IN THE TAX COURT

HELD AT JOHANNESBURG

Case Number: 13251
Case Number: VAT 1077

In the tax appeal between:

ABC (PTY) LTD **APPELLANT**

and

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

JUDGMENT

THE COURT:

INTRODUCTION

1. The taxpayer carries on a large retail business, much of it conducted on a cash basis. In 2013 SARS issued additional estimated assessments for the years 2003 to 2009 in respect of income tax and VAT plus penalties all of which totaled some R600 million. An objection was disallowed and the taxpayer proceeded with an appeal in March 2012 which this court commenced hearing in September 2016.

2. The Relevant assessment and litigation chronology as follows:
   a. Over the period 19 November 2010 until 15 June 2011, SARS issued a Letter of Preliminary Audit Findings, then a Letter of Findings, Findings, and finally an Assessment Letter for the tax years 2003 to 2009 inclusive.
   b. An objection was made by the Taxpayer in October 2011 and disallowed by SARS in March 2012.
   c. The Taxpayer proceeded with an appeal of which the Notice of Appeal is dated 31st March 2012 and the Letter of Appeal 16 April 2012.
   d. SARS issued Grounds of Assessment of additional estimated tax liability, penalty and interest on 23rd May 2013.
   e. The Taxpayer furnished a statement of Grounds of Appeal on 4th September 2013.[1] Amended Grounds of Appeal were delivered on 19 October 2015.[2]

FIRST POINT IN LIMINE – 'CHANGES IN ASSESSMENT' VS 'CONCESSION IN APPEAL'

3. The first point *in limine* raised by the Taxpayer is that SARS made an initial assessment which it then sought to change merely by way of a notice summarizing the evidence of an intended witness. It is argued that this was a material change in the 'amount of liability' which could only be done by withdrawal of the original assessment and substitution therefore in accordance with the provisions of the TAA.

Chronology

4. A brief overview of the methodology adopted by SARS in auditing and making the disputed estimated additional assessment of the Taxpayer over the years 20013 – 2009 need be given for purposes of determining this point *in limine* raised by the Taxpayer.

5. By reason of certain disclosures made to SARS by a director of this Taxpayer, enquiry into the tax affairs of another retail entity within the same group and examination of the purported Annual Financial Statements of the Taxpayer, SARS requested information from this Taxpayer in February 2009. Absent satisfaction of its request, SARS visited the premises of the Taxpayer (both with and without a warrant) and obtained such information as was eventually made available.

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[1] Those Grounds sought orders that the additional assessments for the 2003-2009 years of assessment are set aside, additional tax/penalties and/or interest be remitted and that SARS be ordered to pay the costs on a scale as between attorney and client.

[2] With the caveat that the Taxpayer disputed that there had been 'assessments' as defined in the Act.

6. All that was provided by the Taxpayer to SARS was computer data from the Taxpayer's point of sales system for a period of 7 months being 1st August 2008 to 28 February 2009 (known as 'the REACT data' of the '7 month period'); some PASTEL information compiled by the Taxpayer from the REACT data for those same 7 months; as well as purported Annual Financial Statements ('AFS') and VAT returns for the entire period in question of 2003 to 2009.

7. The upshot was that, notwithstanding it's best efforts, SARS found itself in possession, at the end of the day, with no more original material than limited data covering a period of 7 months for the entire 84 month period of the tax years 2003 to 2009.

8. The Taxpayer remained in possession of the data from which SARS made copies.

9. Certain of the available information was thereafter partially accessed by SARS and thereafter scrutinised and made available for access by an independent entity known as FACTS Consulting.

10. In establishing its Grounds of Assessment, SARS relied, in the main, upon the REACT data, established that certain 'P adjustments' had been made and that certain stock values were out of kilter with recorded sales. SARS then determined there to be an under-declaration of sales for the 7 month period found in the REACT data. SARS estimated what it deemed to be the more reasonable quantum of sales resulting in a gross profit margin percentage ("GP %'). That gross profit margin percentage resulted in a 'variance' amount in Rands of under-declaration of sales for 7 months. This estimate for the 7 month period was then extrapolated to the 12 month period of the 2009 tax year. Thereafter, SARS applied the same methodology retrospectively to the earlier tax years from 2003 onwards.

11. Initially, on 23rd May 2013, SARS' Grounds of Assessment determined there to be an under-declaration of some R38 million ('the R38 million variance') resulting in calculation of the gross profit margin at 3.6% which was then extrapolated to each of the tax years 2003 to 2009 to determine what SARS estimated to be the more reasonably calculated income on which tax was payable. SARS then estimated the taxpayer's liability to be R284 871 704 made up of R192 755 633 (Income Tax on under declared sales) and R92 116 071 (VAT on under declared sales) which amount excluded additional tax, interest and penalties.

12. However, on 30th April 2015 and for purposes of this Appeal, SARS filed a notice in terms of the Rules that the SARS assessor, Ms P Khoosal, would be called as an expert witness by SARS at the hearing of this appeal to give evidence on and in support of her report.('the Khoosal Report'). The notice stated that the SARS assessor had taken into account certain additional adjustments reflected in the REACT data. She had therefore recalculated the under-declaration of sales for the 7 month period to be the lesser sum of R28 million ('the 28 million variance') and the gross profit margin had now been reduced to 2.04%. The resulting extrapolation to the 2003 – 2009 years of assessment had (on this 2.04%) reduced the estimated liability to R208 288 351 made up of R140 632 843 (Income Tax on under declared sales) and R67 655 508 (VAT on under declared sales) which amount excluded additional tax, interest and penalties.

13. In response to this Expert notice, the Taxpayer delivered an amended statement of Grounds of Appeal on 19 October 2015 in which the Taxpayer identified the 'first point *in limine'* as "whether the wrong assessments are before the court". SARS advised by letter through its attorneys on 21 October 2015 that it did not intend to issue reduced assessments.

Taxpayer argument that change in calculation of an amount is not an assessment"

14. The first point *in limine* raised by the Taxpayer is that SARS has sought to change its initial assessment of 2011 but failed to follow the procedures laid down in the Tax Administration Act 28 of 2011 ('the TAA') and done so solely by way of a notice of a summary of the evidence which might be given by an intended witness at the hearing of the appeal.

15. The Taxpayer has argued that the different amounts in the initial SARS assessment made in 2011 , SARS Grounds of Assessment of 2013 and the Expert Report of 2015 (on which basis SARS defended this Appeal) were "serially recalculated amounts of liability" to justify 'assessments' which differ from each other as the matter has proceeded.

16. The Taxpayer maintains that that SARS cannot effect a material change in the 'amount of liability'[3] via notice of evidence intended to be led at the hearing of the Appeal by an expert witness. It is argued that such new assessment could only be effected by withdrawal of the original assessment of 2013 and substitution therefore (based upon its

[3] Being the definition of an 'assessment' in the TAA.

new methodology, implementation, calculations) to come to the 'amount of liability for the relevant tax years. The taxpayer argues that SARS should have proceeded as provided for in section 98(1)(*d*) of the TAA[4] and subsequently section 93(1)(*e*)(ii) of the TAA.[5]

SARS claims a "concession" in part of the quantum claimed – in terms of section 107(7) of the Tax Administration Act 28 of 2011

17. SARS has responded that although the 'amount of liability' has changed SARS had 'conceded' the amount in terms of section 107(7) of the TAA.

18. Counsel for SARS was adamant that "there had been a clear and unequivocal concession of part of the appeal" and "the point [had been] conceded" that there was an adjustment to the initial SARS calculation of R38 million under-representation of sales for the 7 month period and a 3.6% GP margin and SARS was now only proceeding on the basis of the R28 million under-statement of sales for that 7 month period and the 2.04% GP margin.

19. SARS relied upon an exchange of correspondence in 2015 subsequent to service of the notice of the evidence of the witness Khoosal and the Khoosal report. When the Taxpayer's attorney queried on 15th October 2015 whether "whether your client intends to issue reduced assessments", the response of SARS on 23rd October was :

> "[19] Kindly note that we are of the view that the methodology described by Ms Khoosal in her report is the same methodology used by her in raising the estimated assessment forming the subject matter of the tax appeal and on which our client in the statement of the grounds of appeal relies.
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> "[20] Although our client intends proving reasonability of the methodology used at the tax appeal, the Tax Court will be asked to confirm the reduced margin of 2.04% as extrapolated. Therefore the tax court will be asked to make an order in terms of section 129(2)(*b*) of the Tax Administration Act 28 of 2011.

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[4] Section 98(1)(d) of the TAA was added in 2013 to take effect from 1 October 2012 and deleted in 2015 with effect from 8 January 2016 and provided that "SARS may… withdraw an assessment which

(*d*) in respect of which the Commissioner is satisfied that
  (i) it was based on
    (*bb*) a processing error by SARS
  (ii) it imposes an unintended tax debt in respect of an amount that the taxpayer should not have been taxed on;
  (iii) the recovery of the tax debt under the assessment would produce an anomalous or inequitable result;
  (iv) there is no other remedy to the taxpayer; and
  (v) it is in the interest of the good management of the tax system."

[5] Section 93(1)(e)(2) was added in 2015 with effect from 8 January 2016 and provides that SARS "may make a reduced assessment if a senior SARS official is satisfied that an assessment was based on a processing error by SARS."

> "[21] In the light of the above, we place on record that our client does not as currently advised intend issuing reduced assessments prior to determination by the Tax Court of the tax appeal."

[our underlining]

20. At commencement of the hearing of this appeal, counsel for both the Taxpayer and SARS were given the opportunity to set out the factual and legal basis of the appeal and opposition thereto and to deal with what might be called 'housekeeping' issues. In the course of his address, counsel for SARS made it clear that SARS did not intend to and was not proceeding with insistence upon full liability in accordance with the figures of 2011 and 2015 but that it was proceeding only with the figures set out in the amended Khoosal report based upon under-declared sales for the 7 month period of the lesser amount of R28 million resulting in the 2.04% Gross Profit Margin – as set out in the expert witness summary of April 2015 and as confirmed in the correspondence of 23rd October 2015. That was indeed the basis upon which the appeal was heard.

Has there been a "concession" in terms of section 107(7) of the TAA?

21. Section 107(7) permits 'concession' by SARS of an appeal in part (i.e. of portion of that which is the subject matter of the appeal) before the appeal is heard.[6] The 'concession' contended for by SARS would have to be and is a reduction of the amount claimed to be a tax liability and therefore "in part' of the appeal.

