THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 291/12
Reportable

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES **APPELLANT**

and

PRETORIA EAST MOTORS (PTY) LTD **RESPONDENT**

Neutral citation: *SARS v Pretoria East Motors (Pty) Ltd* (291/12) [2014] ZASCA 91 (12 June 2014)

Bench: Ponnan, Theron, Wallis, Willis JJA and Van Zyl AJA

Heard: **20 May 2014**

Delivered: **12 June 2014**

Summary: Revenue – Income Tax Act 58 of 1962 and Value Added Tax Act 89 of 1991 – assessment to additional income tax and value added tax – appeal against dismissal of objection by taxpayer – onus of proof – evidence – sufficiency of to discharge onus.

ORDER

On appeal from: Tax Court, held at Pretoria (Goodey AJ sitting as court of first instance):

1. The appeal and cross-appeal are each upheld in part, with the costs, including those consequent upon the employment of two counsel, to be paid in each instance by the Commissioner for the South African Revenue Services.
2. The additional income tax assessments in respect of the 2000, 2001 and 2002 tax years and the additional VAT assessments for the tax years 2000, 2001, 2002, 2003 and 2004 are set aside and referred back to the Commissioner for reassessment in the light of this judgment.
3. The costs order of the court below is set aside and substituted with an order that each party pay their own costs.

JUDGMENT

PONNAN JA (THERON, WALLIS, WILLIS JJA and VAN ZYL AJA concurring):

[1] The Respondent, Pretoria East Motors (Pty) Ltd (the taxpayer), an authorised dealer on behalf of Toyota South Africa (Toyota SA), conducted business as a car dealership at Menlyn and Garsfontein in Pretoria selling new and used vehicles. During June and July 2003 officials in the employ of the appellant, the Commissioner for the South African Revenue Services (SARS) conducted a detailed audit of the tax affairs of the taxpayer for the period 2000 to 2004. At the conclusion of the audit various additional Income Tax (IT) and Value-added Tax (VAT) assessments were raised by

SARS. Although the assessments themselves were omitted from the record it appears that there were additional assessments for income tax in respect of each of 2000, 2001 and 2002. There were five additional VAT assessments, respectively for 2000, 2001, 2002, 2003 and 2004. There was also an assessment to Secondary Tax for Companies but that appeal was dismissed by the Tax Court and not persisted with in this Court. The taxpayer's objection to those assessments, having been disallowed by SARS, it then appealed to the Special Tax Court: Pretoria. The Tax Court (Goodey AJ sitting with assessors) upheld SARS assessment in relation to 18 of the 21 items in dispute and found for the taxpayer in respect of the remaining 3 items. It also confirmed the penalties at the maximum rate of 200 per cent that had been levied by SARS in respect of the additional assessments. SARS was ordered to pay the costs of the appeal on the basis that the taxpayer was 'substantively successful and is entitled to costs'. The appeal by SARS and the cross-appeal by the taxpayer direct to this court in each instance against the conclusions adverse to them are with the leave of the Tax Court.

[2] It is important at the outset to emphasise, as Curlewis JA did in *Bailey v Commissioner for Inland Revenue* 1933 AD 204 at 220, that the Tax Court is not a court of appeal in the ordinary sense: it is a court of revision. That means, as Centlivres JA observed in *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue* 1944 AD 142 (at 150):

'. . . that the Legislature intended that there should be a re-hearing of the whole matter by the Special Court and that that Court could substitute its own decision for that of the Commissioner.'

As the fate of this appeal depends upon an interpretation of certain provisions of the Income Tax Act 58 of 1962 (the IT Act) and the Value-Added Tax Act 89 of 1991 (VAT Act), before passing to a closer consideration of the evidence and proceeding to narrate the issues that arise for decision, it would be appropriate to first record, in broad outline, some general observations about IT and VAT.

[3] Taxable income is the basis upon which normal tax is levied. It is arrived at by first determining the taxpayer's gross income, consisting of all receipts and accruals, other than those of a capital nature, and certain other specified amounts and then deducting therefrom any amounts exempt from normal tax. One thereby arrives at the

income of the taxpayer. The taxpayer's taxable income is then determined by deducting from its income the various amounts which the IT Act allows by way of deduction, of which those covered by s 11(*a)* are of relevance to this matter. Section 23 prescribes what deductions may not be made in the determination of taxable income. Subsections (*f*) and (*g*) of s 23 represent what has been described as the 'negative counterpart' of s 11(*a*) and, in determining whether a particular amount is deductible, it is generally appropriate to consider whether or not such deduction is permitted by s 11(*a*) and whether or not it is prohibited by s 23(*f*) and/or (*g*). (See *Commissioner for Inland Revenue v Nemojim (Pty) Ltd* 1983 (4) SA 935 (A) at 946H-947C.)

[4] The general deduction formula laid down in s 11(*a*) of the IT Act permits the deduction from the taxpayer's income of 'expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature', whilst ss 23(*f*) and (*g*) of the Act prohibit a deduction in respect of:

'(*f)* any expenses incurred in respect of any amounts received or accrued which do not constitute income as defined in section one;

(*g*) any moneys, claimed as a deduction from income derived from trade, to the extent to which such moneys were not laid out or expended for the purposes of trade.'

In *Joffe & Co Ltd v Commissioner for Inland Revenue* 1946 AD 157 at 163 it was put thus:

'All expenditure, therefore, necessarily attached to the performance of the operations which constitute the carrying on of the income-earning trade, would be deductible and also all expenditure which, though not attached to the trading operations of necessity, is yet *bona fide* incurred for the purpose of carrying them on, provided such payments are wholly and exclusively made for that purpose and are not expenditure of a capital nature.'

[5] As its name signifies, VAT is a tax on added value. The system was introduced by s 7(1) of the VAT Act, which provides that

'. . . there shall be levied and paid . . . a tax, to be known as the value-added tax–

(*a*) on the supply by any vendor of goods . . . supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;

. . .

calculated at the rate of 14 per cent on the value of the supply concerned . . . .'

VAT is calculated on the value of each successive step as goods move along the commercial chain. Kriegler J explains (*Metcash Trading Ltd v Commissioner, SARS* 2001 (1) SA 1109 (CC)):

'[14] Being a tax on added value, VAT is not levied on the full price of a commodity at each transactional delivery step it takes along the distribution chain. It is not cumulative but merely a tax on the added value the commodity gains during each interval since the previous supply. To arrive at this outcome a supplying vendor, when calculating the VAT payable on the particular supply, simply deducts the VAT that was paid when the particular goods were supplied to it in the first place. As a commodity is on-sold by a succession of vendors, each payment of VAT by each successive supplier must then represent 14% of the selling price less the 14% of the price which was payable when that commodity was acquired. According to the scheme of the Act the tax that is payable by a supplying vendor is called output tax and the tax that was payable on the supply to that vendor upon acquisition is called input tax.

[15] . . . In the result vendors are entrusted with a number of important duties in relation to VAT. First there is the duty to calculate and levy VAT on each supply of goods; then to calculate the output tax and the input tax on that transaction correctly; also to keep proper records supported by the prescribed vouchers, periodically to add up the sum of output and input taxes attributable to that period and appropriately deducting the total of the input taxes from those of the output taxes; and, ultimately and crucially, to make due and timeous return and payment of the VAT that is payable in accordance with the vendor's allocated tax period.

