REPUBLIC OF SOUTH AFRICA

TAX COURT
Held at Johannesburg

CASE NO: IT 14157

Reportable:	No
Of Interest to Other Judges:	No
_____	_____
Signature	Date

In the matter between:

XYZ CC **Appellant**

and

The Commissioner of the South African Revenue Service **Respondent**

JUDGMENT

VALLY J

[1] On 12 May 2014 an employee of the South African Revenue Service (SARS), represented here by the respondent, sent a notification to the appellant that it had been selected for an audit to be conducted over its tax affairs. It was informed that the audit would be conducted by a Ms B and that the scope of the audit would be "*to verify whether employee tax is in accordance with the fourth schedule.*" The appellant was informed that it should provide for inspection all of the following:

a. Documents dealing with its remuneration policies;

b. Minutes of all meetings dealing with remuneration and/or incentives;

c. Employment contracts;

d. Cashbook and bank statements;

e. The pension and/or provident fund rules;

f. A "*list of independent contractors, personal* [sic] *service providers and/or labour brokers*"; and

g. Exemption certificates (IPR30), tax directives and rulings from SARS.

It was further informed that the scope of the audit may be expanded in time and that it was a criminal offence to wilfully refuse to provide any of the documents sought without just cause.

[2] Having received the letter, the appellant sent some of the documents, particularly its revenue schedules, to Ms B. These were sent by a Mr C. Mr C owns 49% of the appellant. After perusing them, on 30 May 2014 Ms B sent an email to Mr C asking him to explain the business relationship between the appellant and one VWX Construction (VWX). She also asked him to furnish her with a copy of the agreement or contract entered into with VWX. She wrote:

> "…
>
> Upon review of the revenue schedules provided can you please explain your business relationship with VWX Construction as a customer and supplier. Can you also please provide us with an agreement/contract entered into with VWX Construction?"

[3] Mr C responded by stating that the relationship between the appellant and VWX was that the appellant sub-contracts all construction type service and works to VWX and that:

> "1. The relationship between [the appellant] and VWX is that all the Construction type services and works are sub-contracted to VWX, as VWX has the professional expertise and equipment to conduct these services and works. Of the total amount payable [the appellant] retains a 4% fee for our inputs and the administration of the contracts, as well as our profit. The balance of 96% is then paid directly to VWX on payment from Client, for the services and works provided.
>
> 2. <u>The relationship between [the appellant] and VWX started quite a while back and was on a very small scale when it started – we actually never had an official</u> [sic] <u>signed agreement in place since the start hereof and the agreement has been running on "mutual trust" between both parties. The services and works have just continued on the same mutual agreement that was made from the start – however if you rather suggest that we get a written agreement in place, then we can do so</u>.
>
> We trust that the above explains itself sufficiently."

(Underlining added.)

[4] Thereafter, on 10 June 2014, a meeting of the parties took place. The key protagonists at the meeting were Ms B for SARS and Mr C for the appellant. The purpose of the meeting was for Ms B to understand the payroll system of the appellant and to receive all information relevant to the taxation obligations of the appellant and its employees. A standard form

document was completed. It essentially consists of a list of questions which were read by Ms B to the appellant's representatives with Mr C furnishing the answers thereto. Ms B recorded the answers on the form. The following questions and the answers thereto are relevant:

Question	Answer
19. Do you pay commissions to anyone?	No
13. Approximately how many employees do you employ within SA?	± 600
24. Are any of your directors or other managers employed by a separate management company	No
28. Do you procure staff or workers from a 'labour broker' (individual) or personal [sic] service provider (company)?	No
30. Please furnish a list of all your payrolls, including any offshore payrolls and any payroll administered by any other party. Indicate the categories and number of employees in each payroll	All payroll records to be sent
35. Does your payroll-system cater for the VAT and Skills Development Levies (SDL) implications of those fringe benefits giving rise thereto?	Yes
40. At the end of their latest tax year, were all qualifying employees issued with IRP 5 certificates?	Yes
42. Did you issue any IT3(a) certificates to any person other than an employee?	No
130. Do you make any payments to any of the following? Independent contractors Labour Brokers (Individuals only with effect 1 March 2009	 Yes No

Alongside question 130 is an audit note which reads:

"VWX Construction uses workforce from [the appellant] enterprise. Handles all construction contracts and gets 96% of revenue from these contracts.