22. SARS did advise by letter in October 2015 that SARS would now proceed only on the alleged under declaration of sales in the reduced amount of R28 million over the 7 months period for which there was data and therefore on the alleged gross profit margin as reduced to 2.04%. That advice was obviously given well before this appeal commenced it's hearings in September 2016.

23. The issue for this court to determine is whether or not SARS has "conceded" portion of its claim against the Taxpayer before the hearing of this matter clearly and unequivocally and without prejudice to the Taxpayer and in accordance with the appropriate procedure.

24. The powers of the Commissioner are prodigious, can and do have profound impact upon individuals and corporate entities, may and often do deny David the opportunity to challenge Goliath, could and often are prone to fiscal imperatives inimical to individual or business interests. In short, the Commissioner enjoys unusual prerogatives and a

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[6] Section 107(7) reads " SARS may concede an appeal in whole or in part before—
(a) the matter is heard by the tax board or the tax court;
(b) an appeal against a judgment of the tax court or higher court is heard."

multiplicity of resources. These can only be exercised within the confines of those powers expressly granted by the legislation. Excess hubris and overwhelming might must be constrained by the relevant legislation, in this case, the Income Tax Act 58 of 1962 ('the ITA') and the TAA (and necessarily the provisions of the Constitution). So also must lackadaisical approach to and use of those powers. The conduct of and presentation of the case for SARS has not always indicated that these dangers and values are appreciated.

25. However, in the present case, we are of the view that the point *in limine* raised by the Taxpayer must fail.

26. First, subsection 107(7) gives no direction how such 'concession' is to be made other than that it must be made before the matter is heard by the tax court – which it was.

27. Second, Rule 46 does provide for notice to be given where there is withdrawal or concession of an appeal. Sub rule (1) applies before an appeal has been set down for hearing while Sub rule (2) deals with the scenario where the appeal is already set down.[7] [8] In the present matter the first notice of set down in terms of Rule 39(4) is dated 23rd April 2015 for a date in 2015 when the appeal did not proceed; the second notice of set down in terms of Rule 39(4) is 5th July 2016 for September 2016 and there are subsequent Rule 39 Notices. Accordingly, the SARS attorney's letter of October 2015 advising of the intention to proceed on the 'reduced' gross profit margin and for an order in terms of section 129(2)(*b*) for the assessment to be altered was after the first notice of set down for a hearing which did not take place and before the notice of set down for a hearing which did take place – which was September 2016. This suggests that sub rule 46(1) is of application.

28. Third, both sub rules require a "notice of concession' to be given to the other party but only sub rule (2) requires a 'notice of concession' to be given to the registrar as well.

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[7] Rule 46 reads: "(1) If at any time before it has been set down under rule 39 an appeal or application under Part 107F is withdrawn by the appellant or conceded by SARS under section 107 of the Act, notice of the withdrawal or concession, whichever is applicable, must be given to the other party. (2) If an appeal or application has been set down for hearing under Rule 39 or is part heard and the appellant withdraws or SARS concedes the appeal or application the relevant party must—

(a) deliver a notice of withdrawal or concession, whichever is applicable to the other party and to the registrar; and

(b) in such notice indicate whether or not the party consents to pay the costs of the other party."

[8] The difference in wording in the sub rules might suggest that sub rule (1) envisages a concession of part of the appeal while sub rule (2) envisages concession of the entire appeal and not just of part thereof. This issue was not properly argued and we do not make our decision based on any interpretation of these Rules.

The format of such notice is not prescribed. The taxpayer was indeed notified in the Rule 37 expert summary notice of 30th April 2015 that SARS was claiming a lesser amount as also in the SARS attorney's letter of 23rd October 2015. 'Notice', such as it was, was 'delivered'[9] to the Taxpayer.

29. Fourth, it is obvious that the letter from SARS dated 23rd October 2015 made no reference to the provisions of section 107(7) nor made use of the word 'concession' as set out therein. However, both the Khoosal report furnished to the Taxpayer and the SARS letter made it clear that the new gross profit margin (expressed as a GP% of 2.04%) as now calculated in the mind of SARS, resulted in a lesser estimation of tax liability and in the amount of tax claimed. The SARS letter affirmed that there was an intention to ask the court to confirm a 'reduced' calculation and make an order to 'alter' the assessment in terms of section 129(2)(*b*). All this adds up, perhaps obtusely, to advice that SARS abandoned portion of that which was previously claimed in its earlier assessment and was thus conceding of portion of that which is the subject matter of the appeal.

30. Fifth, the Taxpayer clearly understood the import of that of which it was informed and such understanding was confirmed by both parties in the subsequent correspondence and in all actions they both subsequently undertook. There was an understanding of minds and action even though not acceptance thereof nor agreement therewith.

31. Sixth, the computation of the under-declaration of sales for the 7 month period, the notification of the new gross profit margin (from 3.6% to 2.04% and the rationale therefore were all spelt out and explained in great detail in the expert summary and report of the SARS assessor, Ms Khoosal. The Taxpayer was not in the dark about the calculations or results or the assessment or determination of financial liability.

32. Seventh, the initial assessment of 2011 and the Grounds of Assessment of 2013 and 2015 all involved the same accounting approach methodology as did Khoosal's summary of 2015. The only difference was the final result as to quantum – not as to approach or method. The actions of SARS in the present instance are in no way analogous to those criticized by the Supreme Court of Appeal in *Commissioner, South African Revenue Service v Brummeria Renaissance (Pty) Ltd & others 2007(6) SA 601 (SCA)* where the SCA found that "the Commissioner had changed the entire basis of the

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[9] The rules of the Tax Court defines "deliver means to issue, give, send or serve a document to the address specified for this purpose under these Rules".

assessment" in the further revised assessments. The same foundation for this assessment has always existed – under declaration of sales and gross profit margins.

33. Eighth, the approach and methodology and material considered was known and understood and appreciated by the Taxpayer who commissioned the services of two expert accounting witnesses (Messrs Stride and Sabbagh) each of whom worked upon the same principles and precepts in considering, agreeing or disagreeing with those of the SARS assessor (Khoosal) and witness (Strydom).

34. Ninth, SARS may have failed to give notice in terms of Rule 46(2) to the Registrar of the Tax Court of the reduction in quantum claimed. But, as already pointed out, the letter of October 2015 was sent prior to the Rule 39 Notice of July 2016 for the commencement of the hearing of September 2016. Even if the first (and stillborn rule 39 notice) is the relevant notice, any such notice to the Registrar would have been superfluous. No action from the Registrar or the court would have been required. This was not a concession of the entire appeal by SARS. There can be no prejudice to the Taxpayer if the registrar was not notified of a reduction in quantum claimed.

35. Tenth, such abandonment or concession of quantum as has taken place has not been to the prejudice or disadvantage of the Taxpayer.

36. Eleventh, the methodology and accounting principles are unchanged – the Taxpayer has not been confronted with any new matter let alone new matter of which there has been no timeous notice. The under declaration of sales was calculated utilizing the same material and arithmetical process but with correction of computer script which had previously merged data from certain accounting tables and also by taking positive P-type adjustments into account.

37. Twelfth, this appeal has heard evidence from some five expert accountant witnesses (Messrs Stride, Sabbagh, Strydom and Ms Khoosal) on the interpretation of 'the REACT data', the use to which 'the 7 month data' could or should be put, the methodology of under-declaration of sales, the amount of variances therein, calculation of gross profit margins and the appropriate sums involved. All expert reports and all witnesses have worked on and given evidence on and been questioned on the lesser under declaration of sales, the lesser variance of R28 million and the lesser gross profit margin percentage of 2.04% computations as sought by SARS. The previous greater variance of R38 million, GPM% of 3.6% have not been the subject matter of this appeal although the exact same material, foundation, methodology and calculations have been utilised.

38. Thirteenth, there is no reason why the initial Grounds of Assessment, the Rule 31 notice, the Rule 37 Notice,[10] the subsequent letters should not at all times be read together constituting a grand and glorious notice to the taxpayer of the lesser amount in assessment.

39. In short, the rose presented to the Taxpayer was still a rose - only it now smelt far sweeter. The Taxpayer has been confronted with an estimated assessment and what has been considered in this appeal is that assessment - portion of which has indeed been conceded by SARS. The point *in limine* is dismissed.

SECOND POINT IN LIMINE – THE DATA USED BY SARS

40. The Taxpayer has, from the outset , challenged both the provenance of the data obtained and utilised by SARS as well as the security of the chain of evidence of such data as was relied upon in preparing evidence or as presented in court.

41. The complaints are many. Firstly, although SARS claims to have imaged the data obtained within and from the REACT system, the Taxpayer protests that it did not know what was imaged and what was used as database. Secondly, although a number of SARS employees imaged certain data at the offices of the Taxpayer. Arendse and Pitso, were not called as witnesses and accordingly, the Taxpayer does not concede the provenance of that which was imaged or presented as data originating from the REACT system. Third, although SARS utilised an external entity known as FACTS to work on and extract the REACT imaged data from 2012, the Taxpayer contends that this was some three years after data was taken from the Taxpayer offices in 2009 and there is no guarantee that the 2009 and the 2012 data is the same. The FACTS report of January 2015 cannot confirm the provenance of the material upon which they worked. Fourth, although SARS approached one Naicker of REACT for assistance, SARS would not allow Naicker access to the full system taken from the premises of the Taxpayer which, according to the Taxpayer suggests *male fides* in SARS' reliance on data.

42. We find no substance to these complaints about copying and relay and usage of data.

43. All material is based upon hard drives and software and data created by and in the possession of and under the control of the Taxpayer over many, many years.

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[10] Read with Rule 34 which refers to the summary of the expert's opinion and reasons therefore as they pertain to the issues in the "appeal".

44. Wherever and whenever there may be a complaint, then it was always open to the Taxpayer to point out any incompatibilities between the original material in the possession of the Taxpayer and the material utilised by SARS. No such instance of discrepancy or disparity has been pointed out to us.

45. It is correct that those SARS employees who copied the data from the REACT system at the Taxpayer's premises did not give evidence. It would appear they are no longer in SARS employ. But neither expert witnesses nor the court were shown any example of error or failure in such copying of data. That avenue remains available to the Taxpayer – the Taxpayer's employees were present at the time the copying was done, retained the original material , were invited to attend the opening of the evidence bags containing the copies of REACT data, still retains the original data which it has always been able to compare with the copy in the possession of SARS.

