REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

HELD AT DURBAN

REPORTABLE

CASE NO: IT 13950

APPELLANT COMPANY (PTY) LTD **APPELLANT/APPLICANT**

and

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

JUDGMENT

Delivered on: 30 JANUARY 2017

MOODLEY J:

[1] This is an interlocutory application by the taxpayer, the Appellant, in the course of a tax appeal against an additional assessment for Capital Gains Tax ('CGT') in respect of the 2008 year of assessment issued by the Commissioner for the South African Revenue Services ('the Commissioner') on 30 April 2013 ('the 2013 assessment') in terms of the Tax Administration Act No 28 of 2011 ('the TAA').

[2] The Appellant contends that the Commissioner was *functus* after issuing the 2013 assessment, in which the base cost of shares in X (Pty) Ltd ('X') and X Holdings (Pty) Ltd ('X Holdings') disposed of by the Appellant in the 2008 year of assessment was determined by relying on the valuation report of one G, who reviewed the valuation of the Appellant's investment in X and X Holdings.[1] The Commissioner arrived at a lower base cost for the shares disposed of and consequently the capital gain was determined at a higher amount than disclosed by the Appellant.

[3] However, in his statement of grounds of assessment in terms of Tax Rule 31 issued in terms of the TAA, delivered subsequently on 15 August 2015 ('the Rule 31 statement / the 2015 assessment'), the Commissioner changed the valuation assumptions and factual basis on which the 2013 assessment was determined, and substituted the 2013 determination with the determination recorded in paragraphs 34 – 49 of the 2015 assessment.

[4] The Appellant contends that by revising and increasing the 2013 assessment, the Commissioner made a new determination of the Appellant's tax liability and included grounds in his Rule 31 statement that constitute a novation of the whole of the factual and legal basis of the 2013 assessment, in respect of which SARS ought to have issued a revised assessment. The Appellant contends further that if SARS is of the view that the 2013 additional assessment does not reflect the correct application of the law to the prejudice of the fiscus, then SARS must issue a new assessment in terms of section 92 of the TAA. Instead SARS is attempting to circumvent both Tax Court Rule 31(3) and section 92 of the TAA and the 2015 assessment in itself requires the issuing of an assessment.

[5] The Appellant therefore seeks an order declaring that the Commissioner has failed to comply with the provisions of Tax Rule 31(3) of the TAA, striking out the offending grounds in the 2015 assessment[2] and directing the Commissioner to file a revised statement of grounds of assessment, and for costs in its favour.

[6] The Commissioner opposes the application, contending that the Appellant suffers no prejudice by the additional reasons furnished in the Rule 31 statement, as the additional reasons do not alter the onus on the Appellant to establish that its valuation of the base cost of the shares in issue is correct and the Appellant may place any of the material facts and legal grounds in the Rule 31 statement in issue, which will be fully ventilated in the appeal before the tax court.

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1 Founding affidavit para 11.

2 The Appellant originally sought an order setting aside the Rule 31 statement in its entirety.

[7] In the heads of argument filed on behalf of the Commissioner, an objection is raised *in limine* that the tax court has no jurisdiction to hear what is effectively a review application, as this is a substantive application directed at an administrative act or an act which is the exercise of a power conferred by legislation, while the tax court's powers are circumscribed by section 129 of the TAA. But should the court not find merit in the objection *in limine,* the Commissioner submits that the Rule 31 statement is not an administrative act which may be reviewed either under the Promotion of Administrative Justice Act[3] ('PAJA') or on the basis of the principle of legality.

[8] The Commissioner also advances the argument that Rule 31(3) is vague and therefore inoperative; alternatively if the language in which Rule 31(3) is couched, is objectively and purposively interpreted in the context of the Rules pertinent to the conduct and hearing of appeals before a tax court and Chapter 9 of the TAA, the Commissioner is not precluded from relying on additional grounds not previously disclosed in its assessment, provided that the grounds do not substitute the entire basis for the disputed assessment with another and which requires the issue of an additional assessment to substitute the disputed assessment.[4]

[9] The Commissioner submits that the Rule 31 statement in issue complies with Tax Rule 31(3) as the legal and the factual bases for the assessment remain unchanged and the onus remains on the Appellant to establish that is valuation is correct.

