
**IN THE TAX COURT OF SOUTH AFRICA**

**JOHANNESBURG**

**DELETE WHICHEVER IS NOT APPLICABLE**

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE:……

SIGNATURE: ….……

**CASE NO.: 13492**

In the matter between:

**AB CC** Appellant

and

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

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**JUDGMENT**

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**JANSEN J**

**Nature of the application**

1. The appellant is an entity called AB CC which made various loans to its related close corporations and companies during the years of assessment which are relevant to this appeal – namely the years 2007 – 2011.

2. These loans were described in the annual financial statements submitted with the tax returns. However, the initial financial statement filed by AB CC did not correctly record that the loans advanced bore interest at the normal rate which was 10% during the 2007 year of assessment.

3. The interest reflected in the original annual financial statements and tax returns was interest received from financial institutions and excluded the accrued interest from connected persons.

4. The respondent, the Commissioner for the South African Revenue Service, assessed these loans by AB CC to its related close corporations and companies as so-called deemed dividends as defined in section 64C(2)(*g*) of the Income Tax Act 58 of 1962 as amended **(**"**the Act**").

5. The interest charged by AB CC to its related corporations and companies was less than the official rate of interest. Hence the respondent assessed AB CC to pay secondary tax on companies ("**STC**") on these deemed dividends.

6. The STC assessments were issued on 19 November 2011.

7. Further, in order to understand the respondent's reasoning, section 64C(6) of the Act defines a so-called "dividend cycle" as the date when the loan was made available to the connected corporation or company. The last day of the dividend cycle in each year of

assessment is the year end of the entity which received a loan. The appellant's annual financial year ends on 28 February.

8. AB CC was assessed to tax in respect of the 2007 STC cycle as at 28 February 2007 in the sum of R1 812 609.00. AB CC filed a notice of objection against this assessment which was disallowed in its entirety and AB CC filed an appeal against the disallowance of the objection.

9. When the matter first came before me on 11 May 2015, I was informed that AB CC conceded that it had settled the merits of the case on 6 May 2015 but wished to argue a ground of appeal against the Commissioner's assessment, namely that the 2007 assessment had become prescribed in terms of section 99(1) read with section 99(2) of the Tax Administration Act 28 of 2011 ("**the TAA**"). In its argument before the court on 11 May 2015, counsel for the Commissioner made the submission that it would seek to prove that there had been fraud, alternatively non-disclosure, alternatively misrepresentation by AB CC giving rise to the raising of the assessment for secondary tax on companies ("**STC**") for the year of 2007 (by the respondent, when the letter of assessment was issued on 9 November 2012). This, the plaintiff alleged, was caused by the fact that AB CC relied on a new ground of appeal, namely that the 2007 assessment had prescribed. This reasoning is circuitous. Once a party has conceded the merits of a case, as it was pleaded, and based on a certain factual matrix, a party may still raise a legal point but may no longer seek to supplement the evidence on which the merits of the case have been conceded.

10. The Commissioner sought leave to amend its grounds of assessment in terms of section 99(2) of the TAA, which allows such an amendment in certain prescribed circumstances. It wished to do so to plead fraud, alternatively misrepresentation,

alternatively non-disclosure by AB CC which would allow it to raise STC after a period of five years. None of these allegations of fraud, etc. had, however, been raised by the Commissioner in its notice of assessment on 19 November 2012, nor in its notice of disallowance of AB CC's objection to its grounds of assessment dated 11 February 2014.

11. Counsel for the Commissioner further sought to rely on the amended financial statements for 2007 submitted with AB CC's notice of appeal on 17 June 2014.

12. In contrast, in its letter of 9 November 2012, the Commissioner had pertinently indicated that no additional tax would be imposed. Furthermore, when the Commissioner wishes to rely on fraud, alternatively misrepresentation, alternatively non-disclosure, it must set out the facts which give rise to these conclusions.

13. Furthermore, as stated, the appeal had been conceded and in these circumstances it was argued that the facts were no longer before the court and that such an amendment to the grounds of assessment would be highly prejudicial to AB CC.

