

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **Yes**

Date: **6th July 2023** Signature:

CASE NUMBER: A5036/2022

DATE: 6th July 2023

In the matter between:

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

Appellant

and

M

Respondent

Neutral Citation: *CSARS v M (A5036/2023)* [2023] ZAGPJHC --- (06 July 2023)

Coram: Wepener, Adams et Mahalelo JJ

Heard: 8 March 2023

Delivered: 06 July 2023 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:30 on 06 July 2023.

Summary: Appeal from the Tax Court – whether undeclared receipts and deposits into taxpayer’s personal bank accounts and other accruals were income or the repayment of loans – a factual issue.

Definition of ‘gross income’ in s 1 of the Income Tax Act – the total amount, in cash or otherwise, received by or accrued to or in favour of a taxpayer not of a capital nature – an assessment is in respect of a specific amount – the taxpayer is required to address every single receipt and accrual, as detailed in the finalisation of audit letter – rule 7 of the Rules of the Tax Court – a taxpayer, in his objection, must specify in detail ‘the specific amount of the disputed assessment objected to’ – s 102(1)(a) of the Tax Administration Act – ‘[a] taxpayer bears the burden of proving that an amount, transaction, event or item is exempt or otherwise not taxable’ –

Taxpayer failed to discharge the onus in most of the itemised assessed amounts.

Appeal upheld and the order of the Tax Court set aside.

ORDER

- (1) The appeal of the appellant (SARS) against the order of the Tax Court dated 16 July 2021 is upheld.
- (2) The order of the Tax Court of 16 July 2021 is set aside and in its place and stead is substituted the following order: -
 - (a) The appeal of the appellant (the taxpayer) against the additional assessments in respect of the 2007, 2008, 2009 and 2010 tax years of assessment are dismissed;
 - (b) SARS is ordered to alter the assessments to reflect the amounts reflected in the following table;

YEAR	Investec	Nedbank	Schedule from FX Africa Foreign Exchange (Pty) Ltd	TOTAL	Revenue declared as per IT12	Amount of adjustment
2007	963 300.00	35 346.00	39 378.57	1 038 024.57	455 472.00	582 552.57
2008	1 130 250.00	35 000.00	1 348 500.00	2 513 750.00	768 810.00	1 744 940.00
2009	2 153 732.15	25 600.00	160 500.00	2 339 832.15	922 839.00	1 416 993.15
2010	56 408.05	47 127.12	642 608.85	2 496 815.02	1 750 671.00	746 144.02

	6 702 941.79	143 073.12	2 190 987.42	8 388 421.74	3 897 792.00	4 490 629.74
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(c) The understatement penalty imposed by SARS is confirmed as well as the interest imposed in terms of section 89quat of the Income Tax Act;

(d) There shall be no order as to costs.'

(3) Each party shall bear his own costs of this appeal.

JUDGMENT

Adams J (Wepener *et* Mahalelo JJ concurring):

[1]. During the tax years of assessment 2007, 2008, 2009 and 2010, the respondent in this Full Court appeal ('the taxpayer') received and/or had accrued to him amounts in the total sum of R9 578 217.82, which, according to the appellant, the Commissioner of the South African Revenue Services ('SARS'), constitute his income during those years. The total income which had been declared by the taxpayer in respect of those tax years was the sum of R3 897 792.

[2]. Accordingly, on 15 May 2015, SARS issued a '*Finalisation of Audit*' letter in respect of the 2007 – 2010 years of assessment. In that communiqué, SARS advised the taxpayer of its findings that an amount of R5 680 425.82 had been received by the taxpayer during these tax assessment years in addition to the R3 897 792, which had been declared by him as income in respect of that period. Those findings were incorporated into and schematically demonstrated by the following table:

YEAR	Investec	Nedbank	Schedule from FX Africa Foreign Exchange (Pty) Ltd	TOTAL	Revenue declared as per IT12	Amount of adjustment
2007	963 300.00	35 346.00	39 378.57	1 038 024.57	455 472.00	582 552.57
2008	1 130 250.00	35 000.00	1 663 010.00	2 828 260.00	768 810.00	2 059 450.00
2009	2 153 732.15	25 600.00	235 235.00	2 414 567.15	922 839.00	1 491 728.15
2010	2 356 408.05	47 127.12	893 830.85	3 297 366.10	1 750 671.00	1 546 695.10
	6 603 690.20	143 073.12	2 831 454.42	9 578 217.82	3 897 792.00	5 680 425.82

[3]. Pursuant to the finalisation of audit letter, accompanied by the additional assessments, SARS made the above consequential adjustments to the taxpayer's taxable income and adjusted upward the taxpayer's tax liability in respect of the 2007 – 2010 tax assessment years by an amount of R3 610 053.80. Understatement penalties amounting in total to R2 134 966 were also levied, resulting in additional tax liability by the taxpayer to make payment of the additional sum of R5 745 019.80.