Is also on [the appellant] payroll with IRP5

Reimburse [the appellant] for salaries paid to employees on projects he handles."

[5] At the conclusion of the meeting Mr C was given the document to study the questions and the answers recorded therein. Thereafter, he co-signed the document with Ms B indicating that he agreed with its contents, including the audit note.

[6] It was clear to everyone that the SARS wanted all the information about the payroll system of the appellant in order to establish whether, amongst others, the PAYE tax and the SDL levies were deducted from employees and paid over to SARS. Ms B made this clear in her letter of 12 May 2014 and reiterated it at the meeting. After the meeting Ms B was

presented with copies of two employment contracts: one for a Mr D and one for Mr C. On the basis of these contracts she accepted without more that both Mr C and Mr D were employees of the appellant. She was not presented with copies of the payroll records of all employees showing who its employees were, despite the promise made at the meeting (recorded in answer to question 130 of the document). This was important bearing in mind that the appellant informed the SARS that it had 600 employees.

[7] On 15 August 2014 Ms B sent the appellant a letter outlining her audit findings. The relevant as well as controversial part of her findings was:

> "1.1.1 Additional income in the form of salaries was identified for certain employees when cash book/bank statement analysis was performed.
>
> …
>
> 1.1.5 VWX Constructions [VWX] and IOP:
>
> Service rendered by the above to [the appellant] were not to be an independent trade. According to the employment contracts and IRP5 issued; it was found that Mr C who trades as IOP and Mr D who trades as VWX Construction; are both employees of [the appellant]. The contract in place is between employer and employee. According to the employer employee relationship observed both parties perform their services mainly at the premises of [the appellant], conditions of service as to what services will be rendered, hours of work and that work will be performed under client supervision are stipulated. Further information gathered during our enquiry was that no formal agreement exist between VWX Construction and [appellant], and with IOP also stated that there is no formal agreement. The services rendered are part of [the appellant] business plan. It was also gathered that VWX Construction uses work force that belongs to [the appellant] for construction projects and thereafter reimburses [the appellant] for salaries incurred. In our opinion the exclusion paragraph in par 1 definition of remuneration of the fourth schedule for amounts paid to a person for service rendered in a course of a trade carried by him [sic] independently could not be demonstrated as only the employer employee relationship was observed. Therefore payments received from VWX Construction and IOP will be included as part of remuneration in terms of par 1 definition "remuneration" and will be subject to employees' tax. In terms of par 2(1) an obligation is placed on the employer to deduct or withhold employees' tax from remuneration paid to its employees."

[8] The appellant objected to this finding. On 18 September 2014 XXX, a tax consulting firm wrote to the SARS identifying the points of contention. In this regard it said that IOP provided payroll services to the appellant, while at the same time Mr C, who is the sole member of IOP, is an employee of the appellant in the capacity of a General Manager. For this reason, so it was contended, the services provided by IOP to the appellant were not subject to PAYE as IOP was an independent contractor. An identical contention is made with regard to VWX. It is said that Mr D is employed by the appellant in the capacity of a Technical Advisor while at the same time as the sole proprietor of VWX. He is therefore not to be treated as an

employee of the appellant when he acts for VWX as the appellant has a contractual relationship with VWX and VWX has an independent contract of employment with him. The appellant sub-contracts with VWX for certain works it is obliged to perform in terms of a contract it has with another party. That party is YYY. As VWX performs the works it is paid by the appellant. The payment is not remuneration to any employee, including Mr D, but payment to Mr D as a sole proprietor. VWX is therefore a separate legal entity. At the same time Mr D is an employee of both the appellant and VWX. The work he performs is on the site that the appellant is in control of. It belongs to YYY but has been handed over to the appellant by YYY so that it can perform its obligations in terms of the contract between itself and YYY. Mr D is employed by it to work on the site. At the same time he works on the site as the sole proprietor of VWX. As for IOP it was stated that Mr C runs its affairs from his home which he does outside his working time for the appellant. It was never claimed that Mr C was an employee of IOP.