46. The REACT data was obtained by SARS in 2009 from the Taxpayer's premises. FACTS only received and worked thereon from 2012 onwards. Clearly FACTS was not in a position to make any comment on the material as and when obtained from the Taxpayer. But the Taxpayer was in a position to retain the material throughout and even to the duration of the appeal (or if it did chose not do so has given no explanation therefore). No reason has been given for doubting the veracity of the material given to FACTS.

47. No suggestion has been made as to what may have been or was actually removed or inserted by nefarious actors within SARS before the REACT data was given to FACTS. No instance has been demonstrated of dissonance or difference or quarrel between the data upon which FACTS relied and the results obtained therefrom and the data upon which the Taxpayer could have relied which was in its possession.

48. SARS did decline to give its full set of data to Mr Naicker of REACT. SARS could indeed have sent a copy to Naicker for his analysis. But he apparently said that he required the original material (which was in the possession of the Taxpayer). If SARS sent the original copy imaged by itself to Naicker and kept only a copy of the copy - then the security of the chain of evidence would certainly have been disrupted.

49. In the course of the appeal the experts for the Taxpayer and for SARS worked with figures arrived at by SARS for the sake of discussion purposes (and argument) only and on that basis alone agreed that the 'variance' was in the region some R28 million (R28 000 000) for the 7 month period for which there was original data. However, the experts who gave evidence for the Taxpayer made it clear that they had not asked their

own client which had instructed them, the Taxpayer, for the original data created and held by the Taxpayer, had not looked for or found any discrepancies between the data held by the Taxpayer and the SARS data copied at the premises of the Taxpayer. In fact, the experts had not established from the Taxpayer if there was a 'variance' of R28 million or any other amount and the reason therefore. But that is the choice of the Taxpayer – the Taxpayer had the data long before anyone else and has never indicated that it was unable to check the data upon which its own experts relied (the copied REACT data in the possession of SARS) as against the data in the possession of the Taxpayer. The Taxpayer did not enlighten its own experts on the existence of same or lesser variances, the use to which the P adjustments were put and why, the amount of stock discrepancies and the reasons therefore. The Taxpayer's own witnesses were limited by their extremely confined mandate and absence of information from their client, the Taxpayer.

50. At the end of the day, the duty rests upon each and every taxpayer to keep his or her, it's or their accounting records.[11] It is the taxpayer who creates, receives, stores, relies upon, amends, collates, compares, amalgamates, correlates, extracts, permutates and finally resolves the documents and data which contain and record his or her or it's or their financial records. This taxpayer produced nothing of value except under duress when SARS visited its premises. That which was finally extracted was for a period of no more than 7 months out of a total of 7 entire tax years. No reason was given for the absence of information since no employee or director of the Taxpayer gave evidence on behalf of the Taxpayer.

51. The Taxpayer has chosen to make much of the failure of SARS to make it's estimation in terms of section 95 of the TAA which peremptorily requires SARS to rely "on information readily available to it". SARS contends it was only required to makes it's estimation in terms of section 78 of the ITA which does not place such peremptory requirement upon SARS. To our mind, this is not an issue to be determined at this point. Both the ITA and

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[11] Section 73A of the ITA states that all person required to render a return "must retain all records relevant to that return for a period of five years from the date…" and such records are stated to include all "ledgers, cash books, journals, cheque books, bank statements, deposit slips, paid cheques, invoices and stock lists and all other books of account and any electronic representations of information in any form." Section 29 of the TAA states that "a person must keep the records, books of account or documents that enable the person to observe the requirements of a tax Act, are specifically required under a tax Act or by the Commissioner by public notice, enable SARS to be satisfied that the person has observed these requirements" and that such records, books of account of documents need not be retained by the person after a period of five year from date of submission off the return.

the TAA attract Constitutional requirements of reasonableness and rationality. These considerations will be taken into account when determining the 'reasonableness' or otherwise of the assessment.

THE ESTIMATED ASSESSMENT

'Reasonableness of assessment"

52. Subsection 102(2) of the TAA provides that the burden of proving whether an estimate under section 95 of the TAA is 'reasonable' rests upon SARS. This applies whether an estimate is made in terms of subsection 95(1) of the TAA[12] or in terms of subsection 79(1) of the ITA.[13]

53. Reasonableness requires that SARS has struck a balance fairly and reasonably open to them on the facts before them or available to them (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004(4) SA 490 (CC*)). A balance must be struck between a range of competing considerations and must therefore be context-specific (*Head, Western Cape Education Department v Governing Body, Point High School 2008(5) SA 18 (SCA*).

54. SARS can only defend it's decision on the original assessment by reference to those considerations upon which reliance was placed at the time of making the assessment (*ITC 1862 75 SATC 34* and *ITC 1876 77 SATC 175*). However, insofar as the 'conceded assessment' or the balance of the assessment after the concession was made, the information which gave rise to the concession and the post assessment calculation of the remaining balance must be relevant.

Approach to and methodology of the audit

55. Attached to Khoosal's report is an affidavit deposed to by Mr X, a director of the Taxpayer, which reveals certain systemic methods of avoiding disclosure of income within other entities in the group of companies of which this Taxpayer appears to be one; that affidavit apparently led to an order made by the High Court in terms of the Prevention of Organised Crime Act; it also led to a section 74C tax enquiry. Following

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[12] SARS may make "an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate'.

[13] SARS may "estimate either in whole or in part the taxable income…" .

thereon, Khoosal had regard to the presented Annual Financial Statements ('AFS')[14] of this Taxpayer and Khoosal then became that concerned that this Taxpayer reported a negative gross profit when the sales and cost of sales (opening stock, purchases and closing stock) were compared.

56. Attempts were thereafter made by SARS to obtain data from the Taxpayer especially that resulting from use of the 'REACT Point of Sales' system ('REACT POS'). Initially, SARS was provided with selective data and accounting records in 2009 and thereafter SARS obtained a search and seizure warrant executed in March 2009 which enabled SARS to copy or 'image' the Windows based REACT POS data for a period of no more than 7 months – being the months of August 2008 to February 2009 inclusive.

57. No reasons for the absence of verifiable financial or accounting records and data for the full period in question – 2003 to 2009 - were given at the hearing of this appeal by the Taxpayer. Khoosal learned of certain reasons, one being an alleged robbery or theft, but she has no knowledge thereof and no witness of any sort has appeared from the Taxpayer to explain the absence of records, documents, books of account.

58. Such imaged data as was obtained and copied by SARS from the Taxpayer premises and hardware was accessed by SARS. The Taxpayer was invited to be present but failed to attend. SARS restored the REACT POS data.

59. When the REACT POS system was examined by the experts, it emerged that a P-type functionality (known in this appeal as the 'P type adjustment') was included in the REACT POS system which permitted suppression of sales.

60. Khoosal trawled through the REACT POS data. She identified the absence/removal of stock from the 'stockstatdaily' table without recordal of a corresponding sale in the 'salesitemtable'. This gave rise to a monetary value in the 'variance' between disclosed sales in the POS system and absence of stock which she determined to be 'under-declared' sales. In arriving at this 'variance' for the 7 month period for which data had been obtained under the search and seizure warrant, Khoosal utilised the REACT opening stock figures for 1st August, the REACT closing stock figures for 28th February, the REACT POS purchases and sales for the period 1st August to 28th February.

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[14] These AFS documents presented by the Taxpayer to SARS for the seven years 2003 to 2009 were signed by someone purporting to be an external auditor on three occasions (without indicating a firm of chartered accountants or practice number) and by directors on only two occasions.

61. The taxpayer's Gross Profit Percentage ('GP %') was then reconstructed by reliance upon this REACT POS raw data available for the 7 month period. Cost of sales were calculated by taking opening stock figures as at 1st August 2008 from the 'stockstatdaily' table on the REACT POS system to which was added purchases as found on the REACT POS system from which was deducted closing stock figures as at 28th February 2009 from the 'stockstatdaily' table on the REACT POS system. This cost of sales calculation was then deducted from overall sales as found on the REACT POS system to achieve an estimate of gross profit and gross profit percentage ('GP %')

62. Initially, Khoosal extrapolated a gross profit percentage of 3.6% as was set out in the SARS Grounds of Assessment. (However, after amending two variables –which involved increasing purchases and decreasing sales - a gross profit margin of 2.04% was reached as set out in the Khoosal Report.)

63. Since SARS was only in possession of 7 months original REACT data, SARS utilised the GP % and adjusted the declared sales for each of the years of assessment by applying the GP % to the cost of sales declared by the Taxpayer. In order to estimate the under declared sales for the full period under assessment Khoosal applied this GP % for the tax years 2003 to 2009.

64. By November 2010 SARS issued a letter of audit findings to the Taxpayer who responded with a number of challenges: the "stockstatdaily"table was an incorrect table to utilise because this is a statistical and not a transactional table; there were defects in the REACT POS system itself which had resulted in SARS identifying a variance between stock and sales recorded; that sales prices had incorrectly been taken into account instead of promotional prices.

65. An entity known as FACTS consulting was instructed by SARS to test the system for any defects as averred by the Taxpayer. Witnesses Malan and Byrd gave evidence that they had not found such defects. Khoosal had regard to the difference between sales and promotional prices. The assessment was raised.

The critique of SARS methodology

66. The Taxpayer has raised a number of criticisms of the work done by Khoosal both as a matter of logic or accounting practice or common sense and also based on the expert opinion evidence given by two accountants in private practice – Mr Stride and

Mr Sabbagh. It is perhaps appropriate to consider such comments in conjunction with the expert accountant evidence given by Mr Strydom.

67. Firstly, the Taxpayer complains that SARS' pleaded case is one of understatement of sales and not manipulation of stock whereas the case presented in the course of the appeal is one of understatement of sales through the manipulation of stock. But, examination of the documentation and correspondence[15] indicates that reference is made throughout to 'stock quantity variance', 'analyses of stock', 'quantity [of stock] variance'. While it is clear that SARS always placed reliance upon under-declaration of sales and that Khoosal saw her task to assist SARS in making a 'sales quantification', SARS was perfectly entitled to enquire into and examine the issue of stock – cost of stock, quantities of stock present and absent, sales recorded and so on – as a means of determining the true or full or estimated manipulation of funds and SARS made it clear to all concerned from the outset that it had so done.