[4]. It is not in dispute that over the period from 01 March 2006 to 28 February 2010 the taxpayer had received from time to time payment of amounts totalling R9 578 217.82. The individual sums received into a particular bank account (the taxpayer's Investec or Nedbank bank accounts) or from a particular source (FX Africa Foreign Exchange (Pty) Ltd ('FX Africa')) during a particular period are listed and itemised in various schedules, the contents of which are common cause between the parties. Furthermore, by the time the evidence was completed during the trial and the hearing of the taxpayer's appeal in the Tax Court, SARS had accepted explanations given by the taxpayer for certain receipts and/or accruals from FX Africa, which meant that those particular amounts were no longer to be included in the calculation of the taxpayer's income for the relevant period.

[5]. The net effect of the foregoing is that, on the version of SARS, the total amount of income, as being receipts from FX Africa, are to be reduced by R640 467 from R2 831 454.42 to R2 190 987. The same reduction by the said amount R640 467 should also be applied to the total amount of the adjusted income of R9 578 217.82, resulting in a net total of R8 937 750.82 taxable income as per the case on behalf of SARS.

[6]. In order to demonstrate the nature, size and frequency of the receipts, it may be apposite to use the 2008 receipts into the Investec account as an example of one of the schedules which are under consideration in this appeal. That schedule is as follows: -

SP M		Investec	1001-----
2008			
Date	Description	Amount	
02/05/2007	Cash Deposit	40 000.00	
12/10/2007	Cash Deposit	50 000.00	
16/10/2007	Cash Deposit	70 000.00	
23/10/2007	Cash Deposit	100 000.00	
24/10/2007	Cash Deposit	100 000.00	
05/11/2007	Cash Deposit	60 000.00	
12/11/2007	Cash Deposit	100 000.00	
20/11/2007	Cash Deposit	30 000.00	
30/11/2007	Cash Deposit	50 000.00	
05/12/2007	Cash Deposit	50 000.00	
19/12/2007	ACB Credit	153 800.00	
09/01/2008	Cash Deposit	40 000.00	
25/01/2008	Cash Deposit	46 450.00	
11/02/2008	Cash Deposit	90 000.00	
20/02/2008	ACB Credit	150 000.00	
TOTAL		1 130 250.00	

[7]. It bears emphasising that for each total received into a bank account for any particular year (as per the table in para 2 *supra*), there is a list similar to the one in the paragraph immediately above. Individual amounts, which constitute the total, are tabularised in schedules. And, in sum, it is common cause that for the 2007, 2008, 2009 and 2010 tax years of assessment, the total amount of R8 937 750.82 was received by the taxpayer from FX Africa and into his personal bank accounts held at Investec and Nedbank.

[8]. What is not common cause are the details relating to the nature of these receipts. In other words, whether these amounts were income in the hands of the taxpayer (as alleged by SARS) or whether they were repayment of loans which the taxpayer had advanced to related third party entities, which is the case of the taxpayer. The taxpayer therefore disputes the findings of SARS as per its finalisation of audit letter and contends that these receipts or accruals represent repayments to him of loans which he had advanced to related third party entities.

[9]. On 1 June 2015, the taxpayer lodged an objection to these additional assessments, which objection was disallowed by SARS as per their letter dated 4 September 2015, in which SARS reiterated its stance that the additional approximately R5.7 million represents gross income in the hands of the taxpayer, which ought to have been declared by him. On 11 September 2015, the taxpayer filed a notice of appeal in the court *a quo* ('the Tax Court') in terms of section 107 of the Tax Administration Act ('the TAA')¹, against the foregoing additional assessments and against SARS's disallowance of his objection to same. On 16 July 2021, the tax court (per Crutchfield AJ, sitting with an Accounting member and a Commercial Member) upheld the taxpayer's appeal with costs and set aside the additional assessments, thus accepting the taxpayer's explanation that the amount of about R5.7 million received by him represented in the aggregate the total amounts of the loan repayments to him from third party entities.

