

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A5017/15
TAX COURT CASE NO: VAT 1132

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

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DATE

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SIGNATURE

In the matter between:

THE COMMISSIONER FOR THE SOUTH

AFRICAN REVENUE SERVICE

Appellant

And

AFRI-GUARD (PTY) LTD

Respondent

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

- [1] This is an appeal from a judgment of the Tax Court, Johannesburg in terms of section 133(2)(a) of the Tax Administration Act 28 of 2011 (“the TAA”).
- [2] The appellant is the Commissioner for the South African Revenue Service (“SARS”), and the respondent is Afri-Guard (Pty) Ltd, a VAT vendor under the Value Added Tax Act 89 of 1991 (“the VAT Act”).
- [3] The dispute between the parties arises out of the imposition by SARS of additional tax at the rate 200% against the respondent in terms of section 60(1) of the VAT Act. This section permits SARS to raise additional tax in circumstances involving tax evasion. It reads as follows, in relevant part:

“Where any vendor or any person under the control or acting on behalf of the vendor fails to perform any duty imposed upon him by (the VAT Act), or does or omits to do anything, with intent-

(a) to evade the payment of any amount of tax payable by him; or

(b) ... ,

such vendor shall be chargeable with additional tax not exceeding an amount equal to double the amount of tax referred to in paragraph (a)” (emphasis added)

- [4] Although the VAT Act has been repealed by the TAA, the parties are agreed that in terms of the transitional provisions of the latter Act, section 60(1) still finds application for purposes of this dispute. There is less consensus

between the parties regarding other consequences of that repeal, particularly regarding the question of the onus in appeals to the Tax Court. I will revert to this issue later.

- [5] The respondent objected to the imposition of the additional tax, resulting in the appeal to the court *a quo*. In that court, Wepener J upheld the respondent's appeal. He ordered that:

"The additional tax imposed upon the Appellant is set aside. The assessment is referred back to the Commissioner and it is directed that the additional tax be remitted to nil."

- [6] I will deal later with the findings of the court *a quo* that led to this order. Before doing so, it is necessary to set out a summary of the relevant history of the dispute.

HISTORY OF THE DISPUTE

- [7] Following an audit conducted by SARS into the tax affairs of the respondent, it issued assessments during 2012. The assessment covered, among other things, respondent's VAT obligations for the period from February 2007 to February 2011.
- [8] In terms of the assessments, respondent was found to be liable for amounts due for adjustments made in respect of output VAT under declared, input VAT denied, and input VAT overstated. The present dispute concerns the assessment in respect of the latter liability. Additional tax at the rate of 200% was also imposed.

- [9] The assessment process commenced in April 2012, when SARS provided its first letter of audit findings to the respondent. The respondent was invited to respond and did so. This resulted in an exchange of correspondence and meetings between the parties.
- [10] This process culminated in a revised assessment by SARS, which was communicated to the respondent in an assessment letter dated 24 July 2012. As regards the issue of respondent's overstatement of input VAT, this assessment letter recorded that:
- [10.1] The respondent had been requested to provide explanations in respect of differences in the reconciliations between the input VAT control account and the input VAT declared in the VAT 201 returns for the period March 2009 to February 2011.
- [10.2] The respondent had explained that it had been referred to and had entered into an agreement in respect of labour hire with an entity called Zingaro Trade ("Zingaro"). In terms of this agreement, Zingaro would be entitled to a commission from the respondent for the provision of labour services. Zingaro issued monthly invoices to the respondent in respect of labour hire, commission and VAT. The respondent paid the labour hire portion to its own employees, whereas payment of the commission and VAT was paid to Zingaro.
- [10.3] SARS had requested the respondent to provide copies of all of the invoices from Zingaro, and to provide proof of payment, but respondent had failed to do so.

[10.4] SARS had found that respondent had showed intentional disregard of the law by not providing the invoices and proof of payments requested. Although it had provided 2 invoices, these were “materially flawed”. This was the basis on which the additional tax of 200% was imposed.

