REPUBLIC OF SOUTH AFRICA

TAX COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 14232

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

In the matter between:

MR K Appellant

and

THE COMMISSIONER FOR
THE SOUTH AFRICAN REVENUE SERVICE Respondent

J U D G M E N T

THIS JUDGEMENT WAS PREPARED AND AUTHORED BY THE ACTING JUDGE WHOSE NAME IS REFLECTED AND IS HANDED DOWN ELECTRONICALLY BY CIRCULATION TO THE PARTIES / THEIR LEGAL REPRESENTATIVES BY EMAIL AND BY UPLOADING IT TO THE ELECTRONIC FILE OF THIS MATTER ON CASELINES. THE DATE OF THE JUDGMENT IS DEEMED TO BE 16 JULY 2021.

CRUTCHFIELD AJ, MS D NDLOVU, MS M PADIA

[1] This appeal is brought against certain additional assessments raised by the respondent, the Commissioner for the South African Revenue Service ('SARS'), against the appellant, Mr. K (the 'taxpayer').

[2] The trial ran over six days and the taxpayer was the only witness who gave evidence.

[3] SARS raised the additional assessments in respect of the taxpayer's 2007 to 2010 years of assessment ('relevant tax years'), pursuant to a tax audit conducted on the taxpayer's tax affairs.

[4] Following the tax audit, SARS issued a revised letter of audit findings ('the Letter of Findings') dated 11 February 2015, informing the taxpayer that as a result of the audit SARS intended raising the additional assessments against him in respect of the relevant tax years.

[5] The taxpayer responded to the findings by way of correspondence dated 11 March 2015, submitted by the taxpayer's accountants, being the former auditors of GP Africa, a company registered in South Africa under registration number XXX, ('GP Africa' or 'GP').

[6] I interpose to mention that the taxpayer was employed previously by GP Africa, a bureau de charge.

[7] SARS' Finalisation of Audit letter followed on 15 May 2015, in terms of which SARS informed the taxpayer of the additional assessments raised in respect of the relevant tax years (the 'Finalisation of Audit Letter'), the grounds of assessment and the calculations of the assessed amounts.

[8] SARS' basis for the additional assessments comprised certain deposits into various of the taxpayer's bank accounts. SARS analysed the relevant bank statements and concluded that the deposits 'appear(ed) to have been by virtue of the taxpayer's employment as a director of GP Africa.'

[9] The relevant amounts omitted from the taxpayer's gross income were calculated at R5 680 425.74 in total, the amounts in respect of the relevant years being R582 552.57 in respect of 2007, R2 059 450.00 for 2008, R1 491 728.15 regarding 2009, and R1 546 695.02 in respect of 2010 (the 'omitted amounts').

[10] Whilst SARS acknowledged that the relevant tax years had prescribed, SARS had reopened them in terms of section 99(2) of the Tax Administration Act, 28 of 2011 ('the TAA'), on the basis of non-disclosure of material facts given that the taxpayer 'failed in disclosing income received and as a result substantially under-declared income in the 2007 to 2010 tax years resulting in non-disclosure of material facts and in relation to certain facts.'

[11] Thus, SARS contended that the initial assessments in respect of the relevant tax years did not reflect the correct application of the TAA to the prejudice of SARS.

[12] On 1 June 2015, the taxpayer lodged an objection, essentially disputing SARS' contention that he had under-declared income and referring to his response to the Letter of Findings. In terms of the taxpayer's objection:

[12.1] The taxpayer referred to two loans he advanced to GP Africa through D Company, a company incorporated by him in the British Virgin Islands ('BVI') during January 2000, when he resided in Zimbabwe. Over the years, the taxpayer made loans to D Company of approximately $1 500.

[12.2] The two loans advanced to GP comprised:

[12.2.1] $1 073 591.27 on 1 October 2004; and

[12.2.2] €60 000 on 28 February 2006.

[12.3] D Company, in anticipation of it being wound up, ceded its loan claims against GP Africa to the taxpayer during 2007. The taxpayer was substituted as GP Africa's creditor in the sum of R8 532 735.00.

[12.4] This was the reason why GP Africa repaid the D Company loans to the taxpayer and debited D Company's loan account.

[13] SARS disallowed the objection. On 4 September 2015, SARS issued a Notice of Disallowance of Objection ('the disallowance') setting out the factual basis pursuant to which it disallowed the objection, in the following terms:

[13.1] SARS considered the taxpayer's affidavit insufficient during the assessment stage. SARS informed the taxpayer accordingly and advised that in order for the taxpayer's affidavit to be considered sufficient, SARS required supporting documents that substantiated the contents of the affidavit. SARS considered GP's annual financial statements but they did not prove the taxpayer's claim that the omitted amounts constituted loan repayments from GP as the financial statements reflected only the loan relationship between GP and D Company.

[13.2] Given that the taxpayer was unable to provide sufficient evidence demonstrating why the alleged repayments were made to him and not to D Company when the loan existed between D Company and GP, and not with the taxpayer in his personal capacity, the taxpayer, (who claimed that the loan and the right to receive repayment thereof was ceded to him by D Company), failed to submit sufficient proof in support of that claim.

