

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: A78/2021

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

Appellant

.....
SIGNATURE **DATE:** 7 September
2021

**COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE**

Respondent

JUDGMENT

WEINER J, OPPERMANN J, MAKOLA AJ

Introduction

[1] The appellant and the respondent are parties in a pending Tax Court appeal relating to the appellant's 2013, 2014 and 2015 income tax years of assessment ('the relevant years of assessment'). The main dispute relates to the appellant's statutory entitlement to deduct qualifying expenditure amounts from its income.

[2] The Tax Administration Act 28 of 2011 ('the TAA') governs the conduct of the parties to this dispute. The Rules under Part E of the TAA deal with Procedures of the Tax Court.¹

Factual Background

[3] The appellant carries on mining operations at three mines at Aggeneys in the Northern Cape Province, namely, the Deeps mine, the Swartberg mine and the Gamsberg mine. In its income tax returns for each of the relevant years of assessment, the appellant sought to deduct from its income the following amounts as capital expenditure ('CAPEX') incurred by it in respect of its mining operations:

- (a) 2013 year of assessment: R144 673 981;
- (b) 2014 year of assessment: R191 264 736;
- (c) 2015 year of assessment: R142 278 688.

[4] Pursuant to an audit process, the respondent ring-fenced the following amounts (of CAPEX) incurred by the appellant in relation to its mining operations at Gamsberg in terms of s 36(7C) and s 36(7F) read with s 36(10) of the Income Tax Act 58 of 1962 ('the ITA'):

- (a) 2013 year of assessment: R44 381 000;
- (b) 2014 year of assessment: R80 451 000;
- (c) 2015 year of assessment: R45 326 000.

[5] The appellant had claimed the CAPEX relating to the Gamsberg mine as part of its mining operations of the Deeps and the Swartberg mines, and the respondent contended that the Gamsberg mine should be treated separately from the Deeps and Swartberg mines.

[6] On 3 April 2017, the respondent raised additional assessments for the relevant years of assessment, in terms whereof it disallowed the deductions by the

¹ TAA Rules in GN 550 GG 37819 of 11 July 2014, promulgated in terms of s 103 of the TAA.

appellant (of CAPEX) from income derived by it from its mining operations; it imposed understatement penalties of some R4 764 424.

[7] On 19 June 2017, the appellant objected to the additional assessments and specifically relied on the provisions of s 11(a) of the ITA in respect of the deductibility of CAPEX incurred during the relevant years of assessment.² After the respondent's partial disallowance of the objections, and on 16 November 2017, the appellant delivered its notice of appeal in which it excluded reliance on s 11(a) of the ITA.

[8] In 18 July 2018, the respondent delivered its Rule 31 statement of grounds of assessment, and on 20 November 2018 the appellant delivered its Rule 32 statement of grounds of appeal.³ On 25 September 2020, the appellant gave notice of its intention to amend its Rule 32 statement, by *inter alia*, including s 11(a) of the ITA as a ground of appeal. In the application for leave to amend its Rule 32 statement, the appellant sought leave to—

- (a) introduce reliance on s 11(a) of the ITA;
- (b) deduct its qualifying expenditure incurred from income derived by it from its mining operations during the relevant years of assessment;
- (c) attach a new annexure, 'Annexure BMM', to its Rule 32 statement, reflecting the classification of the appellant's expenditure during the relevant years of assessment; and
- (d) insert a table summarising the appellant's arguments in relation to its expenditure, with reference to the applicable provisions of the ITA.

[9] The Tax Court dismissed the appellant's application for the amendment on 27 January 2021.⁴ This is an appeal against the judgment and order of the Tax Court.

² Section 11, titled, 'General deductions allowed in determination of taxable income' provides: 'For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived—
(a) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature;
(b) ...'

³ See Rule 31 and Rule 32 in footnote 21 below.

⁴ *Black Mountain Mining (Pty) Ltd v The Commissioner for the South African Revenue Service [2021] ZATC 2.*

[10] In its judgment, the Tax Court referred to the fact that the appellant had previously relied on s 11(a) of the ITA as part of its grounds of objection against the respondent's additional assessments (filed on 19 June 2017), but that it did not rely on this ground in its notice of appeal (filed on 16 November 2017). The following was stated in paragraph 10 of the appellant's notice of appeal:

'10.... BMM does not persist in its second (alternative) ground of objection referred to in paragraph 1.1 of page 2 of the Objection stating that such expenditure is deductible in terms of section 11(a) of the ITA, read with section 23(g) of the ITA.' [the 'paragraph 10 statement']

[11] The Tax Court found that the aforesaid omission by the appellant, in not relying on the provisions of s 11(a) of the ITA in its Rule 32 statement, coupled with the paragraph 10 statement, had the effect that the appellant abandoned and waived its reliance on s 11(a) of the ITA as a ground of appeal.

[12] The appellant contended that the Tax Court erred in dismissing the application for amendment, as the dismissal of the application precluded the appellant's intended reliance on s 11(a) of the ITA, which claim was held to have been abandoned and waived. It argued that the issue was thus *res judicata*. [the 's 11(a) issue']

Legislative background

[13] The Tax Court's jurisdiction is set out in s 117 of the TAA. It has jurisdiction over tax appeals lodged under s 107 and, in terms of s 117(3), it may hear and decide an interlocutory application or an application in a procedural matter relating to a dispute under Chapter 9 of the TAA. Chapter 9 is the chapter dealing with dispute resolution.

[14] Section 117(3) of the TAA makes an express distinction between interlocutory and procedural matters. Its powers in regard to an assessment or 'decision' under appeal or in relation to an application in a procedural matter referred to in s 117(3) of the TAA are set out in s 129(2), which reads:

'In the case of an assessment or "decision" under appeal or an application in a procedural matter referred to in section 117(3), the tax court may—

- (a) confirm the assessment or “decision”;
- (b) order the assessment or “decision” to be altered;
- (c) refer the assessment back to SARS for further examination and assessment; or
- (d) make an appropriate order in a procedural matter.’

[15] Section 129(1) of the TAA is concerned with the decision by the Tax Court that finally resolves the point in issue, namely, the correctness of the assessment or the ‘decision’.

[16] The TAA statutorily regulates what types of judgments and orders may be appealed against. Section 133 of the TAA regulates the right to appeal a ‘decision’ of the Tax Court and subsection 133(1) reads: ‘The taxpayer or SARS may in the manner provided for in this Act appeal against a decision of the tax court under sections 129 and 130.’

[17] The appellant’s right to appeal is founded on s 133 read with s 129(2). This appeal has been brought under s 133(2)(a) of the TAA, which in relation to matters properly appealable, grants an automatic appeal to the full bench of the Provincial Division of the High Court. Further, the appellant contended that its right to appeal in the present case falls within s 129(2)(d), namely, a decision in a procedural matter.

The issues

[18] The appellant submitted that the order of the Tax Court is appealable on the basis that:

- (a) the order is final in effect; and
- (b) it constitutes a decision in an application in a procedural matter as contemplated in s 117(3) read with s 129(2)(d) and s 133(1) of the TAA.

[19] This is disputed by the respondent, who contended that the judgment and order of the Tax Court are not appealable, as the order is not final in effect or determinative of any issue in the main proceedings.