14. In addition, it was argued that it could not be accurate that the Commissioner wished to raise fraud, etc. based on the amended financial statement accompanying the grounds of appeal on 17 June 2014, because the Commissioner did not raise the assessment based on interest which might have been received or which might have accrued to AB CC during the 2007 year of assessment but based it on deemed dividend, in respect of loans which were advanced by AB CC to connected parties. It was argued that the difference between the financial statements initially filed and the one filed on 17 June 2014 did not give rise to the assessment raised by the Commissioner.

15. It was also emphasised that the issue of prescription was raised in the statement of grounds of appeal filed on 17 June 2014. The current Tax Court Rules were implemented

from 7 July 2014. In terms of Tax Court Rule 33(1) the Commissioner may file a reply to the grounds of appeal within 15 days which it failed to do. It similarly failed to request an extension within which to file a reply. (It could have filed a reply on 9 July 2014.)

16. Furthermore, on 24 August 2014, the parties held a pre-trial where the Commissioner stated that it intended to amend its statement of assessment in respect of the "new" ground of objection by AB CC, namely prescription, by 30 September 2014. It failed to do so. The parties further agreed that the parties may amend their pleadings in terms of Tax Court Rule 35 (11) on or before 30 September 2014. None of the parties elected to do so.

17. It was only at the hearing on 11 May 2015 that the Commissioner indicated that it intended relying on section 99(2) of the TAA to prove fraud, alternatively misrepresentation, alternatively non-disclosure by AB CC.

18. It was therefore argued by AB CC that the Commissioner did not rely on section 99(2) earlier, and now, belatedly, sought to do so, 11 months after becoming aware of alleged "facts" allowing it to do so. A litigant which seeks an amendment at the last hour seeks an indulgence and cannot be granted the right to amend as a matter of right.

    ***Minister van Die SA Polisie v Kraatz* 1973 (3) 490 (A) at 512 E–H*; Gollach & Gomperts* (*1967) (Pty) Ltd v Universal Mills and Produce Company (Pty) Ltd and Others* 1978 (1) SA 914 (A) at 928 D**

19. As stated, the alleged non-disclosure in the amended financial statements relates to amounts of interest earned in 2007, and has nothing to do with the new assessment raised by the Commissioner, which is an assessment relating to deemed dividend as a result of loans advanced by AB CC to connected entities. The interest which AB CC earned is of no consequence to the determination of the issue whether the 2007 assessment has

become prescribed by operation of section 99(1) of the TAA. Hence it was argued that the amendment sought by the Commissioner was *mala fide.*

20. It was argued that the amendment could not be rectified by a postponement or a tender of costs, because on 19 November 2012, a STC assessment was raised based on a deemed dividend without any reliance on fraud, misrepresentation or non-disclosure.

21. It was rather argued that by seeking the amendment, the Commissioner sought to resuscitate a claim which had prescribed and which, at law, it was not competent to do.

22. The provisions of the TAA came into effect on 1 October 2012 and prescribe that the Commissioner may not raise an assessment in respect of a self-assessment, such as STC, after a period of five years.

23. No case law could be found regarding the correct interpretation to be placed on section 99(1) read with section 99(2). These sections are, however, very similarly worded to equivalent subsections in the earlier section 79 of the Income Tax Act 58 of 1962 which reads as follows:

> ***(1) If at any time the Commissioner is satisfied—***
>
> ***(a) That any amount which was subject to tax and should have been assessed to tax under this Act has not been assessed to tax; or***
>
> **…**
>
> ***(c) That as respects any tax which is chargeable and has become payable under this Act otherwise than under an assessment, such tax has not been paid in respect of any amount upon which the tax is chargeable or an amount is owing in respect of such tax, he shall raise an assessment or assessments in***

***respect of the amount or amounts, notwithstanding that an assessment or assessments may have been made upon the person concerned in respect of the year or years of assessment in respect of which amounts in question is or are assessable, and notwithstanding the provisions of sections 81(5), 83(18) and 83A(12): provided the Commissioner shall not raise an assessment under this subsection—***

***(i) after the expiration of three years from the date of the assessment (if any) in terms of which any amount which should have been assessed to tax under such assessment was not so assessed or in terms of which the amount of tax assessed was less than the amount of such tax which was properly chargeable, unless—***

***(aa) The Commissioner is satisfied that the fact that the amount which shouldsection have been assessed to tax was not so assessed or the fact that the full amount of tax chargeable was not assessed, was due to fraud or misrepresentation or nondisclosure of material facts; …***