[16] . . . The first significant point to note is that VAT, quite unlike income tax, does not give rise to a liability only once an assessment has been made. VAT is a multi-stage tax, it arises continuously. Moreover VAT vendors/taxpayers bear the ongoing obligation to keep the requisite records, to make periodic calculations of the balance of output totals over and above deductible input totals (and any other permissible deductibles) and to pay such balances over to the fisc. It is therefore a multi-stage system with both continuous self-assessment and predetermined periodic reporting/paying.'

[6] In terms of s 82 of the IT Act:

'The burden of proof that any amount is –

(*a*) exempt from or not liable to any tax chargeable under this Act;

. . . shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off, . . . and upon the hearing of any appeal from any decision of the Commissioner, the

decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.'

A similar provision is to be found in s 37 of the VAT Act. The present appeal must therefore be approached on the basis that the onus was on the taxpayer to show on a preponderance of probability that the decisions of SARS against which it appealed were wrong (*CIR v SA Mutual Unit Trust Management Co Ltd* 1990 (4) SA 529 (A) at 538D). That, however, is not to suggest that SARS was free to simply adopt a supine attitude. It was bound before the appeal to set out the grounds for the disputed assessments and the taxpayer was obliged to respond with the grounds of appeal and these delineate the disputes between the parties.

[7] To discharge the onus resting upon it, the taxpayer called two witnesses, Dr WAA Gouws and Mr C Wolpe. The former, a chartered accountant, became involved in the matter soon after the audit commenced. He prepared the letter of objection on behalf of the taxpayer and later a report including annexures which formed part of the record before the Tax Court on the strength of the taxpayer's contemporaneous financial records and other documentation. The latter was the financial director of the taxpayer and one of its principal shareholders. The managing director of the taxpayer, Mr Dick Jacobs, who suffered from Alzheimer's disease, was unable to testify. For SARS, Ms Jacqueline Victor, who had been principally responsible for conducting the audit that gave rise to the assessments and for the disallowance of the various objections, testified. Much of the evidence before the Tax Court, however, took the form of documentary exhibits, primarily in the form of court dossiers prepared by the taxpayer. Those included documents obtained or prepared by Ms Victor during the course of the audit as well as the annexures to the letter of objection prepared by Dr Gouws and his summary.

[8] It is so that the taxpayer's *ipse dixit* will not lightly be regarded as decisive. But it must be considered together with all of the other evidence in the case. And, given the unfavourable position of having the onus resting upon it – a 'formidable and difficult' one to discharge (per Trollip JA; *Barnato Holdings Ltd v Secretary for Inland Revenue* 1978 (2) SA 440 (A) at 454A-B) – the interests of justice require that the taxpayer's evidence

and questions of its credibility be considered with great care. Indeed the taxpayer's evidence under oath and that of its witnesses must necessarily be given full consideration by the court, and the credibility of the witnesses must be assessed as in any other case that comes before the court. (See *Malan v Kommissaris vir Binnelandse Inkomste* 1983 (3) SA 1 (A) at 18E.) It thus remains the function of the court to make a determination of the issues that arise for decision on an objective review of all of the relevant facts and circumstances. Not the least important of the facts, according to Miller J (ITC 1185 (1972) 35 SATC 122 (N) at 124), 'will be the course of conduct of the taxpayer in relation to the transactions in issue, the nature of his business or occupation and the frequency or otherwise of his past involvement or participation in similar transactions. The facts in regard to those matters will form an important part of the material from which the court will draw its own inferences against the background of the general human and business probabilities'.

[9] SARS raised the additional assessments on the basis of information in the taxpayer's records and, in the case of the additional VAT assessments, the VAT 201 forms completed by the taxpayer for each period of assessment. The approach adopted by Ms Victor was to examine the accounts and, where she found a discrepancy that she did not understand and for which in her view no adequate explanation was furnished, she raised an assessment to additional tax - either income tax or VAT or, in some instances, both.

[10] It does not appear that Ms Victor sought to familiarise herself with the workings of the accounting system utilised by the taxpayer, even though the information available to her, confirmed by the evidence in the appeal, was that it was a customised system installed not by the taxpayer but by Toyota SA. It was designed not simply to reflect the taxpayer's financial position, but to provide statistical information to Toyota SA and to manage the complexities inherent in the taxpayer financing its operations under a floor-plan agreement with Toyota Financial Services (Pty) Ltd. In the result a number of transactions that were purely internal to the taxpayer's operations were reflected on that system as 'sales'. Whilst that may have been useful as a management tool to enable the taxpayer to assess the profitability of the different branches of its business, it could

be misleading if not properly understood. That was because it resulted in entries being made in the accounts dealing with VAT that indicated that VATable transactions had occurred, when in truth they had not and the entries were merely directed at maintaining the accounts in balance. Ms Victor ignored the internal character of these transactions. Thus she treated as taxable supplies: the transfer of vehicles from sales stock to demonstration purposes; sales clearly reflected in the accounts as internal transactions; and, the transfer of sales stock (swaps) between the two branches of the business. This was incorrect, as it ignored the fact that under s 7(1)*(a)* of the VAT Act, read with the definition of 'supply' in s 1, output tax is to be raised only on taxable supplies by a vendor and these internal activities did not constitute supplies to anyone.

[11] As best as can be discerned, Ms Victor's approach was that if she did not understand something she was free to raise an additional assessment and leave it to the taxpayer to prove in due course at the hearing before the Tax Court that she was wrong. Her approach was fallacious. The raising of an additional assessment must be based on proper grounds for believing that, in the case of VAT, there has been an under declaration of supplies and hence of output tax, or an unjustified deduction of input tax. In the case of income tax it must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified. It is only in this way that SARS can engage the taxpayer in an administratively fair manner, as it is obliged to do. It is also the only basis upon which it can, as it must, provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment is wrong. This erroneous approach led to an inability on Ms Victor's part to explain the basis for some of the additional assessments and an inability in some instances to produce the source of some of the figures she had used in making the assessments. In addition, as a matter of routine, all the additional assessments raised by her were subject to penalties at the maximum rate of 200 per cent, absent any explanation as to why the taxpayer's conduct was said to be dishonest or directed at the evasion of tax.

[12] According to the unchallenged evidence of Dr Gouws, who represented the taxpayer from about the end of 2003 or early 2004, he had prepared schedules from the

taxpayer's records and offered to provide additional information to that already furnished, but his overtures were rejected by Ms Victor. He stated that in response to a suggestion that insufficient proof had been proffered by the taxpayer, all the ledger accounts were put in a van and taken to the SARS office and Ms Victor was invited to take whatever she needed, but she declined to do so. The SARS auditors had thus been given access to all the documents foundational to the taxpayer's accounts but chose not to examine any of them. This disturbing approach persisted in the Tax Court. Prior to the hearing, Dr Gouws approached Mr Tjiane, who represented SARS at the hearing, and after pointing out that there was a mass of invoices and files covering the areas in dispute between the parties enquired what he should bring to the hearing. He was told that it was unnecessary to bring everything and simply to bring an example. During the course of the hearing documents were tendered for inspection but once again the SARS representatives did not take up these offers. Mr Tjiane persisted in cross-examination in asking Dr Gouws about source documents that demonstrated that SARS was wrong, without ever indicating, beyond a question about invoices for entertainment expenditure and charter fees, which documents he had in mind, or why it was impermissible for Dr Gouws to make use of the audited figures in exactly the same way as Ms Victor had done. It appeared as if he thought that it was necessary for the taxpayer to reconstruct its accounts in order to discharge the onus resting on it.