[20] The issues in this appeal are thus whether:

- (a) *in limine*, the order of the Tax Court is appealable;
- (b) the appellant is precluded from amending its Rule 32 statement of grounds of appeal by including its reliance on s 11(a) of the ITA as a ground of appeal in the pending Tax Court proceedings;
- (c) the introduction of Annexure BMM to the appellant's Rule 32 statement is permissible;
- (d) the insertion of a table of expenditure reflecting the appellant's legal contentions regarding the deductibility of those items of expenditure, is permissible.

Appealability

- [21] Three issues arise in this regard:
- (a) Is the order appealable under the common law – is it final in effect and definitive of an issue in the appeal?
 - (b) Is the order appealable under the TAA?
 - (c) Is it in the interests of justice that the order be declared appealable?

Final in effect and definitive of the rights of the parties

[22] The appellant argued that, whilst the order of the Tax Court dismissing the application to amend may be seen as an interlocutory order in the 'wide sense', it is in essence a final order which is appealable. The judgment and order of the Tax Court, the appellant submitted, have the effect of disposing of a substantial portion of the main relief claimed in the Tax Court appeal.

[23] In this regard, the appellant sought to include the additional ground of appeal pertaining to s 11(a) of the ITA as a main ground of appeal for a large portion of its expenditure. According to the appellant, the judgment and order of the Tax Court is determinative of the appellant's reliance on s 11(a) of the ITA in the main proceedings. By virtue of the judgment and order, including the Tax Court's findings

regarding the appellant's 'abandonment and waiver' of its reliance on s 11(a) of the ITA, the issue is incapable of being revisited or corrected during the Tax Court appeal. The appellant submitted that although a purely interlocutory order may at common law be corrected, altered or set aside by the judge who granted it at any time before the final judgment, an order which has a final and definitive effect (even though it may be interlocutory in the wide sense), is *res judicata*.

[24] In contrast, the respondent contended that the order is not appealable as it is purely interlocutory, is not final in effect and does not dispose of an issue in the main proceedings. According to the respondent, the parties dispute the nature of the expenses and the deductibility of CAPEX claimed. At the end of the Tax Court hearing if the Tax Court finds that all or part of the expenditure claimed is not expenditure relating to prospecting or even capital expenditure, the Tax Court, in terms of s 129(2)(c) of the TAA, can 'refer the assessment back to SARS for further examination and assessment', which may be objected to and appealed against. Alternatively, the Tax Court will make a final order in terms of s 129(2)(a) or s 129(2)(b), whereafter the appellant can appeal. The respondent thus submitted that appellant would still be entitled to deal with the full value of the CAPEX claimed.

[25] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*,⁵ Corbett JA considered the meaning of 'interlocutory' orders in the context of their appealability. He stated:

'(a) In a wide and general sense the term "interlocutory" refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper", which do not....

(b) Statutes relating to the appealability of judgments or orders (whether it be appealability with leave or appealability at all) which use the word "interlocutory", or other words of similar import, are taken to refer to simple interlocutory orders. In other words, it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal or making it subject to the limitation of requiring leave, as the case may be. Final orders, including

⁵ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 549F–550A

interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation....'

[26] It is not merely the form of the order but also, and predominantly, its effect that must be considered by this Court. In our view, the order in the present matter falls into the first class described by Corbett JA in *South Cape Corporation*. By virtue of the Tax Court's findings regarding the appellant's 'abandonment and waiver' of its reliance on s 11(a) issue, the issue cannot be corrected during the Tax Court hearing, or thereafter. The s 11(a) issue is central to the dispute between the parties. The decision of the Tax Court, in effect, precludes the appellant from relying on this significant issue in the Tax Court appeal. The order is thus final in effect and is *res judicata*.

Appealability under the TAA

[27] The appellant argued that, in any event, the order and judgment are appealable in terms of the TAA. More specifically, it stated that an application for leave to amend (which the TAA categorises as a 'procedural' matter under Part E of the Rules) is specifically provided for in Tax Court Rule 52(7). Rule 52(7) provides:

'A party seeking an amendment of a statement under rule 35, may apply to the tax court under this Part for an appropriate order...'

[28] The appellant submitted that the Tax Court's decision in such an application is appealable in terms of s 133(1), read with s 129(2)(d) and s 117(3) of the TAA.⁶ Section 117(3) refers to both 'interlocutory' applications and applications in 'procedural' matters relating to certain disputes.⁷

[29] The appellant contended that the terms 'interlocutory application' and 'application in a procedural matter as provided for in the rules' are not mutually exclusive. However, the reference to an 'interlocutory application' in s 117(3) of the TAA (and the omission of such reference in s 129) thus refers to a 'simple (pure) interlocutory' application and orders to that effect. Further, it was contended that the

⁶ See paras [13]-[17] above.

⁷ As stated above, s 117(3) of the TAA provides that a Tax Court 'may hear and decide an interlocutory application or an application in a procedural matter relating to a dispute under this Chapter [Chapter 9] as provided for in the "rules".'

phrase ‘application in a procedural matter as provided for in the “rules”’ (as contained in s 117(3) and s 129 of the TAA) referred to those orders arising from applications specifically provided for in the Tax Court Rules (i.e. those applications contemplated in Rule 52, in respect of the procedural matters provided for in Part E of the Rules).

[30] The appellant submitted that while an application for leave to amend a Rule 32 statement may (if interpreted in a narrow manner) be considered to be ‘interlocutory’ in the widest sense of the word, the current application, being an application in ‘a procedural matter as provided for in the Rules’, was legislated to be specifically appealable, and the order granted by the Tax Court is not a pure interlocutory order, as the effect thereof is final.

[31] The appellant argued that the reference to an ‘interlocutory’ application in s 117(3), on the one hand, refers to simple (or pure) interlocutory applications and resulting orders; whereas the reference to ‘an application in a procedural matter relating to a dispute under this Chapter, as provided for in the “Rules”’, refers to those orders arising from applications specifically provided for in the Rules – and, in particular, the amendment application brought under Rule 52. Therefore, the appellant submitted that the amendment application is a ‘procedural’ matter.

[32] On the other hand, the respondent contended that a matter cannot be automatically classified as ‘procedural’ in nature merely because it was brought in terms of s 117(3) and the Rules. It contended that the test for the appealability of orders remains whether the order is final and/or dispositive of the main issue.

[33] The respondent submitted further that the order is not a ‘decision’ as envisaged in the TAA, because a decision is defined in a limited and narrow sense. Whilst a procedural matter has not been defined in the TAA, the authorities provide guidance on the meaning and scope of matters of a procedural nature. It contended that, in the context of the Tax Court, the term ‘procedural matter’ is something of a ‘term of art’, and must be distinguished from interlocutory applications.

[34] The respondent referred to the decision of the Supreme Court of Appeal (the SCA) in *Hassim v Commissioner, South African Revenue Service*.⁸ In this case, the

⁸ *Hassim v Commissioner, South African Revenue Services* [2002] ZASCA 140; 2003 (2) SA 246 (SCA).