[9] The appellant's objection was overruled. The reasons therefore were

> "b. In relation to IOP we accepted to regard IOP as an independent contractor for the tax periods ended 2012 and 2013. From the information provided it was observed that for the two tax periods the services were provided from Mr C's house and he also had five employees independent from [the appellant]. With regards to the tax period ended 2011 it remains our submission that he was not an independent contractor as the services were performed from the premises of [the appellant] using [the appellant]'s employees (IOP – Mr C did not have three or more employees). As previously stated, the only relationship that could be observed is that of an employer/employee. Therefore assessments have only been raised in respect of the 2011 tax period.
>
> c. In relation to VWX Construction (VWX) no any other relationship with [the appellant] could be observed other than that of employer/employee relationship. VWX Construction and Mr D is one and the same person. Mr D is a full time employee of [the appellant]. VWX Construction does not have employees. The employees that are said to be used by VWX belong to [the appellant], including Mr D. [The appellant] is a construction company that performs services at the sites of 'its clients'. The sites on which services are rendered are allocated to [the appellant] by its clients and for projects that are owned by [the appellant]. It follows then that the type of activities performed by [the appellant] cannot, in most cases, if not at all, be performed in the direct premises of [the appellant], but on the sites that are allocated and controlled by [the appellant]. The Act should not be interpreted in isolation, without taking all the facts and real issues into consideration. The fact is that [the appellant] has got full time employees, which include a technical advisor and a general manager, who perform services at the sites allocated and controlled by it ([the appellant]). It is not clear why [the appellant] would, having capable employees, a capable general manager and technical advisor, employed on a full time basis, opt to classify monies paid to its employee as monies paid to an independent contractor. VWX Construction does not have employees, works on [the appellant] sites and using [the appellant] employees, therefore (as previously

indicated) payments made to JF Construction have been included as part of remuneration in terms of par 1 definition "remuneration" and is subjected to employees' tax. It is the employer's obligation in terms of par 2(1) to deduct or withhold employees' tax from such remuneration."

[10] Still aggrieved the appellant filed the present appeal on 17 November 2015. The grounds of appeal are that in terms of the common law both IOP and VWX were independent contractors with whom it contracted for certain services. Payments made to them did not constitute remuneration and therefore it was not required to deduct a SDL or PAYE from such payments. However, it did pay over the PAYE and SDL payments that VWX was responsible for to the SARS on behalf VWX. Expanding on these contentions the appellant stated:

"13.1.2 VWX entered into a service agreement with the appellant in terms whereof:

13.1.2.1 VWX was required to execute construction type works on behalf of the appellant;

13.1.2.2 VWX was responsible for the operational costs (costs of labour, raw materials and equipment), except for the payroll cost of employees that the appellant seconded to VWX for the applicable works; and

13.1.2.3 The appellant was entitled to a 4% management fee or any other amount agreed to from time to time.

13.1.3 The service agreement between VWX and the appellant was executed in the following manner:

13.1.3.1 The appellant obtained work from a client (i.e. YYY) and sub-contracted such work to VWX;

13.1.3.2 The appellant retained the management fee from the income received from the client and paid VWX as per the tax invoices that VWX issued to the appellant;

13.1.3.3 The tax invoices that VWX issued to the appellant included the cost of labour, raw materials and equipment, which in turn included the wages of the employees of VWX together with VAT on all these items.

13.1.4 Some of the tax invoices that VWX issued to the appellant reflected under "deduction wages" the amount of the PAYE and SDL liabilities as a deduction from the total amount due. The reason why VWX deducted the PAYE and SDL liabilities of its employees from the total amount due in some of the tax invoices was to give effect to the administrative arrangement that the appellant would act as a payroll intermediary or agent for VWX."