[11] The respondent filed an objection to this assessment, supported by a letter from one Mr Strydom, the respondent’s auditor, setting out the respondent’s grounds of objection. As far as the overstatement of input VAT was concerned, the objection letter recorded that:

“We hold the necessary tax invoices supplied to us by the relevant registered VAT vendor and now gladly supply all to you. All these invoices comply with the requirements of section 20 for valid Tax Invoices and we do not accept your finding that we failed to provide sufficient proof of the input tax claimed nor do we have any reason to believe that implied adjustment can be made for the previous years.”
(emphasis added)

[12] The letter went on to explain how the business agreement with Zingaro Trade worked. It addressed the issue of the additional tax imposed. In this regard, the respondent denied that it had intended to evade tax or obtain an improper refund. It stated that *“the mistakes were made in the normal course of business and bona vide (sic)”*.

[13] It is also relevant to record that the respondent provided SARS with a document from Zingaro purporting to confirm the business relationship between the entities and the terms thereof.

[14] When SARS denied the objection, the respondent filed a Notice of Appeal. This was on 11 March 2013.

[15] The grounds of appeal were set out in an accompanying letter signed by a tax practitioner. This letter made it clear that the respondent was no longer disputing the capital amounts owing in terms of the assessment. As regards the input VAT overstatement is concerned, the grounds of appeal extracted from the letter indicate that:

[15.1] the respondent continued to dispute that it had the intention to evade the payment of tax;

[15.2] the directors had been under the impression that Mr Strydom had handled all of their tax affairs;

[15.3] they did not have tax and accounting experience and so they had trusted Mr Strydom's judgment;

[15.4] they requested leniency from SARS in the form of a waiver of additional tax, penalty and interest.

[16] Shortly thereafter, on 15 March 2013, the respondent again wrote to SARS advising as follows:

[16.1] The respondent confirmed that it "never had any dealings with" Zingara. (emphasis added)

[16.2] All respondent's financial transactions were either done by Mr Strydom "*and/or done on his advise (sic)*" as respondent's auditor, to its detriment.

[16.3] Mr Strydom had also handled all of the respondent's tax affairs *and/or advised Afri-Guard (Pty) Ltd how to handle same*".

[16.4] The respondent reiterated that it was never its intention to defraud or mislead SARS.

[16.5] It undertook to pay the capital amounts due under the assessments.

[16.6] It advised that if it were forced to pay additional tax, penalties and interest, it would not survive.

[17] In preparation for the appeal before the Tax Court, SARS filed a Statement of Grounds of Assessment, and the respondent filed a Statement of Grounds of Appeal.

[18] In its statement, SARS set out the history of the matter, including details of the contents of the letters of 11 March and 13 March 2013. It made the following significant submissions:

[18.1] The respondent had failed to provide valid tax invoices.

[18.2] The subsequent denial on the part of the respondent that it ever did business with Zingaro illustrated an undisputable intention on its part to defraud the *fiscus*.

[18.3] The respondent's statement that all its financial transactions were done on the advice of its auditor, Mr Strydom, indicates that the respondent was at least complicit in, if not the moving force of the attempt to defraud the *fiscus*.

[18.4] On this basis, SARS submitted that it had rightly imposed the 200% additional tax.

[19] In its statement, the respondent made the following relevant submissions:

[19.1] The directors of the respondent held no tertiary educational qualifications, and were “*not acquainted with*” the VAT Act. Thus, it had appointed the auditors to ensure compliance with the VAT Act.

[19.2] The respondent only became aware of the overstated input tax during 2012, as all correspondence up to then had been with Mr Strydom.

[19.3] It claimed that Mr Strydom had not contacted the respondent for its input, and that the contents of the letter of 28 September 2012 (the objection letter) was attributable to Mr Strydom and not to the respondent.

[19.4] Once the respondent had become aware of the overstatement in respect of input VAT, it had immediately arranged for the down payment of the capital amount to be paid.

[19.5] The respondent was not aware that Mr Strydom was not entitled to act as both its accountant and auditor.

[19.6] It claimed that Mr Strydom had disguised the improper VAT claim he had made. The respondent had relied on him for professional advice and this had caused respondent's overstatement of input VAT.