[13] That approach was untenable, for, it left the taxpayer none the wiser as to what was truly in issue and what needed to be produced in order for it to discharge the burden of proof that rested upon it. The taxpayer thus adopted the general approach that as Ms Victor had misunderstood the accounts and ignored the provisions in particular of the VAT Act, it sufficed for it to demonstrate that through the evidence of Dr Gouws. That was a perfectly proper approach in respect of most, but not all, items, particularly in the light of Ms Victor having informed the taxpayer that all sales had been properly entered in the company's accounts and that she had relied for the assessments on the trial balances prepared by the company's auditors. The taxpayer was not alerted to any other issue and was certainly not called upon to produce every underlying voucher or invoice or to reconstruct its accounts from scratch for the Tax Court.

[14] In these circumstances the submissions made to the Tax Court and repeated on appeal in relation to many of the disputed items, namely that the original vouchers had not been produced or that Dr Gouws' explanations were to be ignored because they were based on hearsay, cannot be sustained. Whilst there are disputes in tax appeals, such as the entertainment expenditure in the present appeal, where the production of invoices or vouchers is called for if the taxpayer is to discharge the onus of proof resting on it, that is not always the case. Everything will depend upon the nature of the dispute between the parties as defined by the grounds of assessment and the grounds of appeal. Where, for example, the SARS auditor has based an assessment upon the taxpayer's accounts and records, but has misconstrued them, then it is sufficient for the taxpayer to explain the nature of the misconception, point out the flaws in the analysis and explain how those records and accounts should be properly understood. That can be done by a witness such as Dr Gouws who, as a qualified chartered accountant, is capable of giving such an explanation after a full and proper consideration of the accounts. If there are underlying facts in support of that explanation that SARS wishes to place in dispute, then it should indicate clearly what those facts are so that the taxpayer is alerted to the need to call direct evidence on those matters. Any other approach would make litigation in the Tax Court unmanageable, as the taxpayer would be left in the dark as to the level of detail required of it in the presentation of its case. It must be stressed that SARS is under an obligation throughout the assessment process leading up to the appeal and the appeal itself to indicate clearly what matters and which documents are in dispute so that the taxpayer knows what is needed to present its case.

[15] Against that background I turn to the substantive issues raised by the appeal and cross appeal.

The SARS Appeal

First ground: Input tax on the purchase of second hand vehicles

[16] Part of the taxpayer's business as a motor dealership involved the acquisition of second-hand vehicles from third parties, either by way of an out-and-out purchase or as

a trade-in against the purchase of a new vehicle. In terms of s 16(3) of the VAT Act the amount of VAT payable by a vendor is calculated by, *inter alia*, deducting from the sum of the output tax of the vendor the amounts of input tax in respect of qualifying goods and services. The taxpayer had claimed input VAT deductions in respect of the purchase of second-hand vehicles for the period 2000 to 2003 in the total sum of R14 099 943. Those were disallowed by SARS on the basis that the taxpayer had not kept the necessary records as required by the VAT Act.

[17] Input tax is defined in s 1 of the VAT Act to include:

'(*a*) tax charged under section 7 and payable in terms of that section by –

(i) a supplier on the supply of goods or services made by that supplier to the vendor; or

. . .

(*b*) an amount equal to the tax fraction . . . of the lesser of any consideration in money given by the vendor for or the open market value of the supply (not being a taxable supply) to him by way of a sale on or after the commencement date by a resident of the Republic . . . of any second-hand goods situated in the Republic; . . . .'

Therefore 'input tax' in respect of second-hand goods acquired by a vendor is a deemed amount equal to the tax fraction[1] (namely 14 over 114) of the lesser of the sale price or the open market value of such goods. Section 16(2)*(c)* of the VAT Act, however, prohibits the deduction of input tax in respect of the supply of goods, unless *inter alia:*

'(*c*) sufficient records are maintained as required by section 20(8) where the supply is a supply of second-hand goods or a supply of goods as contemplated in section 8(10) and in either case is a supply to which that section relates; . . . .'

At the relevant time, s 20(8) read:

'Notwithstanding anything in this section, where a supplier makes a supply (not being a taxable supply) of second-hand goods or of goods as contemplated in s 8(10) to a recipient, being a registered vendor, the recipient shall, where the value of the supply is R1 000 or more, obtain and maintain a declaration by the supplier stating whether the supply is taxable supply or not and shall further maintain sufficient records to enable the following particulars to be ascertained . . . .'

[1] According to s 1 of the VAT Act, tax fraction means the fraction calculated in accordance with the formula R over (100 plus R) in which formula R is the rate of tax applicable under s 7(1), namely 14 per cent.

[18] According to the taxpayer, the transactions fell into three categories, namely, the acquisition of used vehicles from: (a) registered vendors; (b) non-vendors for resale; and (c) non-vendors as a trade-in against the sale of a new vehicle. The taxpayer asserted that it had specifically been brought to the attention of Ms Victor that each individual vehicle bought or sold by it had a separate file. And as all of those files were quite voluminous, it had been agreed between Dr Gouws and Mr Devlin Bissetty, the legal officer then in the employ of SARS, that although all of those files were available for inspection, a random sample of only 50 files would be scrutinised by SARS.

[19] In respect of the transactions covered by category (a), the evidence was to the effect that the registered vendor in each case had supplied the taxpayer with a valid invoice, which reflected its VAT registration number and otherwise complied with the requirements of the VAT Act. But Ms Victor did not treat those transactions any differently to those that fell into the other two categories. The impermissibility of Ms Victor's approach was demonstrated by an exchange between her and one of the assessors in which he asked whether she had disregarded transactions where there was a valid tax invoice and she agreed that she had.

[20] In regard to categories (b) and (c), SARS disallowed the input tax deduction solely on the basis that the taxpayer was not in possession of a 'declaration by the supplier stating whether the supply is a taxable supply or not' as contemplated by s 20(8) of the VAT Act. That requirement was introduced by way of an amendment to s 20(8) in terms of the Taxation Laws Amendment Act 30 of 1998. When s 16(2)(*c*) was first enacted, a declaration by the seller was not one of the documents contemplated by the expression 'sufficient records . . . as required by s 20(8)'. Tellingly, when s 20(8) was amended there was no corresponding amendment to s 16(2)(*c*). Section 20(8) requires the recipient vendor to 'maintain a declaration by the supplier' and in addition to 'further maintain sufficient records to enable the following particulars to be ascertained'. The 'following particulars' to be ascertained from the records, include the name of the supplier, a copy of the seller's identity document or details of the seller if not a natural person, the address of the supplier, the date of sale, a description of the goods and the consideration for the supply, all of which the taxpayer admittedly possessed in this case.

A declaration by the supplier was not one of those particulars. It was an additional requirement over and above the requirement that 'sufficient records' be kept of the particularised matters. It follows that such a declaration - being a requirement that is additional to those particulars - is plainly not encompassed by the expression 'sufficient records' in s 16(2)(*c*). Not being a requirement of that section, it must follow that SARS' disallowance of the input tax deduction on the basis that the taxpayer was not in possession of those declarations, could not stand. In the result the appeal by SARS in relation to this ground must fail.

Second ground: Fuel coupons

[21] SARS disallowed income tax deductions claimed by the taxpayer in respect of the period 2000 to 2002 in the sum of R1 113 762 (involving tax of R334 129). This pertained to the use of fuel coupons or vouchers to obtain fuel for demonstration vehicles, delivery of vehicles or for other internal purposes by the taxpayer. Mr Wolpe explained:

'And then if M'Lord came in himself to buy a car, you would be insisting that you get a full tank of petrol or half a tank, and this was the method that we put petrol in the tank.'