***(ii) In respect of any tax referred to in paragraph (c), after the expiration of three years from the date of payment of any amount paid in respect of such tax unless—***

***(aa) The Commissioner is satisfied that the fact that such tax was not paid in full was due to fraud or misrepresentation or non-disclosure of material facts;"***

**(**Emphasis added.)

24. In ***Natal Estates Ltd v Secretary for Inland Revenue*** **1975 (4) SA 177 (A)** and ***Kommisaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk*** **1985 (2)**

**SA 668 (T)**, it was held that the Commissioner had to be fully satisfied regarding the deception to defraud and had to satisfy itself regarding the alleged non-disclosure as it was a substantive and far reaching determination.

> ***"I shall assume without deciding in favour of the [Commissioner], that, once he is satisfied that an amount was not previously assessed because of fraud or misrepresentation or non-disclosure of material facts, his decision is unappealable. However, there must be some evidence before the special court [now the tax court] that he was so satisfied otherwise there is no displacement of immunity conferred on the taxpayer by the proviso to section 79(1) and the opening words of paragraph (a) thereof. The convenient time and place for indication [his satisfaction] would be in the additional assessment itself, or in a covering letter, or in his notice which the Commissioner is required by section 81(4) to send to the taxpayer if the latter's objection to the assessment is disallowed and it should state the particular conduct of the taxpayer to which it relates, that is whether the fraud or misrepresentation or non-disclosure of material fact.***

25. In ***ITC* 156 3 55 SATC 315 (1993)** it was held that the Commissioner must be satisfied fully before he can raise an additional assessment, and before the Commissioner could displace prescription. The letters which had been written by the Commissioner did not reveal in any way why a further assessment had been made. The same is applicable to this case.

26. On 19 November 2012, the Commissioner knew about the loans made to connected parties, yet did not raise any grounds of non-disclosure and the like. The onus to prove non-disclosure and the like rests squarely on the Commissioner.

27. Furthermore, the Commissioner never relied on non-disclosure, fraud and hence did not raise additional tax. Hence, the only inference that can be drawn is that the Commissioner had due regard to the facts placed before it and had taken a decision that there was no fraud, misrepresentation or non-disclosure warranting the raising of additional tax at a rate of 200%.

28. The court, nonetheless, allowed the Commissioner formally to file an application for amendment, in order to assess whether it had any merit.

29. It was pointed out in the application that in terms of the TAA, the Commissioner may not make an assessment, in the case of self-assessment, five years after the date of original assessment which is by way of self-assessment by the tax payer or in circumstances when no tax return is received by the Commissioner.

30. It is common cause that AB CC never submitted any return in respect of STC. The Commissioner did not raise any STC assessment except that issued on 9 November 2012 when the return of assessment was issued and the notice of assessment of 19 November 2012 was raised.

31. It was argued by the Commissioner that the five year period had not even commenced given that AB CC did not render an STC return for 2007 and the Commissioner only raised the STC assessment for 2007 on 19 November 2012.

32. Even if the five year period had lapsed, which was denied, it was stated that the assessment had not prescribed due to exceptional circumstances as envisaged in section 99(2)(*b*) of the TAA. Section 99(2)(*b*) stipulates that the five year period does not apply in cases of:

    i. Fraud;

ii. Intentional or negligent misrepresentation;

iii. Intentional or negligent non-disclosure of material facts; or

iv. The failure to submit a return or, if no return is required, the failure to make the required payment of tax.

33. In any event, AB CC failed to submit any STC return for the 2007 year of assessment. It was stated that AB CC did not disclose the interest received from connected persons in its statement for 2007. In the amended annual financial statement for 2007, it was stated that interest was received in an amount of R8 273 267.00 whilst in the return and original assessment interest of only R2 160 868.00 was disclosed. The discrepancy is clearly substantial and it was contended by the Commissioner that the discrepancy constituted a non-disclosure of material facts or a misrepresentation which caused the assessment not to be issued within the five year period (were it to be held that the five year period had lapsed if that period had, indeed, already commenced to run).

34. It was also stated in the application that although the parties had agreed at the pre-trial that the Commissioner could amend its grounds of assessment, it was not done because AB CC first had to supplement its grounds of objection to include prescription.