[19.7] The respondent did not intend to cause a refund in excess of the lawful amount, and therefore the imposition of 200% additional tax was improper. It should be remitted or reduced.

[20] Prior to the hearing before the Tax Court, the parties agreed to certain common cause facts. These included the fact that:

[20.1] respondent never had any dealings with Zingaro;

[20.2] Mr Strydom handled all the respondent's tax affairs;

[20.3] all financial transactions were done by or on the advice of Mr Strydom; and

[20.4] the respondent acted on the advice of Mr Strydom.

[21] The pre-trial statement by the parties also recorded that the only issue for determination by the Tax Court was whether, in the circumstances, SARS had correctly imposed additional tax of 200% in terms of section 60(1) of the VAT Act.

HEARING BEFORE THE TAX COURT

[22] At the hearing before the Tax Court, SARS accepted that it had the onus of proving that the 200% additional tax was correctly imposed. Whether this concession was correctly made is one of the issues before this court. I will deal with it in more detail later.

[23] Each party called a witness to testify before the Tax Court.

- [24] Mr Claasen testified for SARS. He is employed as an auditor by SARS, and works as an operational specialist conducting audits. He testified that he was the auditor who had raised the assessment in respect of the respondent.
- [25] In his evidence he stated that as part of the audit process he had held a number of meetings with the respondent and its representatives. He had dealt with the respondent directly, save for one meeting when only Mr Strydom had attended as the respondent's representative.
- [26] Mr Claasen estimated that there had been approximately four meetings, and that at three of these one of the directors, Mr Olivier, had been present together with Mr Strydom. Mr Olivier was involved in the discussions with Mr Claasen concerning the issues raised in the audit. The meetings had been aimed at obtaining information, explanations and material from the respondent regarding the issues raised in the audit. Mr Olivier was present in the meeting when Mr Strydom had provided the two Zingaro invoices, and Zingaro's registration documentation to Mr Claasen.
- [27] Mr Claasen testified that he was the co-author of the first letter of audit findings to the respondent, dated April 1012. He had hand delivered the letter to Mr Olivier, and had met with Mr Olivier at the time of delivery to discuss it.
- [28] In his evidence, Mr Claasen dealt with the contents of the letter of assessment, including the paragraph dealing with Zingaro.
- [29] Mr Claasen also testified that he was the co-author of the final assessment letter, dated 24 July 2012. He explained that as part of the audit process SARS considers the vendor's audit history. In the case of the respondent,

SARS took into account that it had previously been found to have overstated VAT inputs. This was one of the contributing factors as to why additional tax had been imposed in respect of the present audit.

[30] He testified further that the overwhelming factor taken into account as far as imposing an additional tax was concerned was the issue regarding the Zingaro invoices, which appeared at the time of the assessment to be fraudulent. On further investigation, SARS determined that although Zingaro's VAT number on the invoices was a valid VAT number, it was not yet in existence at time when the input VAT was claimed, i.e. as at the date of the invoices. In other words, Zingaro was not registered as a VAT vendor under the number reflected when the invoices were issued.

[31] The import of Mr Claasen's evidence in this regard was that Zingaro claimed to have supplied vatable services to the respondent at a time when Zingaro was not registered for VAT. It should be noted, at this stage, as I have already indicated, that on 13 February 2013, the respondent ultimately conceded that the dubious role of Zingaro in the whole affair went even further, viz. that respondent had never done business with Zingaro at all.

[32] Mr Claasen also explained in his evidence what procedure is followed within SARS when an assessment is made. He testified that once a finding is made, following an audit, a taxpayer, like the respondent, is given an opportunity to provide relevant information and material as to why additional tax should not be imposed. He testified that it was part of his role in the whole process to make recommendations to the relevant SARS committees regarding an appropriate decision. His recommendation to the effect that a

200% additional tax should be raised was based on the findings of the audit and assessment process, the nature of the respondent's transgression, and the fact that it had a previous history of input VAT overstatement.

[33] Mr Claasen readily conceded that he was not the ultimate decision-maker. He explained that his recommendations had been considered by two committees. These committees had the authority to veto his recommendation.