[10] Finally the Commissioner contends that the Rule 31 statement contains grounds which may justify the confirmation or alteration of the assessment in terms of section 129(2)(*a*) or (*b*) respectively, and therefore does not require the issue of an additional assessment to substitute the disputed assessment. The Commissioner consequently seeks dismissal of the application with costs.

Factual Matrix

[11] The following is common cause:

1. The Appellant disposed of 3 788 250 shares in X and 85 329 shares in X Holdings in the 2008 year of assessment. In arriving at its disclosed capital gain, the Appellant utilised the base costs ascribed to the shares by E Services (Pty) Ltd ('E') in a valuation report issued in July 2003.

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3 No 3 of 2000.

4 The Commissioner also submits that the word 'or' is incorrect and should be replaced by 'and'.

2. SARS raised an assessment against the Appellant in respect of the shares disposed of on the 30 April 2013 on the contention that the Appellant had failed to pay the full amount of the CGT due. The basis of the assessment was that SARS disagreed with the valuation of the base costs of the shares held in X and X Holdings ascribed by E.

3. In raising the assessment, SARS arrived at a lower base cost for the shares disposed of and determined the capital gain at R85 356 153 as against the disclosed capital gain of R58 856 314, which resulted in an increased taxable gain of R26 499 838 and tax payable in the amount of R7 419 955, and issued a Notice of Additional Assessment ITA34 which included an understatement penalty in the amount of R448 637.

4. On 12 July 2013 the Appellant delivered its Notice of Objection to the assessment and understatement penalty, reasserting its reliance on the E valuation of the shares in X and X Holdings.

5. On 31 March 2014 SARS agreed to remit the understatement penalty but disallowed the Appellant's objection.

6. On 16 May 2014 the Appellant noted an appeal against the disallowance of the objection to the 2013 assessment.

7. On 15 August 2015 SARS issued its statement of grounds of assessment in terms of Rule 31 of the TAA, in which the new determination of the taxable capital gain for the 2008 year of assessment was a total of R60 858 797, with the total tax payable being R17 040 463, an increase of R9 620 508 from the 2013 assessment. SARS advised the Appellant that the assessment had been increased because its previous assessment was 'conservative'. SARS included grounds in the Rule 31 statement that were not in the 2013 assessment and changed certain valuation assumptions in arriving at the increased assessment.

8. On 13 November 2015 the Appellant filed the 'application in terms of Tax Court Rule 31(3)',[5] seeking an order setting aside the 2015 assessment as invalid and non-compliant with Rule 31(3).

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[5] The notice of this application filed by the Appellant reads: 'Appellant's Notice of Application in terms of Tax Court Rule 31(3) issued in terms of the Tax Administration Act 28 of 2011'. This is a misnomer as Tax Rule 31(3) does not provide the mechanism for an application per se, as pointed out properly by the Commissioner. But this is, in my view, not fatal to the application.

Jurisdiction of the Tax Court and the Power to Review

[12] Although, as properly pointed out by Mr *H* SC who represented the Appellant, the issue of jurisdiction was raised only in the heads of argument filed by the Commissioner and not by way of a special plea, because the jurisdiction and the power of the tax court to grant the relief sought by the Appellant are closely allied, I deal with both issues briefly.

[13] It is trite that the tax court is a creature of statute[6] and its jurisdiction is specified in the TAA. In this context, jurisdiction means the power vested in the court by law to adjudicate, determine and dispose of a matter.[7] Subsequently, Bertelsmann J sitting in the Tax Court, agreed that 'the tax court only has adjudicate jurisdiction allocated to it by the legislature over matters brought before it'.[8] It is also not in dispute that the powers of the tax court are limited to those specified in the TAA.[9]

[14] Section 117 of the TAA provides:

> '**117. Jurisdiction of tax court.**—(1) The tax court for purposes of this Chapter has jurisdiction over tax appeals lodged under section 107.
>
> (2) The place where an appeal is heard is determined by the "rules".
>
> (3) The court may hear and decide an interlocutory application or an application in a procedural matter relating to a dispute under this Chapter as provided for in the "rules".'