68. Secondly, the Taxpayer questions use by SARS of the GP % methodology including cost of sales (ie stock values) where the Taxpayer avers that the dispute set out in the Grounds of Assessment pertains only to sales. But, as indicated above, stock always featured in the methodology utilised and in calculation of the 'variance' and the GP%. Although Khoosal explained that the methodology chosen would take cost of sales into account, the Taxpayer complains that this 'morph' is not in accordance with SARS' case as pleaded. It may well have been that Khoosal was alerted, as she said, by the negative gross profit in the AFS when and if only the sales and cost of sales (i.e. stock, purchases, stock) were compared but that query or suspicion is the basis for the examination which followed into the role played by stock in estimating the GP%. It is also difficult to comprehend how SARS could be expected to explore, audit and then allege an under-declaration of taxable income without having regard to cost of stock (correctly or incorrectly, truly or falsely stated) which gave rise to sales of such stock (correctly or incorrectly, truly or falsely stated) at margins (correctly or incorrectly, truly or falsely stated) which result in the very income sought to be estimated for taxation purposes.

69. Thirdly, the Taxpayer challenges the alleged failure by SARS to have regard to other material available to it. Both Stride and Sabbagh testified that rebates and discounts should have been taken into account and deducted from cost of sales which would have impacted on the GP percentage. However, we note that the Taxpayer itself failed to record any such rebates/discounts in the REACT POS system either in purchases or

[15] Letter of Assessment, Grounds of Assessment, Khoosal's report.

closing stock and erratically recorded such rebates/discounts in its annual financial statements ('AFS') as 'other income' or sometimes above and sometimes below the line in those AFS. Whilst certain documents which (apparently and perhaps) were rebate agreements and/or creditors journals were found on the taxpayer premises, these were, according to Mr Stride, usually considered confidential material, were not explained to the court and no one from the Taxpayer explained what these documents were, whence they emanated, what they revealed, how they impacted upon cost of sales or sales themselves. Khoosal did, however, acknowledge that adjustments are usually made to stock at year-end and such adjustments are acceptable in terms of IFRS and the ITA. However, what such rebates or adjustments could or would be either in volume or value, as contended for by both Stride and Sabbagh, apparently remains anyone's guess at the end of this appeal. Certainly we heard nothing from the Taxpayer on rebates or discounts. At the end of the day, the court concluded that the 'rebates' and 'discounts' were never treated by the Taxpayer itself as anything more than a red herring in this appeal.

70. Furthermore, the Taxpayer has argued that SARS should have had (greater) regard to VAT returns, the Pastel accounting system, the AFS, management reports on the REACT system and other unnamed source documents seized from the Taxpayer. It is clear that, in interrogating the REACT POS system data, SARS primarily turned to the original material created by the Taxpayer itself at point of operations. Pastel reports and management reports were drawn from the REACT POS system and are not original documents themselves. VAT returns and annual financial statements were created by unknown employees of the Taxpayer from unknown documentation and are not themselves original data. Insofar as Khoosal gave evidence that she was informed that the Pastel data imaged by SARS was 'corrupted', she did not ask the Taxpayer to provide a further copy because it was not original data and would not assist her in identifying suppressed sales. We have already footnoted that the value of the AFS is doubtful when one has regard to the absence of directors' signatures thereon in some years and the absence of any indication as to an actual independent audit.

71. Fourthly, the Taxpayer critiques the application of the GP % methodology by Khoosal as being flawed in multiple respects.

72. One identified flaw argued by the Taxpayer is the result of the method of extrapolation. It is pointed out that the variance of R38 million (later R28 million) for the 7 month period was extrapolated in accordance with the GP % to the 12 month period resulting in a total

of amount of under declared sales R145 million (later a R104 million) for the year. The result is what was known at later stages in the appeal hearings as 'the bulge' – a variance of R28 million for 7 months with the larger amount of R78 million for the lesser 5 months. This is submitted by the Taxpayer to be 'unbelievable' and suggestive of something seriously wrong with the methodology adopted by SARS.

73. Khoosal was clear, both in her report and her evidence, that the 'variance' of R28 million was in respect of 'suppressed sales' alone and explained that no one, other than the Taxpayer, was in any position to comment on this 'bulge' because there were no records for the five months of the year and that there was no information as to what gave rise to the negative GP % in the first place. Whatever speculation Khoosal might make is of little assistance since she is not in a position to explain what the stock and sales movements were and why for the unrecorded 5 months of the 2009 tax year. She is correct to concede her inability to speculate. But, no person actually working at or for or directing the work at the Taxpayer gave evidence on any of the possibilities suggested to this court – ranging from seasonality of sales to wastage.

74. The Taxpayer submits that SARS should have tested it's methodology by, for instance, considering the output resulting from application of this formula and whether such output gave reasonably justifiable results.[16] The 'bulge' suggests that the results are unjustifiable. The Taxpayer went further to argue that Khoosal/SARS should have 'tested' its methodology using and against the VAT returns submitted by the Taxpayer to SARS. The difficulty with this argument are multiple. First, the REACT data was a point of sales system; the P type adjustment was an adjustment of sales; the methodology adopted looked at under declaration of sales and VAT returns do not give cost of sales and furthermore are a secondary source of information created by the Taxpayer and not a primary source of information as is the REACT system. Secondly, the methodology utilised the AFS which emanated from the Taxpayer and was submitted annually to SARS by the Taxpayer; it is correct that they are secondary and not a primary source of information but the information does include sales; it was always open to the Taxpayer to explain to SARS and Khoosal and even to the court how and why its own AFS were not reliable (if that was their case).

75. Another flaw identified by the Taxypayer is that the expert witness, Strydom, in annualizing the <u>average</u> sales figures for the 7 month period in question, raised another

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[16] See paragraph [19] of *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and Others 2006(2) SA 191 (SCA).*

'variance'. The upshot was for the Taxpayer to suggest that the GP % methodology is flawed. But Strydom explained, as discussed later in this judgment, that he worked out the average figures whereas Khoosal went somewhat further and worked out the actual figures. Each of the expert witnesses – Stride, Sabbagh and Strydom – made many postulations and offered many possibilities including 'variances' whilst they were in the witness box. The variances explored and evaluated by Strydom do not negate or even tarnish the methodology of Khoosal. It is indicative of the careful scrutiny to which the SARS work was subjected because Strydom then concurred with Khoosal's calculations and confirmed them as 'reasonable' in all the circumstances.

Conclusion

76. This court must weigh up the documentation presented (some 75 ring binder files plus further material) and as explained and commented upon by the assessor, Khoosal, and the accountants, Stride, Sabbagh, and Strydom.

77. The Taxpayer failed to present explanations or documents or other evidence which must have been within the knowledge or expertise of its own directors, managers, employees - none of whom were called. It is trite that an adverse inference may be drawn from a failure to present available evidence[17] and from a failure to rebut a fact peculiarly within the knowledge of a party.[18] Where there is failure to challenge the testimony of a witness in cross-examination then the party calling that witness is entitled to assume that the unchallenged testimony is accepted as correct.[19]

78. Insofar as the critique of the SARS methodology and calculations by Stride and Sabbagh are concerned we bear in mind that their mandate was limited. Both indicated that they testified on the basis of limited facts disclosed to them by few persons involved in the conduct of the business of the Taxpayer whose employees or employers or directors did not themselves testify. In many instances, in the absence of consultations or explanation from the Taxpayer, the expert witness was obliged to rely upon his own interpretation or understanding of facts supposedly recorded in certain documents or procedures which had not been discussed with the Taxpayer. Both experts relied upon the data utilised by SARS. Sabbagh did not even have sight of the books of first entry i.e. the REACT POS system for the period under assessment.

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17 *Galante v Dickinson 1950(2) SA 460 AD.*

18 *National Director of Public Prosecutions v Zuma 2009 (1) SACR 361(SCA).*

19 *President of the Republic of South Africa and others v South African Rugby Football Union and Others 2000(1(SA 1 (CC).*

79. Insofar as the work done by Khoosal is concerned it is noted that the Taxpayer's experts did not dispute or challenge the accuracy of the opening stock as at 1st August 2008 or the closing stock as at 28 February 2009 or that it was obtained by SARS from the REACT POS system data. Insofar as there was an attempt to persuade the court that the AFS stock details should have been relied upon with allowance made for rebates and discounts - as indicated earlier in this judgment, such suggestion as regards discounts and rebates was not substantiated by reference to documents or evidence.

80. The findings by FACTS consulting as detailed by the witnesses Byrd, Malan or Khoosal was not challenged. Cross examination of Strydom belatedly tried to suggest differences in the variance between quantity sold in the 'stockstatdaily' and 'salesitem' tables so as to contend that SARS utilised different data than that provided to FACTS consulting. But the reports and evidence of Khoosal explains the difference between the' itemcount' totals of FACTS and herself as does the separate report of Strydom. In any event the data utilised by FACTS and Strydom was the same.

81. The evidence of Mr Strydom of PWC was of particular assistance to this court. He was adamant that he would commence with the primary books of account being the REACT POS system containing the details of sales, opening stock, purchases and closing stock. It was his view that the paucity of information provided by the Taxpayer was insufficient to permit a precise calculation of the exact taxable liability for each of the years 2003 to 2009.

82. Initially Khoosal calculated the first variance under declared sales for 7 months of R38 million with a 3.6 GP %; Khoosal's subsequent calculations took into account positive P-adjustments and corrected script which had failed to merge goods received and goods returned to the 'stockstatdaily' table resulting in an adjustment to the purchases and resulted in a reduced variance of R28 million and a 2,04 GP%. Strydom then did his own independent calculations and arrived at a variance of R26 million and a gross profit percentage of 1.92%. This difference in GP % – between 2,04% and 1.92% - was explained by Strydom – he used an <u>average</u> sales price while SARS looked at <u>daily</u> sales price. It would seem from his evidence that Khoosal's method was more accurate.

83. Even the Taxpayer's witnesses, Stride and Sabbagh, were hard put to rely upon the documents created by the Taxpayer such as the Annual Financial Statements as also the Pastel computations which were based upon the REACT POS system data and

neither sought to rely upon any information other than the REACT POS system data as the first book of entry.