[34] He testified that he had considered whether there were any mitigating factors on the basis of the respondent's submissions to SARS, but that there had been none. He pointed out that the respondent runs a multi-million Rand business, and is responsible for over 4000 employees. SARS had taken into account as a mitigating factor that the directors had relied on Mr Strydom. However, given the size of the enterprise, it stood to reason that the directors had some business acumen and it could not be contended that Mr Strydom should shoulder all of the blame.

[35] The witness for the respondent was Mr Muller. He is the respondent's current accountant. He was employed by the respondent in March 2013. Mr Muller was not in the employ of the respondent when the relevant events pertaining to the dispute took place. He had no personal knowledge of them, and did not seek to give any evidence regarding what had transpired at that time.

[36] Mr Muller's evidence was directed at establishing the current financial position of the respondent. He testified about its major contracts, its revenue for 2014, its anticipated revenue for the next 12 months, and the

respondent's expenses. He also testified that the capital amount of the assessment raised by SARS had been paid, although under cross-examination some uncertainty arose as to whether this was so, taking into account the monthly interest accruing on the outstanding amounts.

[37] Under cross-examination, Mr Muller indicated that the respondent's monthly income was approximately R22 million. He also confirmed that if the respondent was successful in securing pending tenders it would be in a position to pay the additional tax amount levied.

[38] The respondent called no other witnesses. Significantly, none of the respondent's directors, nor Mr Strydom were called to testify on its behalf.

JUDGMENT OF THE COURT *A QUO*

[39] The court *a quo* delivered a brief judgment. A substantial portion of the judgment recited what the court referred to as the common cause facts between the parties. There was consensus at the hearing before us that the facts recited by the court *a quo* were not the agreed common cause facts. However, nothing turns on this.

[40] The gist of the court *a quo*'s judgment can be summarised as follows:

[40.1] The court noted that SARS had accepted that it bore the onus of establishing that the additional tax had been correctly imposed.

[40.2] It noted that the decision to impose additional tax was discretionary.

[40.3] The court noted further that on the basis of established authority, in this case *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue*,¹ a hearing before the Tax Court involves a re-hearing of the whole matter; the Tax Court considers the issue afresh and may substitute SARS' decision with its own.

[40.4] The court emphasised the fact that Mr Claasen had not had the authority to make the final decision regarding the imposition of additional tax. Further, that SARS did not call any witness to explain the decision of the senior committee that had made the final decision.

[40.5] Accordingly, said the court, it was unable to assess the correctness of the decision of the committee.

[41] The court *a quo* concluded that:

“The Commissioner, having failed to place any evidence before the court as to how and why the senior committee arrived at a decision to impose the 200% additional tax failed to prove that the imposition of the additional tax was justified and the imposition thereof cannot be upheld.”

[42] On this basis, the court *a quo* upheld the respondent's appeal, and set aside the additional tax imposed. The court directed SARS to remit the additional tax to nil.

THIS APPEAL

¹ 1944 AD 142 150

[43] It is well established that a court hearing an appeal against a decision of the Tax Court may only interfere with that decision on limited grounds. These were identified by the Appellant Division in the leading case of *CIR v Da Costa* as being: “*if the Special Court did not bring an unbiased judgment to bear on the question, or did not act for substantial reasons, or exercised its discretion capriciously or upon a wrong principle.*”²

[44] The reason for this is because the Tax Court, in hearing the matter afresh, exercises its own discretion. In *Da Costa*, the court explained the situation thus:

“*It seems clear, therefore, that in cases involving the exercise of a discretion by the Commissioner the Special Court on appeal to it is called upon to exercise its own, original discretion*” (emphasis added)

[45] In *Da Costa*, one of the issues before the Tax Court was whether it was competent for the Commissioner to delegate his power to impose penalties to a committee. In this regard, and flowing directly from the above-cited dictum, the Appellate Division held that:

“*And since the appeal is directed against the penalty determined by the Court a quo, it is immaterial whether the Commissioner was entitled to delegate his function to the aforesaid committee.*”³