[14] As a result, SARS, in its Rule 31 Statement, deemed the omitted amounts to be gross income.

[15] The taxpayer raised the following facts, briefly stated, in his Rule 32 statement:

[15.1] D Company was wholly owned by the D Company Trust ('the Trust'), established in the BVI by the taxpayer, together with D Company, during January 2020. The taxpayer was the sole beneficiary of the Trust.

[15.2] During 2000 to 2002, the taxpayer advanced monies to the Trust for onward remit to D Company, as interest free loans repayable on demand. The total amount advanced by the taxpayer to the Trust for payment to D Company was US$1 500 000.00. At that stage, the taxpayer resided and was tax resident in Zimbabwe.

[15.3] D Company advanced the US dollar and Euro denominated loans aforementioned to GP.

[15.4] GP repaid D Company's loan account to the taxpayer over the financial years ending on:

[15.4.1] 31 March 2008, in the sum of R1 792 812.00;

[15.4.2] 31 March 2009, in the sum of R2 986 933.00; and

[15.4.3] 31 March 2010, in the sum of R3 572 990.00.

[16] SARS in its Rule 33 statement pleaded 'no knowledge' to the taxpayer's allegations in respect of the factual nature of the transactions, meaning that SARS was not able to proffer a version of the nature of those transactions, and, put the taxpayer to the proof thereof.

[17] The taxpayer argued that SARS did not meet the jurisdictional preconditions required by section 99(2)(*a*) of the TAA, to raise the additional assessments after they had prescribed, namely that SARS was 'satisfied' and '(made) a determination' as to the nature of the transactions comprising the omitted amounts.

[18] The taxpayer admitted receipt of the omitted amounts, and, conceded the reasonableness of the assessments raised by SARS in terms of section 102(2) of the TAA.

[19] The issues in dispute are the following:

[19.1] Whether the additional estimated assessment ('assessments') should be confirmed or altered in terms of Section 129 of the TA Act;

[19.2] Whether the estimated assessment issued by SARS for the years 2007 to 2010 have prescribed;

[19.3] Whether SARS was justified in imposing an understatement penalty of 100% pursuant to the taxpayer's alleged conduct constituting 'gross negligence';

[19.4] Whether interest imposed by SARS in terms of Section 187(1) of the Act should be remitted;

[19.5] The costs of the appeal.

[20] The essence of this appeal, however, is whether the omitted amounts fall to be characterised as 'capital' or as 'income' (the 'characterisation').

[21] The outcome of the characterisation will result in a determination of the fulfilment or otherwise of the jurisdictional requirements of s 99(2)(a) of the TAA. If the requirements are satisfied, then SARS was authorised to raise the additional assessments after the lapse of the three-year prescription period.

[22] In the event that the omitted amounts are found to be remuneration and characterised as revenue, then they are taxable and the issues of interest and penalties, including understatement penalties under s 221 to 223 of the TAA, will arise accordingly. The issue of interest includes whether interest should be remitted in full given the taxpayer's contention on reasonable grounds that such amounts should not have been included in terms of section 89*quat*(3) of the Income Tax Act, 58 of 1962 ('ITA').

[23] If the omitted amounts are characterised as loan repayments, being receipts of a capital nature, the taxpayer will find success on the merits and the prescription issue and those of penalties and interest will fall away.

[24] The taxpayer carried the onus to prove that the omitted amounts were not of a taxable nature. SARS did not present a competing or alternate version to that of the taxpayer in respect of the nature of the omitted amounts.

[25] SARS criticised the absence of relevant documents substantiating the taxpayer's version. Such documents included those reflecting payment of the monies advance by the taxpayer to the Trust. The absence of documentation was reasonably and objectively ascribed by the taxpayer to the time lapse between the dates that he advanced the loans to the Trust for onward payment to D Company, and the date of the additional assessments raised by SARS. In addition, the taxpayer's attempts to access relevant substantiating documents from Zimbabwe in preparing for the appeal were fruitless.

[26] However, the absence of such documentation does not in and of itself, render the taxpayer's oral testimony any less credible than it would otherwise be. The entire body of evidence placed before the Court during the appeal stands to be considered in determining the outcome of the matter.

[27] In this regard, the taxpayer referred to *SFW Group & Another v Martel Et CIE & Others*[1] to the effect that when a court having heard all the evidence finds itself with two opposing versions that are equally balanced, the probabilities, being the independent facts against which the oral evidence must be assessed, prevails.

[28] As regards the characterisation of the omitted amounts, the taxpayer relied in the main on two principles:

[28.1] In the first instance, that the economic substance of the loan arrangements between D Company , the Trust, GP, and the taxpayer ought to prevail over their form (the 'economic substance argument'); and

[28.2] Secondly, that of cession, being that D Company ceded its claims against GP to the taxpayer resulting in GP repaying the D Company loan account to the taxpayer and not to D Company, whilst debiting D Company's loan account.

