether a special court hearing tax appeals could interfere with the decision of the commissioner only when the discretion was exercised on an incorrect basis or unreasonably; or whether the tax court exercises its own discretion starting with a clean sheet of paper. With reference to *Rand Ropes (Pty) Limited v Commissioner for Inland Revenue* 1944 AD 142 the court in *Da Costa* held that in cases involving the exercise of a discretion by the commissioner the court is called upon to exercise its own, original, discretion. (See also *Commissioner, South African Revenue Service v Pretoria East Motors (Pty) Limited* 2014 (5) SA 231 (SCA) at para 54.) This was because the legislature had deemed it necessary to give a special right of appeal which involves a rehearing of the whole matter by the special court. "The special court is not a court of appeal in the ordinary sense: it is a court of revision." (See *Da Costa* at 774 B-J.)

[31] There seems to be no reason to regard the function or role of a tax court convened under the Tax Administration Act as any different to that of the special court under the legislation considered in *Da Costa*. If that is correct

then the question for this court is whether or not the present case involved gross negligence on the part of the appellant.

[32] Counsel for the appellant referred us to the case of *MV Stella Tingas: Transnet Limited t/a Portnet v Owners of the MV Stella Tingas and Another* 2003 (2) SA 473 (SCA) at para 7 for a discussion of the meaning of the term "gross negligence". Scott JA held that the concept is not capable of precise definition but examined a number of authorities which provide guidance. His conclusion was as follows:

> "It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity."

[33] Counsel also referred us to *Lewis Group v Woollam* 2017 (2) SA 547 (WCC) at paragraph 18. That case concern a shareholder who sought to use the derivative action to compel the company in question to have four of its directors declared delinquent in terms of section 162 of the Companies Act, 2008. One of the circumstances in which the court might make such an order is that the director has "by gross negligence" inflicted harm upon the company. After referring to the judgment of Scott JA in the *Stella Tingas* Binns-Ward J made the following observation in paragraph 18:

> "Establishing so-called "ordinary" negligence, poor business decision-making, or misguided reliance by a director on incorrect professional advice will not be enough."

(My emphasis)

[34] The appellant is a close corporation of which Mr B is the sole member. The appellant's position may be equated to that of a company which has only one director who is the sole beneficial owner of its shares. The first, and sometimes the only port of call when attempting to ascertain the intentions of such a corporation is the sole director. Centlivres CJ put it as follows in *CIR v Richmond Estates (Pty) Limited* 1956 (1) SA 602 at 606 G-H:

> "A company is an artificial person with no body to kick and no soul to damn and the only way of ascertaining its intention is to find out what its directors acting as such intended. Their formal acts in the form of resolutions constitute evidence as to the intentions of the company of which they are directors but where a company has only one director, who is also the managing director and the sole beneficial owner of all its shares, I can see no reason in principle why it should be incompetent for him to give evidence as to what was the intention of the company at any given time. In such a case it is, perhaps, not going too far to say that his mind is also the mind of the company."

[35] It appears safe to proceed upon the assumption that Mr B was the directing mind of the appellant. It was Mr B's idea that the appellant should allow E Entity's undertaking to distribute R2 million (or perhaps R2 millions worth) to the community to be regarded as a discharge of R2 million of E Entity's accumulated debt owed to the taxpayer. He does not dispute that he sought to have that transaction work to his advantage in applying for BEE points. Nor can he dispute, having regard to his conduct, that if the arrangement he made with E Entity generated an advantage as to tax for the appellant, he would pursue that benefit for the appellant.

[36] Counsel for the respondent has argued that the appellant is "seeking to protect its unjustified game by compounding one deception upon another". He has argued that this was a scheme devised to deprive the respondent of the tax due to it. In my view counsel for the respondent brings too severe an eye to bear upon the facts revealed during the course of this appeal.

[37] It appeared clear that when Mr B described what this court has found to be the true nature of the transaction, he did not realise that he was undermining the foundation of the argument put up on behalf of the appellant at the objection stage, and the basis upon which the appellant's representatives were presenting the appellant's case in the appeal proceedings. A number of

questions were put to him during the course of his evidence which he could not answer, as a result of which he had to invite the court to await the evidence of his accountant, Mr C. It is clear that both the objection and the appeal procedures were followed on advice given by Mr C which Mr B did not fully understand. And where there are conflicts between the evidence of Mr C and Mr B (the obvious one being Mr C's assertion that he received instructions from his client that price reductions had been agreed), Mr B's evidence is preferable.

[38] Counsel for the respondent has submitted that the appellant cannot argue that it finds itself the victim of poor advice from its accountants, as the evidence is that all instructions came directly from the appellant (in the form of Mr B). But the argument ignores entirely what appears to be clear, that the "tax position" adopted by the appellant was the product of advice given by the accountant. To use the words of Binns-Ward J in *Lewis*, this is a case of "misguided reliance by a [member of a close corporation] on incorrect professional advice." As pointed out by Binns-Ward J, that does not support a conclusion that the case is one of gross negligence.

[39] I conclude, therefore, that the penalty must be reduced to 50% on the basis that this is a case where there is an absence of reasonable grounds for the tax position taken by the appellant.

[40] Counsel for the respondent has argued that this court may and should order that the costs of the appeal be paid by the appellant upon the basis that the appellant's grounds of appeal are held to be unreasonable. (See section 130 of the Tax Administration Act.) The word "may" where it appears in section 130 signifies that a court's ordinary discretion as to costs is maintained; which means that it is not necessarily so that an order for costs should be made in every case where an objective assessment of the appellant's grounds of appeal leads to a conclusion that they are unreasonable. In this case it seems clear to us that the appellant, represented by Mr B, was misled into advancing unreasonable grounds of appeal. Counsel for the appellant has pointed out that Mr C's assertion that the effect of the transaction was to reduce the accruals to the appellant's gross income involved concepts beyond the ken of a lay person exercising his or her right to pursue a living through trade. There is merit in that argument. As already

mentioned, when Mr B gave evidence it became apparent that he did not understand the basis upon which the appeal was being advanced on behalf of the appellant. Furthermore, the appeal as to the quantum of the penalty succeeds.

[41] This accordingly appears to be a case where the court should not exercise its discretion in favour of an award as to costs.

The following orders are made:

(1) The appellant's appeal with regard to the imposition of tax under the additional assessment in relation to the transaction of R2 million dealt with in that assessment is dismissed and the assessment is confirmed.

(2) The appellant's appeal against the imposition of a penalty of 100% in respect of the R2 million transaction is upheld. That penalty is set aside, and there is substituted for it a penalty of 50% in the sum of R280 000,00.

OLSEN J

MR S MSOMI (ASSESSOR)

MR E BHERO (ASSESSOR)

Date of Hearing: TUESDAY, 24 OCTOBER 2017
to
THURSDAY, 26 OCTOBER 2017

Date of Judgment: MONDAY, 20 NOVEMBER 2017