35. This reason for not amending its grounds of assessment ring hollow, given the fact that AB CC had included prescription in its grounds of appeal. It is always possible, when launching an appeal or even when arguing it, to raise a new legal point.[1]

36. It is also important to bear in mind that an appeal to the special tax court is in the form of a rehearing as was held in the Constitutional Court case of ***Metcash Trading Ltd***

[1] In any event, the issue of prescription is very crisp as was admitted by the deponent for the Commissioner himself.

***v Commissioner, South African Revenue Service 2001 (1) SA 1109 (CC)*** as pointed out below.

37. This fact has been taken into account in the rules of the Court promulgated in July 2014. Tax Court Rule 10(2)(C) now states that the notice of appeal must specify in detail:

> ***"(i) in respect of which grounds of objection referred to in rule 7 the taxpayer is appealing;***
>
> ***(ii) the grounds for disputing the basis of the decision to disallow the objection referred to in s 11(5); and***
>
> ***(iii) any new grounds on which the taxpayer is appealing."***

38. In ***Cabinet for the Territory of South West Africa v Chikane & another 1989 (1) SA 349 (A)*** Grosskopf JA referred to the general principle that:

> ***"A party in motion proceedings may advance legal arguments in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers provided they arise from the facts alleged."***

39. The learned judge, as authority of this proposition, referred to the *dicta* of Botha JA in ***Van Rensburg v Van Rensburg 1963 (1) SA 505 (A) at 509E – 510B.*** Furthermore, Botha JA stated at 510A that:

> ***"In ieder geval meen ek dat 'n uitleg van die Hofreël wat die Hof sou verhinder om 'n aansoek op 'n regspunt uit te wys wat uit die beweerde feite ontstaan, slegs omdat die aansoekdoener nie in sy aansoek uitdruklik daarop gesteun het nie, vermy kan en moet word, anders sou dit kon lei tot die onhoudbare posisie dat die hof deur 'n regsdwaling aan die kant van die aansoekdoener gebonde kan wees."***

40. The court ruled that the application for amendment of the Commissioner's grounds of assessment was dismissed, because the Commissioner had caused its own dilemma. It was aware of the new ground of appeal, yet remained supine for 11 months. It was further ruled that AB CC could rely on the ground of appeal regarding prescription on the basis that it was a legal point which could be raised on the facts as they stood.

41. That legal points which arise from the facts may be argued at any point in time was pertinently held in ***ITC* 10229 1185 6 J TLR 139 Eastern Cape Special Court**. New grounds for assessment may be raised by the commissioner, so long as the principle of *audi alteram partem* is adhered to (at page 170). In this matter, however this type of reasoning is not available to the Commissioner as it settled the merits of the matter with the Appellant on certain facts.

42. In ***Metcash Trading v The Commissioner, South African Revenue Services 2001 (1) SA 1109 (CC)***, the Constitutional Court held that challenges before the special board for the hearing of tax appeals were not appeals in the forensic sense of the word, but rather proceedings for the reconsideration of a category of administrative decision. Prior to **Metcash** *supra* the Appeal Court held in ***Hickland v Secretary for Inland Revenue 1980 (1) SA 481 (A)*** that a hearing before the Tax Court was effectively a rehearing of the case.

43. This is reflected in the rules of the Tax Court promulgated in July 2014. Tax Court rule 10(2)(c) now reads that the notice of appeal must set out:

    ***"(i) in respect of which grounds of objection referred to in rule 7 the taxpayer is appealing;***

    ***(ii) the grounds for disputing the basis of the decision to disallow the objection referred to in s 11(5); and***

    ***(iii) any new grounds which the taxpayer is appealing."***

The rule then further states that:

***"(3) The taxpayer may not appeal on a ground that constitutes a new objection against a part or an amount of the disputed assessment not objected to under rule 7. (4) If the taxpayer in the notice of appeal relies on a ground not raised in the objection under rule 7, SARS may require the taxpayer within 15 days after delivery of the notice of appeal to produce substantiating documents necessary to decide on the further progress of the appeal."***

Rule 32 furthermore states that:

***"(3) The appellant may not include in the statements of grounds of appeal that constitutes a new ground of objection against a part or an amount of the disputed assessment not objected to under rule 7."***