His evidence was never challenged. Nor was it disputed that this type of expenditure could be claimed by the taxpayer in terms of s 11(*a*) of the IT Act. In fact in its statement of grounds of assessment filed in terms of rule 10,[2] SARS conceded:

'22. The Appellant claimed a deduction for the vouchers/coupons issued by it for the petrol used on demo cars and other workshop vehicles. It is not disputed that such expenditure would be deductible for tax purposes.

23. However, the Appellant could not produce the proof of the expenditure for the period assessed. The cash reconciliation presented by the Appellant was not for the period under scrutiny. Therefore, the deduction was disallowed by the Commissioner.'

It was thus disallowed because proof of the expenditure was not provided.

[22] In Dr Gouws' report it was explained that these amounts related to 'coupons' which 'authorised the petrol attendants to sell petrol to the value of the coupon and accept it [the coupon] as payment'. Moreover, it was stated 'the disbursements in the

[2] Rules promulgated under s 107A of the Income Tax Act 58 of 1962, GN R467, *GG* 24639, 1 April 2003.

form of petrol coupons relates to expenditure incurred for petrol used for the demonstration vehicles and other workshop vehicles where petrol is needed'. According to Dr Gouws, on a daily basis the petrol attendants completed and reconciled sales reports which were forwarded to the accountant, who reconciled them with the shift report and passed 'the necessary journal entries to account for the sales of the floor'. Dr Gouws, asserted that: there was a daily reconciliation after every eight hour shift for the entire year and specifically for the period which was the subject of the audit; and, while all of the supporting documentation was available and had earlier been made available to Ms Victor and had further been tendered at court, she had declined to peruse them. Dr Gouws added that it would be 'absolutely ridiculous' to bring 'every petty cash voucher' to court. What he did place before the Tax Court (as he had before the SARS auditors) were separately numbered petrol vouchers and, as confirmation of the practice then prevailing at the taxpayer, the following written statement:

'We hereby confirm that the following procedure relating to fuel provided for demo and the delivery of vehicles is as follows:

1. Coupons which are required for the above, are obtained from Mr D. Jacobs.

2. On the issue of these coupons, the demo vehicle being taken out for demonstration purposes, or new vehicles being delivered, are driven to the fuel pumps, and the necessary fuel to the value of the coupon is inserted in the car.

THIS PROCEDURE IS CONFIRMED BY:

A. RAS	SALESMANAGER
DAAN BEKKER	SALESMAN
WILLIE VAN DEVENTER	SALESMAN
ELIZE LOMBAARD	SALESLADY'

That statement bore the signature of each of those individuals alongside their name.

[23] It was not suggested, either during the course of the audit or before the Tax Court, that the taxpayer's account on that score was untruthful and should be rejected. Quite the contrary, all of that evidence simply did not elicit a response from Ms Victor. Accordingly, SARS' disallowance of the income tax deductions claimed by the taxpayer in respect of the fuel vouchers for the period in question could not stand. In the result the appeal by SARS in relation to this ground must fail.

Third ground: Parking rentals

[24] SARS disallowed IT deductions and VAT input tax deductions in respect of payments allegedly made as rentals to a landlord in respect of an additional parking space leased by the taxpayer. Mr Wolpe testified that the basement of a neighbouring shopping centre called Marylyn was rented for the parking of their new vehicles and customers' vehicles. Ms Victor confirmed that she had seen a parking area where some cars were parked. It therefore did not appear to be in dispute that a parking area was rented. Ms Victor's initial complaint was that there was insufficient proof that the claimed expenditure had in fact been incurred as rental payments.

[25] In support of the taxpayer's objection, Dr Gouws stated that the rental for the premises was paid on an invoice and he attached what he said was an example of such a monthly statement. He then went on to state that 'the owner of the property insists that part of the rent should be dealt with via invoice as above and the balance to be paid monthly in cash to him'. Ultimately, it was only the alleged cash payments (amounting to R134 625.99) that remained in dispute in the Tax Court. The record of the proceedings before the Tax Court reflects that whilst Mr Wolpe was testifying about the Marylyn parking his evidence was interrupted by a question from one of the assessors about a related matter. When he sought to revert to the parking rental, the learned Judge stated:

'COURT: That was just an explanation what this flat is about as was the parking. And the parking is clearly, what I can see here, for generating an income, because you have to have the facilities so that the motor vehicles of the – the new ones as well as the ones of clients, not standing in the hail.

MR CLOETE: Absolutely.

MR WOLPE: Yes.

MR CLOETE: And I can refer the court to the bundle which was prepared by SARS . . . (intervention)

COURT: No, well do you need to go any further than that. Because it was inspected that is the end of the case.'

[26] No doubt believing that no further persuasion was necessary, that is where matters were allowed to rest. There was thus, regrettably, no further evidence adduced

on behalf of the taxpayer pertaining to those cash payments. The Tax Court's conclusion that '[w]e find that SARS was not correct on this assessment', appeared not to appreciate that at issue between the parties was not the entire rental but just the alleged cash component and in that respect the evidence was insufficient to discharge the onus. However, that was due to the intervention of the judge. As the taxpayer did not discharge the onus of proof the appeal by SARS must succeed in relation to this item, but the matter must be remitted to SARS for further investigation and assessment.

[27] To sum up on the appeal: In relation to SARS first and second ground, the appeal fails and it is accordingly dismissed. In relation to SARS third ground, the appeal succeeds. The cash component of the parking rentals allegedly paid by the taxpayer in the sum of R134 625.99 is remitted in terms of s 83(13)*(a)*(iii) of the IT Act to the Commissioner for further investigation and assessment.

The taxpayer's cross appeal

First ground: The difference between the VAT reports and VAT 201 returns – liability R681 208

[28] According to SARS, whilst the taxpayer's internal VAT control account and accounting VAT reports correlated with one another, there was a discrepancy between those and the VAT returns submitted by the taxpayer. Ms Victor asserted that as at 28 February 2003 there had been an under declaration of output VAT by the taxpayer in the sum of R681 208. Mr Wolpe's evidence was to the effect that when the taxpayer's auditors had informed him that the taxpayer had underpaid R500 000 in VAT, it had sought to remedy the situation in its VAT return for March 2003 by including an additional R500 000 to address the previous under-payment. SARS does not intimate what its approach was to that subsequent payment. But, as this ground is inextricably linked to the next, because they are both concerned with under declarations of supplies and hence output VAT in the years in question and there can be only one shortfall in that regard not two, the conclusion reached there is also determinative of this ground. I accordingly turn, without more, to the taxpayer's second ground of cross appeal.

Second ground: The difference between output and turnover liability: R4 912 808

[29] SARS' auditors compared the taxpayer's internally generated VAT reports for each of the 2000 to 2003 tax years with the actual sales turnover of its business as reflected in its general ledger. According to Ms Victor, the general ledger turnover was found to exceed the amounts reflected in the VAT reports by a total of R35 091 489 over the four years in question. SARS accordingly concluded that over that period the taxpayer's output VAT had been under declared by an aggregate of R4 912 808. The Tax Court appears to have accepted Ms Victor's calculations which differed from those of Dr Gouws.