[29] Similarly, that the economic substance of loans made by certain related companies to GP, and the repayment of those loans to the taxpayer, should prevail over the form of those arrangements. The taxpayer alleged that repayment of the loan accounts held by the related companies in GP was made to him, either directly from GP or from the related company concerned.

[30] The related companies were companies in which the taxpayer held a significant interest, (the 'related companies'), namely SS Company, PQ Company and JK Company (the 'related companies').

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1 *SFW Group & Another v Martell & CIE & Others* 2003 (1) SA 11 (SCA) para 5.

[31] The taxpayer held 65% of the shareholding in PQ Company. JK Company was the registered owner of the taxpayer's home residence. SS Company was a confirming house held by the taxpayer offshore.

[32] Furthermore, the taxpayer contended that certain of the omitted amounts detailed on a schedule prepared by GP's treasury, (referred to during the appeal as the 'GP Schedule'), were not loan repayments but withdrawals from the taxpayer's own bank accounts and not taxable.

[33] SARS argued that the taxpayer's cession argument contradicted the substance over form argument, and that the cession, if upheld by this Court, applied only in respect of the loans between D Company and GP, and not as between the related companies and GP.

[34] Insofar as SARS contended that a cession of the loan accounts was prohibited under the two subrogation agreements, the relevant notations prohibit cessions to third parties alone, and not to related parties.

[35] SARS argued that the term 'related party' is unknown in tax legislation. I accept that as correct. However, the subrogation agreements and the financial statements were prepared for use in a commercial environment and the term 'related party' is given content and meaning by the GP 2007 financial statements, which detailed the relevant 'related parties', including the taxpayer.

[36] The B report, to which I refer hereunder, however, refers to contraventions of the subrogation agreements.

[37] Thus, whilst I accept that the purpose of the subrogation agreements was to protect GP's creditors as argued by SARS, the subrogation agreements prohibited cession of the loan accounts to third parties only, not to related parties such as the taxpayer.

[38] The taxpayer gave oral evidence regarding the various loans made by him to the Trust, those advanced by D Company and the related companies to GP, and the repayment of those loans.

[39] The loans between the related companies and GP and the repayment thereof to the taxpayer were not referred to in the taxpayer's objection or in his statement of case, but were dealt with in the taxpayer's evidence to this Court.

[40] SARS argued that in order for this Court to find that the economic substance of the loan arrangements should prevail, we had to ignore the separate legal personalities of D Company, the Trust, the taxpayer, GP and the related companies respectively. Additionally, that we had to ignore the fact that GP's financial statements did not record the loans as being with the taxpayer but with D Company and the respective related companies.

[41] The taxpayer referred to and relied upon the *dicta* in *SARS v Capstone 556 (Pty) Ltd*[2] in which the SCA, quoting *Commissioner for Inland Revenue v General Motors SA (Pty) Ltd*[3]*,* stated that:

> 'Finally, I consider that the correct approach in a matter of this nature is not that of a narrow legalistic nature. What has to be considered is the commercial operation as such and the character of the expenditure arising therefrom. This is perhaps but another way of expressing the concept that it is the substance and reality of the original loan transaction that is the decisive factor.'

[42] Also in *Capstone,* the Court referred to the principle[4] that:

> 'The … principle of construction was a recognition that the statutory language was intended to refer to commercial concepts, so that in a case of a concept such as a "disposal", the court was required to take a view of the facts which transcended the juristic individuality of the various parts of a preplanned series of transactions.'

Further, if the receipt or accrual arises from a detailed commercial transaction, the transaction must be considered in its in entirety from a commercial perspective and not be broken into component parts or subjected to narrow legalistic scrutiny.[5]

[43] Thus, SARS' arguments stand to be considered against the backdrop of the 'commercial operation' of the transactions as a whole rather than assessed with regard to the various individual components of the transactions and their 'narrow legalistic form'.

[44] The factual findings of this Court are the following:

[44.1] The taxpayer established the Trust and D Company in the BVI during 2000.

[44.2] The taxpayer was the sole beneficiary of the Trust and the Trust was the sole shareholder of D Company.

[44.3] In effect, the taxpayer was the sole beneficial owner of D Company.

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2 *SARS v Capstone 556 (Pty) Ltd* 2016 (4) SA 341 SCA ('*Capstone*').

3 *Commissioner for Inland Revenue v General Motors SA* (Pty) Ltd 1982 (1) SA 196 (T) at 204A

4 Articulated in *MacNiven (Inspect of Tax) v Westmoreland Investments Ltd* [2001] 1 All ER 865 at para 32.

5 *Capstone* para 34.

[44.4] The taxpayer advanced funds to the Trust for onward advance to D Company between the years 2000 and 2002.

[44.5] In order to recapitalise GP pursuant to losses sustained in its expansion phase during 2001 to 2005, D Company advanced the US dollar denominated loan of US$1 073 591.27 to GP on 1 October 2004. As at 28 February 2006, D Company advanced the euro denominated loan of €60 000.00 to GP.