SCA considered the meaning of a ‘decision’ for the purposes of appealability in relation to s 86A of the ITA. The SCA stated that—

‘The words “any decision” are also used in s 21 of the Supreme Court Act 59 of 1959. In the case of s 21 it was held that the “decision” referred to must be a decision of the same nature as a “judgment” or “order” in the sense in which those terms are used in s 20 of the Supreme Court Act 59 of 1959.... A “judgment” or “order” referred to in s 20 does not in general include “a decision which is not final (because the Court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings” (see *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 536B).

I do not think that the phrase “any decision” in s 86A should be interpreted differently and neither of the parties contended otherwise. To interpret the phrase literally would be at odds with the generally accepted view that it is in general undesirable to have a piecemeal appellate disposal of the issues in litigation and that it is advisable to limit appeals in certain respects....⁹

[35] In considering whether the application for the amendment is ‘interlocutory’ under s 117(3), this Court is enjoined to look beyond the form of the ‘interlocutory’ order, and consider its effect to determine its true nature. In *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*, it was held that:¹⁰

‘...a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to “dispose of any issue or any portion of the issue in the main action or suit” or, which amounts, I think, to the same thing, unless it “irreparably anticipates or precludes some of the relief which would or might be given at the hearing”.’

[36] We therefore conclude that the reference to an ‘interlocutory’ application in s 117(3) refers to a simple interlocutory application and resulting order, whilst the reference to ‘an application in a procedural matter relating to a dispute under this Chapter as provided for in the “Rules”’, refers to those orders arising from applications specifically provided for in the Rules; provided they are final in effect and cannot be altered by the Tax Court, are definitive of the parties’ rights and dispositive of at least a substantial portion of the issues. The application for an

⁹ Ibid paras 10-11.

¹⁰ *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 870, cited with approval in *South Cape Corporation* (note 5 above) at 550B-C.

amendment brought in this matter under Rule 52 falls within the purview of a procedural matter and is accordingly appealable.

[37] We want to make it plain that we are not saying that all applications for amendment brought under Rule 52 are procedural (as opposed to interlocutory) and therefore appealable. However, we find that the application under consideration is appealable having regard to the merits of this case, the common law considerations in respect of appealability, as well as the interests of justice (as discussed hereinafter).

The interests of justice

[38] In conclusion on the issue of appealability, the Court must take into account whether it is in the interests of justice to find that the order is appealable. We consider that it is, as the appeal would lead to a just, reasonable and prompt solution of the real issues between the parties. In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,¹¹ the Constitutional Court provided a synopsis of the jurisprudence post the test as set out in *Zweni v Minister of Law and Order*.¹² In *Zweni*, the test for appealability required the following three attributes, namely, that—

‘...the decision must be final in effect and not open to alteration by the court of first instance; it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings....’¹³

[39] The Constitutional Court in *SCAW* dealt with the evolution in the law relating to appealability of orders as follows:

‘After *Zweni* the Supreme Court of Appeal has recognised that the general rule against piecemeal appeals could conflict with the interests of justice in a particular case. Howie P — writing for a unanimous court in *S v Western Areas* [2005 (5) SA 214 (SCA)] ... concluded that the general principles enunciated in *Zweni* are neither exhaustive nor cast in stone. He further held that:

¹¹ *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC) paras 47-55

¹² *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533A.

¹³ *SCAW* (note 11 above) para 49.

"(I)t would accord with the obligation imposed by s 39(2) of the Constitution to construe the word decision in s 21(1) of the Supreme Court Act to include a judicial pronouncement in criminal proceedings that is not appealable on the *Zweni* test but one which the interests of justice require should nevertheless be subject to an appeal before termination of such proceedings. The scope which this extended meaning could have in civil proceedings is unnecessary to decide. It need hardly be said that *what the interests of justice require* depends on the facts of each particular case." ...

More recently, in *Philani-Ma-Afrika and Others v Mailula and Others* [2010 (2) SA 573 (SCA)], the Supreme Court of Appeal had to decide whether an order of the high court which puts an eviction order into operation pending an appeal was appealable. In a unanimous judgment by Farlam JA, the court held that the execution order was susceptible to appeal. It reasoned that it is clear from cases such as *S v Western Areas* that "what is of paramount importance in deciding whether a judgment is appealable is *the interests of justice*" (emphasis added).

As we have seen, the Supreme Court of Appeal has adapted the general principles on the appealability of interim orders, in my respectful view, correctly so, to accord with the equitable and the more context-sensitive standard of the interests of justice favoured by our Constitution. In any event, the *Zweni* requirements on when a decision may be appealed against were never without qualification....

...[I]n *Machele and Others v Mailula and Others* ... [the court] reaffirmed the importance of "irreparable harm" as a factor in assessing whether to hear an appeal against an interim order, albeit an order of execution:

"The primary consideration in determining whether it is in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution is, therefore, whether irreparable harm would result if leave to appeal is not granted."

... The test of irreparable harm must take its place alongside other important and relevant considerations that speak to what is in the interests of justice, such as the kind and importance of the constitutional issue raised; whether there are prospects of success; whether the decision, although interlocutory, has a final effect; and whether irreparable harm will result if leave to appeal is not granted. It bears repetition that what is in the interests of justice will depend on a careful evaluation of all the relevant considerations in a particular case.¹⁴

¹⁴ *Ibid* paras 51-55 (footnotes omitted). See also *Velocity Trade Capital (Pty) Ltd v Quicktrade (Pty) Ltd* [2019] ZAWCHC 92; [2019] 4 All SA 986 (WCC).

[40] In considering this question, Maya P in *Director-General, Department of Home Affairs v Islam* held:¹⁵

'Traditionally, under common law, an interim order was not appealable except where it was shown that it was (a) final in effect as it could not be altered by the court which granted it; (b) definitive of the rights of the parties in that it granted definitive and distinct relief; and (c) was dispositive of at least a substantial portion of the relief claimed in the main proceedings. The test has since evolved. So whilst the traditional requirements are still important considerations, the court may in appropriate circumstances dispense with one or more of those requirements if to do so would be in the interests of, having regard to the court's duty to promote the spirit, purpose and objects of the Constitution eg where the interim order "has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable".'

[41] As set out above, the respondent, in submitting that the application for the amendment was purely interlocutory, contended that the consequence of any interlocutory decision which is adverse to the taxpayer, can be negated by the Tax Court which court can make one or other of the orders contemplated in s 129(2)(a) or s 129(2)(b) of the TAA. The Tax Court could refer the assessment back to the respondent for further examination and assessment in terms of s 129(2)(c) of the TAA, or the Tax Court could make a final order in terms of s 129(2)(a) or s 129(2)(b).

[42] This suggestion is not in accordance with the test laid out in the various authorities referred to. As was held by the SCA in *Phillips v National Director of Public Prosecutions*,¹⁶ a restraint order made in terms of the Prevention of Organised Crime Act 121 of 1998 was appealable notwithstanding that it '...is only of interim operation and that, like interim interdicts and attachment orders pending trial, it has no definitive or dispositive effect...'.¹⁷ The SCA continued—

'Absent the requirements for variation or rescission laid down in s 26(10)(a) ... a restraint order is not capable of being changed. The defendant is stripped of the restrained assets and any control or use of them. Pending the conclusion of the trial or the confiscation

¹⁵ *Director-General, Department of Home Affairs and Another v Islam and Others* [2018] ZASCA 48 para 10 (footnotes omitted).