[30] Ms Victor produced the following table to illustrate the under declaration for the tax years in question:

	2000	2001	2002	2003	TOTAL
TURNOVER (G/L)	65,438,220	102,029,743	133,551,736	164,533,281	465,552,980
VAT REPORTS	38,280,538	101,298,671	129,426,745	161,455,538	430,461,491
DIFF Exclusive	27,157,682	731,072	4,124,991	3,077,743	35,091,489
Output Vat Under declared	3,802,075	102,350	577,499	430,884	4,912,808

Dr Gouws testified as follows about the turnover items in this table:

'On the 3rd page of the 102 million, if you go one page back. I've analysed the sales and there is a figure of 81 million, 732, which is actually VATable sales. And then there is a figure of 20 million which is non-vatable sales, is the internal swops between the company where vehicles are transferred from one branch to another branch, but it is still recorded in the way of this system, as a sale and a purchase. Then there are internal parts, and petrol is a substantial amount which is tax free, or VAT free. So the allegation made by Mrs Victor, that the whole 102 million is VATable is incorrect. She is charging VAT on every item possible, which is not VATable transactions.

The next one is exactly the same. The VATable transactions is only about 100 million and not 133 million. And for 2003, the VATable sales were 123 million and the internal sales and exempt sales, was 41 million. Now once you compare this, now the turnover per VAT reports, there is a big discrepancy. The VAT reports shows 101 million turnover in 2001, in 2002 there is 129

million turnover and for 2003, there is 160 million turnover, which indicates that there is something wrong with the VAT reports. There is also something fundamentally wrong in her assumption that total sales, minus the 14%, should produce that sort of VAT payable.'

[31] The fallacy in Ms Victor's approach would seem to be that she employed gross figures without deducting the internal sales or vehicle swaps between the taxpayer's two branches at Menlyn and Garsfontein. The figures accepted by SARS as reliable were the audited ledger accounts in the trial balances used to prepare the annual financial statements. Ms Victor therefore ought to have taken the declarations of output tax in the taxpayer's 201 forms and compared them with those accounts. She then ought to have added up the total supplies as per the trial balances for 2001, 2002 and 2003 and deducted the exempt or zero-rated supplies and the internal swaps between the taxpayer's two branches. Dr Gouws testified as to the inappropriateness of Ms Victor's methodology. According to him, given the nature of the business conducted by the taxpayer, there were also many items which did not attract VAT such as petrol sales. Dr Gouws performed a comparison between the turnover as it appeared in the general ledger and what he described as the VATable sales. He concluded that the taxpayer had in fact over declared output VAT for those years. On the audited figures in the general ledger, which counsel for SARS accepted as correct, his logic cannot be faulted in respect of those three years.

[32] For the 2000 year Ms Victor relied on a turnover figure of R 65 428 220. Counsel for SARS conceded that he did not know where she had obtained that figure. However if one were to have regard once again to the trial balance for that year, the vehicle sales for that period totalled R 39 987 336.65. If one then adds the external sales in the ledger accounts corresponding to the other trial balances (excluding internal sales, vehicle swaps and exempt supplies of fuel), there were taxable supplies of a further R6 118 636.13. The total for taxable supplies was therefore R 46 105 972.78. Here as well Ms Victor ignored internal transactions, exempt supplies and vehicle swaps, which explains the difference between this amount and her figure. The taxable supplies reflected in the VAT 201 forms for that year were R 38 280 538. Accordingly, for that year, there appears to have been an under declaration of taxable output sales of

R7 825 434.78, much less than Ms Victor's figure of R 27 157 682. But it is nonetheless significant, attracting, as it does, additional tax in the amount of R1 095 560.87.

[33] It follows that the cross appeal on the first two grounds must be upheld entirely in respect of the 2001, 2002 and 2003 years and in relation to the 2000 year it must succeed to the extent that the assessment in respect of additional tax falls to be reduced to R1 095 560.87.

Third ground: The zero per cent VAT amounts – liability: R1 407 279

[34] This ground concerns the treatment of demonstration stock. The taxpayer's contention was that certain vehicles were removed from regular or 'floor plan' stock to be used by it as 'demo vehicles' or were sold to staff or directors. Dr Gouws explained in his evidence:

'It is a very complicated system that Toyota South Africa has got which requires far substantially more information that you would normally have in an accounting system. Now what happens here, is a new vehicle arrives from the factory. It goes onto the floor. That floor-plan is financed by Toyota Financial Services or whatever finance house carries the book. That vehicle remains on the floor. You cannot touch it. For various reasons, there is insurance involved, there's a lot of cost involved. Then there's a policy of Toyota that certain amount of vehicles must be kept as demonstration vehicles. Now, what happens is, there is a floor-plan arrangement, the specific credit arrangements whereby this vehicle arrived and there is a liability which is guaranteed by Toyota South Africa. The next thing that happens is now, once this vehicle moves from stock, where you can't touch it, to demonstration stock it is no longer under the floor-plan of Toyota South Africa. Consequently what you must do, you must repay the credit, as if the vehicle was sold, and then you move it from, in your stock records, from new stock to demo stock.'

Dr Gouws added:

'So what happens is, Toyota Oos, makes out an invoice as if it is a sale, to clear the credit in the floor-plan. And then another invoice to take over the vehicle, back into stock. But virtually, it is an internal sale, between himself. It is just to rectify the correctness of whether it is demo stock or full stock, because you are the owner of both of them.'

[35] If one followed the transaction through, according to Dr Gouws, there was no furtherance of the enterprise of the taxpayer. So understood, according to him, those sales which were not effective sales had to be disregarded. Dr Gouws' explanation was not disputed. The taxpayer had already purchased the vehicle under the floor-plan agreement and paid VAT. Until it disposed of the vehicle it would not recoup that VAT. Output VAT must only be collected when there is a supply by a vendor in the furtherance of the enterprise of the taxpayer. These internal transactions, reflecting only a reallocation of existing assets, should have been disregarded. It follows that on this ground the cross-appeal must be upheld.

Fourth ground: Sales at no consideration – VAT liability: R856 141 and IT liability: R1 667 411

[36] According to Ms Victor, a number of sales of vehicles by the taxpayer to third parties had apparently been effected at no consideration. Consequently, no output VAT had been declared by the taxpayer on those sales. SARS assessed the taxpayer for output VAT on those transactions, as well as for income tax on undeclared income. But, as Dr Gouws explained:

'The Receiver stated, "Sold at no value". But we say it is not sold at no value. What we are saying, it is a different thing altogether. I'd like to explain in short what happens. When a vehicle comes in for a trade-in, that vehicle is mainly taken in and, for various reasons they want to check the car for the engine and the gear box and what have you, and then places a value on it. And mostly the person is interested in buying a new vehicle. The transaction then gets processed . . . The documents are processed for the sale of the new vehicle. It then goes to the finance houses and when it goes there, the application for finance is turned down. And the transaction is cancelled and the motor vehicle that was given as trade-in is given back to the original person, who wanted to trade it in.

MR SETSHEDI: Dr Gouws are you telling me that when the trade-in comes in, does it trigger an invoice?

MR GOUWS: No-no, what happens, there is a little pink form that they fill in of the car . . . [T]hen they'll negotiate and then he accepts the offer, let's say for argument sake, it is R15000. Now that car comes on the floor, it goes onto used motor vehicle stock. You debit your stock with R15000, You credit your creditors with R15 000. Not exactly that, you debit the notional

input. Now when that transaction is cancelled, it has just been cancelled and removed from the books. . . .'

There was nothing to gainsay Dr Gouws' explanation. Ms Victor and the Tax Court apparently thought that cancelling the transaction would only result in output VAT not being payable if a credit note had been issued in terms of s 21(3)*(a)* of the VAT Act. But that is clearly incorrect, because no VAT invoice would yet have been generated in respect of the purchase underpinning the trade-in. It follows that the cross appeal in relation to this ground must succeed.