[44.6] GP's financial statements dated 28 February 2006 recorded:

[44.6.1] D Company's loan account in GP at R6 562 863.00 and R434 818.00;

[44.6.2] GP's accumulated losses of R (7 680 708.00); and

[44.6.3] The D Company loans had been irrevocably subordinated by the principal shareholder, D Company , to GP in favour of all other creditors including lenders, and D Company had deferred any right to interest and capital repayments thereon until such time as revenue losses incurred during the start-up and expansion phase of GP had been recovered.

[44.6.4] Loans of R362 500.00 in Euros from SS Company, R213 850.00 in US dollars from SS Company , and R3 011 564.00. from JK Company . These three loans amounted to R3 587 914.00.

[44.7] GP's financial statements of 2006 to 2010 recorded:

[44.7.1] The loans between D Company, the related companies and GP, and the movements in those loan accounts.

[44.7.2] Repayment by GP of the loan accounts of D Company. JK Company, SS Company and PQ Company.

[44.8] During 2005, V Company acquired 25.1% shareholding in GP. Subsequently during 2006 to 2007, V Company increased its shareholding in GP to 51.5%, resulting in V Company being the majority shareholder.

[44.9] The subscription agreements in respect of the two share acquisitions provided for the equalisation of the shareholder loans, resulting in D Company being repaid its loan proportionally to its reduced shareholding in GP.

[44.10] As at the end of the 2010 financial year:

[44.10.1] GP's obligations to repay the D Company loan account in GP were extinguished;

[44.10.2] GP's financial statements recorded that the loan accounts held by D Company, PQ Company and SS Company in GP were reduced to zero. This correlated with the relevant tax years during which the taxpayer received the omitted amounts.

[44.11] Interest was not paid on the loans.

[44.12] The relevant tax returns of the taxpayer revealed that GP did not withhold PAYE in respect of its payment of the omitted amounts to the taxpayer. (The importance hereof is that with effect from 2006, V Company constituted the independent majority shareholder in GP. The probabilities of a fraud on the fiscus in the light of V Company's shareholding in GP were minimal, if any at all.)

[44.13] During 2010, Travelex bought out the interests of the taxpayer, his wife and D Company in GP. The buy-out terminated the taxpayer's relationship with GP.

[45] The taxpayer led evidence in respect of the following facts:

[45.1] GP's financial statements reflected a reduction of R239 670.00 in the PQ Company's loan account in GP in that the loan stood at:

[45.1.1] R239 670.00 as at 28 February 2006;

[45.1.2] R91 630.00 as at 28 February 2007; and

[45.1.3] Zero as at 31 March 2008.

[45.2] SS Company's US dollar loan account reflected a similar reduction from R213 850.00 as at end February 2006 to R26 853.00 as at end February 2007.

[45.3] A note to GP's 2007 financial statements referred to D Company as a shareholder with significant influence, and, PQ Company as an entity with a common director, being the taxpayer.

[45.4] The outstanding balance of PQ Company's loan account in GP as at the end of the 2006, 2007 and 2008 financial years was paid to him, albeit that he was not certain whether the flow of funds was from GP to him directly or whether it was from an account held by PQ Company to him.

[45.5] Similarly, an amount of R170 309.00 was paid to the taxpayer in reduction of SS Company's loan account in GP.

[45.6] The same comparative exercise was performed with respect to JK Company's loan account in GP with reference to the 2006, 2007 and 2008 financial years. As at 31 March 2010 the JK Company loan account stood at R2 775 974.00.

[45.7] In respect of the D Company loan account, GP's financial statements reflected an amount of R8 352 735.00 as at 28 February 2007. The closing balance as at the end of the 2009 financial year was R3 572 990.00.

[45.8] GP's consolidated annual financial statements for the year ended 31 March 2010, reflected the D Company loan account at R3 705 384.00 as at end 2009 and with a nil balance as at year end 31 March 2010.

[45.9] As at 31 March 2010, other than the loan account held by JK Company, the loan accounts of D Company and the related companies in GP were reduced to zero, (the 'zeroed loan accounts').

[45.10] Repayment of the zeroed loan accounts was paid to the taxpayer, either directly from GP or through the relevant related companies.

[45.11] The total repayments to the taxpayer in respect of the loan accounts of D Company , PQ Company , SS Company and JK Company in GP in respect of the 2007, 2008, 2009 and 2010 tax years amounted to R9 536 739.00.

[45.12] The total amount referred to by SARS as constituting the additional assessment pursuant to SARS' detailed calculations in its Finalisation of Audit Letter was the amount of R9 578 217.74. The latter amount includes the omitted amounts and the amounts declared by the taxpayer.

[45.13] The normal tax together with the additional tax in respect of the years from 2007 to 2010 amounted to R5 745 019.80, being the capital amount claimed by SARS under the additional assessments.