[15] Section 129(2) of the TAA provides:

> '(2) In the case of an assessment or "decision" under appeal or an application in a procedural matter referred to in section 117 (3), the tax court may—
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> (*a*) confirm the assessment or "decision";
>
> (*b*) order the assessment or "decision" to be altered; or
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> (*c*) refer the assessment back to SARS for further examination and assessment.'

[16] The Appellant submits that under section 117(3) and Tax Rule 51(2)[10] the tax court has jurisdiction to hear this interlocutory application to set aside a pleading which does not comply with the provisions of the Income Tax Act, the TAA and the Tax Court Rules issued in terms of the TAA, which relates to the pending appeal against the disallowance of the Appellant's objection to the 2013 assessment by SARS. The application involves a procedural

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6 *Commissioner for Inland Revenue v Taylor* 1934 AD 387 at 390.

7 ITC 1806 (2005) 68 SATC 117 (G) para 42.

8 ITC 1866(2012) 75 SATC 268.

9 *Ackermans Ltd v Commissioner, SARS* 2015 (6) SA 364 (GP) para 15.

10 Tax Rule 51(2) provides: 'An interlocutory application relating to an objection or appeal must, unless the tax court before which an appeal is set down otherwise directs, be brought in the manner provided for in this Part.'

matter, and is not a review, although this court does have jurisdiction and the power to review a decision of the Commissioner.

[17] The Commissioner contends that no review lies against any act of or power exercised by the Commissioner as the tax court's jurisdiction under section 117 relates specifically to an interlocutory application or an application in a procedural matter relating to a dispute, its powers are circumscribed by section 129 of the TAA and there is no provision in the Tax Rules for the review relief sought by the Appellant and the basis on which such relief is premised.

[18] However if it is found that the tax court does have the jurisdiction to hear the application, the Commissioner contends that the Rule 31 statement can only be reviewed and set aside in terms of the provisions of PAJA or, in the alternative, on the constitutional principle of legality. But, the Commissioner contends further, the Rule 31 statement does not constitute an administrative act; it merely records the grounds of assessment and the material facts and legal grounds on which the Commissioner relies to oppose the appeal, and therefore cannot be reviewed in terms of PAJA. Under the legality principle, legislation founds the authority to act. Rule 31 does not authorise the Commissioner to act or constitute the exercise of a power derived from legislation; it imposes an obligation on the Commissioner to deliver a statement setting out the grounds of assessment and the material facts and legal grounds on which it opposes the appeal. Therefore no review lies against any act or exercise of power by the Commissioner under the TAA.

[19] But in *Ackermans*[11] the Commissioner advanced a contrary argument and contended *in limine* that the High Court did not have the jurisdiction to review and set aside under PAJA the decision of SARS to raise an additional assessment under section 79 of the Income Tax Act[12] ('the ITA') as the issues raised required the expertise of the tax court and *the tax court has the power of review* for the relief sought by the applicant. Therefore the Commissioner, in *Ackermans,* acknowledged that the Tax Court is invested with the power of review under the TAA, albeit that application for review was brought on the grounds of PAJA alternatively non-compliance with the principle of constitutional legality.

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11 Supra para 13.

12 58 of 1962. S 79 of the ITA was repealed by the TAA.

[20] In holding that the High Court did have jurisdiction to review the additional assessment raised by SARS under the TAA, Mothle J in *Ackermans* relied on the following comments of Kriegler J in respect of remedies under the VAT Act[13] in *Metcash Trading Ltd v Commissioner, SARS & Another:*[14]

> 'The Act creates a tailor-made mechanism for redressing complaints about the Commissioner's decisions, but it leaves intact all other avenues of relief.'