[11] None of the factual allegations made in the notice of appeal with regard to the relationship between the appellant and VWX were ever told to Ms B when she conducted the audit enquiry. Further, the first time a reference to invoices from VWX was made was in the notice of appeal. None, however, was attached to the notice. Nevertheless, the only issue arising from the grounds of appeal in the notice is whether the payments made to Mr C during 2011 were payments to IOP, and whether the bulk of the payments made to Mr D were actually payments to VWX. Allied to that is the question as to whether IOP and VWX were independent contractors. To assist the court in its consideration of the issue, the parties decided to lead *viva voce* evidence. It is also important to note that the version that it had an agreement with VWX that it would pay over the PAYE and SDL contributions of its employees to the SARS was made for the first time in the notice of appeal.

The appellant's case at the hearing

[12] The appellant stuck to the case it made out in the notice of objection. In support thereof it called three witnesses, Mr C, Mr F and Mr D.

Mr C's evidence

[13] Mr C's evidence was that he concluded a written contract of employment with the appellant in August 2002 and was accordingly employed by it as a general manager and a business advisor. At the same time IOP (of which he is the sole proprietor), represented by himself, contracted orally with the appellant, represented by Mr G, to provide payroll, transportation and cleaning services to the appellant. The contract however was apparently concluded before the appellant was incorporated. When asked to explain this anomaly Mr C said "*I can't comment*".

[14] During the 2011 financial year IOP employed only one person, his daughter-in-law. She assisted him with the payroll services.

[15] Mr C drew attention to the minutes of three "*shareholders meeting(s)*" of the appellant, which were held on 1 March 2010, 1 August 2011 and 24 February 2015. Each of these minutes reflect that the persons present were Mr G in his capacity as a "*Member*" and as "*Chairperson*" of the meeting, Ms NM H in her capacity as a "*Member*" and himself in his capacity as a "*General Manager*". The designation was strange as it was supposedly a meeting of "*shareholders*". At the same time it has to be noted that the appellant was not a company thus making it possible to conclude that the designation "*shareholders meeting"* was a misnomer and that it should have been *"Meeting of Members".* However, there are references to a "*Board*" which indicates that the members (who were only Mr G and Ms H)

and Mr C treated the appellant as if it was a company. There is one paragraph in all the minutes which reads:

> "**2.3 RC C**
>
> Mr C will in his capacity as General Manager remain a Member of the Board – Raymond will however have no voting rights on the Board.
>
> Mr C will in his capacity as Employee remain appointed as the General Manager and Business Advisor. The main responsibilities will be to the functioning of the business [sic]. Mr C has full delegation to administer all company administration and documentation matters, financial matters, tender matters, etc. The remuneration package for Mr C will remain unchanged.
>
> **2.4 IOP**
>
> IOP which is operated and registered as a Sole Proprietor Business under RC C will continue to operate the Payroll and Financial Administration Function, at the rates as determined from time to time."

[16] The appellant maintains that these minutes demonstrate that IOP was an independent contractor which performed the payroll services of the appellant. Mr C further testified that this contract was necessary as the appellant did not have the capacity to perform this function itself. In other words, it could not perform the payroll services, which included deducting the PAYE and SDL levies from each employee's remuneration and paying it over to the SARS.

[17] He further testified that in 2006 the appellant, represented by Mr G, contracted with VWX (which is a sole proprietorship and Mr D is the sole proprietor), represented by Mr D, to perform construction and other work on its behalf, which work it was obliged to undertake in terms of a contract it would conclude with a third party, namely YYY. At the same time Mr D was an employee of the appellant.

