IN THE TAX COURT OF SOUTH AFRICA
GAUTENG

CASE NUMBER: 13879
DATE: 6 July 2018

In the matter between:

ABC (PTY) LTD Appellant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Respondent

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JUDGMENT

MABUSE J:

[1] This matter came before me as an appeal by ABC (Pty) Ltd against a decision of the Commissioner for the South African Revenue Services ("the Commissioner"), to disallow an objection against the assessment of 19 September 2013 in which the Commissioner had assessed two amounts for Income Tax purposes.

[2] The Appellant in this matter is a company with limited liability registered as such in terms of the company statutes of this country. It conducts its brickmaking business in the province of Limpopo. The company is registered for Income Tax purposes with Tax Number XXX. For purposes of brevity I shall, in this judgment, refer to the company as "the taxpayer".

[3] The Respondent is the Commissioner for the South African Revenue Services, the official duly appointed to administer the Income Tax Act No. 58 of 1962 ("the Income Tax Act"), and the Tax Administration Act 28 of 2011 ("the TAA"). Its principle place of business

is situated at 299 Bronkhorst Street, Niew Muckleneuk, Pretoria. For purposes of brevity I shall refer to him as "the Commissioner".

[4] The battlefield of the taxpayer and the Commissioner in this appeal is whether the taxpayer:

4.1 has under-declared its gross income for the 2010 year of assessment;

4.2 is liable for payment of 10% understatement penalties; and

4.3 is liable for interest in terms of section 89*quat*(2) of the Income Tax Act.

According to counsel for the Respondent, the disputes were solely in respect of whether the debtors with credit balances as well as the additional cash receipt accrued to the taxpayer, during the 2010 year of assessment; alternatively, whether any downward adjustment to the closing stock value should be made.

THE OVERVIEW

[5] During September 2011 the Commissioner engaged the taxpayer for an audit of its income tax compliance for the 2010 year of assessment. On 19 March 2012 the Commissioner made its findings known to the taxpayer. The audit findings of the Commissioner were as follows:

5.1 Income in the amount of R9,832,766.43 received was not declared for income tax purposes as income; this amount was included by the respondent as taxable income in the Appellant's 2010 year of assessment as a result of the debtors with credit balances at year end. These amounts were recorded as receipts from customers with no corresponding invoices recorded in the accounting records of the taxpayer.

5.2 Furthermore it was also found that income was received and processed in the debtors' accounts "Cash sales, Cash clients and Small cash" to the amount of R631,628.00 but was not declared as gross income for income tax purposes. This amount was included by the Commissioner as taxable income in the taxpayer's 2010 year of assessment as a result of credit balances in the taxpayer's cash sales account at year end.

The said findings were subsequently followed by the Commissioner issuing additional assessments in terms of the provisions of section 92 of the TAA. These additional assessments were issued on 20 February 2013. Section 92 of the TAA deals with such additional assessments. It provides as follows:

> "92. If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or fiscus, SARS must make an additional assessment to correct the prejudice."

[6] It is the Commissioner's contention that during the 2010 year of assessment, the taxpayer received various amounts. The Commissioner established that all of such amounts, for the following reasons, fell to be included in the taxpayer's total gross income as part of the taxpayer's taxable income for the 2010 year:

6.1 the taxpayer received the sum of R9,832,766.43 and another amount of R631,628.00 total R10,464,394.43 for its own benefit;

6.2 the taxpayer failed to include the aforementioned two amounts in its gross income notwithstanding the fact that the said amounts constituted integral parts of the taxpayer's income. 'Gross income' in terms of section 1 of the Income Tax Act means: *"… (a) the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; … during such year or period of assessment, excluding receipts or accruals of a capital nature…".* 'Income' in terms of section 1 of the Income Tax Act means the amount remaining of the gross income of any person for any year or period of assessment after deducting therefrom any amounts exempt from normal tax under Part 1 of chapter II;

6.3 the taxpayer's failure to declare the said amounts as part of income resulted in the taxpayer's understating its taxable income for the 2010 year of assessment;

6.4 the taxpayer's protestations that the said amounts should not constitute part of its gross income could not be supported by any documentary proof despite the Commissioner having invited the taxpayer, on times without number, to submit proof of such documentary details to justify its claim that the two amounts could not be categorised as part of its gross income.

[7] The additional assessment included the following on the strength of section 92 of the TAA:

"7.1 UNDERSTATEMENT PENALTY

By way of its additional assessment, for the understatement, the Commissioner imposed a penalty of 75% in terms of sections 221, 222 and 223 of the TAA.