84. Where it was sought by the Taxpayer to suggest that SARS produced a multiplicity of unreliable results, the Taxpayer is being disingenuous. SARS produced a letter of preliminary audit findings of 6% to enable the Taxpayer to respond and be heard. As a result of the Taxpayer's input, SARS made a reduction to 3.6%. Khoosal then further corrected the GP% to 2.04% by taking into account positive P-adjustments which reduced the variance from R38 million to R28 million and correcting script which failed to merge goods received and goods returned to the 'stockstatdaily' table resulting in an adjustment to the purchases. Finally, this was followed by the Strydom evaluation of 1.92% described by him as a 'reasonability test' taking into account <u>average</u> selling prices (as opposed to <u>actual</u> selling prices as done by Khoosal). (Our underlining.)

85. Insofar as the critique offered by the accountant experts is concerned, it must be accepted that all are accepted as persons of expertise and integrity. It is not inappropriate that each could or should have their own preferred method of approach to the problems with which they were confronted. This court has to decide if their differences or disagreements with the SARS methodology are of such a nature and extent that doubt is cast upon the 'reasonableness' or otherwise of the SARS assessment.

86. Mr Stride focussed on discounts/rebates to contend that SARS had failed to deduct same from 'cost of sales' but disregarded that the Taxpayer had itself chosen not to apply these discounts/rebates to reduce the cost of sales and instead to reflect same as 'additional income'. He believed that the data relied upon by SARS had changed considerably since the initial assessments were raised but gave no evidence thereof. Mr Stride criticized SARS for not investigating theft of stock but then conceded that P-adjustments which he had found in his data could have arisen as a result of Taxpayer collusion. Mr Stride, without referring to sources for such opinion, opined that programme scripts used to calculate the variance must have been defective and that data was unreliable. Mr Stride was critical of the extrapolation of a gross profit percentage calculated on the basis of 7 month data over a whole seven years period and suggested that, absent information from the Taxpayer, SARS should have investigated suppliers and other businesses but he did not contend that extrapolation of the gross profit percentage to the 2009 year of assessment was equally unreasonable and eventually conceded that it was reasonable. Mr Stride conceded that he had not

been provided with or done any of his own investigation to ascertain data which would have supplemented or superceded the data available to SARS. Mr Stride was uncertain whether or not he had proposed a new or different methodology in his different reports. He accepted that the data in the AFS was probabaly unreliable and incorrect and could not be relied upon to criticize either the SARS methodology or results.

87. Mr Sabbagh proposed alternative methodologies. The 'percentage of sales method', apparently fails to take into account the difference between the closing stock in the REACT POS system raw data and the closing stock reported by Taxpayer in the 2009 AFS which difference was admitted by Mr Sabbagh not to be due to rebates and discounts. The 'adapted SARS methodology', utilises a GP percentage derived from information contained in the Taxpayers's annual financial statements or Pastel data over a 12 month period which methodology ignores the inconsistency of suppressed sales on a month-to-month basis. The 'identified variances' approach assumes that sales suppression pertains only to specific products over the entire 7 year period but such assumptions were unsupported by the objective facts. Mr Sabbagh conceded that the REACT POS system contains manipulated results transferred to the Pastel accounting system and then to the AFS which renders the latter documentation unreliable. He conceded that the effect of the sale suppression resulted in a failure to make full declaration of all sales, that he failed to investigate the true position of such suppression by the Taxpayer and agreed that the effect was to bring down the gross profit margin percentage. Mr Sabbagh accepted that Khoosal had applied her methodology consistently, that the function of SARS and investigative accountants differed, that it was the legal responsibility of the Taxpayer to maintain reliable and accurate accounting records.

88. Mr Strydom of PWC reviewed the calculation of SARS and assessed it for reasonability. With verve and enthusiasm, Strydom went through all the calculations performed by himself and discussed those performed by SARS. He conceded some merit in alternative methods save that they failed to take into account the impact of discrepancies in opening and closing stock. He maintained that the 2.04% GP used by SARS is an fair and accurate reflection of the GP% based on the REACT data for the 7 month period and that it was reasonable to use that percentage to extrapolate it over the seven year period to get to the sum of additional revenue in the amount of some R483 million.

89. It is not possible to do justice to the manner in which each witness gave evidence – referring to a multiplicity of documents, performing calculations in the witness box,

creating new documents to illustrate a proposition. Each witness performed with distinction and energy and showed great experience and knowledge. The detail of their reports and their evidence fill countless thousands of pages and cannot be replicated in this judgment. The assistance of each of the witnesses – Messrs Stride, Sabbagh and Strydom - is much appreciated and has been of great assistance to this court.

90. In summary, the Taxpayer was not cooperative with SARS, accounting records eventually obtained under warrant were limited to a 7 month period alone, the REACT POS system was found to have a P-type adjustment functionality which enabled the suppression of sales, opening and closing stock figures reflected in the AFS were not substantiated by 'stocktake' records, the AFS were incorrect in identifying revenue received by way of discounts/rebates as 'other income', there were unexplained differences in the value of closing stock in the REACT POS system and the relevant AFS, analysis of the P-type adjustments initially resulted in a determination that sales in an aggregate amount of some R38 million had been suppressed in the relevant 7 month period. The Assessment Letter of June 2011 calculated estimated income tax and VAT liabilities on the basis of a R38 million variance and the extrapolation of a 3.6% gross profit. The methodology remained the same – the positive P adjustments and the script errors were changed – and the variance was reduced to R28 million and a 2.04% gross profit margin. Khoosal was clear and of assistance in responding to cross-examination. Strydom was impressive in his evaluation of the SARS methodology and his own parallel assessments. Stride and Strydom alone, without evidence from the Taxpayer, do not persuade that the SARS assessment was not reasonable in all the circumstances.

91. In all the circumstances, we conclude that SARS has been and is 'reasonable' in its computation and assessment of the Taxpayer's liability.

SARS penalties

92. The documentation attached to the Report of Khoosal included affidavits from Mr X, records of the proceedings of a section 74 tax enquiry in respect of ACME Ltd and affidavits from other persons. It made for fascinating reading worthy of a bestselling espionage or mafia novel. Understandably, this knowledge had great impact upon SARS and its employees including Ms Khoosal. It permeated their entire approach and strategy to the investigation of this Taxpayer.

93. SARS did not argue for the admissibility of this information and in argument simply said "it is no more than that" whatever that might mean. The Heads of Argument referred to other evidence which it submitted should be admitted on a similar fact basis.

94. There is no clear pleading to justify the extrapolation from 7 months in 2009 to the full period 1 March 2003 to 31 July 2009 – the grounds of assessment refer only to failure by the Taxpayer to furnish SARS with complete and accurate data over this period of seven years. We note that the supposition that the Taxpayer manipulated it's sales using the REACT POS system (DOS in the beginning) (Windows during the 7 month period) is based, in the main, upon inference.

95. The only direct evidence from witnesses was that of Messrs Moe and Joe who could not have been more pathetic examples of humanity.

96. Mr Moe (chartered accountant and former financial manager at the Taxpayer from February 2013 which is subsequent to the period of review in question) gave evidence as to his personal involvement in so-called '*ooplang*' transactions which involved systematic abstraction of cash from the REACT POS system utilised by the Taxpayer and use of such cash for a variety of purposes. Moe was a most despicable character - he gave evidence that he had knowingly deposed to untrue affidavits falsely alleging criminal conduct on the part of another employee and given evidence against that employee at trial. We are in agreement with the description of him as "a self-serving liar". It is of great concern that he still enjoys registration as a Chartered Accountant and is permitted to practice in that capacity.

97. Mr Joe was an employee of the Taxpayer (and within the group of which the Taxpayer is an entity) during the relevant period when the REACT POS system had the suppression of sales functionality – the P adjustment function. He gave evidence on the *'ooplang'* system operative during the relevant period under assessment where he was a cog in the chain of collection of cash from the daily business takings of the Taxpayer, placing such monies in a box and making it available to senior management of the Taxpayer, completing certain receipts and records in regard to the *ooplang* scheme including payments from this stash of monies. In short, he gave evidence that "ooplang is the sales which is not recorded in, not recorded in the books of accounting" and "where cash is diverted from your normal, from your normal daily takings of a business." The documents he presented pertain to a period well beyond the period of assessment and he was the author of only one such entry. Joe is a single witness and a self-confessed

accomplice to criminal undertakings and conspiracy. His evidence must be viewed with caution.

98. Significantly, counsel for Taxpayer did not dispute or challenge the evidence of either Joe or Moe as to the existence of the "*ooplang*" system and it's diversion of monies out of the financial records of the Taxpayer into the coffers of senior management. In so doing, the legal representatives for the Taxpayer showed the highest professional restraint and integrity.

99. We were referred to a decision of the full bench of the Gauteng South Division*, Road Accident Fund v Maseng 2017 JDR 0914 (GJ),* where reference was made at paragraphs [16] to [18] to several well established authorities as to the approach to be taken to the evidence of a single witness. Those cases were concerned with disputed issues – here there was no dispute insofar as the so-called *ooplang* evidence was concerned. There was only critique of the reliability and credibility of the witnesses Joe and Moe. This court must analyse and evaluate the probabilities or otherwise on the evidence before it and then determine whether SARS has discharged the burden as to the onus of proof.

100. As already remarked in this judgment, an adverse inference may be drawn from a failure to present available evidence[20] and from a failure to rebut a fact peculiarly within the knowledge of a party.[21] Where there is failure to challenge the testimony of a witness in cross-examination then the party calling that witness is entitled to assume that the unchallenged testimony is accepted as correct.[22]

101. On the evidence available to this court, there has been more than mere occasional or innocent omission to include in any return any amount which ought to have been included. It is our view that there has been deliberate evasion through establishment, equipping, staffing and operating a system to manipulate suppression of sales.

102. Joe's evidence that the earlier DOS version of the REACT POS system had a sales suppression capability through its quotation functionality and which had been used by the Taxpayer was never challenged. It is not disputed that the currently operating Windows system of the REACT POS system was found to have a sales suppression

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20 *Galante v Dickinson 1950(2) SA 460 AD.*

21 *National Director of Public Prosecutions v Zuma 2009 (1) SACR 361(SCA).*

22 *President of the Republic of South Africa and others v South African Rugby Football Union and Others 2000(1(SA 1 (CC).*

functionality – the P type adjustments - which functionality had been used in the production of the REACT POS data created by the Taxpayer and obtained by SARS. All the experts in this field (both from FACTS and SARS) testified to the use of this functionality and that it had this impact on the finances of the Taxpayer as disclosed. Stride acknowledged that the suppression of sales by utilizing the P-type functionality in the REACT POS system would constitute tax fraud.