[18] Mr C could not explain why the contract between IOP and the appellant was concluded in August 2002 when the appellant was not even in existence at the time. He further could not furnish an adequate explanation as to why he worked for IOP when his employment contract with the appellant provided that he "*may not be in the direct or indirect service of, or be attached to, or have an interest in, as owner, shareholder, consultant, advisor, or in any other capacity, in any business or undertaking except that of* [the appellant]"

[19] He was asked why the appellant did not discover any invoice received from IOP charging it for the services IOP provided and he replied: "*I did not think it was necessary.*" He was then asked why the appellant discovered the alleged invoices from VWX and his reply was "*because there is a dispute with regard to VWX*". When reminded that there was also a dispute with regard to IOP, he responded with silence. He was then asked why the alleged invoices from VWX were not provided to the SARS during the audit process or when the

objection was lodged, and why were they were only discovered after the appeal was lodged. Again, he could not furnish any explanation.

[20] He said that the appellant employed about 600 employees.

[21] Finally, he was asked to explain why during the audit interview he informed Ms B and her colleague that VWX uses the workforce of the appellant[1] but failed to provide a plausible answer. This, indeed, was the trend during his entire evidence. Apart from repeating what was stated in the objection and appeal notices he was unable to enlighten the court about much else. He constantly said "*I cannot recall*" when asked questions that focussed on the detail and particularity of the appellant's case, and especially that of its relationship with VWX. At one point he became annoyed at reference to details of the appellant's business practice and its case and instead of answering the question said stated that the appellant's erstwhile legal representative, JJJ Inc., and XXX must take responsibility for the way the case was constructed and presented.

[22] Nevertheless, his testimony posed many problems given the appellant's case as reflected in its notices of objection and appeal. He was not able to provide an explanation of its case in a meaningful way. The key problems with his testimony (there are others) are:

a. he confirmed in his testimony that the appellant employed about 600 employees but at the same time sub-contracted the work it was required to do for YYY to VWX

b. he, averred that the appellant did not have the capacity to administer its own payroll and therefore sub-contracted this aspect of its business to IOP. Yet at the same time it took on the task of administering the payroll of VWX;

c. furthermore, there is no mention in his email of 30 May 2014 of the appellant administering any aspect of the payroll of VWX, such as deducting the PAYE and SDL amounts from the salaries due to VWX employees and paying these over to the SARS;

d. the appellant under his direction and supervision discovered the written contract (we will see later that Mr D in his testimony placed particular reliance on this contract) that was concluded with VWX, appointing VWX as a sub-contractor. Yet his email to Ms B on 30 May 2014 unambiguously stated that no written agreement to this effect between the appellant and VWX was ever concluded.

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1 See [4] above, in particular answer to question 130.

Mr F's evidence

[23] Mr F's testimony was that he and his co-employees were employed by VWX, but their salaries were paid by the appellant and the necessary tax documents such as IRP5 were received from the appellant. He was not able to give details of his employment contract with VWX or with the appellant but drew attention to an employment contract he claims he concluded with VWX, a copy of which was discovered by the appellant during the course of the appeal. It was, however, not made available to the SARS during the audit, nor was it included in the documents it submitted in support of its objection to the final audit findings. In any event, the entire contract of employment reads:

> "**LIMITED DURATION CONTRACT OF EMPLOYMENT**
>
> Made and entered into, between:
>
> **VWX CONSTRUCTION SERVICES (the Employer)**
>
> and,
>
> **L ENTERPRISES** (the Contracted Employer)
>
> and,
>
> **O** (the Employee)
>
> I**T IS AGREED AS FOLLOWS**
>
> The Contracted Employer has agreed to employ the Employee on behalf of VWX Construction Services. The Contracted Employer, being [the appellant] will only be responsible to administer all statutory requirements and process the payroll on behalf of the Employer. The Employee accepts employment on a Limited Duration Contract of Employment, as from **1 March 2012**; being "**the commencement date**" until **31 May 2012**; being "**due date**" subject to the terms and conditions determined. [sic] For all practical purposes, the Employer will remain the full time Employer of the Employee and the Contracted Employer will only be responsible for the Employment in terms of the payroll and statutory administration purposes [sic]. VWX Construction Services remains the full time Employer and will be responsible for the employment, in-house administration, timekeeping that includes work periods, disciplinary matters and termination of employee services – the Contracted Employer will not be responsible for these matters."