44. It should be borne in mind that the requirement that the Commissioner must be satisfied of the circumstances referred to in section 79, namely fraud, misrepresentation or non-disclosure is not included in section 99 of the TAA as it provides as follows:[2]

***"99 Period of limitations for issuance of assessments***

***(1) SARS may not make an assessment in terms of this Chapter—***

***(a) Three years after the date of assessment of an original assessment by SARS;***

***(b) In the case of self-assessment for which a return is required, five years after the date of assessment of an original assessment—***

***(i) By way of self-assessment by the taxpayer; or***

***(ii) If no return is received, by SARS;***

[2] Cabinet for the ***Territory of South West Chikane Africa & Another*** **1989 (1) SA 349 (A).**

***(c) In the case of a self-assessment for which no return is required, after the expiration of five years from the—***

***(i) Date of the last payment of the tax for the tax period; or***

***(ii) Effective date, if no payment was made in respect of the tax for the tax period;***

***(d) In the case of—***

***(i) An additional assessment if the—***

***(aa) amount which should have been assessed to tax under the preceding assessment was, in accordance with the practice generally prevailing at the date of the preceding assessment, not assessed to tax; or***

***(bb) full amount of tax which should have been assessed under the preceding assessment was, in accordance with the practice, not assessed;***

***(ii) a reduced assessment, if the preceding assessment was made in accordance with the practice generally prevailing at the date of that assessment; or***

***(iii) a tax for which no return is required, if the payment was made in accordance with the practice generally prevailing at the date of that payment; or***

***(e) in respect of a dispute that has been resolved under Chapter 9***

***(2) Subsection (1) does not apply to the extent that—***

***(a) in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to—***

***(i) fraud;***

***(ii) misrepresentation; or***

***(iii) non-disclosure of material facts;***

***(b) in the case of self-assessment, the fact that the full amount of***

***tax chargeable was not assessed, was due to—***

***(i) fraud;***

***(ii) intentional or negligent misrepresentation;***

***(iii) intentional or negligent non-disclosure of material facts; or***

***(iv) the failure to submit a return or, if no return is required, the failure to make the required payment of tax;***

***(c) SARS and the taxpayer so agree prior to the expiry of the limitations period; or***

***(d) It is necessary to give effect to—***

***(i) The resolution of a dispute under Chapter 9;***

***(ii) A judgment pursuant to an appeal under Part E of Chapter 9 and there is no right of further appeal; or***

***(iii) An assessment referred to in section 98(2).”***

**(**Emphasis added)

45. Date of assessment of terms of section 1 of the TAA means:

> "***(a)*** ***in case of an assessment by SARS, the date of the issue of the notice of assessment; or***
>
> ***(b)*** **in *case* of self-assessment *by the taxpayer—***
>
> ***(i)*** **if a return is required, the date that the return *is submitted;***

**(**Emphasis added)

46. The self-assessment of a taxpayer is done by submitting a return. It was argued that that is why section 99(1)(*b*) states that if a return is not submitted, then the alternative date is when the Commissioner issues an assessment.

47. In terms of section 64B(7) of the Income Tax Act, a taxpayer is required to submit a return for purposes of secondary tax on companies. This section reads as follows:

> ***"The secondary tax on companies shall be paid to the Commissioner by the company liable therefor by not later than the last day of the month following the month in which the dividend cycle relevant to such dividend ends and each payment of such tax shall be accompanied by a return in such form as the Commissioner may require…"***

(Emphasis added)

48. AB CC submitted that it was not obliged to submit a return for STC and therefore prescription only started running when payment was due. It was submitted by the Commissioner that this interpretation was incorrect given the wording of section 64B(7).

49. However, in terms of section 64(2)(9), a loan granted or made available to a shareholder or connected person is deemed to be a dividend.

50. In terms of section 64B(5) of the Income Tax Act "***where the Commissioner is satisfied that any amount of secondary tax on companies has not been paid in full, he may extend the unpaid amount and issue the company concerned a notice of assessment of the unpaid amount".***

51. It was argued on behalf of the Commissioner that it issued a STC assessment for 2007 on 19 November 2012. Hence the five year period only commenced running then.

52. It was argued that the respondent's contention that the 2007 assessment had prescribed on the basis that the 2007 assessment was issued more than five years after the deemed dividend cycle, is bad in law. It was argued that the five year period commences on the date of the return or when the Commissioner issues an assessment.