[46] As at the end of the 2010 financial year, GP's obligations to repay D Company were extinguished. The taxpayer contended that that was by virtue of GP's repayment of the D Company loan account to him directly into his personal bank accounts and that GP debited the payments to him against the D Company loan account.

[47] The taxpayer relied in this regard on an agreement of cession. albeit a verbal agreement, in terms of which the D Company loan was ceded to him, and, repayment of the D Company loan was made to him. It was common cause that the alleged cession was not reduced to writing.

[48] SARS argued that there was no indication in GP's financial statements of the alleged cession.

[49] The 'B report' (the 'report'), dated 10 June 2010 and submitted by the taxpayer into evidence was the result of a shareholder dispute within GP between V Company nd the taxpayer. The report was used allegedly to force the taxpayer out of GP.

[50] GP commissioned the investigation and report, the purpose of which was to investigate 'certain alleged unauthorised withdrawals from loan accounts and whether the terms of the undated Shareholders Agreement entered into between (the taxpayer's wife, the taxpayer, D Company , V Company and another), in respect of the shareholders loans have been adhered to' (the 'investigation').

[51] Mr B conducted the investigation. B was appointed by GP and was independent of the taxpayer.

[52] The investigation analysed D Company, JK Company and V Company's loan accounts in GP.

[53] The investigation concluded *inter alia* that GP repaid the D Company loan account in an amount of R7 514 360.00 directly to the taxpayer, and debited the repayments against the D Company loan account. GP's repayment of R3 977 430.00 of the D Company loan account to the taxpayer was approved by GP and repayment of R3 536 930.00 was not approved by GP.

[54] The investigation sourced approval of the repayment of amounts totalling R3 977 430.00 to the taxpayer from 1 April 2009 to 11 June 2009, in the minutes of a shareholders' meeting held on 26 October 2009.

[55] The report referred to the loan account summary prepared by GP's financial manager and included a list of payments identifying the date and the amount paid on each date from 30 April 2008 up to and including 31 March 2010 totalling R3 536 930.00, paid to the taxpayer. These payments were debited to the D Company loan account.

[56] Documentation or a resolution authorising payment of the amounts totalling R3 536 930.00 to the taxpayer did not exist.

[57] The report indicated that GP's general ledger account reflected withdrawals from the D Company loan account against the taxpayer's name on a regular monthly basis. The opening balance as at 31 March 2008 was R6 559 923.00. The extract from the schedule reflected withdrawals to 31 March 2010 of (R7 461 160.00).

[58] The report recorded that payments were made to and received by the taxpayer in contravention of the provisions of the subordination agreement between D Company and GP *inter alia*.

[59] Furthermore, that due process was not evident in respect of cash withdrawals made from treasury stocks in Cape Town.

[60] SARS argued that the report did not refer to repayment of the loan accounts in GP as the report used the word 'withdrawals' as opposed to 'loan repayments'.

[61] There is no merit in SARS' argument. The report presented a series of factual findings pursuant to the investigation of GP's financial records for the stated purpose. A perusal of the report reflected that the term 'loan repayments' was used interchangeably with 'loan withdrawals'. The fact that the word 'withdrawals' was used instead of 'repayments' or that the terms were used interchangeably was irrelevant.

[62] A similar interchange of terminology could be seen in the minutes of the Special Meeting of Directors held on 26 May 2010, where the minutes referred to the 'repayment of a D Company loan in order to achieve the equalisation …' together with a 'withdrawal' by V COMPANY from its loan account. Furthermore, that 'in 2009 there was a withdrawal of approximately R4 million from the D Company loan account …'

[63] The purpose for which the report was commissioned was manifest. The conclusions of the report were clear and there was no doubt as to the meaning to be conveyed by the use of the terminology 'repayments' or 'withdrawals' in the report. Both terms related to repayments of, or, withdrawals from, the loan accounts held in GP relevant to the investigation.

[64] Consequent on the report, the GP Board convened a disciplinary enquiry into the payment of the unapproved amount to the taxpayer. The disciplinary enquiry died a natural death with the buy-out by Travelex.

[65] The taxpayer argued that the report's findings should be afforded the heaviest weight given the source and the purpose for which the report was commissioned.

[66] This Court has no reasonable doubt that the report was independent of the taxpayer and that the findings made in the report, in so far as they are relevant to issues raised in this matter, provide independent evidence in respect thereof.

THE ASSESSMENT OF THE EVIDENCE

[67] SARS argued that giving effect to the taxpayer's argument of substance over form required that this Court ignore the provisions of the various contracts relevant to the transactions, ignore GP's financial statements that made no mention of loans between GP and the taxpayer, and find that those contracts were not between the taxpayer and the Trust, D Company and the Trust, and D Company and GP but between GP and the taxpayer in circumstances where there was no evidence of any loans between GP and the taxpayer.

[68] In effect, SARS contended that the taxpayer's argument required that this Court overlook the law of separate legal personality, and, find that the underlying transactions of the D Company loan account in GP amounted to a simulated loan between the taxpayer and GP. In other words, we needed to find a simulated agreement between the taxpayer and D Company and not a true loan between D Company and GP.