[10]. It is that judgment and order of the Tax Court which SARS appeals against to this court. In issue in the appeal is whether the above receipts by the taxpayer were income or the repayment of loans he had advanced to the payees of those amounts. This is a factual issue. The real question to be considered is whether the taxpayer has proven that the said amounts are not income. The contention by SARS in this appeal, as it was in the Tax Court, is that the taxpayer failed to adduce evidence in support of his contention that the specific amounts included in his gross income by SARS, should not be taxed in his hands. Furthermore, so it is submitted by SARS, the court *a quo* erred in finding that the taxpayer proved that Sanderling Investment Incorporated ('Sanderling') ceded its loan accounts against FX Africa to the taxpayer in terms of an oral cession agreement. Moreover, so SARS argues, the court *a quo* erred in finding that the 'substance over form' approach should find application and that the economic substance of the loan agreements between Sanderling Inc, a Trust, FX Africa and the taxpayer ought to prevail over their legal form.

[11]. The foregoing issues are to be decided against the factual backdrop of the matter and the facts, the most notable of which is that over the four-year

¹ Tax Administration Act, Act 28 of 2011;

period from March 2006 to February 2010, the taxpayer received various sums of monies, totalling R8 937 750.82. I also accept as a fact that as and at 28 February 2006 FX Africa owed to Sanderling – as per the latter's 'Shareholder's Loan Account' with FX Africa – the total amount of R6 997 681. As and at 28 February 2007, the said loan account, as per the FX Africa's 2007 audited financial statements, stood at R8 352 735. By 28 February 2010 this loan had been repaid by FX Africa. The other relevant facts are set out in the paragraphs which follow.

[12]. It is the case of the taxpayer that in January 2000, whilst he was still a resident of the Republic of Zimbabwe, he caused to be established the Sanderling Investment Company ('Sanderling'), a company registered and incorporated in the British Virgin Islands. The entire shareholding in Sanderling was held by the Sanderling Trust, of which the taxpayer was the sole beneficiary. In effect, the taxpayer was the sole beneficial owner of Sanderling.

[13]. During the period from 2000 to 2002, he progressively advanced, so the taxpayer alleges, various sums to the Sanderling Trust to onward advance these sums to Sanderling as interest free loans payable on demand. The total amount of the sums advanced by him to the Sanderling Trust to advance onward to Sanderling, so the case on behalf of the taxpayer goes, was the amount of US\$1 500 000.

[14]. During the year 2000, Sanderling, with the approval of the South African Reserve Bank, acquired a sixty percent majority shareholding in a company which subsequently became FX Africa Foreign Exchange (Pty) Ltd ('FX Africa'). The balance of the shareholding in that company was held by one Simon David Hayes ('Mr Hayes'). The South African Reserve Bank authorisation granted FX Africa, of which the taxpayer was a director from 2000 to 2011, a licence to operate as a foreign exchange dealer in South Africa. Sanderling had a number of management companies and directors during the period 2000 to 2011, the last of which was a company by the name of Homestead Management Incorporated of Geneva, Switzerland, which was the director of Sanderling

Investments Incorporated during the period 31 December 2010 to 29 October 2013.

[15]. By 31 October 2004, Sanderling had advanced to FX Africa the total sum of US\$1 073 591.27. On 28 February 2006, Sanderling loaned and advanced to FX Africa the further sum of €60 000. These intercompany loans, so it is claimed by the taxpayer, had no tax consequences. They were interest free loans and, according to the taxpayer, both these loan facilities were available to FX Africa until 30 September 2009 and were fully drawn down by FX Africa, with the result that as and at 28 February 2007, FX Africa owed to Sanderling the sum of R8 352 735. The foregoing is confirmed by the Annual Financial Statements of FX Africa for the 2007, 2008 and 2009 tax financial years.

[16]. During the course of 2007, so the case of the taxpayer continues, Sanderling ceded its loan account with FX Africa to the taxpayer and, consequently, he was substituted as FX Africa's creditor in respect of the debt in the sum of R8 352 735. FX Africa, so it is alleged by the taxpayer, repaid the total of the aforesaid sum lent and advanced by him through the Sanderling Trust to Sanderling Investments Incorporated as follows: (a) During the financial year ending on 31 March 2008, the sum of R1 792 812; (b) During the financial year ending on 31 March 2009, the sum of R2 986 933; and (c) During the financial year ending on 31 March 2010, the final sum of R3 572 990 = R8 352 735.

[17]. The sum total of the evidence in support of the foregoing averment that during the 2008, 2009 and 2010 tax years of assessment the amount of the loan of R8 352 735 was repaid by FX Africa to the taxpayer is the annual financial statements, which reflect in the balance sheet that at the end of the 2007, 2008, 2009 and 2010 tax years the loan account in favour of Sanderling was standing at R8 352 735, R6 559 923, R3 572 992 and R0.00 respectively. These figures are then interpreted to mean that during the 2008 tax year of assessment, the movement on (also read as 'payment towards') the Sanderling Loan Account was the sum of R1 792 812, and R2 986 933 for the 2009 tax year and R3 572 990 for the 2010 tax year, without furnishing any specific

details and particulars of when these payments were made and what constituted the individual sums.