7.1.1 Section 221 provides, among others, as follows:

'Understatement' means any prejudice to SARS or the fiscus as a result of—

(*a*) a default in rendering a return;

(*b*) an omission from a return;

(*c*) an incorrect statement in a return; or

(*d*) if no return is required, the failure to pay the correct amount of "tax".

7.1.2 Section 222 provides as follows:

(1) in the event of an understatement by a taxpayer, the taxpayer must pay, in addition to the tax payable for the relevant tax period, the

understatement penalty determined under subsection (2) unless the 'understatement' result from a bona fide inadvertent error;

(2) understatement penalty is an amount resulting from applying the highest applicable understatement penalty percentage in accordance with the table in section 223 to its shortfall determined under subsections 3 and 4 in relation to its understatement in the return.

7.1.3 Section 223 of the TAA deals with understatement penalty percentages table.

7.2 INTEREST

In terms of the provisions of section 89*quat*(2) or the Income Tax Act, an amount in respect of interest was added to the total of the assessed amount. Section 89*quat*(2) of the Income Tax Act states that:

'2. If the taxable income of any provisional taxpayer is finally determined for any year of assessment exceeds—

(*a*) twenty thousand rand (R20,000.00) in case of company; or

(*b*) fifty thousand rand (R50,000.00) in case of any person other than a company,

and the normal taxable income by him in respect of such taxable income exceeds the credit amount in relation to such year, interest shall, subject to the provisions of subsection (3) be payable by the taxpayer at the prescribed rate on the amount by which such normal tax exceeds the credit amount, such interest being calculated from the effective date in relation to the said year until the date of assessment of such normal tax.'

3. Where the Commissioner having regard to the circumstances of the case is satisfied that the interest payable in terms of the subsection (2) is a result of circumstances beyond the control of the taxpayer, the Commissioner may direct that interest shall not be paid in whole or in part by the taxpayer.'"

[8] The Commissioner contends that:

8.1 *"The Appellant is, in compliance with the requirements of section 89quat(2), a provisional taxpayer;*

8.2 *the taxable income determined by the Commissioner set out in the additional assessment in respect of the 2010 year assessment exceeded R20,000.00."*

For the aforegoing reasons the taxpayer was liable to pay interest.

[9] Through its attorneys and by a letter dated 13 September 2013, the taxpayer lodged, in terms of section 104(4) of the TAA an objection against the aforementioned assessment on several grounds. In particular with regard to the sum:

9.1 of R9,832,766.42 referred to in the final audit notice, the objection raised was that the said amount was received by the taxpayer but not included in income. The taxpayer's submission was that the said amount was received but did not form part of the taxpayer's gross income or income. In the alternative, the

taxpayer submitted that if the amount of R9,832,766.42 formed part of the taxpayer's income, then in that event the amount of its trading stock (held and not disposed of) as at the end of 2010 year of assessment was overstated to the extent of the cost price of the trading stock regarded by the Commissioner as having been disposed of in return for that amount. For this reason, so contended the taxpayer, the additional assessment should have made provision for such adjustment since the Commissioner could not simultaneously allege that:

9.1.1 the taxpayer has disposed of trading stock; and

9.1.2 it still owns the very same trading stock;

9.2 further in the alternative, the objection was raised on the ground that in terms of section 22 of the Income Tax Act, the taxpayer has overstated its trading stock held and not disposed of at the end of the 2010 year of assessment by the cost price of stock disposed of the value of R7 200 000, calculated on the average historical gross profit percentage maintained by the taxpayer, and it should be assessed accordingly;

9.3 of R631,628.00 reflected in the Commissioner's bundle notice, the taxpayer admitted that the said amount was received but denied that it was income. The taxpayer's submission was that the said amount did not in law constitute part of the taxpayer's gross income or income. According to the taxpayer those receipts and payments which were reflected as credit balances did not accrue to the taxpayer.