¹⁶ *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA).

¹⁷ *Ibid* para 20.

proceedings he is remediless. That unalterable situation is, in my opinion, final in the sense required by the case law for appealability.¹⁸

[43] Similarly, in the present case, in holding that the appellant had abandoned and waived its rights to rely on the s 11(a) issue, the order granted cannot be varied, altered or corrected at a later stage.

[44] As was noted by Binns-Ward J in *Velocity Trade Capital (Pty) Ltd v Quicktrade (Pty) Ltd*—

'Phillips stands as an illustration of two truths. First, that it is not necessary that all the requirements in Zweni be satisfied for a decision to be appealable. Second, that the insusceptibility of a decision to being altered by the court of first instance does not have to be absolute for the decision to be considered as sufficiently final in effect to render it appealable.'¹⁹

[45] In *FirstRand Bank Limited t/a First National Bank v Makaleng*,²⁰ it was held that 'even where a decision does not bear all the attributes of a final order it may nevertheless be appealable if some other worthy considerations are evident, including that the appeal would lead to a just and reasonable prompt solution of the real issues between the parties'.

[46] The appellant submitted that if one has regard to the table of expenditure (Annexure BMM) sought to be included by the appellant as part of its amended Rule 32 statement, the portion of the expenditure for its claim under s 11(a) of the ITA (as the main proposed ground of appeal) is the total amount of R63 930 507. If the appeal is not adjudicated, and the Tax Court's judgment stands, it will constitute authority that a taxpayer is precluded from relying on a provision of (and an entitlement afforded by) the ITA in an appeal in circumstances where the taxpayer failed to initially plead reference thereto in its Rule 32 statement.

[47] It is the respondent's case that it has already dealt with the s 11(a) issue during the objection stage, when it disallowed the appellant's objection. The appellant must have accepted that the respondent was correct. Thus, the respondent

¹⁸ Ibid para 22.

¹⁹ *Velocity Trade Capital* (note 14 above) para 51.

²⁰ *FirstRand Bank Limited t/a First National Bank v Makaleng* [2016] ZASCA 169; [2016] JOL 36910 (SCA).

contended that the issue had been finalised. Section 11(a) of the ITA is therefore not an issue that SARS should be required to deal with again in the Tax Court appeal. It will suffer prejudice if the issue was allowed to be reintroduced.

[48] In considering the interests of justice, the Court must also balance the prejudice that will be caused to each of the parties if the appeal is allowed. The respondent submitted that the appellant had waited for almost two years before the amendment was sought and the respondent would be prejudiced if the appeal was granted and the amendment allowed.

[49] The appellant had explained that the delay in launching the application for the amendment was based on a change in advice when it employed a new legal team on 5 June 2018. The Tax Court had erroneously found that the new legal team came on board in 2017. Its decision not to persist with the second ground of objection was premised upon an incorrect legal conclusion.

[50] Although there appears to be a considerable delay between the new legal team coming on board and the launching of the application for the amendment, the question is whether this delay has caused prejudice to the respondent which outweighs the prejudice to the appellant if we find that the order is not appealable. We are of the view that, for the reasons stated above, the prejudice which would be occasioned to the appellant far outweighs that which the respondent would suffer if the issue of appealability was decided against the appellant.

[51] The Tax Court acts as a court of review and is obliged to hear the dispute *de novo*. The granting of the appeal and the subsequent amendment will lead to a prompt resolution of the real issues between the parties. The amount claimed as being deductible under s 11(a) of the ITA is substantial. For these reasons, we find that it is in the interests of justice to hold that the order is appealable.

Relevant legal principles relating to amendments under the TAA

[52] Rule 35 provides that the parties may agree that a statement under Rule 31, 32 or 33 may be amended.²¹ If the other party does not agree to the amendment, the

²¹ Procedures of tax court

31. Statement of grounds of assessment and opposing appeal

party that requires an amendment may apply to the Tax Court under Part F for an order under Rule 52. Rule 52(7) provides that a party seeking an amendment for a statement under Rule 35 may apply to the Tax Court for an appropriate order, including an order concerning a postponement of the hearing.

[53] The relevant applicable legal principles have been summarised as follows:

- (a) The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them so that justice may be done. A court will generally grant an amendment where it can be done without prejudice to the other party.

- (1) SARS must deliver to the appellant a statement of the grounds of assessment and opposing the appeal within 45 days after delivery of-
 - (a) the documents required by SARS under rule 10(4);
 - (b) if alternative dispute resolution proceedings were followed under Part C, the notice by the appellant of proceeding with the appeal under rule 24(4) or 25(3);
 - (c) if the matter was decided by the tax board, the notice of a de novo referral of the appeal to the tax court under rule 29(2); or
 - (d) in any other case, the notice of appeal under rule 10.
- (2) The statement of the grounds of opposing the appeal must set out a clear and concise statement of-
 - (a) the consolidated grounds of the disputed assessment;
 - (b) which of the facts or the legal grounds in the notice of appeal under rule 10 are admitted and which of those facts or legal grounds are opposed; and
 - (c) the material facts and legal grounds upon which SARS relies in opposing the appeal.
- (3) SARS may not include in the statement a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment.

32. Statement of grounds of appeal

- (1) The appellant must deliver to SARS a statement of grounds of appeal within 45 days after delivery of-
 - (a) the required documents by SARS, where the appellant was requested to make discovery under rule 36(1); or
 - (b) the statement by SARS under rule 31.
- (2) The statement must set out clearly and concisely-
 - (a) the grounds upon which the appellant appeals;
 - (b) which of the facts or the legal grounds in the statement under rule 31 are admitted and which of those facts or legal grounds are opposed; and
 - (c) the material facts and the legal grounds upon which the appellant relies for the appeal and opposing the facts or legal grounds in the statement under rule 31.
- (3) The appellant may not include in the statement a ground of appeal that constitutes a new ground of objection against a part or amount of the disputed assessment not objected to under rule 7.

33. Reply to statement of grounds of appeal

- (1) SARS may after delivery of the statement of grounds of appeal under rule 32 deliver a reply to the statement within –
 - (a) 15 days after the appellant has discovered the required documents, where the appellant was requested to make discovery under rule 36(2); or
 - (b) 20 days after delivery of the statement under rule 32.
- (2) The reply to the statement of grounds of appeal must set out a clear and concise reply to any new grounds, material facts or applicable law set out in the statement.'