[21] In *Metcash* Kriegler J pointed out further that as the Commissioner is not a judicial officer, the assessments and concomitant decisions by the Commissioner are administrative,[15] not judicial, actions. Therefore challenges to the administrative actions of the Commissioner before the Special Court (or board):

> 'are proceedings in terms of a statutory mechanism specially created for the reconsideration of this particular category of administrative decisions - and the appropriate corrective action - by a specialist tribunal.
>
> … Were it not for this special "appeal" procedure, the avenues for substantive redress available to vendors aggrieved by the rejection of their objections to assessments and decisions by the Commissioner would probably have been common-law judicial reviews as now buttressed by the right to administrative action under s 33 of the Constitution, and as fleshed out by the Promotion of Administrative Justice Act. Here, however, the Act provides its own special procedure for a review of the Commissioner's challenged decisions by a specialist tribunals.'[16]

[22] I am in agreement with Mr *H* that these comments are equally apposite to challenges to the Commissioner's decisions under the TAA.[17]

[23] In *Bailey v Commissioner for Inland Revenue*[18] the court held that 'a Special Court under the Income Tax Acts is not a court of appeal in the ordinary sense; it is a court of revision with power to investigate the matter before it and to hear evidence thereon.'

[24] In *ABC (Pty) Ltd v The Commissioner of SARS*[19] the court of appeal endorsed the view that an appeal to the tax court is a review of the Commissioner's decision on customary review grounds.

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13 Value-Added Tax Act 89 of 1991.
14 2001 (1) SA 1109 (CC) para 33.
15 Grey's Marine Hout Bay (Pty) Ltd & Others v Minister of Public Works & Others 2005 (6) SA 313 (SCA) para 21 to 24 on what constitutes administrative action.
16 Metcash paras 32 – 33.
17 Ackermans paras 15 – 16
18 1933 AD 204 at 220.
19 Case No 129/2014(WC).

[25] In an application for a declaratory order on the legal status of assessments, the court in *Medox Ltd v Commissioner for SARS*[20] held that once an assessment has been done, the parties are locked into the jurisdiction of the tax court and must exercise their rights in the tax court; the lawfulness and correctness of a disputed assessment must be dealt with by the tax court.

[26] The comments of Binns-Ward J in *South Atlantic Jazz Festival (Pty) Ltd v Commissioner, South African Revenue Service*[21] on the powers of the tax court in respect of an appeal, are also useful and pertinent to section 117(3):

> 'The jurisdiction of the tax court to determine tax appeals is conferred without any limitation in section 117(1) of the TAA. The court must be taken to have been invested with all the powers that are inherently necessary for it to fulfil its expressly provided functions.'

[27] Consequently, the arguments advanced by the Commissioner that this court does not have jurisdiction to hear a review application and that no review, unless under PAJA or on the basis of the principle of constitutional legality, lies against any act or exercise of power by the Commissioner under the TAA must fail. If the tax court has the power of review in respect of appeals to it against assessments by the Commissioner, then it is not, in my view, precluded from hearing, or exercising the same power of review in relation to an interlocutory application in terms of section 117(3) arising from a decision made by the Commissioner in the course of an appeal against an assessment under the TAA.

<u>Has there been a Novation of the Factual and /or Legal basis of the 2013 assessment in the statement in terms of Tax Rule 31?</u>

[28] As the determination of this issue requires a consideration of the relevant statutes and rules, it appears appropriate to commence with the principles of statutory interpretation.

Interpretation of statutes

[29] The general rule in respect of interpretation of statutes is set out in the following excerpt from the judgment of Wallis JA[22] in *Natal Joint Municipal Pension Fund v Endumeni Municipality:*[23]

> 'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory

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20 [2014] ZAGPPHC 98 (20 February 2014).
21 2015(6)SA78(WC).
22 See also *Commissioner, SARS v Bosch & Another* 2015 (2) SA174 (SCA) paras 9 and 17.
23 2012 (4) SA 593 (SCA) at paragraph 18 (footnotes omitted).

> instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation … The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[30] With specific regard to the interpretation of fiscal legislation, a strict approach is appropriate. Kellaway in *Principles of Legal interpretation*[24] expresses a similar principle in respect of the interpretation of fiscal legislation, but warns that tax legislation must be construed strictly and nothing is to be implied or read into it. This accords with the comments of Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioner*[25] that '. . . in a taxing Act one has to look at what is clearly said. There is no room for an intendment. There is no equity about a tax.'[26]