[10] In a letter dated 12 August 2014 the Commissioner disallowed partially, with full reasons, the taxpayer's objections. The Commissioner furnished the following reasons for partially disallowing the taxpayer's objections. The Commissioner gave the following reasons:

10.1 Debtors Account:

10.1.1 sales are declared upon generating an invoice. This income was generalised to the sales accounts and consequently remained under-declared. As the taxpayer failed in 2011 to submit the IT14 it could therefore not be confirmed if the income had been declared or would be declared in the future;

10.1.2 the payments were received in respect of sales to clients who had no transport of their own to convey their bricks. The taxpayer employed an internal control measure in terms of which it only issued an invoice once the bricks were loaded for delivery. In other words, irrespective of the fact that it might have received payment, the taxpayer would not issue an invoice but would only do so upon the bricks been loaded for

delivery. This income would immediately be utilised for business purposes though. The Commissioner opined that the tax effect of such deposits would be R9,832,766.43 x 28% = R2, 753,174,60;

10.1.3 the audit was able to establish that the taxpayer received and processed the following income on the debtors' accounts:

Account no. 1Z700: Cash Sales,

Account no. 1Z600: Cash Clients and

Account no. 1Z500: Small Cash.

The Commissioner discovered that income was received and credited to the aforementioned three accounts but was not included in the taxpayer's taxable income. Therefore these amounts should have been included in the taxpayer's taxable income in terms of the provisions of section 1 of the Income Tax Act (definition for 'gross income' and 'income');

10.1.4 the amount of R631,628.00 was arrived at as follows:

1Z700-Cash sales C2228	R150,000.00
1Z700-Cash sales C2231	R50,000.00
1Z700-Cash sales C2231	R50,000.00
1Z700-Cash sales C2232	R50,000.00
1Z700-Cash sales C2234	R50,000.00
1Z700-Cash sales C2235	R40,000.00
1Z700-Cash sales C2235	R29,000.00
1Z700-Cash sales C2238	R15,582.00
1Z700-Cash sales C2238	R100,000.00
1Z600-Cash sales 7.2.78	R47,300.00
1Z500-Small cash RC122227	R49,746.00
Total	R631,628.00

The tax effect is: R632,628.00 x 28% = R176,855.84.

10.2 The amount of R9,832,766.43:

10.2.1 the Commissioner discovered that income in the sum of R9,832,766.43 was received by the taxpayer; that the taxpayer had not issued any invoices for such receipts and that the taxpayer failed to declare the said amount as gross income or income for the 2010 year of assessment. The Commissioner contended that the said

amount constituted income according to the definition of gross income as envisaged in section 1 of the Income Tax Act; that it was received by the taxpayer and that in terms of the law the taxpayer was duty bound to declare it. Accordingly the Commissioner assessed the said amount as follows:

R9,832,766.43 × 28% = R2,753,174.60;

10.2.2 it is of crucial importance to point out that the Commissioner's findings were a consequence of a comparative analysis between, on one hand, the income declared by the taxpayer in its income tax return for the 2010 year of assessment and, on the other hand, the taxpayer's bank statements and accounting records.

[11] The understatement penalty was initially debited at 75%. It was however reduced to 10% after the Commissioner had taken into account the taxpayer's input and the relevant changes introduced into the TAA relating to the said penalty. In respect of the said penalty, the Commissioner applied the provisions of section 270(6)(D) of the TAA and the law as set out under section 76 of the Income Tax Act. Section 270(6D) of the TAA provides as follows:

"(6D) If an understatement penalty is imposed as a result of an understatement, as defined in section 221, made in a return submitted before the commencement date of this Act, a taxpayer may object against the penalty under Chapter 9 (whether or not the taxpayer has previously objected against the assessment imposing the penalty) and if the return was required under—

(*a*) the Income Tax Act, excluding returns required under the Fourth Schedule to that Act, a senior SARS official must, in considering the objection, reduce the penalty in whole or in part if satisfied that there were extenuating circumstances …"

Section 76(1) of the Income Tax Act states that:

"(1) A taxpayer shall be required to pay in addition to the tax chargeable in respect of his taxable income—

(*a*) if he makes default in rendering a return in respect of any year of assessment, an amount equal to twice the tax chargeable in respect of his taxable income for the year of assessment; or

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

(*c*) if he makes an incorrect statement in any return rendered by him which results or would if accepted result in the assessment of the normal tax at an amount which is less than the tax properly chargeable, 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."

[12] In the said letter of findings, the taxpayer was advised that it may note an appeal against the Commissioner's decision in which he assessed the taxpayer as set out above. Furthermore the taxpayer was warned that if it failed to appeal within 30 days, after the date of the notice, the assessment would become final.