[69] It is worthwhile in dealing with the argument of substance over form to consider a selection of the relevant case law, a summary of which was furnished by the taxpayer's counsel.

[70] *Zandberg v Van Zyl*[6] referred to an endeavour by parties to a transaction to conceal the real character of that transaction, giving it a name or a shape intended not to express but to disguise its true nature. A court deciding the rights under such an agreement can do so only by giving effect to what the transaction really is and not what in form it purports to be. A court is required to satisfy itself that there is a real intention, definitely ascertainable, that differs from the simulated intention. The enquiry is one of fact.

[71] The 'true nature of the transaction' is to be determined, being that the parties' intention as a fact must be proved, not what the parties conceived the contract to be.[7]

[72] The judgment of *Dadoo Ltd v Krugersdorp Municipal Council*[8] stated that a 'transaction is in *fraudem legis* if it is designedly diagnosed so as to escape the provisions of the law, but falls in truth within these provisions.' The law looks to the substance rather than the form of the transaction.

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6 *Zandberg v Van Zyl* 1910 AD 302.
7 *McAdams v Flander's Trustee and Bell NO* 1919 AD 207.
8 *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530.

[73] In *Commission of Customs and Excise v Randles Brothers & Hudson Limited,*[9] the court referred to *Zandberg*, stating that a disguised transaction is essentially a dishonest transaction as the parties to the transaction do not intend the transaction to have, as between them, the legal effect that the terms of the contract convey to the outside world. The purpose of the disguise is to deceive by concealing the nature of the real transaction.

[74] The dissenting judgment, also with reference to *Zandberg*, stated that a court must give effect to a transaction in accordance with the 'real intention' of the parties to the transaction. The issue is a factual one and in essence is what the transaction in fact is not what it purports to be.

[75] In *Vasco Dry Cleaners v Twycross*[10] the determination was reduced to the question of whether the plaintiff intended in fact to acquire ownership in the machinery. The court found that accepting that the plaintiff was wholly *bona fide* and taking his version of the transaction at face value, the court harboured doubts as to the plaintiff's real intention in respect of the machinery.

[76] The issue is the actual or real intention of the contracting parties - did the parties intend that as between them, the agreement would have effect according to its tenor. If not, effect must be given to what the transaction really is.[11]

[77] In *CSARS v NWK Limited*[12] the court determined that the enquiry should examine 'the commercial sense of the transaction: its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated'.[13]

[78] In *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC*[14] the court reiterated that a court must 'examine the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intend to implement it, before determining in any particular case whether a transaction is simulated'.

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9 *Commission of Customs and Excise v Randles Brothers & Hudson Limited* 1941 AD 369.
10 *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A).
11 *Erf 3183/1 Ladysmith (Pty) Ltd v Commissioner for Inland Revenue* 1996 (3) SA 942 (A) at 951-953c
12 *CSARS v NWK Limited* 2011 (2) SA 67 (SCA).
13 Id at paras 43-55.
14 *Roshcon (Pty) Ltd v Anchor Auto Body Builders* 2014 (4) SA 319 (SCA) at 23-37.

[79] In *CSARS v Bosch*[15] the court stated that if a transaction 'is genuine then it is not simulated, and if it is simulated then it is a dishonest transaction, whatever the motives of those who concluded the transaction … among those (unusual) features (to be examined) will be the income tax consequences of the transaction …'.

[80] The court in *Sasol Oil v CSARS*[16] stated that in answering the test, a court must have regard 'not only to the terms of the impugned transactions, but also to other factors, including the improbability of the parties intending to give them effect'.

[81] An examination of the intention underlying the series of transactions in respect of the D Company loan account in GP reveals that the taxpayer advanced the funds to the Trust for onward advance to D Company. Subsequently, as and when GP required capital, loans were advanced by D Company to GP. Those loans were recorded in GP's financial statements during the relevant tax years and in the B report.

[82] There is no reasonable doubt that the intention behind the advances of loan finance by D Company to GP was to recapitalise GP during its expansion phase. The taxpayer's evidence in this regard correlated directly with the relevant documentary evidence.

[83] So too the loans made by the related companies to GP stand to be accepted according to their tenor. Those loans were advanced to GP with the intention of providing loan capital to GP. The loans were recorded in GP's financial statements and the taxpayer's evidence accorded directly with those documents.

[84] Furthermore, the movement in the loan accounts of D Company, PQ Company, SS Company and JK Company are reflected in GP's financial statements. Those loan accounts, other than the JK Company loan account, were reduced to zero over the years 2006 to 2010. The movements and the dates thereof accord with the payment of the omitted amounts to the taxpayer.

[85] As regards the repayment of the D Company loan account to the taxpayer, the intention thereof was to repay the loan account to D Company and reduce it to zero in GP's books.

[86] The purpose of GP's repayment of the various loan accounts, be that by way of repayments or withdrawals, was to reduce the loan accounts pursuant to the entry of V Company as GP's majority independent shareholder, and to reduce D Company's shareholding in accordance with the equalisation of the shareholders' loans.

