REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: IT14434/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

…….. ……...

Date **ML TWALA**

In the matter between:

XYZ CC **APPELLANT**

AND

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

JUDGMENT

TWALA J

[1] I am indebted to both my assessors for their invaluable contribution in the hearing and finalisation of this matter.

[2] Central to this appeal is the decision of the respondent of the 27th of January 2015 when it issued an additional assessment against the appellant and allowed the claim for commercial building allowance only for the 2014 year of assessment in the sum of R1 1195 384 whereas the appellant had claimed an amount totalling R6 670 507 covering the period 2007 to 2012 years of assessment. Further, the appeal is against the interest assessed on the amount the respondent claim to be due by the appellant.

[3] It is noteworthy that at the commencement of the hearing, the parties placed it on record that the issues regarding the additional assessment of legal expenses and the dividend tax which were part of the 27th of January 2015 additional assessment and appealed against, has been settled between them as they were conceded by the respondent during the pre-trial conference held in terms of rules 34 and 38 of the Tax Court Rules.

[4] The genesis of this appeal stems from the commercial property which was bought by the appellant in August 2001. The appellant generates rental income from the property and has from 2007 to 2012 effected capital improvements to the property. The appellant has never claimed for the commercial building allowance in the assessment years between 2007 and 2012 and only in the 2014 year of assessment did the appellant put a claim for all these years. It is not in dispute that the appellant was entitled to claim the commercial building allowance neither the amounts that were submitted by the appellant.

[5] It is common cause that the appellant is an investment entity which owns a property described as Portion WWW, Mpumalanga ("the commercial property"). The commercial property was purchased during August 2001 and was registered under Title Deed No: TTT. The appellant generates rental income from the property and has effected capital improvement to the commercial property from 2007 to 2012.

[6] Counsel for the appellant submitted that the appellant did not claim the commercial building allowance as provided for by section 13*quin* of the Income Tax Act, 58 of 1962 ("the Act") between the periods 2007 and 2012 and was therefore entitled to claim same together with the 2013 assessment in the 2014 year of assessment. It was not the appellant's fault not to claim but the appellant was not properly advised by its former accountant. The respondent will not be prejudice if it were to allow these deductions for it will recoup same should the appellant decide to sell the property.

[7] It was contended further by counsel for the appellant that the appellant does not intend to sell the building and would therefore be grossly prejudiced if the building is not sold and the building allowances for the period between 2007 and 2012 were disallowed. The purpose of introducing section 13*quin* was, so the argument goes, to put the taxpayer in the same position as other taxpayers who benefit from allowances (depreciation) granted for movable assets. Further, that subsection 3 of section 13*quin* is ambiguous and therefore needs to be interpreted in favour of the appellant. On a proper interpretation of subsection 3 of section 13*quin*, so it is contended, a taxpayer is entitled to claim allowances for the previous years of assessment relating to the building or improvements as provided for in section 13*quin*. The provision does not provide for the deduction to be disallowed due to the fact that it had not been claimed in the previous year of tax assessment otherwise if that was the intention of the legislature, it would have been clearly stated.

[8] Counsel for the respondent submitted that the appellant has failed to tender any evidence to establish that subsection 3 of section 13*quin* is ambiguous and therefore the appellant cannot invoke the *contra fiscum* rule. The appellant has, so it is contended, declared its income for the 2007 to 2012 years of assessment and therefore the provisions of subsection 3 of section 13*quin* comes into play for those periods. Tax is an annual event and is for that particular year and therefore, as a deeming provision, subsection 3 of section 13*quin* should apply in the case of the appellant.

[9] It was further contended by counsel for the respondent that the year of assessment of a company is its financial year and the financial year of the appellant is from the 1st of March to the 28th of February of each year. When considering the provisions of section 13*quin*, so the argument goes, it is impermissible for the appellant to claim a lump sum of the improvements for 2008 to 2012 and the building allowance for 2013 in the 2014 year of assessment. It is clear from the provisions of subsection 3 of section 13*quin* that if the allowance could not claimed because the receipts and accrual of the taxpayer are not included in its income, the allowance is nonetheless deemed to have been claimed and allowed. The deeming provision, so it is argued, merely provides the taxpayer, who qualifies, to apply the allowances as and when it has to recoup it in terms of section 8(4) of the Act, but does not grant an automatic right to a taxpayer to deduct the previous years' allowances in a subsequent year of assessment.

[10] It is trite that section 13*quin* of the Act was introduces to provide for capital allowances in respect of immovable property depending on the use of the property. The section provides for allowance in respect of commercial buildings that are owned by the taxpayer and used solely for the purpose of the taxpayer's trade.

