REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT MEGAWATT PARK, JOHANNESBURG)

CASE NO: 00052/2018

In the matter between:

ABC TRUST **APPELLANT**

and

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

J U D G M E N T

UNTERHALTER J

[1] The applicant seeks an order that the Commissioner for the South African Revenue Service, to whom I shall refer as SARS, provides reasons to enable the applicant to formulate its objection to the additional assessment for the 2012 year of assessment issued by SARS on 6 March 2018.

[2] SARS made an original assessment in respect of applicant's 2012 year of assessment on 31 January 2013. That assessment stated that no amount was payable under the assessment and the applicant's return was not subject to audit or verification.

[3] On 6 March 2018, more than five years after the original assessment, SARS issued an additional assessment in respect of applicant's 2012 assessment.

[4] Section 99(1)(*a*) of the Tax Administration Act 28 of 2011 ("the Act"), reads as follows:

> "1. An assessment may not be made in terms of this chapter
>
> (a) Three years after the date of assessment of an original assessment by SARS…"

[5] However, in terms of section 99(2)(*a*) of the Act, the following appears:

> (2) Subsection (1) does not apply to the extent that—
>
> (*a*) in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to—
>
> (i) fraud;
>
> (ii) misrepresentation; or
>
> (iii) non-disclosure of material facts;"

It is common ground that the assessments in these cases are assessments by SARS.

[6] It follows that the additional assessment made by SARS on 6 March 2018 would be incompetent unless SARS falls within the provisions of section 99(2)(*a*).

[7] The applicant denies that the Trust made any nondisclosure of material facts. SARS contends otherwise.

[8] The applicant says, however, that if SARS' contention should be sustained as to the nondisclosure of material facts, the applicant is entitled under Rule 6 of the Tax Court rules to require SARS to provide the reasons for the 2012 additional assessment so that applicant can formulate an objection to that assessment. In particular, the applicant contends that SARS must provide reasons as to why the non-disclosures caused SARS not to assess correctly the amount of tax chargeable in its original assessment, nor in the three-year period thereafter that SARS was permitted to do so.

[9] The applicant says that what SARS has put up by way of reasons do not meet its obligation to provide reasons and hence the application before this court.

[10] SARS for its part contends that it has given the applicant reason in compliance with Rule 6 and the applicant is in a position to formulate its objection. SARS references in particular paragraphs 1.1.1 and paragraph 2.3 of SARS' finalisation of audit letter dated 6 March 2018. SARS has further explained its reason in paragraph 32 and 33 of the answering affidavit in these proceedings.

[11] It is common ground between the parties that the scope of the duty to give reasons has been authoritatively laid down by the Supreme Court of Appeal in *Commissioner for SARS v Sprigg Investments* 117 CC 73 SATC 126. In paragraph 14 of the *Sprigg Investments* case the following appears:

> "Thus the cogency of rationality of the reasons is not yet in the balance. As appears from the quoted dictum in Phambili, the rest envisages that the decision in issue may involve:
>
> 'An unwarranted finding of fact or an error of law which is so worth challenging'
>
> And merely requires the decision-maker to explain why he decided the way he did to enable the requester of reasons to launch his challenge. It is only when the objection itself is adjudicated under judicial review that the PAJA test which the respondent wants imposed comes into play. The question now is simply whether the respondent has sufficiently been furnished with the Commissioner's actual reasons for the assessment to enable it to formulate its objections thereto"

[12] Accordingly, it is common ground that what is required of SARS are the actual reasons for the additional assessment so as to enable the applicant to formulate its objection.

[13] It was also common ground:

(a) That the reasons that are required of SARS for the purpose of Rule 6 include reasons as to why the additional assessment is competent in terms of section 99(2)(*a*); and

(b) That the Tax Court enjoys jurisdiction to adjudicate an objection predicated upon the absence of competence on the part of SARS to issue an additional assessment. That is to say that the jurisdictional facts required by section 99(2)(*a*) are absent. I express no final view on these issues but proceed simply on the basis of the parties' agreement on these two matters.

[14] The question I am asked to determine is a narrow one. Has SARS provided the reasons required of it so as to enable applicant to formulate an objection as to whether SARS could issue the additional assessment? Put differently, has SARS provided its actual reasons as to why the additional assessment was competent?

[15] To answer this question it is necessary to say something by way of interpreting section 99(2)(*a*) read with section 99(1)(*a*) of the Act.

[16] Section 99(2)(*a*) does not permit SARS to make an assessment three years after the date of its original assessment. This disability does not apply in the case of an assessment by SARS where the provisions of section 99(2)(*a*) are satisfied. Put simply, SARS, when making an assessment three years after its original assessment, may only do so if the provisions of section 99(2)(*a*) are satisfied.

[17] Section 99(2)(*a*) postulates the fact that the full amount of tax chargeable was not assessed. I shall call this the ultimate fact. If the ultimate fact is proven then SARS may only make an additional assessment three years after its original assessment if the ultimate fact was due to fraud, misrepresentation or nondisclosure of material facts. I shall refer to this conduct as the misconduct. In sum, the ultimate fact must be due to misconduct.

[18] In *Secretary for Inland Revenue v Trow* 1981 (4) SA 821 (A) at 825, Wessels JA interpreting the precursor to the present legislation said the following:

> "The additional assessment could have been raised if the Commissioner were to have satisfied himself
>
> 1. That there had been a nondisclosure of material facts by the taxpayer; and
> 2. The fact that the profit in question was not assessed to tax prior to the expiration of the relevant period of three years was due to such nondisclosure of material facts."