103. The Taxpayer has given not even a hint of an explanation for the absence of statutorily required (in terms of the ITA, the TAA and the VAT Acts) ledgers, cash books, journals, cheque books, bank statements, deposit slips, paid cheques, invoices and stock lists and all other books of account and any electronic representations of information in any form. The Taxpayer has been unable or unwilling to explain what happened to all of it's original records for a period of 6 an a half years – March 2003 until July 2008 (when the REACT data was obtained).

104. The absence of such information is not only an issue of non-compliance with legislation but it also creates serious risk within the operational and financial affairs of this Taxpayer and not only allows for but also encourages manipulation, distortion, deception and obfuscation.

105. The Company's Act 71 of 2008 nd it's predecessor require Annual Financial Statements to have been prepared (internally or by an outside firm) and then signed by auditors and directors. Those purported AFS presented by the Taxpayer were signed by someone (perhaps an unknown auditor or someone's aunt?) on three occasions (but no stamp, name of chartered accountant or firm or practice number is indicated) and by directors on two occasions. This suggests that no one was prepared to or did confirm and take ownership of these purported AFS documents.

106. When SARS initially attempted to obtain information from the Taxpayer it was fobbed off. When it pressed the issue and produced a search warrant the Taxpayer was not helpful and was, in fact, intimidatory - ranging from requiring a senior SARS official to arrive (Mr Makwakwa) to actually locking the gates and not allowing SARS staff to leave. There is every impression of non-cooperation or obstruction in the behavior of the Taxpayer when asked and then required to produce documentation it is statutorily obliged to retain. The Taxpayer has an interest in the satisfactory outcome of any audit or assessment and one would expect provision of assistance but instead there was the exact opposite.

107. To the extent that ‘rebates’ or ‘discounts’ may ever have offered some explanation, the Taxpayer gave no assistance. But interestingly, we were told that rebates and discounts agreements were initially not handed over to SARS. We were also told by Mr Stride that the Taxpayer maintained that these were ‘confidential’ which is difficult to understand since SARS is not a competitor of the Taxpayer and the nature of such confidentiality was never explained to this court.

108. All other reports, such as the management or Pastel accounts or reports were based on what appeared in the REACT data. This is the very system which allows a special functionality for suppression of sales. The information contained therein does not correlate with that contained in the purported AFS documents. In a sense, the Taxpayer is the author of it’s own misfortune. The work of Khoosal in (putting it very simply) comparing stock with sales and the income resulting therefrom disclosed the under declaration of sales and the ‘variance’ which gave rise to the estimated Gross Profit Margin percentage.

109. In all these respects, the Taxpayer has remained silent and failed to offer any explanation for the absence of documentation or the failure to cooperate with SARS or the use of the P type adjustment functionality or the discrepancies between the REACT data and the AFS or the under declaration of sales when the REACT data and the AFS are compared. It is not only the absence of an explanation which is so noticeable. It is also the absence of any challenge to this evidence.

110. The only disputes and challenges made to evidence were either technicalities or presentation of a different view on what would be or was a ‘reasonable’ assessment. But facts were not challenged.

111. The existence of the *ooplang* system may have been described by two despicable characters – Moe and Joe – but was not disputed by the Taxpayer when either of them were under cross-examination. The evidence of Joe relates to the period in question whilst that of Moe can be no more than corroboration of operations after the relevant period. Joe was a pathetic individual, clearly not a mastermind and no more than an incidental collaborator in someone else’s system of tax evasion. The usual cautions as to an accomplice hardly seem applicable. Moe’s evidence confirms that of Joe (for the subsequent period) and does have similar fact value in respect of the earlier period.

112. On the evidence of both witnesses, the “*ooplang”* system was more than just an incidental and *ad hoc* event. There seem to have been many layers of *oopalng :* false

suppliers, cheques endorsed, payment made in and out at certain tills only, cash not recorded, deliveries not made, rebates which did not exist, stock which was never acquired. The REACT POS system may have revealed some of the occurrences but apparently not all.

113. What is clear is that *ooplang* was a parallel system to the supposedly open and above board one captured on REACT software. It was monitored on small pieces of paper which enabled the Taxpayer to track it's undisclosed revenues and profits.

114. Such a system was obviously planned and calculated and regularly and continuously implemented. *Ooplang* impacts on both income tax and VAT calculations and payments.

115. Section 76 of the ITA[23] provided that a taxpayer shall be required to pay additional tax of an amount "equal to twice the difference between the tax calculated in respect of the taxable income returned by him and the tax properly chargeable" where the taxpayer omits from his return any amount which ought to have been included therein or an additional tax of an amount "equal to twice the difference between the tax as assessed in accordance with the return made by him and the tax which would have been properly chargeable" where the taxpayer makes an incorrect statement in any return rendered by him which results or would if accepted resulted in the assessment of the normal tax at an amount which is less than the tax properly chargeable.

116. No extenuating circumstances in terms of section 76(2)(*a*) have been suggested or argued to this court.

ORDER(S) SOUGHT BY EACH PARTY

117. This is not a court of inherent jurisdiction. As a creature of statute it enjoys only those statutory powers granted to it. Section 129(2) of the TAA empowers the court, in the case of an assessment under appeal, to exercise a discretion to do one of three things: to 'confirm' or to 'alter or to 'refer an assessment back' to SARS for reconsideration.[24]

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[23] Section 222(1) of the TAA is to the same effect as regards an 'understatement'.

[24] Section 129(2) "In the case of an assessment under appeal …….. the tax court may—
(*a*) confirm the assessment …
(*b*) order the assessment … to be altered; or
(*c*) refer the assessment back to SARS for further examination and assessment."

118. In this appeal, the taxpayer has been consistent in that which it has sought - that the additional assessments for the 2003-2009 years of assessment be set aside, additional tax/penalties and/or interest be remitted and that SARS be ordered to pay the costs on a scale as between attorney client (see footnote 3 of this judgment). By contrast, SARS has been incoherent and erratic in it's approach and in that which it has sought in no less than three different draft orders presented to this court.

The various iterations of SARS' proposed orders – Subsection 129(2)(*a*) – 'confirm the reduced assessment'

119. In early correspondence – 21st October 2015 – SARS advised the Taxpayer that it would ask the court "to confirm the reduced assessment". At paragraph 9 of its heads of argument of November 2017, SARS requested the court to "confirm the reduced assessments".

120. That which SARS then sought to have 'confirmed' was not the estimated assessment as set out in the original grounds of assessment (an estimated under declaration of R38 million over 7 months resulting in a GP% of 3.6% then extrapolated over 12 months and finally over seven years) had been jettisoned by SARS itself long before the trial began. Quite obviously this court cannot confirm an assessment which not even SARS sought to rely upon at trial.

121. Presumably, what SARS then sought to have 'confirmed' was the balance of the assessment which remained after the concession had been made in terms of section 107(7) of the TAA. However, insofar as any 'reduced' or assessment or 'balance after concession' is concerned, SARS no longer asks that this court 'confirm' same in terms of subsection (*a*).

The various iterations of SARS' proposed orders – Section 129(2)(*b*) and section 93(1)(*c*) – annexure FR48 to the Khoosal Report

122. The first proposed order which SARS attached to its heads of argument purported to be one in terms of section 129(2)(*b*) of the TAA. It asked for a *declariter* that the court is

"empowered to grant an order that the assessments be altered, as envisaged in section 129(2)(*b*) read with section 93(1(*c*)".[25]

123. The order proposed in the heads of argument stated that SARS would "ask" (in the main) for an order "That ACC's under declared taxable income for the 2003 to 2009 years of assessment and ACC's under declared VAT as reflected in annexure FR48 to Ms Khoosal's factual report, File 22, page 504". From this we may deduce that SARS then sought an order in terms of subsection (*b*) that the assessment 'be altered' to those figures and calculations and amounts as set out in an expert report to be found on page 504 of the court record.

124. On commencement of SARS argument, SARS withdrew this proposed order and the matter was argued without any indication to the court as to that which was sought by SARS.

The various iterations of SARS' proposed orders – Section 129(2)(*b*) – the assessments are altered

125. Thereafter, at approximately 12h55 on conclusion of oral argument for the Taxpayer (and in the absence of SARS senior counsel) a completely revised order was handed up just as the Taxpayer was about to commence it's replying argument. This order runs to some 16 pages with copious footnotes referencing the source and methodology for calculations and confirmation thereof. Neither the court nor the Taxpayer had perused nor considered this new proposal and the court requested and received supplementary heads of argument (for which we thank counsel) on this state of affairs and the order now sought by SARS.

126. This final draft proposes that "the assessments are altered in accordance with section 129(2)(*b*) of the Tax Administration Act" and "it is directed that the respondent [SARS] alter the assessments in respect of the 2003 to 2009 income tax assessments and VAT assessments, forming the subject of this tax appeal, accordingly."

127. Thereafter the draft contains (in some 15 pages) for each tax year the amounts from which and to which under declared income is to 'be altered', the amounts from which and to which additional tax in terms of section 76 'be altered', the method of calculation

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[25] At the outset of oral argument, SARS abandoned any reliance upon section 93(1)(*c*) of the TAA which provides that SARS may reduce an assessment to give effect to a judgment of the court where there is no right of appeal which is neither apposite nor appropriate in the present case.

and dates of section 89*quat*(2) interest "be altered", the amounts from which and to which the standard rate output VAT tax "be altered", the amounts from which and to which the additional VAT tax "be altered" and the method of calculation and dates the VAT Act interest "be altered".

128. The amounts which are sought to be altered are those contained in the original Grounds of Assessment whilst the new amounts proposed are those based upon figures utilised, methodology adopted and calculations reached by the SARS assessor Ms Khoosal in her subsequent expert report and as advised by notice on 30th April 2015 as confirmed or affirmed by Mr Strydom in his expert reports and evidence.

129. In short, this court is now being asked by SARS to act in terms of subsection 129(2)(*b*) and 'alter' each and every amount contained in earlier additional assessments and substitute therefore a figure as contained in the second report of the SARS assessor.

130. The Taxpayer has now argued that the only appropriate action for this court to take is to 'refer the assessment back to SARS for further examination and assessment" in terms of section 129(2)(*c*) which is opposed by SARS.