- (b) An application for an amendment will generally be allowed unless that application is *mala fide*, or unless the amendment would cause an injustice and prejudice to the other side which cannot be compensated by a costs order.²²
- (c) Delay is no ground for refusing an amendment – provided that the applicant can show that the application is *bona fide* and explain any delay there may have been in making the application. The applicant must however show that the opponent will not suffer prejudice.²³
- (d) Where a party would be no worse off if the amendment were granted with a suitable order as to costs than if his adversaries' application were dismissed, there is no prejudice in granting the amendment. The mere loss of the opportunity of gaining time is not, in law, prejudice or injustice.²⁴
- (e) The fact that the granting of the amendment would necessitate the re-opening of the case for further evidence to be led is no ground for refusing the amendment where the reason for the failure to lead the evidence was the state of the pleadings, and not a deliberate failure on the part of the applicant.²⁵
- (f) The fact that an amendment may cause the other party to lose its case against the party seeking the amendment is not of itself 'prejudice' of the sort which will dissuade the court from granting it. The fact that the effect of allowing an amendment to a plea might be to benefit the plaintiff's claim is not what is meant by prejudice which cannot be remedied by an appropriate order as to costs.²⁶

The amendment in terms of s 11(a) of the ITA

²² *YB v SB and Others NNO* 2016 (1) SA 47 (WCC) paras 9-11.

²³ *Trans-Drakensburg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640G–641B.

²⁴ *Ibid.*

²⁵ *Myers v Abramson* 1951 (3) SA 438 (C) at 450A-B.

²⁶ D E van Loggerenberg et al *Erasmus: Superior Court Practice* (RS15, 2020) at D1-333 – D1-334.

The nature of the amendment

[54] As set out above, the appellant did not rely on s 11(a) of the ITA as a ground in its Rule 32 statement, and indicated that it would not be persisting with this ground of objection in the paragraph 10 statement. It now seeks to amend its Rule 32 statement by relying upon s 11(a) of the ITA as a ground of appeal.

The evolution of the objection

[55] As set out above, the respondent initially, in a letter of objection, objected to the introduction of the reliance on s 11(a) of the ITA in the amendment on the basis that the appellant had abandoned the ground of appeal sought to be introduced, as the issue was previously raised during the objection stage, but not persisted with in the grounds of appeal. After the appellant instituted its application for amendment, the respondent raised two further grounds of opposition, namely that the appellant's proposed amendment involved the withdrawal of an admission in the notice of appeal and it also alleged irreparable prejudice.

Reliance on grounds of objection to the amendment not previously raised

[56] The appellants argued that the respondent was bound by the content of its initial notice of objection and that the expanded grounds of objection by the respondent, being the alleged waiver and the withdrawal of an admission (which were only raised in its answering affidavit) should not have come into play in considering whether the amendment should be granted.

[57] Without deciding the correctness of this alleged procedural transgression, we intend to deal with all the objections raised before the Tax Court which heard the amendment application – with one proviso: insofar as it is argued by the respondent that a case ought to have been made out in the founding affidavit in respect of the expanded grounds of objection, such argument should quite evidently be rejected, as clearly the appellant ought only to have dealt with the objections raised by the respondent at the time. It was not for the appellant to put up the proverbial skittles, simply to knock them down again. Had it done so, it would have been criticised for dealing with irrelevant considerations.

Withdrawal of admission

[58] The respondent submitted that the appellant's decision not to persist with the s 11(a) issue, because it, in effect, admitted that the respondent was correct in rejecting this ground, coupled with its failure to have included it as one of its grounds of appeal, constituted an admission. In our view, this does not amount to an admission of the sort envisaged in pleadings.

[59] An admission is 'an unequivocal agreement by one party with a statement of fact by the other'.²⁷ No admission is contained in the appellant's Rule 32 statement of grounds of appeal that is sought to be withdrawn.²⁸ The proposed amendment can therefore not amount to a withdrawal of an admission.

[60] Rule 34 provides that the issues in an appeal to the Tax Court will be those contained in the Rule 31 statement of grounds of assessment, read with the Rule 32 statement of grounds of appeal and the Rule 33 reply, if any.

[61] Paragraph 12 of the appellant's Rule 32 statement of grounds of appeal reads:

'12... in what follows the Appellant clearly and concisely pleads which of the facts and the legal grounds in the Rule 31 Statement are admitted and which of those facts or legal grounds are opposed.....'

[62] Paragraph 39 of the Rule 31 statement of grounds of assessment contains the response to the paragraph 10 statement of the appellant's notice of appeal in which the alleged admission appears. The response to the averment in the notice of appeal was '[t]he contents hereof are noted'. This, in turn, is responded to in the Rule 32 statement of grounds of appeal as follows: '[t]he contents thereof are noted'. There clearly is no agreement regarding a statement of fact on the pleadings. More crucially, the pleadings consisting of the Rules 31 and 32 statements, not the notices, do not contain the alleged admission.

²⁷ See *Erasmus: Superior Court Practice* (note 26 above) (RS13, 2020) at D1-337 and the authorities cited therein.

²⁸ The rules regarding withdrawals of admissions refer to admissions on the pleadings and not admissions *dehors* the pleadings. See *Wild Sea Construction (Pty) Ltd v Van Vuuren* 1983 (2) SA 450 (C) at 452F.

[63] Applications for amendments seeking to retract incorrectly admitted legal consequences are normally granted by our courts (even on appeal), for only the law would be prejudiced if cases were to be decided on what parties might, in ignorance, have agreed the law to be. A court is not even obliged to consider prejudice to the other side in such circumstances.²⁹

[64] Mr Bhana SC, representing the respondent, argued that this principle does not avail the appellant because the admission was not only an admission of law, but also an admission of fact. In the respondent's letter disallowing the appellant's objections, the issue is dealt with as follows:

'In BMM's instance the purpose of the expenditure was to set up and/or develop its Gamsberg mine. This setting up costs and/or development expenditure will create a source of profit. The expenditure related to the development of the Gamsberg mine and not to the operating of the Gamsberg mine. In the circumstances the expenditure is more closely related to BMM's income-earning structure rather than its income-producing operations. ['the factual portion']

The expenditure incurred by BMM is therefore of a capital nature and will not qualify for deduction in terms of section 11(a). ['the conclusion']

[65] To this, the appellant responded in the paragraph 10 statement disavowing reliance on s 11(a) of the ITA. The disavowal may have arisen from a particular 'incorrect' interpretation of the section, or it may have been made in ignorance of evidence sufficient to bring the section into operation. A combination of these possibilities would constitute a mixed question of fact and law.

[66] In the fullness of time, the amendment may well be found to constitute evidential material, which might have a bearing on whether reliance on s 11(a) of the ITA was abandoned or waived, but that would depend on the evidence, not the pleadings alone. It might be an admission outside of the pleadings to be taken into consideration for purposes of deciding whether the right to rely on s 11(a) of the ITA had been waived or abandoned.

²⁹ *Potters Mill Investments 14 (Pty) Ltd v Abe Swersky & Associates and Others* [2016] ZAWCHC 5; 2016 (5) SA 202 (WCC) at 205E–G, 205H–J, 207G–J and 209F–G. In this case the defendants, acting on the advice of their legal team, mistakenly admitted in their plea that the law attached certain consequences to an event. When they sought to withdraw the admission by amending their plea, the plaintiff objected, citing prejudice. The objection was rejected by the court hearing the defendants' subsequent application for leave to amend their plea, and the application was granted.

[67] Assuming that the respondent pleads a waiver in response to the amendment, nothing precludes the respondent from cross-examining the appellant's witnesses on the reasons for the change of tack and, if the facts justify the conclusion, from establishing that evidence necessary to sustain reliance on s 11(a) of the ITA is absent from appellant's case. It does not follow that the amendment should be refused, for the parties are, in pleadings, merely setting out what cases they propose presenting.