[46] The Eastern Cape Special Court in *ITC 1430* adopted an approach consistent with *Da Costa* in a matter similar to the present. In that case, the

² 1985 (3) SA 768 (A) at 775G

³ at 775A

Commissioner, acting through a penalty committee, had imposed additional tax. There was no evidence before the court as to the basis on which the Commissioner had reached his decision. The court held that, while this made their task more difficult, it was not simply restricted to deciding whether the decision by the Commissioner was right or wrong. The process before it was a re-hearing, in which evidence could be placed before it. The court concluded that:

*“Nor does it seem to me that the Special Court is restricted to evidence of facts existing as at the date of assessment or of imposition of the additional charges. This would be the situation in an ordinary civil or criminal appeal, where the court on appeal is confined solely to the record. ... In the present case, however, we have to decide not whether the Commissioner’s decision was correct or not, but how we should exercise our discretion. There seems therefore to be no logical reason why we should not consider the facts existing as at the date of the appeal in exercising our powers on appeal”*⁴

- [47] Before us it was submitted on behalf of SARS that this court is entitled to interfere with the decision of the court *a quo* in that it had made its decision based on the application of a wrong principle. More specifically, it was submitted that the question before the court *a quo* was not whether the Commissioner had made the right or wrong decision, or what the reasons were for that decision. Instead, and consistent with *Da Costa*, as well as the approach adopted in other cases, including *ITC 1430*, the court *a quo* was

⁴ (1987) 50 SATC 51 (E) at 56-7

required to hear the matter afresh, based on the evidence before it, and to decide for itself whether SARS was entitled to impose additional tax.

[48] In other words, SARS submitted that the court *a quo* had applied the wrong principle in basing its decision on whether the decision of the Commissioner was correct. The court ought properly to have considered the evidence before it, and on this basis made a determination on whether the jurisdictional requirements for the imposition of additional tax in terms of section 60(1) were met, viz. was there an intent to evade tax on the part of the respondent, or a person acting on its behalf or under its control.

[49] In countering these submissions, the respondent focused as its starting point on the issue of the onus in proceedings before the Tax Court. The parties agree that prior to the adoption of the TAA, the onus was on the taxpayer to establish that the imposition of additional tax was unfounded. The respondent submitted that this position has been altered by the adoption of the TAA and, in particular, section 102(2), read with section 270(3) thereof.

[50] Section 102(2) provides that:

“The burden of proving whether ... the facts on which SARS based the imposition of an understatement penalty under chapter 16 is upon SARS.” (emphasis added)

[51] Section 270(3) reads as follows:

“A form, notice, demand or other document issued given or received by a person or SARS under the provisions of a tax Act repealed by this Act, must be regarded as issued, given or received in terms of any

comparable provision of this Act, as from the date that the form, notice, demand or other document was issued, given or received under the repealed provisions.”

[52] Moving from its primary proposition, the respondent contended that SARS bore the onus of establishing that the jurisdictional requirements for the imposition of additional tax had been met. It submitted that SARS had failed to meet this onus in that it did not produce any evidence to establish on what basis the senior committee had made its decision to impose additional tax. Respondent submitted on this basis that the court *a quo* had correctly concluded that SARS had failed to prove that the tax was justified.

[53] The respondent accepted that an appeal before the Tax Court involves a re-hearing of the matter. However, it contended that one of the jurisdictional facts that must be established by SARS is that the Commissioner was satisfied that additional tax ought to be levied. SARS must produce evidence at that re-hearing directed at establishing that the Commissioner was satisfied that the additional tax was warranted, and the basis for his satisfaction in this regard. Accordingly, the basis for the Commissioner’s decision (or more specifically, that of the senior committee) was not irrelevant to the appeal before the court *a quo*, and that court had correctly identified this as being critical to its finding that SARS had not met its onus.