[18]. It may be apposite at this juncture to deal specifically with the payments received by the taxpayer from FX Africa, as being repayments of the Sanderling Loan Account. That information is gleaned mainly from a report by a firm of Chartered Accountants dated 30 June 2010 ('the Neale report'), which had been commissioned by FX Africa with a view to investigating precisely the regularity of the Sanderling Loan repayments to the taxpayer, who, as already indicated was a director of FX Africa at the relevant time. Those payments, in chronological order, were as follows: -

30/04/2008	R255 314	Not approved
31/05/2008	R300 000	Not approved
30/06/2008	R300 000	Not approved
31/07/2008	R300 000	Not approved
31/08/2008	R303 188	Not approved
30/09/2008	R200 047	Not approved
31/10/2008	R549 952	Not approved
30/11/2008	R350 000	Not approved
31/12/2008	R100 000	Not approved
31/01/2009	R83 409	Not approved
28/02/2009	R245 020	Not approved
01/04/2009	R300,000	Approved
04/05/2009	R100 000	Approved
19/05/2009	R1 000 000	Approved
26/05/2009	R469 000	Approved
26/05/2009	R72 227	Approved
11/06/2009	R2 000 000	Approved
Miscalculation?	R36 203	Approved
30/11/2009	R100 000	Not approved
28/02/2010	R250,000	Not approved
31/03/2010	R200,000	Not approved
TOTAL	R7 514 360,00	

[19]. I will revert to these payments later on in the judgment. At this juncture it bears emphasising that these repayments are not seriously disputed by the

taxpayer and it can and should therefore be accepted as common cause that the taxpayer received in some form or another these payments, as repayments of the Sanderling loan account, on the dates mentioned.

[20]. As regards the list of payments received by the taxpayer into his Investec Bank account (totalling R913 000 of the R963 000 total for the 2007 tax year) from 'PHNX/Paddy2520' during the 2007 tax year of assessment, the taxpayer explained that 'Paddy Pads 2520' was a business venture which traded for eighteen months during the period March 2005 to September 2006. He had allegedly invested the sum of approximately R910 000 in this venture, by lending and advancing to the said entity the said sum interest free and repayable on demand. It is this loan amount, which were repaid into the taxpayer's Investec bank account by Paddy Pads 2520 from March 2006 to October 2006.

[21]. During September 2006, so the taxpayer avers, it became apparent that Paddy Pads 2520 was not profitable and the business venture ceased and the business operations were wound up. Given the efflux of time, no accounting records are available, nor any other supporting documentation.

[22]. I interpose here to note that at no stage, and especially not when submitting during November 2007 his income tax return for the 2007 tax year of assessment, did the taxpayer disclose to SARS that he had received payment of the total sum of R913 000 from Paddy Pads 2520 (or, for that matter, an unexplained amount of R50 000 in cash from an undisclosed source) and that the said receipts were of a capital nature, being loan repayments. Little wonder then that SARS is sceptical about this explanation, especially if regard is had to the dearth of information surrounding this supposed business venture. The same is true of all of the other receipts into the taxpayer's bank accounts during the 2008, 2009 and 2010 tax years of assessment.

[23]. As for the payments received by the taxpayer into his Nedbank bank account, amounting in total to R143 073.12, the taxpayer contends that those deposits were either transfers from his Investec Bank account or payments made by him into the Nedbank bank account. The Nedbank bank account, so

the taxpayer explains, is operated by his wife for the payment of the household and personal expenditure of their family. Consequently, SARS, in considering the deposits into the Nedbank bank account as income in the appellant's hands, has duplicated the classification SARS has made in considering all deposits into the appellant's Investec Bank account as income and then again considering the transfer from the Investec Bank account into the Nedbank bank account or deposits made by him into the bank account as income in the appellant's hands. There is no basis at law for SARS to consider the deposits as income twice, so the contention on behalf of the taxpayer goes.

[24]. With that factual background in mind, I now proceed to deal with the issues which require consideration in this appeal. A convenient starting point is, in my view, a brief discussion of the relevant legislative provisions.

[25]. Section 5(1)(c) of the Income Tax Act² ('the Income Tax Act') provides as follows:

'Subject to the provisions of the Fourth Schedule there shall be paid annually for the benefit of the National Revenue Fund, an income tax (in this Act referred to as 'the normal tax') in respect of the taxable income received by or accrued to or in favour of –

- (a);
- (b);
- (c) any person (other than a company) during the year of assessment ...'.