[68] Even if the intended amendment constituted a withdrawal of an admission (and if we are wrong about the finding that the Rule 31 statement of grounds of assessment did not incorporate by reference the communication to not persist with the s 11(a) issue) then we would conclude that the appellant has provided an explanation for the circumstances giving rise thereto which would entitle it to withdraw it.

[69] The appellant contended that it had received incorrect tax advice, which informed its allegedly incorrect legal conclusion at the time to not persist with its reliance on s 11(a) of the ITA. This was, contrary to the Tax Court's finding, pertinently stated in the founding and replying affidavits. During argument in this Court, it was suggested that there was no explanation on record from the attorneys currently representing the appellant, ENSAfrica, as to why the legal advice changed. However, ENSAfrica only became the attorneys of record of the appellant on 5 June 2018, and were thus not the attorneys representing the appellant when the notice of appeal was delivered on 16 November 2017. The current attorneys were not party to the 'incorrect' advice which had been given.

[70] The Tax Court, however, found that—

'at all material times throughout engagement with the respondent (as far back as 2017) the applicant was represented by the same legal team as is today, and its affidavit is evidently silent as to why its legal representatives acted on this "incorrect legal conclusion" made by KPMG.....'.³⁰

[71] This of course is incorrect. As stated, ENSAfrica only came on record in 2018. This error was crucial to the Tax Court's reasoning process and understanding of the

³⁰ *Black Mountain Mining* (note 4 above) para 29.

factual substrata. This misdirection of fact (in addition to the failure by the Tax Court to exercise a discretion at all) would entitle this Court to interfere with the conclusion reached by the Tax Court.

[72] The proposed amendment is, in our view, *bona fide*. Nothing has yet been put up to counter it, and it was also not suggested that the opposing legal view in relation to the application of s 11(a) of the ITA to the facts quoted and referred to as ‘the factual portion’, was so outlandish that it could safely be rejected.

The abandonment and waiver finding

[73] In our view, the finding of abandonment and waiver made by the Tax Court seized with the application to amend, was neither relevant nor appropriate within the factual matrix of this case and the stage of the proceedings. Such issue stands to be raised by the respondent and determined by the Tax Court in the main Tax Court appeal proceedings. The appellant did indicate earlier that it was not persisting in its reliance on s 11(a) of the ITA. Was this conduct plainly inconsistent with an intention never to change its mind if it later determined (or was advised) that it should rely on that section? We think not. Provided that neither incurable prejudice nor excipiability is introduced by a change of legal foundation to a case (via an amendment to a party’s pleadings, which do no more than tell the other side what case they have to meet and are not evidence of the facts which the pleader intends to prove) the amendment ought to be allowed.

[74] The Tax Court disregarded the fact that it was a court of revision and not a court of appeal,³¹ and that the nature of the appeal is a hearing *de novo*.³² The appellant should, as a matter of principle, be entitled to raise any appropriate ground of appeal forming part of its objection, subject to Tax Court Rule 32(3).

³¹ *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service [2019] ZASCA 148; 2020 (2) SA 19 (SCA)* para 52. See also *Silke on Tax Administration*, February 2020 (SI 12), at Chapter 5.12 where it is stated: ‘... the Tax Court (unlike ordinary courts of appeal which are generally confined to the record of the proceedings in the court a quo) rehears the entire matter and can, if it so decides, substitute its decision for that of the Commissioner. In so doing, the Tax Court may consider facts which were not placed before the Commissioner.’

³² See *Tikly and Others v Johannes NO and others* 1963 (2) SA 588 (T) at 590G, where the court discussed the different connotations of the word ‘appeal’, and held that, ‘an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information...’

[75] We wish to make it plain that the present case should not be read as authority for the proposition that a new ground of appeal can be introduced where such new ground was not part of the grounds of objection initially. That is not the case before us. We make no finding on such a situation, as those are not the facts we have to deal with in this matter. The facts in this case are that the appellant previously relied on the s 11(a) issue but not in its Rule 32 statement and the respondent has therefore – and still will be when the matter comes to a hearing – been afforded an opportunity to deal with the issue in full. Thus the respondent will suffer no prejudice in this regard.

[76] In terms of Rule 10(2)(c)(iii) read with Rule 32(3), the appellant is entitled to raise a new ground of appeal, provided that such ground is not against ‘a part or amount of the disputed assessment not objected to under rule 7’.³³ The appellant had objected to all of the disputed assessments. The appellant had accordingly previously objected to all parts and amounts of the disputed assessments. The total amounts disallowed by the respondent in respect of each of the relevant years of assessment therefore formed part of the dispute between the parties at the objection stage. Given the indication of non-persistence, the s 11(a) issue now constitutes a new ground of appeal which is expressly authorised by Rule 10(2)(c)(iii) and which is not struck by the exclusion.

[77] Even if the initial election by the appellant not to persist in its reliance on s 11(a) of the ITA is akin to an abandonment by the appellant of its right to appeal on that ground (i.e. a pre-emption), the Tax Court is a court of revision, not of appeal. Thus, there can be no pre-emption of a specific ground of appeal. This Court (and the Tax Court) is not bound by what is legally untenable. This principle is equally valid in the context of a mistake of law by a party not to, on appeal, plead reliance on a particular ground.³⁴

³³ Section 10(2)(c)(ii) provides that: ‘A notice of appeal must specify in detail any new ground on which the taxpayer is appealing’.

³⁴ *Government of the Republic of South Africa and Others v Von Abo* [2011] ZASCA 65; 2011 (5) SA 262 (SCA) paras 18-19; and *Paddock Motors (Pty) Ltd v Iggesund* 1976 (3) SA 16 (A) at 23E-F: ‘[I]t would create an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part....’.

[78] Relying on *Commissioner for the South African Revenue Service v Brummeria Renaissance (Pty) Ltd*,³⁵ the respondent contended that if the appellant did not persist with a ground of objection previously raised, ‘it is final and conclusive’. We do not read the *Brummeria* case to have distilled such a rigid principle. *Brummeria*, in our view, simply held that the issues in any appeal court would be those defined in the statement of the grounds of assessment (now Rule 31 then Rule 10(1)) read with the statement of the grounds of appeal (now Rule 32 and then Rule 11(1)) and, in the absence of an amendment sought in terms of the then Rule 13 (now Rule 42(1)), an issue could not be pursued before the higher court.

[79] It would appear to us that the respondent is conflating the principles applicable to establishing the existence of admissions, with those relating to what would constitute evidential material for purposes of deciding the issues of abandonment and waiver.

Conclusion in respect of the admission, abandonment and waiver issues

[80] We find that the Tax Court was influenced by wrong principles of law in that it found the factual and legal existence of an admission. Insofar as we may have erred on this, we find that the Tax Court misdirected itself by finding that the same attorneys represented the appellant at all relevant and material times and, by using this mistaken factual finding as a springboard to conclude that the explanation proffered to withdraw such admission, was inadequate.

[81] We thus find that the Tax Court was also influenced by wrong principles of law and that it misdirected itself on fact by finding that the appellant had abandoned and waived its right to rely on s 11(a) of the ITA, when it ought to have found that triable issues exist in this regard and that these issues could and should be distilled for determination in the trial.