[31] Kellaway states that a revenue statute which imposes a burden upon a subject, should, in the case of an ambiguity, be construed in favour of the taxpayer (*contra fiscum*), but as in all cases of interpretation a court must take the whole statute into consideration and so arrive at the true intention of the legislature. However, if the provision is wanting in clarity and no meaning is reasonably clear, the courts will be unable to regard it of being of any effect. A taxing Act is not to be interpreted according to 'the spirit of the law', nor words be extended so as to operate against the subject. [27]

[32] Kellaway states further that to give effect to the language of a particular statute, such as a 'taxation' statute, which sets out 'procedures' or gives directions for taxation purposes, the clear intention of which is to assess taxation, these procedures or directions when read with other provisions in the Act (even when read with a provision in a Schedule to the Act)

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24 EA Kellaway Principles of Legal Interpretation (1995).
25 (1921) 1 KB 64 71.
26 'Equitable construction' generally no longer finds favour as a general rule of construction.
27 Kellaway at 341.

may be interpreted as imposing a liability on a person to be taxed. If in a taxation Act there is a clear distinction between 'charging provisions' and 'machinery provisions' and the legislature has used a machinery provision such as is to be found, for example, in the word 'assessment' with the clear intention of treating that as an assessment which will impose a liability to tax on the person assessed, the reference to 'assessment' must be read as being, in effect, a reference to charge a tax.

[33] Kellaway's instructive principles for the interpretation of fiscal legislation accords with the section 143 of the TAA**:**

> '(1) A basic principle in tax law is that it is the duty of SARS to assess and collect tax according to the laws enacted by Parliament and not to forgo a tax which is properly chargeable and payable.'

The Relevant Tax Court Rules

[34] Rule 31 provides that SARS must deliver to the appellant a statement of the grounds of assessment and opposing the appeal:

> '(2) The statement must set out clearly and concisely-
>
> (*a*) the consolidated grounds of the disputed assessment;
>
> (*b*) which of the facts or the legal grounds in the notice of appeal under Rule 10 are admitted and which of those facts or legal grounds are opposed; and
>
> (*c*) the material facts and legal grounds upon which SARS relies in opposing the appeal.
>
> (3) SARS may not include in the statement a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment.'

[35] Rules 10 to 12 of the previous Tax Court Rules issued under the ITA are the equivalent of Rules 31 to 33 of the new rules issued under the TAA. Rule 10(3) provided that the statement of the grounds of assessment had to:

> '(*a*) set(ting) out a clear and concise statement of the grounds upon which the taxpayer's objection is disallowed; and
>
> (*b*) stating the material facts and legal grounds upon which the Commissioner relies for such disallowance.'

[36] A comparison of the two versions indicates that under the TAA the requirements for the Rule 31 statement are stated in greater detail and impose both a positive and negative obligation on SARS. Subrule (2) sets out three categories of grounds that SARS must include

in the Rule 31 statement. Subrule (3) stipulates that SARS is precluded from including in the statement:

> '(*a*) a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment; or
>
> (*b*) a ground which requires the issue of a revised assessment.'

Therefore Rule 31 which provides SARS with firm guidelines in respect of the format and content of the statement, does not state that SARS may *not* include a *new* ground, only a ground which has the effect of *novating* the *whole of the factual or legal basis* of the disputed assessment. (My emphasis).

[37] The term 'novation' is usually applied in the context of contracts: a contract is novated when an existing legal obligation, created by contract, is replaced by a new obligation, which discharges the existing one. But the essence of the concept of novation is that there must be a prior legal obligation that is replaced by a new one; the old obligation being the *justa causa* for the new.[28] The word 'novation' is defined in the Oxford English Dictionary as 'the introduction of something new; a change, an innovation' and in the context of a contract, as 'a substitution of creditor, debtor, contract'. There is, in my view, no reason to find that the word 'novation' is inappropriate in the context in which it is used in Rule 31 or that it renders the rule inoperable. Instead it is consonant with the objective of Part E of the rules to provide clear guidelines to be followed by the parties in the procedures before the tax court.

[38] This conclusion is fortified by a consideration of the provisions of Rule 32 – 34, which distinguishes 'novation' of the factual or legal basis in Rule 31(3) from a 'new ground'.