[26]. 'Taxable income' is defined in s 1 of the Income Tax Act as 'the aggregate of: -

- (a) the amount remaining after deducting from the income of any person all the amounts allowed under Part 1 of Chapter 2 to be deducted from or set off against such income ...'.

[27]. And 'Gross income', in relation to any year or period of assessment, is defined in s 1 of the Income Tax Act to mean:

- '(i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident ... during such year or period of assessment, excluding receipts or accruals of a capital nature ...'. (Emphasis added).

[28]. The definition of 'gross income' refers to two concepts, namely 'received by' or 'accrued to', which are notions central to the issues in this appeal.

² Income Tax Act, Act 58 of 1962:

[29]. *In casu*, SARS identified deposits received by the taxpayer into his Investec and Nedbank bank accounts, as well as payments admittedly received from FX Africa. The details of these receipts are set out in the table in para 2 *supra*. As already indicated, the total unexplained deposits received by the taxpayer for the 2007 – 2010 years were R8 937 750.82. The revenue declared by the taxpayer in respect of the aforesaid period, per his income tax returns (IT12s), was the total sum of R3 897 792. According to SARS, the under-declaration is therefore the difference between the amounts of the deposits identified and the income declared, which is R5 039 958.82.

[30]. As submitted by Mr Louw SC, who appeared on behalf of SARS, an assessment is for a specific amount. That means that in this matter, an assessment was raised by SARS, as per his finalisation of audit letter of 15 May 2015, in respect of each and every unexplained deposit, receipt and accrual into the Investec and Nedbank accounts for each of the 2007 – 2010 years of assessment. The point is simply that the taxpayer is required to address every single receipt and accrual, as detailed in the finalisation of audit letter. The question is whether that was indeed done by the taxpayer. It is so that, in terms of rule 7 of the Rules of the Tax Court, a taxpayer, in his objection must specify in detail 'the specific amount of the disputed assessment objected to'. Moreover, in terms of s 102(1)(a) of the TAA, '[a] taxpayer bears the burden of proving – (a) that an amount, transaction, event or item is exempt or otherwise not taxable'.

[31]. The question is simply whether the taxpayer discharged the onus on him of proving that, as a matter of fact, the amounts received by him were not income in his hands. As alluded to *supra*, the fact that these amounts were received by the taxpayer is common cause.

[32]. The breakdown of the deposits into the Investec bank account received during 2007 relates almost in all instances to the entity, Paddy's Pad 2520, referred to above. According to the audited annual financial statements of FX Africa, this company, of which the taxpayer was also a shareholder and a director, was owed R837 738 by FX Africa at the end of 2005 financial year. By

the end of the 2006 financial year end, that debt had apparently been paid up. This is however contradicted by the 2007 annual financial statements, which indicates that at the end of 2006 the debt stood at R239 670 and at R91 630 as at 28 February 2007. By the end of the 2008 financial year, this debt, according to the 2008 AFS, was reduced to R0.00. The implication being, so it was argued on behalf of the taxpayer, that between 01 March 2006 to 28 February 2008 the loan account of Paddy Pads 2520 of R239 670 with FX Africa was repaid ultimately to the taxpayer, who was however unable to indicate whether those payments came to him directly or *via* Paddy Pads, neither could he say what amounts exactly were paid precisely when. The foregoing, so I understand the taxpayer's case, is his explanation for the payments into the Investec bank account during the 2007 tax year of assessment. The shortcomings in this explanation are self-evident.

[33]. Whilst the taxpayer explained in papers before the Tax Court that these receipts related to repayment of monies lent and advanced by him during 2005 to this company to assist it with start-up capital, he led no evidence in support of his contention that these deposits should not be treated as income in his hands. What is more is that the documentation, in particular the annual financial statements alluded to *supra*, gives a different version to the effect that the taxpayer, through Paddy Pads 2520, borrowed monies to FX Africa, which loan was repaid during the 2007 and 2008 tax years.

[34]. All the same, during his evidence-in-chief, the taxpayer contended that during the 2007 year of assessment, there was a repayment of the loan by Paddy's Pad of R148 040 and a repayment of a loan in respect of Phoenix of R170 309, totalling repayment during that year of R318 349. By the end of the 2008 financial year, FX Africa, according to the AFS's, had repaid to Paddy Pads in total the sum of R239 270 and to Phoenix the total amount of R576 350, equating to a total of R815 620. This latter amount, so I understand the case on behalf of the taxpayer, explains in a way the total payment into the Investec bank account during the 2007 tax year of assessment, which, it will be recalled, amounted in total to R963 300.00.