Annexure BMM

³⁵ *Commissioner for the South African Revenue Service v Brummeria Renaissance (Pty) Ltd and Others* [2007] SCA 99 (ZASCA); 2007 (6) SA 601 (SCA).

[82] In the application for the amendment, the appellant sought to substitute annexures “BMM1”, “BMM2” and “BMM3” of the Notice of Objection ('the previous annexures') with Annexure BMM. The previous annexures were attached to the appellant's grounds of objection dated 19 June 2017.

[83] In relation to Annexure BMM, the appellant says that during the relevant years of assessment, it incurred various items of expenditure in respect of the Gamsberg mining operations set up, particularised, and elaborated upon in Annexure BMM.

[84] The respondent objects to the introduction of Annexure BMM on the basis that it is irreconcilable with what was previously furnished to it; that the amounts reflected in Annexure BMM are different from those in the previous annexures; and that, in relation to the amounts claimed, Annexure BMM seeks to raise and claim amounts that were not all included in the notice of objection. It also argues that Annexure BMM seeks to raise, on appeal, matters that were previously abandoned.

[85] The Tax Court held that, because the appellant had conceded that the contents of Annexure BMM differ from the previous annexures, the concession was indicative of prejudice to the respondent, as the respondent would now have to meet a case that was not previously presented to it. This was compounded by the fact that the appellant had failed to explain to the Tax Court why Annexure BMM was not presented earlier.

[86] The Tax Court also held that Annexure BMM was impermissible under the Tax Court Rules.³⁶ The particular Rules were, however, not identified in the judgment.

The appellant's submissions in respect of the annexures

[87] The appellant's case in respect of the annexures can be summarised as follows:

- (a) Annexure BMM supports and substantiates the additional argument raised at the objection stage, but not previously included in the appeal. This relates to the deductibility of the appellant's qualifying expenditure for the relevant years

³⁶ *Black Mountain Mining* (note 4 above) para 42.

of assessment income, which was earned by the taxpayer from its mining operations as contemplated in s 11(a) of the ITA.

- (b) In order to support the additional argument, the appellant wishes to rely on Annexure BMM which, it contended, is of a factual nature.
- (c) The appellant seeks to place Annexure BMM before the Tax Court to reflect the classification of the various items of expenditure incurred by it during the relevant years of assessment. It was not disputed that Annexure BMM reflected the classification of the various expenditure amounts incurred by the appellant during the relevant years of assessment. The only dispute between the parties is the classification of expenditure in order to determine the deductibility thereof.
- (d) The appellant admits that the contents of the previous annexures are different from those of Annexure BMM. The initial annexures related to expenditure classified by the appellant's erstwhile advisor, KPMG, as being related to prospecting. Annexure BMM includes the classification of all expenditure, namely, the total expenditure incurred by the appellant for the relevant years of assessment. Annexure BMM does not only cater for the s 11(a) of the ITA claim, but reflects the classification of all expenditure incurred by the appellant in respect of its Gamsberg operations.
- (e) The appellant contended that the difference between the total amounts of expenditure incurred by it during each year of assessment (as reflected in Annexure BMM), and the amount(s) to be considered in the appeal, are immaterial. In 2013, it is nil; in 2014, R102.88; and in 2015, R103.00. The appellant also disputed that the amendment seeks to claim deductions of amounts which did not previously form part of the objections.
- (f) The appellant contended that there is no prejudice to the respondent because the respondent had, at the objection stage, already considered and dispensed with the s 11(a) issue, which is now sought to be re-introduced.
- (g) The incurrence and quantum of the expenditure is already common cause between the parties. Annexure BMM seeks to crystallise and simplify the

appellant's argument in respect of the deductibility of the expenditure, with reference to each of the grounds of appeal. This, it contended, will assist the parties and the Tax Court when adjudicating the appeal.

- (h) The respondent will have ample opportunity to amend its Rule 31 statement, and the respondent has not pleaded any prejudice as a consequence of the intended amendments.
- (i) A failure by a taxpayer to present a document to the respondent during the objection stage does not bar the use of that document during the Tax Court appeal proceedings, and it is not a relevant consideration in determining whether the amendments by the appellant should be allowed.

[88] The appellant's counsel contended, in conclusion, that the Tax Court did not provide a reason for its finding that the introduction of Annexure BMM is not permissible under the Tax Court Rules.

The respondent's submissions in respect of the annexures

- [89] The respondent's case can be summarised as follows:
- (a) In the previous annexures, the appellant, in support of its claim in its tax returns and notice of objection, set out the nature, classification and amount of the expenses. SARS has accepted those expenses as the nature, classification and amounts that are in dispute, and prepared its case in line therewith. Annexure BMM now reclassifies those expenses, including the nature of the expense and the amount.
 - (b) The expenditure listed in the previous annexures compared to the expenditure listed in Annexure BMM is different in the following respects:
 - (i) The expenses listed in each year are different;
 - (ii) The expenditure previously listed in one year is listed in a different year;
 - (iii) The expenditure amounts have changed;
 - (iv) There are additional expenses listed.

- (c) The respondent denies that the previous annexures related to prospecting and that Annexure BMM extends the classification of the expenditure so as to cater for the s 11(a) of the ITA claim, and all other classifications and the total amounts of expenditure incurred. The appellant accepted in its objection and appeal that certain of the expenditure was capital in nature and that the annexures differ; Annexure BMM extends and changes the classification of the expenditure.
- (d) The respondent would be prejudiced by the amendment. The respondent will now have to deal with expenditure, which it previously did not have to, and the appellant has failed to show this Court why it says the respondent will not be prejudiced in the circumstances.
- (e) This being a tax matter, the proposed amendment is not permissible under the Tax Court Rules.
- (f) By changing the nature of the expenditure, the taxpayer would be changing the factual ground of the expenditure. If the amendment were to be allowed it would undermine the entire structure of the TAA and this is not permissible under Rule 32.

[90] In our view, having found that the amendment pertaining to s 11(a) of the ITA, should be granted, axiomatically, the inclusion of Annexure BMM must be permitted. The initial annexures only dealt with expenditure related to prospecting. Annexure BMM deals with the classification of all expenditure incurred by the appellant in respect of its Gamsberg operations including expenditure relating to the s 11(a) issue. The document is thus an essential factual record of the claims relating to this ground and the amendment seeking to include same should be granted.

Prejudice

[91] Prejudice is generally the determinative factor in allowing or refusing amendments. If incurable, then the prejudice will generally preclude the granting of the amendment. The respondent's arguments underpinning its contention that the order of the Tax Court is not appealable, exposes the absence of prejudice were the

amendment to be granted: the respondent argued that the matter was not appealable because the order of the Tax Court was not final. As set out above, the contention that the Tax Court could find that all or part of the expenditure claimed is not expenditure relating to prospecting or even capital expenditure, and that the Tax Court could refer the assessment back to the respondent for further examination and assessment in terms of s 129 of the TAA, undermines the prejudice argument. As set out above, if the s 11(a) issue is going to be traversed anyway, it is difficult to see why the amendment should not be granted.