[13] On 22 September 2014 the taxpayer, aggrieved by the findings of the Commissioner, lodged, in terms of section 107(1) of the TAA, an appeal against the decisions of the Commissioner as contained in the letter of findings. In terms of the said letter or notice of appeal, the taxpayer gave notice that it would appeal against:

13.1 the Commissioner's partial disallowance of the taxpayer's objection to the notice of assessment, being an additional assessment raised upon the taxpayer for the 2010 year of assessment dated 22 February 2013; and,

13.2 the Commissioner's finding that the sum of R9,832,766.43 was received by the taxpayer and constituted the taxpayer's gross income or income and should therefore have been declared by the taxpayer in its 2010 tax return. The taxpayer persisted with its contention that the said amount was received but was not declared the reason being that it did not constitute part of its gross income or income;

13.3 the alternative basis for the objection and the appeal was that double counting had taken place where the commissioner included the sales as gross income without adjusting the taxpayer's closing stock downwards;

13.4 against the finding that the sum of R631,628.00 was received by the taxpayer during the 2010 year of assessment; that it constituted part of the taxpayer's 2010 income and should therefore have been declared. Again, like in its objection, the taxpayer persisted with its denial that the said amount was received but formed no part of its gross income or income and that the taxpayer was, in the circumstances, not obliged to declare it.

THE APPEAL

[14] At the commencement of the appeal, the Court was informed by counsel for the Commissioner:

14.1 that the taxpayer had accepted that the inclusion of the credit balances of the debtor's accounts as gross income together with cash received do indeed constitute gross income for the purposes of the 2010 year of assessment. The first basis of the objection and appeal was, accordingly, disposed of;

14.2 that the valuation of the stock was no longer an issue after it was accepted that:

> "The inventory balance of R10,989,106.00 as is reflected in the ABC Annual Financial Statements for the year ending 31 October 2010 is correct and represents unsold stock held by ABC at that date."

The financial year of the taxpayer ended on 31 October 2010. Accordingly, the value of the stock as reflected in paragraph 2.1 of the Joint Minutes of the Experts Bundle was the total value of the closing stock held by the taxpayer but not yet disposed of. On the basis of the aforegoing in paragraphs 14 and 15 Ms Counsel for the Respondent submitted that both the bases upon which the taxpayer objected and appealed the 2010 year of assessment have been resolved and therefore there was no tax appeal to be adjudicated upon by the Court.

14.3 that the appellant has accepted that the inclusion of the credit balances of the debtors' accounts as gross income together with cash received did indeed constitute gross income for the purposes of the 2010 year of assessment. It was, according to counsel for the Respondent, common cause between the appellant and the respondent that the deposits were correctly included by the Commissioner as being gross income for the 2010 year of assessment. In other words, an additional gross income included by the Commissioner following the audit of the 2010 year is now accepted by the taxpayer as being correct. The taxpayer accepts that those deposits were indeed gross income for the 2010 year of assessment. This is according to principles laid down in ***South African Atlantic Jazz Festival (Pty) Ltd v the Commissioner of the South African Revenue Service*** **HC A129/2014 WC**. See also ***Pyott Ltd v CIR*** **1944 AD 128, 13 SATC 121**; ***Brookes Lemos Ltd v CIR*** **1947 (2) SA 976(A), 14 SATC 295** and ***Greases South Africa (SA) Ltd v CIR*** **1951 (3) SA 518(A), 17 SATC 358**.

[15] In conclusion counsel for the Commissioner applied that:

1. the Court should dismiss the Applicant's appeal insofar as it related to the 2010 year of assessment;
2. the Respondent be ordered to adjust its additional assessment in respect of the 2010 year of assessment downward by an amount of R1,257,598.61. According to Ms M the VAT amount on R9,832,766.34 + R631,628 x 14/ 114 should be R1,285,101 and not R1,257,598.61 was calculated. In her opening address Counsel for the Respondent had applied that the respondent be ordered to adjust its additional assessment in respect of the 2010 year of assessment downward by an amount of R1,257,498.61;

3. the Court should confirm the 10% understatement penalty and interest at the prescribed rate; and
4. the order that the Appellant should be ordered to pay of the costs of the Respondent on a party and party scale.

[16] In his opening address, counsel for the applicant, confirmed to the Court that the appellant has conceded that the two amounts, in other words, R9,832,766.43 and R631,628.00 should be included for calculation of tax purposes in the 2010 tax year. In other words, the said amount should be included as part of the gross income of the taxpayer in the 2010 tax year of assessment. The parties agreed that said amounts should be included in the taxpayer's gross income for the 2010 year of assessment; that the output Value Added Tax of R1,285,101.06 should be deducted from the total of R10,464,394.34 that was included in the taxable income for the 2010 year of assessment of the Appellant.