[35]. I interpose here to note that this is the general approach adopted by the taxpayer to the additional assessments as per the letter of final assessment dated the 20 May 2015. In fact, no attempt was made at all by the taxpayer to deal with individual receipts and/or accruals. He simply took the total of the amounts owed to him and to his other companies by FX Africa as and at 28 February 2006, deducted that from the total owing as and at 31 March 2010, namely R2 775 974, and concluded that the difference of R9 536 739 represented the total amount repaid to him during the 2007, 2008, 2009 and 2010 tax years of assessment.

[36]. This approach is aptly and schematically demonstrated by a table, which was prepared by and used by Mr Nxumalo, Counsel for the taxpayer, in the Tax Court, which was marked as exhibit '4'. It simply reproduced and summarised in a table material figures from the annual financial statement of FX Africa. In sum, it was contended by the taxpayer that there is no need to reconcile the individual receipts and accruals found by SARS with the repayments of these loans, as long as there is a correlation or at least an approximate correlation between the two totals over the four-year period. To put form over substance, so the argument goes, would not be in the interest of justice. I deal with this approach later on in the judgment, but mention here that the tax court agreed with those submissions.

[37]. That brings me back to the 2007 deposits (in total R963 300) into the Investec bank account apparently mainly from Paddy's Pads. The first observation to be made is that there is no resemblance – none whatsoever – between those amounts deposited and the claim by the taxpayer that those relate to repayment of the loans due by Paddy Pads 2520. Apart from the fact, as became apparent when the taxpayer testified, that he himself is uncertain whether he received loan repayments in respect of the loans between Paddy's Pad and FX Africa and Phoenix and FX Africa, the amounts of the repayments are significantly less than the deposits identified for 2007 – R963 300 as against the R318 349 repayments. On this basis alone, I am of the view that the said receipts remain unexplained. As already indicated, the total repayments in respect of the Paddy's Pad loan were R148 040 and in respect of the Phoenix

loan, R170 309, which give a total of R318 349. If this is compared to the total deposits identified for 2007, which are R963 300, the alleged repayments in respect of the Paddy's Pad and Phoenix loans account for less than one-third of the deposits. Furthermore, there was no evidence to explain which of the specifically identified deposits into Mr Maloney's Investec account in 2007, relates to an alleged repayment of loans.

[38]. Moreover, from FX Africa's AFS's it is clear that these loans were advanced to FX Africa by Paddy Pads and by Phoenix and not by the taxpayer, who, on the face of it, is not party to the loan agreements relating to Phoenix and Paddy's Pad. A cession of the rights of these entities in terms of the loans was not pleaded by the taxpayer. Therefore, this is another basis on which it should be concluded that the taxpayer failed to prove that the amounts received in his Investec account, in 2007, does not constitute income.

[39]. As for the 2008 deposits into the Investec Account – mainly 'cash deposits' amounting in total R1 130 250, as per the schedule reproduced at para 3 *supra* – the only explanation that was proffered during his evidence by the taxpayer for these cash receipts was as follows: -

'So just from memory, I was building at the time doing a renovation, and I just got into the habit of drawing cash for the builder and – that I would say that all of these amounts would correspond, there was no other source of cash if that's what you imply.'

[40]. These amounts are also explained, in the bigger picture, by the taxpayer as 'drawings' against *inter alia* the Sanderling loan account with FX Africa, which, in the end, all came out in the wash. The only difficulty is, however, that the figures do not match, nor do they add up. The total repayment of the Sanderling loan account during 2008 was R1 792 812, which is R662 562 more than the total of the deposited amounts. What is more is that, by some accounts, notably the so-called Neale report, there were no repayments (whether authorised or unauthorised) during the 2008 tax year from FX Africa in respect of the Sanderling loan account. In that regard, see the table at para 18 above. There is therefore a complete disconnect between the 2008 deposits into the Investec bank account (R1 130 250), the audited annual financial statements, which indicate that R1 792 812, was repaid during 2008, and the

official repayment schedule, which suggests that no repayments towards the Sanderling loan was made before 30 April 2008. It is therefore not unreasonable for SARS to conclude that the R1 130 250 had nothing to do with the repayment of the Sanderling loan or any other loans payable to the taxpayer. The amounts do not match, and it is not unreasonable to infer that the loan repayments as listed at para 18 supra were received by the taxpayer but not as part and parcel of any of the amounts received into the Investec bank account.