[19] Accordingly, the statutory provision that proceeded section 99(2)(*a*) has been interpreted by the Appeal Court on the basis that the concept of "due to" means "was causally related".

[20] On this construction, the failure to assess the full amount of tax chargeable must be shown to be causally related to the misconduct, that is, in this case, to the material nondisclosure.

[21] Put in simple terms, what caused SARS in its original assessment and during the period of three years thereafter not to assess the full amount of tax chargeable? If this came about because of the material nondisclosure, then the additional assessment is competent. If the ultimate fact came about for other reasons such as neglect by SARS or some conduct of the taxpayer not amounting to misconduct, then the additional assessment is not competent and cannot be made.

[22] For SARS to give reasons within the scope of Rule 6 as to why it is competent for it to have made an additional assessment the following must be discernible:

(a) That the full amount of tax chargeable was not assessed. This necessarily requires SARS to compare the tax payable under its original assessment and what SARS says is now due by way of its additional assessment.

(b) That there has been misconduct, in this case material nondisclosure by the taxpayer.

(c) That the misconduct caused SARS to fail in its original assessment and in the three years thereafter to assess the full amount of tax chargeable. The reasons must go back to consider the original assessment and why it is in the light of the assessment

made after the three-year period there as a failure to assess the full extent of the tax payable by the applicant.

[23] The applicant does not complain that SARS' reasons failed to traverse what SARS claims to be the full amount of tax for which applicant is liable, nor that SARS does not contend for material nondisclosure by the applicant and the basis for that nondisclosure. Rather, applicant complains that the reasons put up by SARS do not deal with whether the material nondisclosure caused by SARS to fail in its original assessment, and three years thereafter, to assess the full amount of tax for which the applicant was liable. This the applicant says SARS must do because causation is a necessary component of the 99(2)(*a*) enquiry that applicant wishes to raise in its objection.

[24] SARS contends that the passages I have referred to in its finalisation of audit traverses all of these matters so as to satisfy the requirements of Rule 6.

[25] Paragraphs 1.1.1 and 2.3 of the finalisation of audit certainly reflect how the 2012 assessment is to be revised to reflect what SARS says is the full amount of tax chargeable. These paragraphs all explain what it is that SARS says constitutes a material nondisclosure. In plain terms SARS states that applicant's tax return did not disclose a capital gain but rather disclosed the capital gain as income which was impermissible.

[26] Whether indeed this is a material nondisclosure and whether there is an additional tax liability owing by applicant are not matters for me to determine in this application. SARS has given its reasons for asserting these matters in the affirmative.

[27] The only issue is whether the causal question is traversed as to whether the material nondisclosure that SARS contends for caused SARS not to assess the full amount of applicant's tax liability in the original assessment or in the three years thereafter.

[28] In my view, the paragraphs relied upon by SARS in the finalisation of audit imply that the treatment of capital gains in applicant's 2012 return caused SARS to make an incorrect assessment that did not reflect the full amount of applicant's tax liability.

[29] However, the passages do not expressly traverse causation. In my view that was insufficient because in order to make an objection applicant should not be left with uncertainty as to what SARS has given as its reasons for substantiating causation. What is to be implied from reasons expressed may be ambiguous and subject to later dispute. Hence SARS should have made express in its correspondence stating its reasons what it has clarified and rendered express in the passages of its answering affidavit in these proceedings to which I have referred.

[30] Happily, SARS has now explained its position on causation in paragraphs 32 and 33 of its answering affidavit. The parties before me now accept that these paragraphs in the answering affidavit taken together with paragraph 1.1.1 and 2.3 of the finalisation of audit constitute the reason SARS relies upon in respect of its competence to make the additional assessment and that these reasons suffice to satisfy the requirements of Rule 6.

[31] As the parties now agree that SARS have provided the reasons applicant requires, the orders that applicant sought in its notice of motion are no longer required. In substance what applicant claims in its notice of motion is the following:

> "Directing that the respondent be ordered to provide the applicant in terms of Rule 6(1) of the rules promulgated under section 103 of the Tax Administration Act, 2011, reasons that the court regard as sufficient to enable the applicant to formulate its objection in terms of Rule 7 of the additional assessment for the 2012 year of assessment issued by respondent on 6 March 2018 and determining the period within which the respondent must provide the aforementioned reasons to the applicant."

[32] As I have indicated these orders are no longer appropriate given the agreement that the parties have reached on the reasons that SARS has now provided. In light of this, the order that I propose to give will simply be declaratory in nature as to what the parties now accept to be the required reasons under Rule 6.

[33] Finally, as the question of costs, it does appear to me that applicant had to come to court to secure clarity as to the reasons SARS was giving as to the causal component of the requirements that might satisfy section 99(2)(*a*). That being so, applicant is entitled to its costs. In the result the following order is made.

ORDER

1. Declaring that paragraphs 1.1.1 and 2.3 of SARS' finalisation of audit letter dated 6 March 2018 read with paragraphs 32 and 33 of SARS' answering affidavit in these proceedings constitute the reasons in compliance with Rule 6 sufficient to enable the applicant a formulated objection to the additional assessment for the 2012 year of assessment issued by respondent on 6 March 2018.

2. Directing respondent to pay the costs.

Presiding Judge:	Unterhalter J
On behalf of Appellant:	Adv T Emslie (SC)
On behalf of Respondent:	Mr T Mabequa
Date of delivery:	3 May 2019