[54] The respondent relied for this proposition on *ITC 1876*,⁵ a decision of the Western Cape Tax Court. In particular, it referred to the following dictum:

⁵ 77 SATC 175

“In the case of the powers which the Commissioner can exercise upon being satisfied of particular matters, one is dealing with a different situation. One is not dealing with a situation where the law prescribes that certain expenses shall be disallowed or certain income shall be taxed if a certain state of affairs objectively exists. One is dealing, rather, with a situation where a particular fiscal result follows only if the Commissioner himself is satisfied of certain matters. In the latter class of case it is the Commissioner’s satisfaction upon the points in question which constitute the jurisdictional fact for the issuing of the assessment.”

(emphasis supplied by respondent)

[55] As regards the respondent’s primary proposition on the effect of the TAA on onus in cases like the present, SARS pointed out that the tax in question in this matter is “additional tax”, under section 60(1). Section 102(2) of the TAA does not deal with “additional tax” in placing the onus on SARS. It deals with and an “understatement penalty under Chapter 16”.

[56] The respondent’s contention is that the effect of section 270 is that, for purposes of onus, additional tax must be treated as an understatement penalty. SARS countered these submissions on the basis that this was not the effect of section 270, and that in appeals concerning additional tax, the burden remains on the taxpayer.

[57] In my view, it is not necessary to make a determination on this issue. The present appeal can be resolved on the assumption (without reaching any conclusion thereon) that SARS bore the onus before the court *a quo* of justifying the imposition of additional tax.

- [58] What of the respondent's second proposition viz. that SARS had to provide evidence of the basis on which the senior committee was satisfied that additional tax should be imposed, failing which the jurisdictional requirements for additional tax were not met?
- [59] I have difficulty in accepting the respondent's submissions in this regard. They are contrary to the established approach laid down in *Da Costa*. On the established approach, the Tax Court conducts a re-hearing. It may admit new evidence. It has wide appeal powers and, critically, exercises its own discretion in making a decision.
- [60] The respondent's approach, on the other hand, suggests a power more akin to that of judicial review, than that of a wide appeal. In a review, it is often critical for a court to have evidence of the basis on which the decision under review was reached. This is because a review is concerned primarily with whether that decision was exercised lawfully or not. A court on review typically does not exercise its own discretion: its task is to determine the lawfulness of the discretion involved in the decision under review. But the situation is fundamentally different when the Tax Court exercises its appeal powers. I am in respectful agreement with the finding of the court in *ITC 1430* to the effect that the question on appeal to the Tax Court is not whether the Commissioner's decision was correct or not, but how the Tax Court should exercise its own discretion on the evidence before it.
- [61] Is there any merit in the respondent's reliance on *ITC 1876*? The respondent submitted that this case throws new light on the powers of the Tax Court in circumstances where the onus rests on SARS to establish the jurisdictional

requirements. In particular, it was submitted that this case was important in establishing that where the satisfaction of the Commissioner or senior committee is a jurisdictional requirement, SARS must place evidence before the Tax Court as to the basis for that satisfaction. Failing this, it follows that SARS has not met its onus. The respondent submitted that *ITC 1876* and the present case were similar in that both involved the discretion of the Commissioner (or senior committee).

[62] Again, I have difficulty in accepting this proposition. The situation facing the Tax Court in *ITC 1876* was not the same, or analogous to the situation that faced the court a quo. To begin with, it was not an appeal. In *ITC 1876* SARS applied to the Tax Court to amend its grounds of assessment under Rule 10. The court refused the application. In doing so, it was not exercising its powers of appeal.

[63] Furthermore, in *ITC 1876*, the underlying dispute between the parties did not involve section 60(1) of the VAT Act. Instead, it involved section 103(2) of the Income Tax Act 58 of 1962. That section provides that “*whenever the Commissioner is satisfied*” of certain matters, he may disallow the set-off of assessed losses against income. In other words, the satisfaction of the Commissioner was an express jurisdictional requirement for the exercise of the power under consideration in that case.

[64] Thus, the findings in *ITC 1876* upon which the respondent relied have no application to the present matter. The findings were not made in the course of that court exercising its appeal powers. In addition, unlike section 103(2), section 60(1) does not provide that the Commissioner must be satisfied on

certain matters before he can exercise his powers. Accordingly, I find no merit in the respondent's submissions in this regard.