[11] I consider it appropriate at this stage to quote the provisions of section 13*quin* of the Act which provides as follows:

> **"13*quin*. Deduction in respect of commercial buildings—**(1) There shall be allowed to be deducted from the income of the taxpayer an allowance equal to five per cent of the cost to the taxpayer of any new and unused building owned by the taxpayer, or any new and unused improvement to any building owned by the taxpayer, if that building or improvement is wholly or mainly used by the taxpayer during the year of assessment for purposes of producing income in the course of the taxpayer's trade, other than the provision of residential accommodation.
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> (1A) For purposes of this section, if a taxpayer completes an improvement as contemplated in section 12N, the expenditure incurred by the taxpayer to complete the improvement shall be deemed to be the cost to the taxpayer of any new and unused building or of any new and unused improvement to a building contemplated in subsection (1).
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> (2) For the purposes of this section the costs to a taxpayer of any building or improvement shall be deemed to be the lesser of the actual cost to the taxpayer or the cost which a person would, if he had acquired, erected or improved the building under a cash transaction concluded at arm's length on the date on which the transaction for the acquisition, erection or improvement of the building was in fact concluded, have incurred in respect of the direct cost of the acquisition, erection or improvement of the building.
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> (3) Where any building or improvement in respect of which any deduction is claimed in terms of this section was during any previous financial year brought into use for the first time by the taxpayer for the purposes of any trade carried on b such taxpayer, the receipts and accrual of which were not included in the income of such taxpayer during such year or any deduction which could have been allowed in terms of this section during such year or any subsequent year in which such asset was used by the taxpayer shall for the purposes of this section be deemed to have been allowed during such previous year or years as if the receipts and accrual of such trade had been included in the income of such taxpayer.
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> (4) No deduction shall be allowed under this section in respect of any building that has been disposed of by the taxpayer during any previous year of assessment.
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> (5) No deduction shall be allowed under this section in respect of the cost of a building or improvement if any of that cost has qualified or will qualify for deduction from the taxpayer's income as a deduction of expenditure or allowance in respect of expenditure under any other section of this Act.
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> (6) The deductions which may be allowed or deemed to have been allowed in terms of this section and any other provision of this Act in respect of the cost of any building or improvement shall not in the aggregate exceed the amount of such cost.
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> (7) For the purposes of subsection (1), to the extent that the taxpayer acquires a part of a building without erecting or constructing that part—
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> (*a*) 55 per cent of the acquisition price, in te case of a part being acquired; and

(*b*) 30 per cent of the acquisition price, in the case of a part or improvement being acquired,

is deemed to be the cost incurred by the taxpayer in respect of that part or improvement, as the case may be."

[12] In the present case, I understand the crisp issue to be whether subsection 3 of section 13*quin* correctly interpreted allows for the deduction of the building allowance to which a taxpayer was entitled to in the previous year of assessment in a subsequent year of assessment as long as it was not claimed in that previous year. I find myself unable to agree with counsel for the appellant in his contention. The provisions of subsection 3 are clear and plain and need not be interpreted any further than the words used in the provision itself. It is clear that if the receipts and accruals were not included in the income of the taxpayer during the previous year of assessment, any deduction which could have been allowed in terms of section 13*quin* during that year shall be deemed to have been allowed in that year. I therefore hold he view that it would distorting the meaning of the deemed provisions subsection 3 of section 13*quin* to interpret it otherwise.

[13] In In *Novartis v Maphil [2015] ZASCA 111*, the Supreme Court of Appeal per Lewis JA alluded to the following:

"[27] I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention.

[28] The passage cited from the judgment of Wallis JA in Endumeni summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Norvatis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in *Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paragraphs 10 to 12 and in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) paragraphs 24 and 25. A court must examine all the facts – the context – in order to

determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.

[29] Referring to the earlier approach to interpretation adopted by this court in *Coopers & Lybrand & others v Bryant* [1995] ZASCA 64; 1995 (3) SA 761 (A) at 768A-E, where Joubert JA had drawn a distinction between background and surrounding circumstances, and held that only where there is an ambiguity in the language, should a court look at surrounding circumstances, Wallis JA said (para 12 of Bothma-Botha):

> 'That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise" [a reference to a statement of Lord Clarke SCJ in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] Lloyd's Rep 34 (SC) para 21].'

[30] Lord Clarke in *Rainy Sky* in turn referred to a passage in *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) at 545, 551 which I consider useful.

> 'Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.'

[31] This was also the approach of this court in *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13. A further principle to be applied in a case such as this is that a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they might have done. In this regard see *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* [1991] ZASCA 130; 1991 (1) SA 508 (A) at 514B-F, where Hoexter JA repeated the dictum of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* 147 LTR 503 at 514:

> 'Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is

> accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.'