[24] The contract was signed on 1 March 2012. It focusses mainly on one point – that VWX is the employer. The drafter was particularly concerned about emphasising this point. It is made three times in this short paragraph which incidentally constitutes the entire contract.

[25] The contract was signed by Mr F in his capacity as "*Employee*" and Mr D in his capacity as "*Employer*". There was no signature on behalf of the appellant- the purported "*Contracted Employer*" - and yet the first sentence records that it is "(t)*he Contracted Employer* [that] *has agreed to employ the Employee on behalf of VWX*" (underlining added). Mr F could not explain why this was so. Nor could he explain what the relationship between the appellant and VWX was. Mr C who was the operating and controlling mind of the appellant did not deal with this contract at all in his evidence. Mr F, whose evidence is dealt with hereafter, also did not deal with this contract.

[26] During cross-examination Mr F was shown records of the appellant which reflected that the appellant employed him. He was asked to comment on why this was so. His answer was that he did not know. He was adamant that he received his salary from Mr D acting as VWX. He was then asked to comment on Mr C's testimony that the appellant paid him his salary and deducted it from the invoices it received from VWX. His response was that he knew nothing of that sort. He was informed that Mr C's evidence was that VWX would invoice the appellant for services it had rendered and the appellant would deduct the salaries and wages it paid to employees of VWX. This evidence contradicted that of his own (that he received his salary from VWX) and he was asked to comment. His response was that the appellant's version was incorrect. Finally, it was pointed out to him that the contract he based his entire evidence on was one that indicated that he was employed for a period of three months, ie from "*1 March 2012 to 31 May 2012*" while the records of the appellant show that he was in its employ for years before but this contract was for only for four months. His response was that he was always employed by VWX and had signed several contracts with it, all of which were identical to this one. Unfortunately he did not have copies of any of the other contracts. He was asked to reconsider his answer in the light of the contents of paragraphs 13.1.2 and 13.1.3.3 of notice appeal[2], which indicated that he was paid by the appellant. He replied that that was not true. Finally, he agreed that he received his IRP5 certificate from the appellant, reflecting that he was employed by the appellant.

[27] In sum, his evidence was not very helpful in showing that he was at all material times employed by VWX, or that VWX was a separate legal entity.

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[2] Quoted above in [10].

The evidence of Mr D

[28] On 12 May 2016 Mr D deposed to an affidavit for purposes of explaining the relationship between VWX and the appellant. This was almost seven months after the present appeal was noted. At the commencement of his testimony he referred to the affidavit and stated that the averments contained therein were correct and that he wished to base his oral testimony on those averments. He also stated that the attorney who drafted the affidavit was the same one that represented the appellant at the time. In the affidavit Mr D claims that the appellant would secure contracts to perform work for "*state owned enterprises*" and would sub-contract the work to VWX. He drew attention to the purported contract that VWX and the appellant concluded in this regard. The entire contract, which was concluded on 1 October 2007 reads:

> "It is hereby agreed that VWX Construction enters into an agreement with [the appellant], whereby VWX will be responsible to execute all construction type works and other services, as deemed necessary on behalf of [the appellant], on an as and when required basis.
>
> It is further agreed that VWX will be responsible for all related expenses applicable to the works/services, plus payroll costs of the employees that [the appellant] pays on behalf of VWX for the applicable works – in this instance [the appellant] will deduct all the salary related payments from the agreed amount [sic] payable for the works. It is also agreed that [the appellant] will be paid a Management Fee as agreed to from time to time, based on the contract value for the management of the works/services. VWX will therefore be responsible for the total operational costs of the applicable works/services that include the payroll costs and management fee, where applicable
>
> It is furthermore noted that any of the parties may terminate this agreement at any stage due to default [sic] by any of the parties, or by mutual agreement due to circumstantial changes of any of the parties."