[65] In my view, the correct approach in the present matter is that set out in *Da Costa*, which approach was preceded by the decision in the *Rand Ropes* matter.⁶ The court *a quo* correctly cited the relevant dictum from *Rand Ropes* setting out the principle involved. However, in my view SARS is correct in its submission that the court then went on to apply that principle incorrectly. It did this by erroneously identifying the correctness of the senior committee's decision as the critical issue for determination in the appeal before it. In other words, it approached the matter on the basis that SARS had to establish that the senior committee had correctly exercised its discretion. This was not the issue before the court *a quo*. The issue before it was whether, on the evidence before the court a quo, SARS could justify the imposition of additional tax (assuming, for present purposes, that SARS bore that onus).

[66] The imposition of additional tax under section 60(1) requires intent on the part of the taxpayer of a person acting under the taxpayer's control, or on its behalf to evade payment of tax. That SARS was able to establish the necessary intent is patently clear from the undisputed evidence presented before the Tax Court, and the common cause facts.

[67] It was common cause, contrary to their assertions until February 2013, that the respondent had no dealings with Zingaro at all. The undisputed evidence of Mr Claasen established that one of the respondent's directors, Mr Olivier,

⁶ Note 1 above.

was present in the meeting when the documents purporting to prove the business relationship and the VAT paid to Zingaro were provided to SARS. Mr Olivier did not come to testify to shed any additional light on the matter, or to explain how, despite this, he was ignorant of Mr Snyman's machinations.

[68] In any event, even if one takes into account the respondent's assertions in its correspondence with SARS that Mr Strydom should bear responsibility for attempting to mislead SARS in this regard, it was the respondent's own case that he was employed as the respondent's financial manager and auditor. On this basis alone, the provisions of section 60(1) would have been satisfied, as Mr Snyman was, at the very least, acting on behalf of the respondent in attempting to mislead SARS by presenting the purported contract, and supporting invoices involving Zingaro.

[69] It is clear from the evidence presented by respondent at the hearing that the sole purpose thereof was to deal with the issue of mitigation. It was not directed at the issue of intent, and hence at whether the imposition of additional tax was justified. It was concerned only with the question of what percentage of additional tax would be appropriate in the circumstances.

[70] On this undisputed evidence, and the common cause facts, the only reasonably possible conclusion to draw is that the Zingaro explanation, and the documentation presented in support of it (which subsequently proved to be fraudulent) was provided to SARS with the intention of misleading SARS about the respondent's true VAT inputs, and thus of evading the payment of tax.

[71] Even if the matter is approached on the assumption that SARS bore the onus in the appeal before the court *a quo*, there was, at the very least a *prima facie* case establishing intent, which required a rebuttal on the part of the respondent. The respondent failed to produce any evidence to rebut the case made out by SARS.

[72] I conclude that the court *a quo* based its decision on an incorrect application of the applicable legal principles and, consequently, on the incorrect facts. Accordingly, its decision was based on a wrong principle, and falls to be set aside by this court.

[73] Finally, it was common cause before us that SARS had, prior to the hearing before the court *a quo*, advised the respondent that it was prepared to remit the rate of additional tax originally imposed from 200% to 100%. This was on the basis primarily that the respondent had ultimately come clean as to the true position regarding Zingaro, and on the basis that Mr Strydom's central role in the affair was a mitigating factor *vis-a-vis* the respondent's position.

[74] At the hearing before this court, SARS confirmed its position in this regard.

[75] In the circumstances, I propose the following order:

1. The appeal is upheld.
2. The decision of the court *a quo* is set aside, and is replaced by the following order:

"The additional tax imposed upon the Appellant is referred back to the Commissioner and it is directed that the additional tax be remitted to 100%".

3. The respondent in this court is directed to pay the appellant's costs in the proceedings before the court *a quo* and in the appeal before this court, the costs of the latter proceedings to include the costs of two counsel.

R KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I AGREE

MASIPA J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I AGREE

MASHILE J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard:	16 March 2016
Date of Judgment:	27 May 2016
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