53. The latter submission on behalf of the commissioner cannot be accurate. It would bear the consequence that the Commissioner could 10, 20, 30 years after tax was payable based on a self-assessment, issue a further assessment. This would lead to great uncertainty and prejudice and an untenable legal situation. There must be a cut-off date and it is held that the 3 and 5 year periods prescribed by the Act are there in order to peg the periods within which assessments have to be issued by the Commissioner in order to obtain clarity and certainty. Any other interpretation would lead to absurd and egregious consequences and legal uncertainty.

54. Furthermore, it was argued that in terms of section 99(2)(*b*)(iv) the five year period referred to in section 99(1) does not apply in a case of self-assessment when there is a failure to submit a return. It was submitted that even though the court dismissed the

application for amendment of the statement of grounds of assessment it was not necessary for the Commissioner to amend them as it relied on a point of law. This contention made on behalf of the Commissioner cannot be accurate as new facts would have to be adduced regarding fraud by the taxpayer, misrepresentation or non-disclosure of material facts.

55. The case resumed on 7 December 2015. AB CC led its evidence first. Mr X testified that he was the manager of AB CC and that AB CC advanced loans to related entities at a flat rate of 10% (because it was impossible to keep abreast with fluctuations of interest rates). The amended financial statements came about when the interest was correctly calculated.

56. During cross-examination it was pointed out to him that the total of loans reflected in the financial statement was R82 494 477 and what 10% thereof would amount to. Mr X was constrained to admit that the financial statements were inaccurate and hence had to be amended. It was also put to him that there was no return for STC nor any payments in respect thereof.

57. The Commissioner then called a witness, namely a Mrs Z. She testified that she had a national diploma in accounting and was a tax auditor at SARS. She pointed out that the 2007 return only indicated R2.2 million in interest received but five years later the amended financial statement demonstrated a different total which had increased by approximately R6 million.

58. Nothing new arose from this evidence. The Commissioner knew about the discovery and the new financial statement on 17 June 2014 when it was submitted with AB CC's notice of appeal.

59. During argument it was pointed out by counsel for the Commissioner that in the statement of grounds of appeal section 79 was not relied upon, only section 99. It was argued that it was common cause that loans had been advanced to related companies.

60. AB CC argued that only loans which fell short of 10% were assessed and that the other loans were interest free. It was emphasised that in terms of section 64C(2)(9) of the Income Tax Act that when interest was received in terms of loans to related entities and was not less than the usual rate of interest the deemed interest dividend provision does not kick in. The provisions of section 64C(4)(*d*) were also emphasised. In fact, regard has to be had to sections 64C(2)(9), 64B(6), 64B(7) read with sections 99(1) and 99(2) of the TAA.

61. Counsel for the Commissioner emphasised that the relevant dates are as follows:

    - Due date of the income tax assessment for the 2007 year (date of assessment): 1 March 2010.
    - Date of issuing STC assessment: 9 November 2012 (letter of assessment) or 19 November 2012 (actual assessment).

62. It was argued by AB CC that it is common that the 2007 assessment has been raised in terms of the provisions of section 64C(2)(*g*), which provides as follows:

    ***"64C(2) For the purposes of section 64B, an amount shall, subject to the provisions of section (4), be deemed to be a dividend declared by the company to a shareholder, where—***

        ***(g) any loan or advance is granted or made available to that shareholder or connected person in relation to that shareholder."***

63. A company is defined, in terms of section 1 of the Act, to include a close corporation.

64. It was argued by the appellant that in terms of section 64B, STC is declared in relation to any dividend by the approval of the payment or distribution by the directors of the company. A dividend cycle is the period commencing after the previous dividend cycle of the company and ending on the date on which such dividend accrues to the shareholder or on which the amount is deemed to have been distributed as contemplated in section 64C(6).