[41]. The 2009 receipts into the Investec Account amounted in total to R2 153 732.15. The same criticism can be levelled against the taxpayer's explanation relating to these accruals. If it is to be accepted, as contended by the taxpayer, that these receipts represented the repayments in respect of the Sanderling loan account, then how does one explain the complete disconnect between the official list of repayments, which indicates that the repayments commenced only on 30 April 2008 (R255 314) and that the total repayments for the 2009 tax year was R2 986 930, which, incidentally, corresponds exactly with the taxpayer's version based on the loan account balances at the end of each financial year.

[42]. As regards the 2010 receipts into the Investec Account, which amounted in total to R2 356 408.05, there is also a disconnect between that total and the sum total of R4 527 430 of the admitted schedule of repayments. There is however, in my view, a direct and precise correlation between the R300 000 deposited into the Investec account on 2 April 2009 and the 'approved' R300 000 repayment of the Sanderling Loan on 01 April 2009, as per the Neale report. Similarly, the R2 000 000 deposited into the Investec account on 12 June 2009, with reference 'Treasury Trf', corresponds 100% with the R2 000 000 approved repayment of the said loan on 11 June 2009, as referenced in the Neale report. Moreover, according to the 2010 FX Africa AFS, R3 750 000 was repaid towards the Sanderling loan account during that year. All of the foregoing mean that, for once, the figures add up and the amounts are aligned. As regards this total of R2 300 000, I am persuaded that the taxpayer has proven that that sum related to the repayment of a loan, which

means that same should not be regarded as income in the hands of the taxpayer. The point is that these two amounts clearly are loan repayments, as is confirmed by the annual financial statements, as well as by the Neale report.

[43]. The way to deal with this is to disregard same in the calculation relating to the adjustment of the taxpayer's income for the 2010 tax year of assessment, which, it will be recalled, was originally assessed at R1 750 671. The remaining R746 144.02 unexplained receipts in the 2010 tax year would therefore represent the adjustment (upward) for that year.

[44]. As regards the deposits identified in the taxpayer's Nedbank account, which totalled R143 073.12, as already alluded to above, the taxpayer contends that these amounts were in fact transferred from the Investec bank account. The evidence before the Tax Court did however not bear this out. That whole amount is therefore to be treated as income in the hands of the taxpayer.

[45]. Lastly, there were the amounts received by the taxpayer from FX Africa, amounting in total to R2 190 987. This total is the reduced amount after the evidence of the taxpayer during the hearing of the matter in the Tax Court, in which he explained that a portion of the total received from the FX Africa related to a *quid pro quo* exchange for cash between him and FX Africa. The aforesaid balance, and the constituent individual itemised amounts, were not addressed by the taxpayer in his evidence. The general tenet of the evidence, which also covered this amount, was, as alluded to above, to the effect that this amount was to be included in the total amount of R9 536 739, as evidenced by the exhibit '4' in the Tax Court, as being part of the total of the repayment of the loans.

[46]. In sum, the taxpayer, instead of dealing with each assessed amount, contends that the Tax Court only had to consider the 'principle' whether payments from FX Africa and other parties constitute repayment of loans. It is submitted by SARS that this approach is incorrect as the taxpayer is required to prove in respect of each amount assessed by SARS that such amount should not form part of his gross income. I find myself in agreement with this contention. The point is simply that this matter cannot and should not be

decided on the basis of a broad principle instead of considering the specific amounts that were taxed by SARS. There should be evidence of exactly what amounts constitute these repayments of loans. In the absence of such, the reasonable inference to be drawn is that such sums should be treated and regarded as income in the hands of the taxpayer.

[47]. Moreover, there was no evidence before the Tax Court, which linked the specific withdrawals of amounts referred to in the Neale Report (as per the schedule at para 17 above) to specific deposits in the taxpayer's bank accounts. Those payments referred to in the Neale Report nevertheless constitute repayment of the Sanderling loan account by FX Africa in the amount of R7 514 360. Even more telling, is the fact that the amounts in the numerous SARS schedules as constituting the total aforesaid sum of R8 937 750.82, are completely irreconcilable with the repayments claimed by the taxpayers in respect of loans. The only exception being the R2 000 000 and R300 000 mentioned above. Those amounts should, in my view, also be disregarded for purposes of the calculation of the taxpayer's gross income for the period in question.

[48]. For all of these reasons, I do not accept as correct the Court *a quo's* finding that there was a sufficiently close correlation between the total of the omitted amounts and the dates over which the omitted amounts were deposited into the taxpayer's accounts on the one hand and the deduction in the loan accounts and the dates thereof recorded in FX Africa's financial statements. Far from it, as has been demonstrated above.