Fifth ground: Incentive bonus liability: VAT – R470 172 and IT – R882 615

[37] The amounts in question here involved dealer incentive bonuses received by the taxpayer from Toyota South Africa. Ms Victor took the view that those bonuses were taxable by virtue of the definition of gross income in the IT Act and also in terms of s 7 of the VAT Act. She accordingly assessed the taxpayer to tax pursuant to those provisions. In its objection the taxpayer stated:

'The amounts as stated in accounts 1075, 1075M, 1077 and 1077M are acceptable, although the amounts for the year ending February 2003 had already been taking into consideration in their tax calculations.

The amount of R2 258 897 is unacceptable as this amount appeared on a list of debtors which were used as a working paper during a period when the computers crashed and the accounts were rectified by Toyota's accountants.

We cannot trace the amount in any ledger account that it had been taken into consideration whatsoever.'

The taxpayer thus did not object to the amounts raised as the basis for additional assessments in respect of 2000, 2001 and 2002 respectively being R 185 139, R 316 061 and R 593 841.

[38] Dr Gouws testified:

'MR GOUWS: In my schedule Annexure 18 under paragraph 12 Annexure G, it is the disallowance of the incentive bonuses. [Ms] Victor raised these additional assessments and a reason for this was that these incentive bonuses received from Toyota South Africa are taxable in terms of Section 1 of the definition of gross income and Section 7 of the Value Added Tax. So this adjustment affects both income tax and VAT.

She went to Account 1075, Account 1075M and Account 1077 and Account 1077M, the M is for Menlo Park and the G is normally for Garsfontein. She analysed these accounts and she got for the three years, for years subtotals which in total comes to R1.589159.00.

MR CLOETE: Sorry, Dr Gouws, sorry to hamper you, just, you know, in view of the dawning Friday coming, and that is a repetition, isn't the gist of this it was claimed, she said it is taxable, you provided proof and said and her finding was the documents provided is not for the 2000 or the year under review. And then you said she is incorrect in that the schedule appearing in 18.2 and so on and in 18.1 is within the 2002 tax year and it is within her period of review.

MR GOUWS: That is correct, yes.

MR CLOETE: Is that the gist of it?

MR GOUWS: That is the gist of it, yes.

MR CLOETE: And further, my Lord, the one amount, the 2 million that appears on the schedule, there is no information whatsoever. We just don't know where to find it and what to do with it.

COURT: Yes, Mr Cloete?

MR CLOETE: Is there anything that you would like to add regarding this aspect, Dr Gouws?

MR GOUWS: Well, you know, the gist of it is the period, but what you also got completely wrong that these were expense accounts and not income accounts or debit balances and not credit balances. So the whole calculation from beginning to end is just completely wrong without information.

MR CLOETE: And you have actually looked at those ledger accounts?

MR GOUWS: Yes, and I have got copies of the ledger accounts and the annexures that I have added onto as examples 18.2, 18.3 where the transactions are being analysed and it is not remotely close incentives from Toyota Financial Services.

MR CLOETE: Can you refer the court to the discovery file where it was discovered?

MR GOUWS: 18.2, 18.3 on a schedule 2003, 2002, on account 1075 she's got 26 795 as being an incentive bonus. If you go to that specific account in the ledger, which I have included under 18.2, the 26 000, it appears to be petty cash expenses incurred by the branch.

MR CLOETE: And it is contained in the ledger that's . . .

MR GOUWS: Yes, in the general ledger that we have identified and followed the transactions through.

MR CLOETE: And it is in court, that is the ledger (indistinct).

MR GOUWS: Yes, yes, well, not all the ledgers, but that is an example.'

[39] But much of Dr Gouws' evidence, in particular his criticism of account 1075, addressed what was not in issue between the parties. The objection was directed at two aspects of that assessment: namely, the R2 258 897, which 'appeared on a list of debtors which were used as a working paper'; and, the 'amounts for the year ending February 2003'. From the bar in this court counsel for SARS conceded that the R 2 258 897, which did not appear on any of the audited statements of the taxpayer, ought not to have been taken into the reckoning. The matter thus reduced itself to the 'amounts for the year ending February 2003', which totalled R 474 118. In respect of that amount, as I have shown, the evidence adduced by the taxpayer fell woefully short of supporting the objection. Thus, save for the amount of R 2 258 897 which falls to be excluded, the cross appeal on this leg must otherwise fail.

Sixth ground: Discount and over-allowance liability: VAT – R 605 725 and IT – R737 942

[40] According to the taxpayer, clients who purchased new vehicles were afforded discounts beyond the maximum discount threshold allowed by Toyota. Due to Toyota's strict rule about a maximum discount threshold, the taxpayer would bypass that rule by issuing cheques to their clients which could be cashed at its front desk. Ms Victor asserted that as no proof existed for the discounts allowed, the deduction was to be added back for both IT and VAT purposes. SARS appeared to accept that sale discounts paid to clients would in principle be allowable as deductions. At issue therefore was whether there was sufficient proof of discounts having been granted to clients.

[41] Mr Wolpe testified:

'So the invoice would be made at, for example, the full retail price, but a cheque would be made out if it was a fleet owner, or for whatever reason, a cheque would be made out to the customer's name, which the customer would then cash with us, and either that money would be, usually was used as part of his deposit to buy the new vehicle, or else the money belonged to him. It was a discount that we allowed on that vehicle. But whenever, that cheque was always cashed by us first. And then as I say, it was either used for him as part of his deposit or else it was his.'

In disallowing these allowances, Ms Victor stated: '[c]heques were made out to "POT / Cash / Client name" but paid into your own bank account and the cash was received over the counter on your own behalf.'

In his evidence, Dr Gouws explained:

'These are allowances or discounts given to clients over and above the permitted allowance granted by Toyota. Now it is normally given either in cash, or it is normally given by paying it in cash, by cheque which is cash or cheque made out to the client and all these expenditure which, according to Ms Victor, we did not supply documentary proof. If we go to the analysis that I have made of that 1 300 files, there the whole account has been analysed what the selling price was, what the deposit was, what additional expenses was, what the discount was, what the whole analysis is there completely. So all Ms Victor had to do was to go to the specific file as I have done and she will find the documentary proof where they had given the discount and the cheque was cashed at the counter. I cannot give her more explanations than that.'

[42] Dr Gouws' testimony was supported by an annexure to his report, which reflected details of the purchaser, the date of purchase, the invoice number, whether the vehicle being purchased was a new or used vehicle, the purchase price, the discount, and, if applicable, the cheque number issued by the taxpayer. Dr Gouws was not cross examined on any of this evidence. The accuracy of the schedule was never questioned. Ms Victor appeared to suggest that the documents adduced and the schedule in question was not for the period under review. In that she was wrong. It must follow that the cross appeal on this ground must be upheld.

Seventh ground: Journals at year end added back: IT liability - R195 742

[43] According to Ms Victor, the taxpayer had effected two year end journal entries that served to reduce its income and had claimed these deductions from IT. SARS had accordingly disallowed those deductions on the basis that they 'could not be explained together with the necessary proof'. In its notice of objection, the taxpayer asserted: 'We are awaiting full explanations from the previous auditors as to the particulars of this account and upon receipt thereof, it will be forwarded to you'.

In his report Dr Gouws stated:

'The auditors, after they had done the necessary reconciliation, of the VAT accounts, made the adjustment by crediting the VAT account to bring it in line with the various VAT reports and debiting the cost of sales.'