[39] In terms of Rule 32 the appellant, in turn, must deliver to SARS a statement of grounds of appeal:

> '(2) The statement must set out clearly and concisely-
>
> (*a*) the grounds upon which the appellant appeals;
>
> (*b*) which of the facts or the legal grounds in the statement under rule 31 are admitted and which of those facts or legal grounds are opposed; and
>
> (c) the material facts and the legal grounds upon which the appellant relies for the appeal and opposing the facts or legal grounds in the statement under rule 31.
>
> (3) The appellant may not include *in the statement a ground of appeal that constitutes a new ground of objection against a part or amount of the disputed assessment not objected to under rule 7.' (My emphasis)*

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[28] *Tauber v Von Abo* 1984 (4) SA 482 (E) at 485C.

Rule 33 provides that SARS may reply to the statement of grounds of appeal and

> '(2) The reply to the statement of grounds of appeal must set out a clear and concise reply to *any new grounds*, material facts or applicable law set out in the statement.' (My emphasis)

Therefore the appellant is similarly constrained under Rule 32 from including 'a new ground of objection against a part or amount of the disputed assessment not objected to under rule 7'. But as foreshadowed in Rule 33, the appellant is not prohibited from including new grounds under Rule 32(2)(*a*) to which SARS may reply, only a new ground as specified in Rule 32(3). It then follows that both SARS and the appellant may rely on new grounds in their respective statements provided that they do not infringe the negative obligations imposed by Rules 31(3) and 32(3).

[41] The conclusion of Claasen J in *ITC 1843*[29] that Rules 10 to 12 of the old rules entitled the Commissioner and the taxpayer to depart from their respective previously stated positions,[30] particularly because the relevant grounds are expressed in the present tense and not with reference to earlier documents, may be equally applicable to the new Rules 31 to 34. The conclusion of Claasen J is viewed with approval by the authors Emslie and Davis in *Income Tax Cases & Material.*[31]

[42] Rule 34 provides:

> 'The issues in an appeal to the tax court will be those contained in the statement of the grounds of assessment and opposing the appeal read with the statement of the grounds of appeal and, if any, the reply to the grounds of appeal'

which is in accordance with the objective of Rules 31 to 33 under Part E to ensure that the 'pleadings' filed by the parties are precise so that issue/s for determination by the tax court are properly defined.

[43] The next term that requires consideration is 'basis' which is defined in the Oxford English Dictionary as 'the main constituent, the fundamental ingredient'; 'that by or on which anything immaterial is supported or sustained; a foundation, support.' Nor should the significance of the word 'whole' in Rule 31(3) be ignored: the objectionable ground must novate the *whole* of the factual basis *or* the whole of the legal basis of the disputed

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29 72 SATC 229.

30 SARS in its letters of assessment and letters of disallowance and the taxpayer in its objections and notices of appeal.

31 Emslie & Davis Income Tax Cases & Material 4 ed at 1034 – 1035.

assessment. SARS is therefore constrained to ensure that the legal or factual foundation or basis for the assessment is not completely changed.

[44] In the founding affidavit, the deponent Mr T sets out the basis for the present application as follows:

> '6. The respondent has included in its statement of grounds of assessment, a ground that constitutes a novation of the whole of the factual or the legal basis of the disputed assessment issued on 30 April 2013, (which forms the subject matter of the appeal), as the respondent has made a further determination which revises upward the assessment of 30 April 2013 (in the sum of R85 356 152) to the determination contained in the statement of grounds of assessment dated 14 August 2015 in the sum of R119 715 111. This further determination contained in the statement of grounds of assessment requires the issuing of a revised assessment.
>
> 7. The respondent may not rely on a ground in the statement of grounds of assessment that is either a novation of the whole of the factual or legal basis of the assessment under appeal or that which requires the issue of a revised assessment in terms of tax court rule 31(3).'

[45] Mr T refers to 'a ground' which constitutes the prohibited novation, the consequence of which is the upward assessment of the CGT payable, which requires the issue of a revised assessment. He elucidates further that in raising the additional assessment in 2013, SARS accepted certain of the valuation assumptions utilised by E in arriving at the base cost of the shares valued in its report and applied its own valuation assumptions in respect of others factors, thereby arriving at a lower base cost for the shares disposed of in X and X holdings and determined a capital gain higher than that disclosed. But SARS subsequently in the grounds of assessment issued in 2015 changed its own valuation assumptions which it had utilised in the 2013 assessment in six distinct areas, and made a redetermination of the capital gain.