65. Section 64C(6) reads as follows:

> ***"For purposes of this section and section 64B, the dividend contemplated in subsection (2) shall be deemed to have been declared by the company on the date that—***
>
> ***(e) The loan or advance is made available as contemplated in subsection (2)(g);"***

66. *In casu*, the loans were made available by AB CC to its related companies and close corporations by the end of the 2007 financial year, being 28 February 2007. STC[3] is payable ***"not later than the last day of the month following the month in which the dividend cycle to the dividends ends and each payment shall be accompanied by a return in the form as the Commissioner may require."***

67. Thus, the deemed STC was payable no later than 31 March 2007 accompanied by a return.

[3] Section 64B(7)

68. STC is a self-assessment tax. In terms of section 99 of the TAA, SARS is precluded in making an assessment in respect of self-assessment after a period of five years. The relevant provision provides as follows:

> ***"(1) SARS may not make an assessment in terms of this Chapter…***
>
> ***(b) in the case of self-assessment for which a return is required, five years after the date of assessment of the original assessment—***
>
> ***(i) by way of a self-assessment by the taxpayer; or***
>
> ***(ii) if no return is received by SARS."***

69. AB CC was assessed in terms of the provisions of section 64C(2)(*g*) on the loans made available to the connected persons related to the appellant. In consequence, in terms of section 64C(6), as the Commissioner had deemed this amount to be a dividend, it triggered the necessity to file the STC return and pay the STC within a month after the end of the dividend cycle.

70. As AB CC's dividend cycle coincides with its year end, being 27 February of each year, the STC return and payment in respect of the loans advanced by AB CC should have been paid by no later than 31 March 2007.

71. This obligation to render a STC return and to make payment in respect of STC payable in terms of the return is separate and distinct from the obligation to render an income tax return in any particular year. The STC becomes payable as soon as the dividend is declared, which is not necessarily at the company year end, although in this instance it was.

72. The dividend cycle of AB CC for the 2007 year of assessment was deemed to be declared on 27 February 2007. It is from the date for the filing of the STC return that an obligatory payment is determined in terms of 64B(7).

73. The assessment for 2007 was raised on 9 November 2012, more than five years after the return and payment were deemed to be due in terms of the provisions of section 64B(7).

74. More than five years have expired from the month following the dividend cycle in 2007, namely, March 2007, to the time of the issuing of the assessment on 19 November 2012. This argument on behalf of the plaintiff cannot be faulted.

75. It was the submission on behalf of the Commissioner that prescription could only have commenced to run as from 19 November 2012.

76. However, it seems to be clear from what has been set out above that prescription for a STC assessment commenced running from 31 March 2007, and due to the merits of the case having been settled, on a matrix of facts not including fraud, misrepresentation not non-disclosure of material facts.

77. Regarding costs, section 130 of the TAA states:

> ***"130 Order for costs by tax court***
>
> ***(1) The tax court may, in dealing with an appeal under this Chapter and on application by an aggrieved party, grant an order for costs in favour of the party, if—***
>
> ***(a) the SARS grounds of assessment or 'decision' are held to be unreasonable;***
>
> ***(b) the 'appellant's' grounds of appeal are held to be unreasonable;***

***(c) the tax board's decision is substantially confirmed;***

***(d) the hearing of the appeal is postponed at the request of the other party; or***

***(e) <u>the appeal is withdrawn or conceded by the other party after the 'registrar' allocates a date of hearing</u>.***

***(2) The costs awarded by the tax court under this section must be determined in accordance with the fees prescribed by the rules of the High Court.***

***(3) The tax court may make an order as to costs provided for in the 'rules' in—***

***(a) A test case designated under section 106(5); or***

***(b) An interlocutory application or an application in a procedural matter referred to in section 117(3)."***

(Emphasis added)

78. It was argued that because the appellant had conceded the appeal, the Commissioner was entitled to costs. Costs are only to be granted in exceptional circumstances. However, given the complications brought about by the Commissioner's insistence that it could still counter AB CC's defence of prescription very belatedly at the commencement of the hearing, both parties are equally to blame for the costs incurred by the hearings.

**<u>Conclusion</u>**

Due to the respondent allowing the matter to be settled on a certain matrix of facts, it cannot now "reopen" the matter and lead further evidence to prove fraud, misrepresentation and the like, particularly because it was given the opportunity to

amend its grounds of assessment by AB CC but elected not to do so until the date of the hearing.

*Order*

The appeal is upheld and it is held that:

1. The 2007 assessment has become prescribed, and is set aside.
2. The 2007 assessment is remitted to the respondent to be revised to zero.
3. No order as to costs is made.

**JANSEN J**
**JUDGE OF THE HIGH COURT**