[14] I am unable to disagree with counsel for the respondent that the provisions of section 13*quin* should be construed in the context of the other provisions of the Act. The appellant has failed to demonstrate that the provisions of subsection 3 are ambiguous and capable of a different meaning than that ascribed to it. There is no cogent reason why the provision of subsection 3 should be interpreted differently from the ordinary meaning of the words use in the provision and to look at in the context of the whole Act.

[15] Section 1(1) of the Act provides as follows with regard to the definition of the year of assessment:

> " **'year of assessment'** means any year or other period in respect of which any tax or duty leviable under this Act is chargeable, and any reference in this Act or any year of assessment ending the last or the twenty-eight or the twenty-ninth day of February shall, unless the context otherwise indicates, in the case of a company be construed as a reference to any financial year of that company ending during the calendar year in question."

[16] In *New Adventure Shelf 122 (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] (5) SA 94 (SCA) the Supreme Court of Appeal stated the following:

> "[18] There are a number of difficulties confronting this argument bearing in mind the provisions of the basic scheme under which capital gains tax is levied, the assessment of capital gains tax is, an annual event in the sense that, if any occurrences during a tax year render the provisions of Schedule Eight applicable to an accrual of a taxable capital gain, the amount thereof is to be included in the taxpayer's taxable income for that year. This is in line with the general principle that income tax is an annual fiscal event so that, as was stated by Botha JA in *Caltex Oil (SA) Ltd v Secretary for Inland Revenue* 1975 (1) SA 665 (A) at 677H-678A:
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> '. . . .events which may have an effect upon a taxpayer's liability to normal tax are relevant only in determining his tax liability in respect of the fiscal year in which they occur, and cannot be relied upon to re-determine such liability in respect of a fiscal year in the past.'
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> [19] Consequently, the fact that in a particular year they may not be any events which lead to the accrual of a taxable capital gain is no reason to find that when they do occur, and when a taxable capital gain is included in a taxpayer's taxable income, provisions relating to an assessment of tax liability such as those in s81 should not apply.
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> [20] In addition, the appellant's argument requires paragraph 35 of the Eighth Schedule to be construed as applying not only to the determination of capital gains in a particular year, but also to require a redetermination in a later year of a capital gain already accrued. But that is inconsistent with the overall scheme of paragraph 35(3). In the first place the sub-paragraph relates to the determination of the proceeds of a disposal 'during a year of assessment'. It

provides that the proceeds in that year, and that year alone, are to be reduced by three items."

[17] I understand the above authority to mean that tax is an annual event and the year of assessment as the period in respect of which a tax is chargeable. In the light of the appellant's failure to claim the building allowances in the 2007 to 2012 years of assessment, the provisions of section 13*quin*(3) deem the allowance having been claimed and allowed as a deduction for the past years of assessment. I find myself unable to disagree with counsel for the respondent that the appellant is precluded from claiming the deduction of the building allowances for the period 2007 to 2012. I am of the respectful view that it does not make any business sense for the appellant to claim a lump sum after having incurred the expenses over a period of 5 years. The deeming provisions, in my view, were inserted in section 13*quin*(3) to prevent taxpayers from delaying in applying for these deductions and to avoid unnecessary cash flow problems.

[18] Section 89 of the Act provides the following:

"(1) ……..

(2) If the taxpayer fails to pay any tax in full within the period for payment notified by the Commissioner in the notice of assessment or within the period for payment prescribed by this Act, as the case may be, interest shall, unless the Commissioner having regard to the circumstances of the case grants an extension of such period and otherwise directs, be paid by the taxpayer at the prescribed rate on the outstanding balance of such tax in respect of each competed month (reckoned from the date for payment specified in the notice of assessment or the date on which the tax has become payable in terms of this Act, as the case may be) during which any portion of the tax has remained unpaid."

[19] I am unable to disagree with counsel for the respondent that the provisions of section 89(2) make it clear that interest shall be paid by the taxpayer at the prescribed rate on the outstanding balance of such tax in respect of each month. On the 27th of January 2016 an additional assessment was made by the respondent and that amount of tax remained unpaid and has in terms of the provisions of section 89 attracted interest at the prescribed rate in respect of each month it remained outstanding.

[20] In the circumstances, I make the following order:

I. The appeal is dismissed;

II. The appellant is liable to pay the additional assessment raised for the 2014 year of assessment (excluding the issue of legal expenses and dividends tax to which the parties agreed)

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TWALA M L
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

Date of hearing: **5th of June 2019**
Date of judgment: **28th of June 2019**