He added:

'The entry is incorrect in the sense that they should not have debited cost of sales, but sale. The reason for this being is that the VAT accounts were understated and the sales overstated.

These entries were necessary after there was a computer breakdown and certain accounts had to be adjusted manually.'

[44] In his evidence, Dr Gouws explained: 'Now again I don't know why they have done it. I don't know why they did not do it to the sales accounts, but nevertheless . . .'. The promised explanation from the previous auditors was never furnished. Instead Dr Gouws had to resort to speculation when testifying as to what he 'suspected happened'. In the circumstances the cross appeal on this ground must fail.

Eighth ground: Stock liability: IT - R576 642

[45] According to Ms Victor, during the course of the audit by SARS it was found that in respect of the 2002 year of assessment vehicle creditors in the amount of R1 321 531 were not added back to closing stock on 28 February 2002. In her letter of assessment, Ms Victor informed the taxpayer:

'As the creditors at year end were compared to the stock numbers and dates sold, it was found that these vehicles were sold after year end, but were not included in the closing stock.'

Later in SARS rule 10 statement, she asserted:

'The trading stock not sold in a specific tax year forms part of a taxpayer's closing stock. The Appellant in its closing stock for the years 2002 omitted certain vehicles still held in stock.

The Commissioner found that these vehicles were only sold after year end. An income tax assessment amounting to R576 642 was raised by the Commissioner in the 2002 tax year to take into account these omitted sales.'

[46] In support of her assertion Ms Victor produced the following schedule:

LIST OF CREDITORS ON 28 Feb 2002

T Inv #	Inv Date	Creditor	Inclusive	VAT	Excl	SELL DATE	CLOSING STOCK Under Stated
V04175	20010423	Carlona Toyota	(66 981.00)	(8 226.00)	(58 756.00)		(58 755.50)
T357962	20020104	Toyota SA	54 421.00	6 683.00	47 738.00	30/04/02	47 738.00
T362554	20020208	Toyota SA	228 226.00	28 028.00	200 198.00	04/03/02	200 198.00
T363143	20020211	Toyota SA	228 825.00	28 101.00	200 724.00	04/03/02	200 724.00
V05121	20020219	Toyota SA	166 156.00	20 405.00	145 751.00	12/03/02	145 751.00
T365695	20020220	Toyota SA	57 231.00	7 028.00	50 203.00	12/03/02	50 203.00
T365634	20020220	Toyota SA	135 630.00	16 656.00	118 974.00	30/04/02	118 974.00
T365790	20020221	Toyota SA	109 046.00	13 392.00	95 654.00	12/03/02	2 924.93
T365798	20020221	Toyota SA	109 046.00	13 392.00	95 654.00	30/04/02	95 654.00
T365637	20020221	Toyota SA	107 763.00	13 234.00	94 529.00	30/04/02	94 529.00
T365393	20020221	Toyota SA	92 917.00	11 411.00	81 506.00	30/04/02	81 506.00
T366223	20020222	Toyota SA	136 078.00	16 711.00	119 367.00	30/04/02	119 367.00
T366374	20020226	Toyota SA	153 343.00	18 832.00	134 511.00	30/04/02	134 511.00
	20020228	Toyota SA	57 231.00	7 028.00	50 203.00	20/04/02	50 203.00
		POT	5 321.00	38 004.00			38 003.92
							1 321 531.35

[47] The response that this elicited from Dr Gouws was:

‘The stock as detailed in your letter is detailed here below and all the vehicles had been properly accounted for and no further explanations are necessary.

Stock #	Creditor	Creditor Inv No.	Creditor Inv Date	Cost of Vehicle Exc VAT	Date of Sale	Inv #	Date Settled
6073	Toyota SA	T357962	04/01/2002	47 738.00	04/01/2002	106667	20/03/2002
6198	Toyota SA	T362554	08/02/2002	200 198.00	22/02/2002	106887	05/03/2002
6203	Toyota SA	T363143	11/02/2002	200 724.00	25/02/2002	106893	05/03/2002
6251	Toyota SA	T365633	19/02/2002	145 751.00	19/02/2002	106868	12/03/2002
6264	Toyota SA	T365695	20/02/2002	50 203.00	26/02/2002	106908	12/03/2002
6265	Toyota SA	T365634	20/02/2002	118 974.00	25/02/2002	106894	20/03/2002
6270	Toyota SA	T365798	21/02/2002	95 654.00	28/02/2002	106827	20/03/2002
6273	Toyota SA	T365637	21/02/2002	94 529.00	21/02/2002	106879	20/03/2002
6278	Toyota SA	T365393	21/02/2002	81 506.00	28/02/2002	106921	20/03/2002
6281	Toyota SA	T366223	22/02/2002	119 367.00	27/02/2002	106914	20/03/2002
6290	Toyota SA	T366374	26/02/2002	134 511.00	27/02/2002	106917	20/03/2002
6303	Toyota SA		28/02/2002	50 203.00	28/02/2002	106925	20/03/2002

1 339 358.00’

[48] The taxpayer thus explained that although the vehicles in question may have been sold and invoiced prior to 28 February 2002, payment in each instance was only received during the course of the subsequent tax year in March 2002. That evidence was not disputed by SARS. As the sales had been concluded in the 2002 year the income from them accrued in that year and income tax would be paid on it in that year. Likewise the cost of those sales, including the cost of the vehicles, would serve as a deduction in that year. Accordingly the removal of those vehicles from stock was correct. It follows that the cross appeal in relation to this ground must be upheld.

Ninth ground: Creditors: accrued expenses and provision account – Liability: R54 178

[49] According to Ms Victor, with regard to the 2001 year of assessment, the taxpayer had claimed various deductions in respect of a range of accrued expenses amounting to R143 603 plus a ‘provision for discount’ in the amount of R36 989. Dr Gouws testified that these expenses amounted to provision for known liabilities where the precise amount of an incurred amount is not yet known because the invoice had not yet been received by the taxpayer. He explained:

'Yes. My Lord, can I explain the nature of this transaction? Every year it is standard accounting practices to make provision for certain expenses when you don't have the vouchers which is known and you've got them, like audit fee, bonuses, water and lights, telephone accounts. You make provision for it. It is a standard practice. What happens in the next financial year, you reverse the transaction and the normal expenditure. So from year-to-year this adjustment goes through.

What had happened firstly, that was only done once-off. You must be consistent. You cannot disallow the provisions in one year and allow them in the following year. No here she is very inconsistent in what she did. So what in fact had happened, is she disallowed it in 2001, the following year the expenditure was reduced with this amount. So she should have add it onto the following, or made a deduction in the following year when the expenses occurred. That is a mere accounting adjustment going from year-to-year and must be done consistently.'

[50] Before us, Counsel for the taxpayer conceded that these claims were allowable at the discretion of the Commissioner. That being so, the objection to those disallowances by the taxpayer had to fail because the Commissioner had exercised that discretion against the taxpayer. In the result the cross appeal on this ground must fail.

Tenth ground: Expenses: liability - Vat: R280 363 and IT: R783 572

[51] The taxpayer had claimed a number of deductions both from IT and as input VAT in respect of expenses listed under the headings 'Pretoria Oos Cheques'; 'Rental: flat and parking'; 'Charter Expenses and Hanger Fees'; 'Entertainment' and 'General Expenses'. No case at all was pleaded in respect of the Pretoria Oos Cheques, hence that disallowance must be deemed to have been accepted by the taxpayer. In its rule 11 statement, the taxpayer accepted that as far as the rent for the flat is concerned, 'this expense is not a deductible expense envisaged in section 11A of the [IT] Act'; and, that as far as the hangar fees were concerned, that 'does not constitute a deduction in the hands of the taxpayer appellant and therefore does not present a taxable deduction'. For the remaining items, there simply was no proof that those expenses had been properly incurred in the production of income. It must follow that on this ground the Tax Court cannot be faulted and the cross appeal in relation thereto must fail.