[17] Referring to the said two amounts, he highlighted the problem in appropriation, as follows. He stated that the problem lay with the calculation of the tax in the tax year. The gross income of the taxpayer was constituted by deposits of cash and otherwise received in those two amounts and the stock on hand on the premises of the taxpayer. According to him the Commissioner had by mistake taken all the stock at the end of the 2010 tax year and the deposits received in advance that had been made, in other words, the two amounts received by the taxpayer, and taxed those items. He requested that the closing stock value that was included in the gross income should be reduced to avoid double taxation. He argued that double taxation would take place when the closing stock value was not reduced in the 2010 year of assessment for the stock to be delivered in the following year. This related to the additional income of R10,464,394.34.

[18] According to counsel for the Appellant, the dispute in the matter lies in the fact that the calculation of income tax of the taxpayer in the 2010 year of assessment has not been agreed to. It was stated by counsel for the Appellant that it was not correct that the sums of R9,832,766.43 and R631,628.00 were not declared. He stated that the said amounts appeared in the Financial Statements of the taxpayer and therefore they were declared. Counsel for the Appellant's point was that the Commissioner may not lawfully tax all the stock and all the amounts received in advance, while a portion of the stock already existed on the premises but had not yet been delivered. He conceded that in the books of the accounts of the taxpayer the amount of R9,832,766.43 was reflected in the 2010 year assessment as a current liability. He argued that because of that the said amount was disclosed in the financials of the taxpayer and had therefore been declared.

[19] Accordingly the issues that the Court as called upon to determine were:

19.1 whether the value of the closing stock should, for tax purposes, be reduced for the 2010 year of assessment; and,

19.2 whether any other deduction should be allowed against the income of R9,179,293.28, included in the taxable income of the appellant.

ADJUSTMENT OF CLOSING STOCK

[20] Section 22(1) of the Income Tax Act provides as follows:

> "The amount which shall, in the determination of the taxable income derived by any person during any year of assessment from carrying on any trade (other than farming), be taken into account in respect of the value of any trading stock held and not disposed of by him at the end of such year of assessment, shall be—
>
> (*a*) in the case of trading stock other than trading stock contemplated in paragraph (b), the cost price to such person of such trading stock, less such amount as the Commissioner may think just and equitable as representing the amount by which the value of such trading stock, not being any financial instrument, has been diminished by reason of damage, deterioration, change of fashion, decrease in the market value or for any other reason satisfactory to the Commissioner."

The said section allows the taxpayer to reduce the closing stock value "held at year end and not disposed of by him" when the value of the stock diminished by reason of:

20.1 damage;

20.2 deterioration;

20.3 change of fashion;

20.4 decrease in the market value; and

20.5 any other reason satisfactory to the Commissioner.

[21] The Appellant agreed that the closing stock value as in accordance with its financial statements represented the value of the stock held at year end by the Appellant. Not a single reason listed in section 22(1)(*a*) of the Income Tax Act was evident in this matter. The Appellant requested the Commissioner to reduce the closing stock value to avoid double accounting, by including the income received in advance from clients for stock which had not been delivered and included in the closing stock value at year end. This may fall within the ambit of paragraph 20.5 listed above.

APPELLANT'S EXPERT REPORTS

[22] The Appellant had appointed an expert, a certain Mr V who confirmed, during his cross-examination in Court, that he was not a tax expert and furthermore that his report was focussed mainly on the accounting treatment of the transaction. Mr V confirmed that the closing stock value in accordance with the financial statements was correct. He concluded in his report that a deduction of 84% should be allowed against the income to be included in the Appellant's 2010 year of assessment. He explained furthermore that failure to allow the 84% deduction against the income will result in the same income being taxed twice in the 2010 year of assessment and 2011 year of assessment.

RESPONDENT'S EXPERT

[23] The Respondent had appointed an expert, one Mr Z. He reviewed the accounting records for the 2010 year of assessment and the 2011 year of assessment. He had an inconclusive report as all the records requested from the Appellant were not provided to him. His findings on the available records were as follows:

23.1 invoices for R2.9 million of the income received from customers in the 2010 year of assessment, included income by the Respondent were raised in the 2011 year of assessment;

23.2 one invoice of R2 million was raised in the one debtors account but the invoice number was omitted. He therefore made an assumption that the invoice was raised.

23.3 the remaining balance of R9,864,233 customers with credit balances investigated were either transferred to other debtor accounts still outstanding at the year end of the 2011 year of assessment or he was unable to trace the transfer being recorded in the customer ledger account.