[92] It thus follows that if the amendment is granted, it is not, as argued by the respondent, that the respondent has to meet a case it did not have to meet prior to the amendment. On its own argument, it acknowledges that the Tax Court has the powers to make orders in terms of s 129(2)(a), (b) and (c) and that it would therefore have to deal with the nature of the expenditure with all its nuances.

[93] Put differently, the Tax Court will not be bound by the incorrect legal conclusion apparently reached by KPMG (if that is indeed what it ultimately finds it to be). This is particularly so, as the Tax Court has expressly been directed to s 11(a) of the ITA in paragraph 26 of the Rule 32 statement of grounds of appeal.

[94] The section 11(a) issue was properly raised by the appellant as its second ground of objection to the respondent's findings contained in its Audit Finalisation Letter during the objection stage. The respondent had proper and sufficient opportunity to consider and determine the issue at that time already. The respondent cannot contend to be either surprised or incurably prejudiced by the issue raised.

[95] Furthermore, the appellant quite squarely claimed in its founding affidavit in support of the amendment, that it would be in the interests of justice and also just and equitable to allow the amendments with 'regard *inter alia* had to the Appellant's constitutional rights in respect of access to court, and to have its dispute(s) resolved by the application of law in a fair, *de novo* hearing before a court of competent jurisdiction.' [Emphasis added.]

[96] The appellant submitted that the respondent would not be required to meet a new case. But even if it were, that would not be a relevant consideration in deciding whether the amendments should be allowed. The overall burden of proof rests upon

the appellant to prove its entitlement to deduct the qualifying expenditure in terms of the appropriate and relevant sections of the ITA. There would be no onus on the respondent as a result of the amendment.

[97] Furthermore, the respondent never raised prejudice in its initial objection to the notice of appeal; this was only raised in the heads of argument which shed some light on this aspect. It records: ‘...if the amendment is allowed, SARS is required to deal with a different case than prior to the amendment and SARS will not be put in the same position it was before the amendments were made....’. As emphasised previously, the hearing before the Tax Court is a hearing *de novo*, so there can be no talk of a different case for which the respondent could not adjust its pleadings, prepare, present and argue its case as the case is only just starting.

[98] Should the amendment be allowed, the respondent would be entitled to consequentially amend its Rule 31 statement or file a Rule 33 reply. There is thus no prejudice of the sort relevant during an amendment application. There will be a *de novo* hearing with all the issues clearly distilled, thereby ensuring that justice is done between the parties with a full ventilation of the issues, which is what the interests of justice require.

[99] The Tax Court found that no prejudice would result if the amendment was granted, which finding is borne out by the facts, as the s 11(a) issue had already been dealt with by the respondent.

[100] The taxpayer in the Tax Court, save for certain limited exceptions, is always saddled with a burden of proof to prove deductibility in the Tax Court litigation. It therefore does not lie in the mouth of the respondent to argue that it is incurably prejudiced by this withdrawal of the admission (assuming it to be that) as the appellant will have to prove everything it relied upon in any event, and the respondent will be able to present its case on the point – provided it is properly pleaded in a consequential amendment.

Authority to interfere with finding of Tax Court and the issue of discretion

[101] In *Oakdene Square Properties v Farm Bothasfontein (Kyalami)*,³⁷ Brand JA discussed the authority of a court of appeal to interfere with the exercise of a discretion by a lower court. He concluded that if the discretion is no more than a value judgment (also referred to as a ‘wide discretion’ or a ‘discretion in the loose sense’), the court of appeal would be bound to interfere if it differed from the finding of the court *a quo*.

[102] The refusal of an amendment is not a value judgment and therefore this Court may only interfere if the Tax Court was influenced by wrong principles of law, or a misdirection of fact, or if it failed to exercise a discretion at all. The reason for the limitation being that, in an appeal against the exercise of such discretion, the question is not whether the lower court had arrived at the right conclusion, but whether it had exercised its discretion in a proper manner.³⁸

[103] We have already dealt with the wrong principles of law and the misdirection of facts which would justify our interference,³⁹ but we may also do so for another reason.

[104] The Tax Court did not exercise a discretion at all. It recognised, in summarising the relevant legal principles, that in exercising the discretion it has, it should lean in favour of granting the amendment in order to ensure that justice is done between the parties in deciding the real issues between the parties, but then failed to exercise this discretion.⁴⁰

[105] The failure to have done so entitles this Court to consider the application for an amendment afresh.

[106] This Court is accordingly entitled to exercise the discretion the Tax Court failed to exercise. The absence of prejudice to be suffered by the respondent should the amendment be granted weighs so heavily in favour of exercising the Court’s

³⁷ *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] ZASCA 68; 2013 (4) SA 539 SCA paras 18-20.

³⁸ *Ibid* para 18. See too *Mabaso v Law Society of the Northern Provinces and Another* [2004] ZACC 8; 2005 (2) SA 117 (CC) para 20.

³⁹ Paras [58] to [100] hereof.

⁴⁰ *Black Mountain Mining* (note 4 above) paras 9 & 12.

discretion in favour of the appellant, that it is difficult to conceive of factors which could counter this.

[107] The considerations in concluding that the interests of justice would be served if the amendment were granted, strongly feed into exercising the discretion in favour of the appellant. In addition, the Tax Court will consider the distilled issues *de novo* and will be called upon to determine the real issues between the parties so that justice may be done. The matter has not started yet so there is no question of the re-opening of a case or the re-visiting of evidence already led. Neither this Court nor the Tax Court has made any adverse findings in respect of the *bona fides* of the appellant. As things stand on the papers, the receipt of the ‘incorrect’ advice (if that is what it is ultimately found to be) stands uncontested.

[108] Finally, in exercising the discretion in favour of the appellant, we are mindful of the general tendency in our courts that where an amendment can be granted without prejudice, courts would generally do so.

Conclusion

[109] The appeal should therefore succeed with costs. However, in the Tax Court, the appellant sought an indulgence, did not adequately explain the delay, and the respondent’s opposition in that court was not frivolous or unreasonable. The appellant should accordingly bear the costs of that application.

Accordingly, the following order is granted:

- (a) The appeal is upheld with costs, including the costs of two counsel where so employed;
- (b) The order of the Tax Court dismissing the appellant’s application for leave to amend its Rule 32 statement of grounds of appeal is set aside and replaced with the following:
 - ‘1. Leave is granted to the appellant to effect the proposed amendments to its Rule 32 statement of grounds of appeal in terms of appellant’s notice in terms

of Tax Court Rule 42(1) read with Uniform Rule 28(1), dated 25 September 2020.

2. The appellant is ordered to pay the costs of the application for amendment, including the costs of two counsel where so employed.'

SE WEINER

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I OPPERMANN

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

B MAKOLA

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

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Date of hearing: 21 May 2021
Date of judgment: 7 September 2021

Appearances:

Counsel for the appellant: Adv. PA Swanepoel SC;
Adv. CA Boonzaaier
Attorney for the appellant: Edward Nathan Sonnenbergs Incorporated
Counsel for the respondent: Adv. AR Bhana SC;
Adv. L Haskins
Attorney for the respondent: State Attorney, Johannesburg