[46] Therefore the thrust of the objection by the Appellant is some of the *valuation assumptions* which affected the determination of capital gain were changed. But 'assumptions' are not the factual or legal basis for the assessment as they do not constitute the foundation or basis for the assessment. Assumptions are by their very nature 'assumed or taken for granted, a supposition or postulate'; the meaning ascribed to 'assume' in the Oxford English Dictionary is 'to take for granted as the basis of argument or action'. Therefore the assumptions relate to the valuation of the shares only and do not provide the factual or legal basis for the assessment itself.

[47] The factual basis for the 2013 assessment is the disposal of the shares and that the Appellant adopted the market value of the shares as at 1 October 2001.[32] The factual basis for the 2015 assessment is set out in paragraphs 15 – 18 of the Rule 31 statement. Thereafter SARS proceeds to discuss the disparate valuation of the shares and sets out the valuation assumptions utilised by E[33] on which the Appellant relies and the valuation assumptions utilised by SARS.[34] It is at this stage that 'the new ground' objected to in the founding affidavit by Mr T is introduced. But the factual basis in the Rule 31 statement is the same as in the 2013 assessment viz the disposal of the shares by the Appellant and the value asserted by the Appellant. Consequently as there is no change to the factual basis, there can be no novation.

[48] The legal basis for the 2013 assessment is paragraph 26(1) read with paragraph 29(7)(*b*) of the Eighth Schedule to the IT Act.[35] In the Rule 31 statement the legal basis for the 2015 assessment remains unchanged as it is premised on the same relevant paragraphs of the Eighth Schedule.[36] The law applicable at the time of the disposal has been applied by SARS in both assessments. In the premises the legal basis is unchanged and has not been novated in the 2015 determination.

[49] Consequently, by introducing the new valuation assumptions in the Rule 31 statement, SARS may have included a new ground but not a ground that novated either the factual or legal basis of the 2013 assessment against which the appeal lies.

[50] Mr *H* relied on *ABC (Pty) Ltd v Commissioner for SARS*[37] to sustain the argument advanced by the Appellant that the Commissioner could not, midstream the appeal, change the proverbial horse he rode in 2013 by making a new determination in the Rule 31 statement. In *ABC (Pty) Ltd,* in determining an application by the Commissioner for leave to amend his grounds of assessment in terms of Rule 10 in order to rely on a second change in shareholding after he had already issued a Rule 10 statement in respect of the first change in shareholding, Rogers J found relevance in the following comments of Desai J in an appeal against the Commissioner's determination in terms of section 103(4) of a tax liability and its amount:[38]

> 'Once the Commissioner reaches the requisite level of satisfaction and exercises the power to determine the tax liability on the strength of that satisfaction, an appeal must of necessity go to

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32 Para 1.1 of the 2013 Assessment.
33 Para 25 of Statement ito of Rule 31.
34 Para 35 of the Statement ito Rule 31.
35 Paragraph 1.2 of the 2013 Assessment.
36 Para 14 of the statement ito Rule 31.
37 Case No 13238 & 13164/2008 (CT) [18]-[20] and [44].
38 ITC 1862 75 SATC 34 [59]-[60].

> whether he was justified in being so satisfied. He must stand and fall by his reasons for exercising the power. If the Commissioner did not make the tax determination on the basis of being "satisfied" about an alternative scheme, he cannot rely on the alternative when his section 103(1) determination is challenged on appeal.'

[51] Rogers J therefore held that the Commissioner could not 'support his existing assessment on the basis of matters on which he was not satisfied when he issued that first assessment' and refused the application to amend the Rule 10 assessment. But Rogers J acknowledged that the question of the extent to which the commissioner and the taxpayer could introduce new matter into their rule 10 and 11 statements is not settled. He also noted that although Claasens J's judgment in *ITC 1843* had not been followed in *HR Computek (Pty) Ltd v Commissioner for SARS,*[39] the court had in *HR Computek* followed a judgment which was decided when section 83(7)(*b*) of the ITA expressly limited a taxpayer to the grounds set out in his notice of objection, which limitation was subsequently removed from the ITA.[40] Therefore no new grounds were permitted as they are under the current Rule 32.