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15 *SARS v Bosch* 2015 (2) SA 67 (SCA).

16 *Sasol Oil v CSARS* (923/2017) [2018] ZASCA 153 (9 November 2018).

[87] The contract between GP and D Company cannot be found to be a simulation. Nor can this Court find a simulated loan between the taxpayer and GP or a simulated agreement between the taxpayer and D Company.

[88] SARS' argument that it was not possible for GP to repay the loan accounts to the taxpayer as the creditors were D Company and the related companies, was inconsistent with the principles articulated by the SCA in *Capstone* to the effect that detailed commercial transactions must be considered in their entirety from a commercial perspective and not be broken into component parts or subjected to narrow legalistic scrutiny.[17]

[89] The taxpayer demonstrated that the transactions detailed on the GP schedule were withdrawals from the loan accounts, cash withdrawals made by him from GP's treasury stocks and paid from his bank accounts alternatively debited against one of the relevant loan accounts in GP or foreign exchange for travel purposes.

[90] Details of the withdrawal transactions were recorded on email and sent to GP's Head of the Treasury Department in Cape Town, the financial manager and the financial director.

[91] The B report stated that the GP general ledger account reflected withdrawals against the taxpayer's name from the D Company loan account.

[92] There was no evidence that the B report was anything other than wholly independent of the taxpayer. The circumstances under which the B report came into existence and the purpose for which the report and its underlying investigation was commissioned, together with the report's conclusions, reflected its independence from the taxpayer.

[93] The B report supported the genuine nature of the D Company loan account. The report independently corroborated the taxpayer's evidence that GP repaid the D Company loan account in GP to him directly. Thus, the D Company loan was reduced to zero. This was despite GP's records not reflecting a loan relationship between GP and the taxpayer, and, notwithstanding that the taxpayer and D Company were separate legal entities with separate legal personality.

[94] The report evidenced that the parties as between them implemented the cession of which the taxpayer testified, and, established the existence of the cession.[18] Accordingly, the parties by reason of their dealings with each other enforced the cession agreement. SARS, as a stranger to the cession agreement, cannot contradict that evidence.[19]

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17 *Capstone* para 34.

18 *Anglo Platinum Management Services (PTY) Ltd v Commissioner, South African Revenue Service* 2016 (3) SA 406 (SCA).

19 Id para 34.

[95] SARS argued correctly that the taxpayer did not provide evidence linking the specific withdrawals or payments referred to in the B report to specific deposits in the taxpayer's bank accounts. However, SARS' argument overlooked the independence of the report from the taxpayer, and the statements in the report that GP repaid the D Company loan account in the amount of R7 514 360.00 to the taxpayer directly.

[96] In the circumstances, this Court finds that GP repaid the D Company loan account in GP directly to the taxpayer and debited the D Company loan account in GP's books and records accordingly.

[97] SARS put it to the taxpayer that in respect of the alleged repayment of the loan accounts of PQ Company, SS Company and JK Company in GP, there were no loan agreements between the taxpayer and any of these respective entities. SARS' contention was correct.

[98] The taxpayer's evidence was that the payments were made to him despite the absence of such loan agreements. The taxpayer conceded that he did not always recall the exact sequence of the payments to him. That is to be expected given the lapse of time in the interim.

[99] There was a sufficiently close correlation between the total of the omitted amounts and the dates over which the omitted amounts were deposited into the taxpayer's accounts on the one hand, and the reduction in the loan accounts and the dates thereof recorded in GP's financial statements, on the other hand.

[100] Thus, there is nothing to gainsay the taxpayer's evidence that repayment of the loan accounts of PQ Company, SS Company and JK Company in GP was made to him.

[101] The taxpayer's evidence that the omitted amounts were not received by him by virtue of his employment with GP was corroborated by the taxpayer's personal records, being his tax returns. Those returns reflected that GP withheld employee's tax or PAYE on payments made to the taxpayer pursuant to his employment with GP but PAYE was not withheld by GP in respect of payment of the omitted amounts.

[102] In those circumstances and given the presence of the independent majority shareholder at GP during the years 2006 to 2010, the most reasonable explanation is that PAYE was not withheld by GP as the omitted amounts were not paid to the taxpayer by virtue of his employment with GP.

[103] My overall impression of the taxpayer notwithstanding his occasional lapse in memory was that he was honest, transparent and did his best to assist the Court. In effect, there was no evidence that contradicted or rebutted that of the taxpayer.

[104] There was no evidence that supported SARS' suspicion that the omitted amounts were received by the taxpayer by virtue of his employment with GP or were of a revenue nature.

[105] In respect of SARS' argument that the taxpayer was required to deal with each and every omitted amount, the taxpayer argued that it was a matter of principle and the taxpayer was not burdened with dealing with each of the omitted amounts.

[106] The close correlation between the total of the omitted amounts with the amount by which the D Company, SS Company, JK Company and PQ Company loan accounts in GP were reduced is compelling. Hence, it is unnecessary in the circumstances for the taxpayer to deal with each and every omitted amount.