"Subsections (*b*) and (*c*) – "be altered" versus " further examination and assessment"

131. The Oxford English Dictionary provides a useful starting point for distinguishing between the options contained in subsections (b) and (c). The word "alter" is defined as:

> "to make (a thing) otherwise or different in some respect; to make some change in character, shape, condition, position, quantity, value, etc. without changing the thing itself for another ; to modify, to change the appearance of"
>
> "to become otherwise, to undergo some change in character or appearance"

and the passive form "be altered" is defined as "made otherwise, changed in some particulars". When one turns to the same dictionary, 'examination' is defined as:

> "a testing, trial, proof"
>
> or
>
> "the action of testing or judging by a standard or rule"
>
> or
>
> "the action of investigating the nature, qualities or condition or any object by inspection or experiment, minute inspection, scrutiny" or "the action or process or searching or inquiring into (facts, opinions, statements etc), investigation, scrutiny".

132. The distinction seems clear. Subsection (*b*) envisages that when an assessment is ordered to "be altered", the assessment is changed or modified in identified respects but the assessment is not completely transmuted or transmogrified into an entirely new entity comprising new DNA. Subsection (*c*) envisages that the assessment is referred back to the creator thereof, SARS, for a further process of investigation so as to test the subject matter and arrive at a further result.

133. Both counsel were asked to refer us to precedent on the issues of 'alteration' versus 'further examination'. We were directed to a number of judgments where section 129(*b*) and (c) of the TAA and their predecessors in section 83 in the ITA were applied.

134. In *ITC 1869 (75 SATC 329)* an ancillary issue to the main dispute was an error whereby a management fee of some R12 million had been twice allowed as a deduction. The court accepted the practical approach argued by counsel that the trial had been run on the basis of certain averments set out in the opening address which reinforced the general observation that the taxpayer knew the case which was to be mounted by SARS to justify its assessment and framed its own case accordingly. The court made an order in terms of section 129(2)(*b*) amending the original assessment by the deduction of the duplicated R12 million management fee thereto. It appears neither the appeal court nor the SCA took issue with such order of alteration.

135. In *Dr A v SARS, Case No 13132* SARS had issued an additional assessment in respect of "closing stock from farm operations". The court found the assessment by SARS to be deficient in at least three respects: there was an error as to amount in Rands (included as taxable income in respect of closing stock from farming operations) which was "manifestly erroneous, unfair and unreasonable" which error "arose out of employing an illogical and incongruous methodology" and the court noted that "no evidence was adduced on behalf of SARS in support of the error"; subsequent to amendment by SARS of its grounds of assessment "no alternative value was fixed " and the taxpayer was not informed what SARS case was on an alternative value; SARS "did not respond to the taxpayer's request for reasons for the assessment" as required by the Rules of the Tax Court which defect had not been remedied in the SARS grounds of assessment. The court found that "With the paucity of evidence adduced on what would constitute a fair and reasonable method of quantification, this court is not in a position to substitute respondents calculation with that of its own." Further, in view of certain evidence advanced by the taxpayer it was held that "this court cannot on the available evidence, make a determination with regard to the amount of the assessment." The issue of

determining the value to be placed on the produce was remitted back to SARS for further consideration and for re-assessment in terms of subsection (c). On appeal (*Dr H C Avenant v SARS 367/2015 SCA*) no comment was made on the decision by the court *a quo* to refer the assessment back for further examination and assessment.

136. In *CSARS v Stepney Investments (Pty) Ltd 2016(2) SA 608 (SCA)* there was dispute as to the value of shares in a company which held a casino license – SARS contended for a net asset valuation methodology whilst the taxpayer contended for a discounted cash-flow method of valuation. The SCA accepted certain concessions made by SARS at the hearing of the appeal and also found that the taxpayer's valuation was flawed in certain respects. In such circumstances, the SCA ordered that the matter was remitted back to the Commissioner for further investigation and assessment.

137. Quite obviously, the latest order proposed by SARS is not the original assessment raised. The chronology set out in this judgment has shown that these final amounts (of Khoosal, evaluated by Stride and Sabbagh, confirmed by Strydom as 'reasonable') are based upon facts and opinions not known to SARS as at time of the assessment letter of 2010 through to the Grounds of Assessment of 2013 (i.e. the P adjustments to be included and the scripts which had merged information). That is one of the reasons why this court could not 'confirm' that original assessment in terms of subsection 129(2)(*a*). It is also one of the reasons why the TAA envisages that it may be appropriate, in certain circumstances, to 'alter' an assessment when further facts and opinions and surrounding circumstances become known.

138. This is a court of revision and may therefore take into account all evidence presented at the hearing, exercise its own discretion and make its own decision and thus act in terms of subsection (*b*) by making an order as to the alteration to be effected by SARS. It is because subsection (*b*) is within the powers of this court we are able to exercise a discretion to literally operate as a court of arithmetical revision.

139. In deciding whether or not to exercise such discretion, this court cannot ignore important issues of law and public policy pertaining to the collection of tax and the role of the fiscus in so doing. We have already adverted to the prodigious powers granted to the Commissioner which are subject to the constraints of both the ITA and the TAA and the Constitution.

140. We are mindful that, as matters of public policy, good governance, professional competence, entitlement to trust in government institutions, responsible exercise of

enormous powers, fairness to taxpayers, appropriate use of almost unlimited resources, the calculation of an assessment must be properly and thoroughly investigated and prepared before the assessment is raised . Expert assistance (if needed) must be sought before litigation commences. Equally, SARS cannot merely lie back and think of England once litigation commences and seek comfort from what will hopefully emerge at the appeal hearing and then in the last minutes of argument present an order which SARS then proposes be made by the court.

141. Subsection (*b*) is an appropriate tool where portion of the original assessment can be set aside with clarity, where the taxpayer has not been taken unawares and proper notice has been given of the proposed alteration, where the provenance of the alteration is known to all and has been carefully examined by both SARS and the taxpayer and the court, where there can be no prejudice to either the taxpayer or SARS, where a matter is brought to finality and it is appropriate so to do.

142. In the present matter, no matter how inelegantly worded, SARS did notify the taxpayer in October 2015 that it would seek 'confirmation of the reduced assessment" which is the equivalent of giving notice that SARS would seek an order that the 2013 Grounds of Assessment would "be altered" to those amounts set out in the Khoosal Report furnished in April 2015. The Taxpayer is not taken unawares by or of this proposed alteration.[26]

143. This court is not being asked to replace an assessment with an alternative whose provenance has not been clarified. This matter is unlike those authorities already discussed where "no evidence has been adduced" or "no alternative value was fixed" or where there was "a paucity of evidence"[27] or where a combination of concessions made at the hearing and flaws in evidence meant that no determination could be made.[28]

144. Alteration of the assessment does not ignore the clear separation of functions between SARS, those independent experts whom it may consult and from whom it may receive advice and this court itself. This court is not asked to do arithmetical calculations on ten fingers or an abacus in order to arrive at the 'altered' amounts and, in so doing, override the responsibilities of SARS functionaries, assessors and accountants. This court cannot usurp the functions of an administrative agency such as SARS or its personnel.[29] The

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[26] See the discussion of *ITC 1869 (75 SATC 329).*

[27] See the discussion of *Dr A v SARS Case no 13132.*

[28] See the discussion on *CSARS v Stepney Investments (Pty) Ltd 2016(2) SA 608 (SCA).*

[29] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others 2004(4) SA 490 (CC).*

proposed alterations rely on methodology and figures and calculations and explanations made and tendered by the SARS assessor Khoosal.

145. The methodology on which these figures are based and each and every amount in the proposed order has been examined, considered, debated both outside this court (in all the reports of Khoosal, Stride, Sabbagh and Strydom) and inside this court when each of SARS and Taxpayer witnesses presented their reports and elaborated thereon at length.[30]

146. These alterations have been critiqued by the Taxpayers' experts but neither devastated nor even impaired. This court has given full consideration to the methodology pursued, the amounts proposed by Khoosal and confirmed by Strydom and the evaluations of Stride and Sabbagh and has found the methodology to have been consistent and' reasonable' and the amounts arrived at 'reasonable' in all the circumstances. The assessment is not accepted as "perfect" but the law does not set the standard that high.

147. Subsection (*b*) is an appropriate tool where finality can be brought to a dispute where there has been compliance with the imperatives of fairness and reasonableness and rationality. Subsection (*c*) is the only option available to a court where such finality should not be sought by reason*, inter alia*, absence of notice, no foundation for the provenance of any proposed alteration, paucity of evidence, lack of explanation, obscurity of methodology/figures/calculations as opposed to clarity thereon, lack of opportunity to challenge proposed alterations or offer postulations of other alterations, where the court overreaches by performing the function of SARS rather than having regard to the evidence of SARS, the Taxpayer, experts and relying upon their methodology and computations.

148. In the present matter, it is difficult to conceive what useful purpose could be served by this court sending SARS back to the drawing board in terms of subsection (*c*). The examination has already taken place by the SARS assessor and the three independent accountant expert witnesses and all involved in this litigation. It is difficult to envisage what further examination could take place and none has been suggested.

149. It has <u>not</u> been a relevant consideration to this court that SARS might bewail the enormous task of returning to the drawing board to commence with further examination and issue of a fresh assessment. If that were the appropriate manner in which this court

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[30] Unlike the facts in *Dr A supra.*

should exercise it's discretion then SARS would be the author of its own misfortune. After all, SARS chose in 2015 not to withdraw assessments by reason of a 'processing error' in terms of section 98 of the TAA or issued reduced assessments by reason of a 'processing error' in terms of section 93 of the TAA after January 2016. t is not for this court to speculate on the reasons therefore but if concern to extract full interest from the Taxpayer played any part in SARS making such a decision, then such a debacle of an order in terms of subsection (*c*) and the cost in time and money (all to the taxpayer) would have been a ghastly warning to all of us who seek to short circuit statutory procedures. The possibility of an order in terms of subsection (*c*) exemplifies the mediaeval poem that "for the want of a nail the kingdom was lost".[31] Had SARS acted in terms of either sections 98 and then 93, then it would not have run the risk of an order in terms of subsection (*c*) with accompanying embarrassment, prodigious costs, lost interest, possible problems of prescription, and the possible escape from fiscal justice of an identifiably noncompliant and possibly dishonest taxpayer.