THE COMMISSIONER'S AUDITOR

[24] Ms M was called as a witness by the Respondent. She conducted the SARS audit of the Appellant for the 2010 year of assessment. According to her, the taxpayer had alleged that amounts were received from customers in advance for lay-by sales. There was no documentary proof of lay-by sales that could be inspected at the time of the audit. Ms M discussed the sales procedures with the sales department and it was concluded that the sales invoices were not always issued for stock that was delivered. There were also differences between the general ledger, trial balance and financial statements provided by the Appellant to the Commissioner at the beginning of the audit. Justified reasons for the differences were not provided by the Appellant. An Audit findings letter was issued to the taxpayer. It stated the reason for including in the gross income the customers with credit balances and cash accounts. No further documents were provided by the taxpayer in response to the audit findings.

[25] In terms of section 82 of the Income Tax Act, the burden of proof to provide sufficient evidence and to convince the Court that a deduction should be allowed against the amount to be included in the gross income lies with the Appellant. The taxpayer could not show that any portion of the closing stock held by it at the end of the 2010 year of assessment related to the payments that SARS added to its gross income. The taxpayer was further unable to prove the value of the alleged stock sold but not yet delivered. It was established that the debtors with credit balances made up a portion of the taxpayer's total sales and that in the absence of evidence to the contrary it was probable that the stock held at the end of 2010 was sold to other customers not being on the B and D list. According to counsel for the Respondent, and I agree with her, both V and G incorrectly worked on the assumption that the credit balances in dispute are directly linked to the closing stock for 2010. It was argued by counsel for the Respondent that the methodology is based on unproven but contested facts. That methodology, according to counsel for the Respondent, incorrectly includes transport income which is totally unrelated to the closing stock. Mr D, however, testified that not all the credit balances related to advanced payments or deposits received. He confirmed that the corporate customers must all have received their goods and that they should have been invoiced. Therefore, no-one of the closing stock possibly related to such corporate customers. A possibility existed that the same accounting oversight occurred in respect of some of the mutual persons on the B and D list, in other words, that they already received their bricks but were never invoiced. Sufficient evidence was therefore not provided by the taxpayer in terms of section 82 of the Income Tax Act to satisfy the 'burden of proof' to convince the Court that an adjustment should be made against the closing stock value of the taxpayer.

[26] According to counsel for the Respondent, both G and V also incorrectly assumed that all the stock was directly linked to the income that was reflected as debtors with credit balances. In his foundation the proposed methodology was based on unproven and uncontested facts. That methodology incorrectly included transport income which income was not related to the closing stock. In addition, the gross profit margin of the brick division was different to that of the transport division especially having regard to the fact that the sale price of bricks was fixed for long-term customers referred to as layby customers while that is not the case for the transport services. That methodology still did not provide for credit balances that were still reflected as such in subsequent years to be excluded from the formula. Mr. G conceded that the methodology was incorrect but stubbornly sought to defend it by referring to it as being fair.

[27] In terms of the provisions of section 129(2)(*b*) of the Tax Administration Act, SARS requested a correction of the amount that it should have assessed as gross income insofar as it related to the payments in dispute for two reasons. Firstly, the payments in dispute are inclusive of VAT. The VAT component cannot be assessed as income in the hands of a taxpayer for income tax purposes. Mr. Z determined that not all the debtors with credit balances were reflected in the list prepared by B and D. Some accounts were omitted but should have been included in the list. The section 129(2)(*b*) of the TAA provides that:

> "In the case of an assessment or, 'decision' under appeal or an application in a procedural matter referred to as section 117(3), the Tax Court may—
>
> (*b*) Order the reassessment or decision to be altered."

According to the Commissioner his inclusion of sales inclusive of VAT resulted in an over assessment of gross income by R1,257,498.61 being the total amount of receipts in dispute inclusive of VAT less total receipts in dispute excluding VAT. For that reason SARS humbly requests this Court for an order that ABC's appeal be dismissed subject to SARS raising a reduced assessment removing the overstated VAT component from income as described above.

[28] In conclusion the following order is made:

1. The appeal (in respect of the 2010 year of assessment) is hereby dismissed.
2. The respondent's 2010 tax assessment of the appellant is hereby confirmed.
3. The respondent is hereby ordered to alter the additional assessment in respect of the 2010 year of assessment with a downward adjustment by the amount that represents Value Added Tax;
3. The imposition by the respondent of 10% understatement penalty is hereby confirmed;
4. The appellant is hereby ordered to pay the costs of the appeal.

PM MABUSE

JUDGE OF THE HIGH COURT