[107] The correlation between the years over which the loan accounts were reduced in GP's financial statements and the payment of the omitted amounts into the taxpayer's bank accounts, is equally compelling.

[108] In the circumstances, the body of evidence before this Court, both documentary and that of the taxpayer, supports the finding of this Court that the omitted amounts comprised repayment of the loan accounts of D Company , SS Company , JK Company and PQ Company in GP, and withdrawals from the taxpayer's bank accounts.

[109] The 'substance and reality of the original transaction(s)'[20] is the 'decisive factor'. The characterisation of the original transactions as loans is determinative of the outcome of this matter. The result is that the repayment of those loans by way of the omitted amounts is characterised by this Court as being of a capital nature.

[110] By virtue of the aforementioned, this Court finds that the omitted amounts constitute receipts of a capital nature. It follows that the taxpayer discharged the onus carried by him.

[111] By virtue of the abovementioned, the appeal is determined in favour of the taxpayer and the additional assessments are set aside.

[112] As to the costs of the hearing, section 130 of the TAA provides:

> '130(1) The tax court may, in dealing with an appeal under this Chapter and on application by an aggrieved party, grant an order for costs in favour of the party, if—
>
> (*a*) the SARS grounds of assessment or 'decision' are held to be unreasonable;
>
> (*b*) the Appellant's grounds of appeal are held to be unreasonable;

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[20] *Commissioner for Inland Revenue v General Motors SA (Pty) Ltd* 1982 (1) SA 196 (T) at 204A as quoted in *Capstone* para 34.

(2) The costs referred to in sub-section (1) must be determined in accordance with the fees prescribed by the rules of the High Court.'

[113] The taxpayer argued that SARS' persistence with the appeal after the second supplementary discovery (which included the B report) was unreasonable, and warranted a costs order against SARS, including the costs of opposing SARS' appeal against the ruling of Rabkin-Naicker J.

[114] In the light of SARS' argument that the documentation comprising the taxpayer's returns and the financial statements of GP does not reflect loans between GP and the taxpayer, I am of the view that SARS was reasonable in continuing with this appeal.

[115] However, SARS' attempt to appeal the ruling of Rabkin-Naicker J stands on a different footing.

[116] Prior to this hearing, SARS objected to the taxpayer's allegedly belated raising of prescription. The issue was argued separately before Rabkin-Naicker J who dismissed the objection.

[117] SARS attempted to appeal the ruling resulting in the taxpayer having to incur the costs of an application to set aside the irregular step dated 6 June 2019 on the basis that the ruling was not appealable.

[118] Subsequent to the appellant filing the notice of application in terms of Uniform Rule 30 read with Tax Court Rule 42, SARS withdrew the notice of intention to appeal the ruling.

[119] The ruling was not appealable as it did not constitute a decision of the Tax Court as envisaged in s 129(2) of the TAA, and the ruling was not final in effect. The ruling was not definitive or dispositive of the parties' rights. Nor did it have the effect of disposing of at least a substantial part of the relief claimed in the tax appeal.

[120] The taxpayer referred to the relevant tax cases[21] of the SCA to the effect that a Tax Court ruling is not a decision in terms of s 129(2)(a) to (c) and is not appealable. That is settled law. In order for an interlocutory ruling to constitute a decision contemplated in s 129 it must dispose of a matter that is subject to objection and appeal in terms of s 104(2) of the TAA.

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[21] *Lion Match Company (Pty) Ltd v CSARS* 80 SATC 383; *Wingate-Pearse v CSARS* 2017 (1) SA 542 (SCA).

[121] Accordingly, SARS' right to appeal the ruling arose only once the merits of the appeal had been finalised. The ruling in and of itself is not appealable separately from the merits of the matter. Accordingly, it ought not to have been necessary for the taxpayer to bring an application to set aside an irregular step, or to incur the costs thereof and SARS must be held liable for the costs of that application.

[122] It is not open to doubt that SARS must have known that the ruling was not appealable. SARS has been involved in the cases referred to as well as the cases in respect of the ruling not being final in effect.[22]

[123] In the circumstances, this Court is persuaded that SARS' conduct in respect of attempting to appeal the ruling of Rabkin-Naicker AJ was unreasonable and that SARS ought to be held liable for the costs incurred to the taxpayer as a result thereof.

[124] By virtue of the aforementioned, I grant the following order:

1 The appeal is upheld.

2 The additional assessments imposed by SARS are set aside.

3 The respondent, SARS, is ordered to pay the appellant's costs of the application in terms of Uniform Rule 30 read with Tax Court Rule 42.

A A CRUTCHFIELD SC
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

DATE OF THE HEARING: 9 DECEMBER 2020

DATE OF JUDGMENT: 16 JULY 2021

[22] *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* 2012 (4) SA 618 (CC); *Baliso v Firstrand Bank Limited t/a Wesbank* 2017 (1) SA 292 (CC).