150. However, for all the reasons set out above, we are of the view that it is appropriate, fair and reasonable in all the circumstances to make an order in terms of subsection 129(2)(*b*) of the TAA and in the specific terms set out in the draft submitted for consideration by SARS.

COSTS

151. From the outset, the Taxpayer has claimed costs on an attorney and client scale. In it's final proposed draft, SARS sought costs against appellant Taxpayer.

152. The issue of punitive costs was not argued.

153. In the present case, neither party has been without fault.

154. We are mindful of the arrogance displayed by SARS in its strategy and planning of this litigation and in its approach to what or which assessment was before this court, the casual expectation by SARS that the court would come to it's aid when it had failed to address the problems with the 'assessment' pertinently adverted to by the Taxpayer; SARS disregard for rules of hearsay in producing reams of paper to which this court could not properly have regard and in persistence in arguing on matters where no evidence was before this court; SARS production of nearly 300 pages of heads of

[31] "For want of a nail the shoe was lost, for want of a shoe the horse was lost, for want of a horse the knight was lost, for want of a knight the battle was lost, for want of a battle the kingdom was lost, all for the want of a horseshoe nail."

argument which failed to succinctly address those issues covered in the 133 pages of heads of argument presented by the Taxpayer; an apparent attitude of bluster and unpreparedness in preparing or failing to prepare the order it sought on a matter of such significance to the administration of fiscal justice.

155. Against this, we must also measure the uncooperative attitude of the Taxpayer in respect of provision of financial and accounting material to SARS; the time spent in court on technicalities and accounting niceties which could obfuscate proper appreciation of tax non-compliance and the *modus operandi* thereof.

156. However, at the end of the day neither party was successful in their initial claim. SARS proceeded to court on the 2013 Grounds of Assessment which have now been 'altered'; the Taxpayer asked for the additional assessments, penalties and interest to be set aside which has not been granted.

157. Section 130 permits a tax court to grant an order for costs. In the present case we do not propose to make any order of costs.

ORDER

Having heard the evidence and argument on behalf of the parties, the Court grants the following order:

1. That the appeals be dismissed.

2. That the assessments are altered in accordance with section 129(2)(*b*) of the Tax Administration Act as indicated below, and it is directed that the respondent alter the assessments in respect of the 2003 to 2009 income tax assessments and VAT assessments, forming the subject of this tax appeal, accordingly.

   2.1 Income tax assessment, 2003

   2.1.1 The under declared taxable income be altered from R35 555 740 to R27 238 040.66;

   2.1.2 The additional tax imposed in terms of section 76 of the Income Tax Act, Act 58 of 1962 (as it read at the time of imposition thereof), be altered from R21 334 644 to R16 342 824.40;

   2.1.3 The section 89*quat* (2) interest on the under payment of provisional tax, be altered to be calculated on the amount with which the normal tax payable (on the total taxable income, taking into account the altered under

declared taxable income referred to above) exceeds the credit amount in relation to the 2003 year of assessment, at the prescribed interest rate, from the effective date (30 September 2003) until the assessment of such normal tax, being 23 June 2011.

2.2 VAT assessment: 02/03

2.2.1 The standard rate output tax be altered from R11 032 659.84 to R9 868 181.83;

2.2.2 The additional tax be altered from R9 955 607.40 to R7 626 651.38;

2.2.3 The interest in terms of section 39(1) be altered to be calculated at the prescribed rate on the outstanding balance (taking into account the altered under declared output VAT), from 1 April 2003, to date of payment.

2.3 Income tax assessment, 2004

2.3.1 The under declared taxable income be altered from R71 884 116 to R56 818 233.83;

2.3.2 The additional tax imposed in terms of section 76 of the Income Tax Act, Act 58 of 1962 (as it read at the time of imposition thereof), be altered from R43 130 470 to R34 090 940;

2.3.3 The section 89*quat*(2) interest on the under payment of provisional tax, be altered to be calculated on the amount with which the normal tax payable (on the total taxable income, taking into account the altered under declared taxable income referred to above), exceeds the credit amount in relation to the 2004 year of assessment, at the prescribed interest rate, from the effective date (30 September 2004) until the assessment of such normal tax, being 23 June 2011;

2.4 VAT assessment: 02/04

2.4.1 The standard rate output tax be altered from R21 959 724.44 to R19 850 500.97;

2.4.2 The additional tax be altered from R20 127 552.42 to R15 909 105.48;

2.4.3 The interest in terms of section 39(1) be altered to be calculated at the prescribed rate on the outstanding balance (taking into account the altered under declared output VAT), from 1 April 2004, to date of payment.

2.5 Income tax assessment; 2005

2.5.1 The under declared taxable income be altered from R86 937 350 to R69 462 379.17;

2.5.2 The additional tax imposed in terms of section 76 of the Income Tax Act, Act 58 of 1962 (as it read at the time of imposition thereof), be altered from R52 154 192 to R41 677 427.50;

2.5.3 The section 89*quat*(2) interest on the under payment of provisional tax, be altered to be calculated on the amount with which the normal tax payable (on the total taxable income, taking into account the altered under declared taxable the credit amount in relation to the 2005 hear of assessment, at the prescribed interest rate, from the effective date (30 September 2005) until the assessment of such normal tax, being 23 June 2011;

2.6 VAT assessment: 02/05

2.6.1 The standard rate output tax be altered from R22 736 266.49 to R20 289 774.95

2.6.2 The additional tax be altered from R24 342 455.24 to R19 449 466.16;

2.6.3 The interest in terms of section 39(1) be altered to be calculated at the prescribed rate on the outstanding balance (taking into account the altered under declared output VAT), from 1 April 2005, to date of payment.

2.7 Income tax assessment, 2006

2.7.1 The under declared taxable income be altered from R112 416 989 to R89 940 453.62;

2.7.2 The additional tax imposed in terms of section 76 of the Income Tax Act, Act 58 of 1962 (as it read at the time of imposition thereof), be altered from R71 949 108.12 to R52 165 463.10;

2.7.3 The section 89*quat*(2) interest on the under payment of provisional tax, be altered to be calculated on the amount with which the normal tax payable (on the total taxable income, taking into account the altered under declared taxable income referred to above), exceeds the credit amount in relation to the 2006 year of assessment, at the prescribed

interest rate, from the effective date (30 September 2006) until the assessment of such normal tax, being 23 June 2011;

2.8 VAT assessment: 02/06

2.8.1 The standard rate output tax be altered from R32 776 677.32 to R29 629 960.48;

2.8.2 The additional tax be altered from R31 476 757 to R25 183 327.02;

2.8.3 The interest in terms of section 39(1) be altered to be calculated at the prescribed rate on the outstanding balance (taking into account the altered under declared output VAT), from 1 April 2006, to date of payment.

2.9 Income tax assessment, 2007

2.9.1 The under declared taxable income be altered from R89 057 501 to R59 648 034.31;

2.9.2 The additional tax imposed in terms of section 76 of the Income Tax Act, Act 58 of 1962 (as it read at the time of imposition thereof); be altered from R51 655 152 to R34 595 859.90;

2.9.3 The section 89*quat*(2) interest on the under payment of provisional tax, be altered to be calculated on the amount with which the normal tax payable (on the total taxable income, taking into account the altered under declared taxable income referred to above), exceeds the credit amount in relation to the 2007 year of assessment, at the prescribed interest rate, from effective date (30 September 2007) until the assessment of such normal tax, being 23 June 2011;

2.10 VAT assessment: 02/07

2.10.1 The standard rate output tax be altered from R32 571 204.60 to R28 453 879.19;

2.10.2 The additional tax be altered from R24 936 100.42 to R16 701 449.60;

2.10.3 The interest in terms of section 39(1) be altered to be calculated at the prescribed rate on the outstanding balance (taking into account the altered under declared output VAT), from 1 April 2007, to date of payment.

2.11 Income tax assessment, 2008

2.11.1 The under declared taxable income be altered from R116 517 421 to R76 005 900.53;

2.11.2 The additional tax imposed in terms of section 76 of the Income Tax Act, Act 58 of 1962 (as it read at the time of imposition thereof), be altered from R67 580 104 to R44 083 422.30;

2.11.3 The section 89*quat*(2) interest on the under payment of provisional tax, be altered to be calculated on the amount with which the normal tax payable (on the total taxable income, taking into account the altered under declared taxable income referred to above), exceeds the credit amount in relation to the 2008 year of assessment, at the prescribed interest rate, from the effective date (30 September 2008) until the assessment of such normal tax, being 23 June 2011;

2.12 VAT assessment: 02/08

2.12.1 The standard rate output tax be altered from R39 327 373.23 to R33 655 760.33;

2.12.2 The additional tax be altered from R32 624 877.94 to R21 281 652.14;

2.12.3 The interest in terms of section 39(1) be altered to be calculated at the prescribed rate on the outstanding balance (taking into account the altered under declared output VAT), from 1 April 2008, to date of payment.

2.13 Income tax assessment, 2009

2.13.1 The under declared taxable income be altered from R145 602 847 to R104 589 742.09;

2.13.2 The additional tax imposed in terms of section 76 of the Income Tax Act, Act 58 of 1962 (as it read at the time of imposition thereof), be altered from R89 906 431.55 to R58 570 255.56;

2.13.3 The section 89*quat*(2) interest on the under payment of provisional tax, be altered to be calculated on the amount with which the normal tax payable (on the total taxable income, taking into account the altered under declared taxable income referred to above), exceeds the credit amount in relation to the 2009 year of assessment, at the prescribed

interest rate, from the effective date (30 September 2009) until the assessment of such normal tax, being 23 June 2011;

2.14 <u>VAT assessment: 02/09</u>

2.14.1 The standard rate output tax be altered from R46 171 716.93 to R40 429 882.25;

2.14.2 The additional tax be altered from R40 768 797.14 to R29 285 127.78;

2.14.3 The interest in terms of section 39(1) be altered to be calculated at the prescribed rate on the outstanding balance (taking into account the altered under declared output VAT), from 1 April 2009, to date of payment.

DATED AT JOHANNESBURG THIS 16TH DAY OF MAY 2018

Date of hearings: 12 September 2016 – 24 September 2016; 6 March – 31st March 2017; 30 October 2017 – 23 November 2017; 4h December 2018 – 8th December 2018.

Satchwell J

Makume J

Mali J

Natasha Singh – assessor

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Bongani Mathibela – assessor

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