[52] But in my view, *ABC(Pty)Ltd* and *ITC 1862* are distinguishable from this application. In *ABC(Pty) Ltd* the Commissioner intended, through the amendment of his Rule 10 statement, to rely not only on the first change in shareholding in respect of which the Commissioner was satisfied as required by section 103(2) of the ITA and disallowed the set-off of assessed loss, but also on a second change in shareholding which occurred subsequent to the first. Rogers J was not satisfied that the new rules applied to the application and refused to determine the application in terms of Rule 31(3) of the new rules. He nevertheless held that the Commissioner could not add the second change in shareholding through an amendment. In my view, by adding a second change in shareholding, the Commissioner intended effectively to change the factual basis of his Rule 10 assessment, and had the new Rule 31 been applied, the court could have held that the amendment was effectively 'novation of the factual basis' of the assessment and prohibited in terms of Rule 31(3).

[53] Similarly, in *ITC 1862* Desai J held that the Commissioner could not rely on an alternative scheme when his determination in terms of section 103(1) of the ITA was challenged on appeal, if he did not make his section 103(1) determination on the basis of being 'satisfied' about the alternative scheme. By relying on the alternative scheme, the commissioner introduced not a *new ground*, but a *new basis* for the section 103(1) determination which Desai J found repugnant, which would have also fallen foul of Rule 31(3).

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39 [2012] ZASCA 179 (29 November 2012).
40 ABC (Pty) Ltd [19].

[54] But as I have found that there is no novation of the factual or legal basis of the 2013 assessment in the Rule 31 statement filed in this application, the reliance by the Appellant on *ABC(Pty)Ltd* and *ITC 1862* cannot be sustained.

Does the Rule 31 statement require the issue of a revised assessment?

[55] Sections 91 to 95 of Chapter 8 of the TAA provides for five categories of assessments: 'original', 'additional', 'reduced', 'jeopardy' and 'estimated'. A 'revised' assessment is not defined in the TAA. Therefore while SARS may only issue a revised assessment in respect of an assessment provided for in terms of Chapter 8, there is no cogent reason to presume that a 'revised assessment' necessarily means revising an assessment upwards only by way of an additional assessment. The term may equally apply to a reduced assessment which would entail a revision downwards. Nor does the TAA preclude the issue of further revised assessments by SARS, whether revised additional assessments or revised reduced assessments.

[56] Of course the need for finality to be achieved in respect of a tax dispute may prove fatal to a series of further revised assessments issued by SARS as held by the Supreme Court of Appeal in *Commissioner, South African Revenue Service v Brummeria Renaissance (Pty) Ltd & Others.*[41] However *Brummeria* is in my view distinguishable because the SCA held that 'the Commissioner changed the entire basis of the assessment in the further revised assessments' by allowing Brummeria's objection to the revised assessments in full as contemplated in section 81(5) and was therefore precluded by the provisions of section 79(1) read with section 81(5) of the ITA from raising the assessments objected to in the further revised assessments. As already held I am not satisfied that SARS has changed the entire basis of the assessment in the statement of grounds of assessment. Therefore I am not persuaded that the Rule 31 statement requires SARS to issue a revised or additional assessment as contended by the Appellant.

Costs

[57] Each party argued for costs to be awarded in its favour. S 130(3)(b) read with Rule 50(5) provides that a court hearing an application on notice under Part F, which includes an interlocutory application in terms of Rule 51(2), may make an order as to costs. However I am of the view that as this matter involves the interpretation and implementation of a new rule and there is little evidence of how reasonable persons in the position of those who administer

41 2007 (6) SA 601 (SCA) paras 26 – 27.

the TAA will understand and construe Rule 31(3),[42] an order for costs is not appropriate.

Order

1 The application is dismissed.

2 Each party is to bear its own costs.

APPEARANCES

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Date of hearing: 19 September 2016

Date of judgment: 30 January 2017

[42] *Commissioner ,SARS v Bosch & Another* 2015 (2) SA 174 (SCA) para 17.