[29] He further testified that the appellant would be paid by its contracting party, the "*state owned entity*", and would pay some of that money to VWX, which payment would be based on the following principles:

> "On a month to month basis, [the appellant] would retain a management fee from the income received on work sub-contracted to VWX as agreed from time to time, based on the contract value for the management of the works/project. The balance would be paid to VWX in order to cover operational costs/ other expenditure such as costs of labour, raw materials and equipment as well as other sundry inter-company costs. <u>It was also specifically agreed that the salary costs of VWX's employees who were utilised in completing the sub-contracted works/projects would be payable to VWX who would then pay its own employees their net remuneration (after the deduction of the employees' tax by [the appellant])</u>."

(Underlining added.)

[30] There is a marked similarity between this averment and the appellant's ground of appeal as expressed in paragraphs 13.1.2 and 13.1.3 quoted above in [10] save for the fact that he is clear in his mind that the appellant would be responsible for deducting all the PAYE obligations of an employee from the employee's salaries and for paying it over to the SARS. Paragraphs 13.1.2 and 13.1.3 do not state that the appellant performed this function. Neither VWX nor the appellant produced evidence of an employee's payslip showing what was earned, how much was deducted for PAYE or SDL (in fact, Mr D's averment makes no reference to an SDL deduction) from the employee's remuneration. Mr D claims that VWX paid each of its employees his/her remuneration but does not give any details as to how this was done, who these employees were, what documents were issued to the employees together with the money that was paid to each employee. The appellant, too, did not provide any of these details.

[31] Mr D referred to a contract of employment of one of the employees of VWX, a Mr T, which he said demonstrated that VWX operated as an independent contractor. The said employment contract was discovered by the appellant long after the appeal was noted. Apart from the one for Mr F it was the only contract of employment that was discovered. More importantly, it was crafted in exactly the same terms as that of Mr F, which is quoted in full in [23] above. As with Mr F's contract of employment this document notes that the employment is "*subject to the terms and conditions determined*". Mr D could not enlighten the court as to what the terms and conditions of the employment were.

[32] Mr D was asked during evidence in chief if the appellant charged VWX a fee for doing the payroll over and above the management fee and he responded: "*I can't recall.*" Pressed on this he was asked if the service could have been provided for free and he said it could be. Then he was told that Mr C testified that the appellant had no capacity to perform payroll services and that it sub-contracted this work to IOP. He was asked that in the light of this evidence could it not have been that the actual provider of this service to VWX was IOP and not the appellant. He said he could not answer that. And all this occurred during evidence in chief.

[33] During cross-examination he was asked if he was employed by both the appellant and VWX and he confidently said yes. He did not see a contradiction between this answer and his claim that he was the sole proprietor of VWX. He was asked how many hours he worked for the appellant and how many hours he worked for VWX. He responded that 40% of the time he worked for the appellant and 60% of the time it was for VWX. However, all his working time was on the same site. The site belonged to the "*state-owned entity*" but was handed over to the appellant for the appellant to perform the contracted services. In other words, he worked at all times on the site provided to him by the appellant but regarded himself as working some

of the time for the appellant (for which he drew a salary) and some of the time for VWX. He then said that he did not draw a salary from VWX even though he was employed by it.

[34] He was asked who completed the tax returns for VWX. His response was "*VWX was not always tax compliant*". In fact, Mr D could not provide any details of the tax affairs of VWX to support any of his averments. Instead to this end the affidavit records the following confession:

> "I hereby acknowledge that VWX did not maintain its tax affairs at all times in the correct manner and that a portion of the VAT and income tax was not properly declared and tax paid thereon in respect of the amount received from [the appellant] for contract work rendered."

[35] He was asked if he could furnish any documents showing that VWX paid the VAT it was obliged to pay if it was an independent contractor registered for VAT. He admitted that he did not have any such documents, as it had not paid this tax to the SARS.

[36] He was asked to comment on the appellant's answer, furnished by Mr C, to question 130 of the interview during the audit, which stated that VWX used the "*workforce*" of the appellant.[3] His response was that that averment was false.