Eleventh ground: Salaries and wages: IT - R103 041

[52] For the 2002 year of assessment the taxpayer had reflected a total sum of R4 669 901 in its annual financial statements as expenditure in relation to salaries (R3 263 490), directors' remuneration (R393 000) and commission (R 1 013 411). The taxpayer's IRP5 certificates and wage registers, however, only reflected expenditure of R4 386 431. There was also an adjustment of R60 000 as a result of a difference between the trial balance and the financial statements in relation to the directors' remuneration. Ms Victor thus took the view that the taxpayer had claimed R343 469 more in respect of deductions for salaries and wages than could be substantiated by its records. Those deductions were accordingly disallowed. In its notice of objection, the taxpayer contended that the directors' remuneration portion (R393 000) had to be eliminated from this schedule as it had been 'dealt with separately apparently in the accounts and no further explanation is necessary'. The evidence adduced on behalf of the taxpayer however failed to indicate precisely where the amounts had been dealt with. Ms Victor testified that an amount of R153 000 had appeared on Mr Wolpe's IRP5, which is at odds with the R393 000 reflected in the taxpayer's annual financial statements.

[53] Mr Gouws testified:

'Yes. Here again there are certain assumptions made. According to the financial accounts, Ms Victor referred to salaries, directors' remuneration and commission, which is in total 4 696 901. She then went to the IRP5 documents, which is the documents issued at year end to employees. And when she totalled the IRP5 reconciliation, it disclosed an income, wages paid of 3 531 186. She added thereto 153 000 for Mr Wolpe and she did some calculations as far as wages are concerned, which comes to about 702 000 and she merely said but you've claimed salaries and wages for 4 669 000, but your records only show 4 386 000, so there is a deficit of 283 000 and there is also a difference on the trial balance of 60 000. So you've over-claimed salaries and wages to the extent of R343 000.00. On that 30% tax is 103 000.'

Dr Gouws added: 'Now the big difference here relates to the remuneration of Mr Wolpe, but if that is allocated correctly, there is hardly any difference'. However, he did not explain where this amount had been accounted for or where it should have been

allocated or what the effect of this on tax should have been. It follows that the cross appeal on this ground must fail.

Twelfth ground: Penalties of 200 per cent raised (VAT and IT)

[54] SARS imposed, and the Tax Court confirmed, penalties of 200 per cent in respect of various amounts of tax (both IT and VAT) held to be payable by the taxpayer. The additional tax imposed was in terms of s 76 of the IT Act and s 60(1) of the VAT Act. As the Tax Court, on appeal to it, was called upon to exercise its own, original discretion, this court will interfere with that determination only on the limited grounds on which a value judgment of a court of first instance may be set aside or varied on appeal (*Commissioner of Inland Revenue v Da Costa* 1985 (3) SA 768 (A) at 774F-J). It bears noting, however, that in this instance the Tax Court simply rubber-stamped SARS decision. Its failure to even engage with the issue means that we are at large.

[55] Section 76(1)*(b)* of the IT Act provides that, if a taxpayer omits from his return any amount which ought to have been included therein, he shall be required to pay, in addition to the tax chargeable in respect of his taxable income, 'an amount equal to twice the difference between the tax as calculated in respect of the taxable income returned by him and the tax properly chargeable in respect of his taxable income as determined after including the amount omitted'.

Subsections 2*(a)* and *(b)* read:

'*(a)* The Commissioner may remit the additional charge imposed under subsection (1) or any part thereof as he may think fit: Provided that, unless he is of the opinion that there were extenuating circumstances, he shall not so remit if he is satisfied that any act or omission of the taxpayer referred to in paragraph *(a)*, *(b)* or *(c)* of subsection (1) was done with intent to evade taxation.

(b) In the event of the Commissioner deciding not to remit the whole of the additional charge imposed under subsection (1), his decision shall be subject to objection and appeal.'

Section 83(13)*(b)* of the IT Act provides that, subject to the provisions of the Act, in the case of any appeal against the amount of the additional charge (the penalty) imposed under s 76(1), the Special Court may reduce, confirm or increase the amount of the penalty.

[56] Section 60 of the VAT Act reads:

'(1) 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 this 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*) to cause a refund to him by the Commissioner of any amount of tax (such amount being referred to hereunder as the excess) which is in excess of the amount properly refundable to him before applying section 44 (6),

such vendor shall be chargeable with additional tax not exceeding an amount equal to double the amount of tax referred to in paragraph (*a*) or the excess referred to in paragraph (*b*), as the case may be.'

[57] The key words of s 76(2)*(a)* are 'any act or omission of the taxpayer . . . done with the intent to evade taxation'. In *Da Costa* (at 777A), Van Heerden JA suggested that whilst it is certainly arguable that the phrase applies only to an actual - and not also an imputed - intention of the taxpayer to deceive, it was unnecessary to decide the point. Like Van Heerden JA, I also deem it unnecessary to decide the point, for it was simply never suggested to either Mr Wolpe or Dr Gouws in evidence that an intention to deceive was being imputed to the taxpayer. Like its counterpart in the IT Act, s 60 of the VAT Act also required a finding that the taxpayer had conducted itself 'with intent . . . to evade the payment of any amount of tax payable by him'. During argument counsel for SARS submitted that the presumption in s 59(2) of the VAT Act availed it. But, as he was ultimately constrained to concede, that presumption - as that section makes plain - only finds application to proceedings under it, namely 'offences and penalties in regard to tax evasion'. It must follow that the additional tax and penalties imposed by SARS cannot stand and accordingly on this ground the cross appeal must succeed.

[58] To sum up on the cross appeal: It succeeds in respect of grounds 3, 4, 6, 8 and 12; and fails in respect of grounds 7, 9, 10 and 11. In respect of grounds 1 and 2 – the cross appeal succeeds in respect of the 2001, 2002 and 2003 years and in relation to the 2000 year it succeeds to the extent that the assessment in respect of additional tax falls to be reduced to R1 095 560 - 87. In respect of ground 5 – save for the amount of R 2 258 897, which falls to be excluded from any assessment, the appeal fails.

[59] That leaves costs: The Tax Court ordered SARS to pay the taxpayer's costs because the 'taxpayer was substantively successful'. Given the wide ranging disputes between the parties and the manner in which the matter unfolded before the Tax Court, there appears to have been no warrant for that order. Before us it was accepted that that order should be substituted with one that each party pay their own costs. Turning to the costs of the appeal and cross appeal: In the light of the substantial success that the taxpayer has had in this court, SARS must be ordered to pay the taxpayer's costs, such costs to include those of two counsel.

[60] In the result:

1. The appeal and cross-appeal are each upheld in part, with the costs, including those consequent upon the employment of two counsel, to be paid in each instance by the Commissioner for the South African Revenue Services.
2. The additional income tax assessments in respect of the 2000, 2001 and 2002 tax years and the additional VAT assessments for the tax years 2000, 2001, 2002, 2003 and 2004 are set aside and referred back to the Commissioner for reassessment in the light of this judgment.
3. The costs order of the court below is set aside and substituted with an order that each party pay their own costs.

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V M PONNAN

JUDGE OF APPEAL

APPEARANCES:

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