[37] He was referred to approximately 77 invoices that VWX (numbering 0121- to 0198 and spanning a period from March 2010 to January 2012) purportedly sent to the appellant. These invoices showed no allowance for the deductions of PAYE or SDL payments that the appellant supposedly made on behalf of VWX. He was asked to explain why this was so. His answer was that VWX made a separate payment to the appellant for these deductions. When it was pointed out to him that this answer contradicted his averment in the affidavit[4] (which he confirmed in this court to be true), as well as the terms of the contract between the appellant and VWX[5], that the appellant would deduct the PAYE and SDL amounts from the invoice his response was: "*Sir, can I recall everything from 8 years back, can you recall everything from 8 years back?*"

[38] He was asked to comment on the email note of Mr C to Ms B - which stated that there was no written contract between the appellant and VWX and that if she required one, then one would be concluded[6] – as the contents of that email contradicted his version that there was a written contract. His response was that the contents of Mr C's email was false.

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3 Quoted in [3] above.
4 See the underlined portion of the averment from his affidavit quoted above in [29].
5 See [28] above.
6 See [3] above.

The respondent's case

[39] The respondent led two witnesses, Ms B and a Mr R. Mr R continued with the audit after Ms B had conducted the initial interview as Ms B took maternity leave. Both Ms B and Mr R maintained that their audit findings were correct. They further took issue with the fact that much of the appellant's case was based on evidence, such as the purported invoices from VWX ; the contracts of employment of Mr F and Mr T, and most of all the purported contract between the appellant and VWX. Ms B emphasised that she made it very clear to Mr C at the first audit meeting that she required all the documents relating to the employees and that she was never told that the appellant was administering part or all of the payroll of VWX. All she was told was that VWX used the appellant's employees. Nor was she furnished with any documents relating to the payroll services of the appellant or of VWX. This was not challenged during cross-examination. Similarly with the evidence of Mr R. In fact, the entire material aspects of their evidence went unchallenged.

[40] The evidence of both Ms B and Mr R was nothing more than a reiteration of the audit finding and the reasons for the rejection of the objection. Their cross-examination was very brief and did not elicit any information that placed in doubt the validity of the audit findings or the reasons for rejecting the objection.

Conclusion

[41] The appellant's case was as confused as it was confusing. None of its witnesses knew what exactly its case was. None of them knew exactly what the relationship was between each of them and the appellant; between each of them and VWX, and between the appellant and VWX. They could not produce a document that coherently explained all or even one of these relationships. The documents they produced were so incoherent that they raised numerous questions. Some of these questions were posed to them when they each testified, but none of them were able to enlighten the court as to what the true nature of the relationships were. Instead they were evasive in their answers. The evidence of Mr C and Mr D were replete with contradictions and Mr D was also argumentative. None of their evidence was really elucidatory. I have no doubt that none of their witnesses were candid with this court.

[42] The appellant was not able to show that VWX was an independent fully operational construction entity. In fact, it was not able to show that VWX was an operating construction entity at all. What appears from the evidence is that VWX existed mainly, if not wholly, in name. Put differently, Mr D was employed by the appellant only and not by VWX, nor was he a sole proprietor in any meaningful sense of the term.

[43] This conclusion makes it unnecessary to decide whether VWX qualified as an independent contractor as understood in the common law. However, for the sake of completeness it is necessary to point out that VWX did not meet the criteria set out in the common law to qualify for the title "*independent contractor*". The appellant was not able to show that VWX had more than three employees. Nor was it able to show that VWX operated at any premises other than that of the appellant.

[44] In the result, based on a conspectus of the evidence before this court the appellant was not able to show that the factual findings of the audit as well as the reasons for rejecting the objection were faulty or marred by any misdirection. Accordingly, the appeal has to fail.

Order

[45] The following order is made:

The appeal is dismissed with costs.

Vally J

Judge: Tax Court, Johannesburg

Dates of hearing : 10, 11, 12 September 2018;
4 and 5 May 2019;
29, 30, 31 July, 1 and 2 August 2019

Date of judgment : 7 November 2019