[49]. I am furthermore in agreement with the submission made by Mr Louw that, as regards the claim by the taxpayer that some of the payments were received from FX Africa by related parties, being Paddy's Pad, Phoenix and Evening Star, should have been rejected by the Tax Court. This averment and the taxpayer's evidence in support thereof are completely at odds with the case pleaded on behalf of the taxpayer in the Tax Court and in his objection to the additional assessments. For the reasons mentioned above, I, in any event,

reject the taxpayer's contention that payments made by Paddy Pads, Phoenix and Evening Star constituted repayment of loans to the taxpayer.

[50]. In light of my foregoing findings, it is not necessary for me to deal in detail with any of the other grounds of appeal raised by SARS. Suffice to say that there may very well be merit in SARS' contention that the taxpayer has not proven a cession in respect of the loans reflected in FX Africa's books in respect of Paddy's Pad 2520, Phoenix Confirming Ltd and Evening Star Investments (Pty) Ltd. That may very well be fatal to the taxpayer's cause in respect of those receipts.

[51]. SARS also made much of the fact that the evidence, so they contended, mitigated against the taxpayer's assertion that Sanderling's Loan account with FX Africa had been ceded to him during or about 2007. SARS vigorously disputes that the taxpayer was substituted as FX Africa's creditor in respect of the sum of R8 532 735. On the taxpayer's own version, so it was submitted on behalf of SARS, he did not advance any monies to FX Africa. He only advanced monies to the Sanderling Trust, who, according to the taxpayer, in turn advanced monies to Sanderling, which in turn advanced monies to FX Africa.

[52]. It follows, so the submissions continue, that unless the taxpayer proves that Sanderling ceded its claims against FX Africa to the taxpayer, the taxpayer had no right to receive loan repayments from FX Africa and does not explain the deposits received by the taxpayer in the Investec and Nedbank accounts and from FX Africa.

[53]. SARS also contends that the existence of the cession is belied by two subordination agreements – concluded during 2005 and 2007 – which prohibited any cession and in terms of which Sanderling guaranteed that its loans to FX Africa had not been ceded, as well as by the annual financial statements of FX Africa which do not reflect any loan between FX Africa and the taxpayer, which would have been the case if there was indeed a cession. Moreover, so SARS contends, the taxpayer's personal income tax returns do not reflect any loans against FX Africa.

[54]. I disagree with these contentions. The simple fact of the matter is that, according to his evidence, an oral cession agreement was concluded between the taxpayer and Sanderling during the course of 2007. The fact that same was prohibited by the subordination agreements does not, in my view, detract from the fact that the cession was in fact entered into. What is more is that, by all accounts, the parties, notably FX Africa and the taxpayer, conducted themselves in a manner, which is consistent with the existence of a cession. All payments were made directly to the taxpayer.

[55]. There is another reason why it should be accepted that there was in existence, at the relevant time, a cession in terms of which the loan account of Sanderling with FX Africa had been ceded to the taxpayer. And that relates to the fact that, as was found by the Tax Court, the economic substance of the loan agreements between Sanderling, the Trust, FX Africa and the taxpayer ought to prevail over their form. The simple point being that, stripped of all of the legalities and other niceties, the Sanderling loan had, for all intents and purposes, been advanced by the taxpayer.

[56]. In that regard, the SCA held as follows in *Commissioner, South African Revenue Service v Capstone 556 (Pty) Ltd*³: -

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

[57]. Also in *Capstone*, the Court had this to say about ‘substance over form’: -

‘The ... principle of construction was a recognition that the statutory language was intended to refer to commercial concepts, so that in a case of a concept such as a “disposal”, the court was required to take a view of the facts which transcended the juristic individuality of the various parts of a pre-planned series of transactions.’

[58]. It is indeed so, as was found by the Tax Court that the issues in this matter, and in particular whether the receipts were income or capital, should be considered against the backdrop of the ‘commercial operation’ of the

³ *Commissioner, South African Revenue Service v Capstone 556 (Pty) Ltd* 2016 (4) SA 341 (SCA);

transactions as a whole rather than assessed with regard to the various individual components of the transactions and their 'narrow legalistic form'.

[59]. On the basis of these principles, I conclude that, insofar as payments were made purportedly in settlement of the Sanderling Loan account with FX Africa, there was nothing untoward or irregular in those payments having been made directly to the taxpayer. And those payments can and should be treated as loan repayments in favour of the taxpayer.

[60]. In the circumstances, the conclusion that I come to is that the amounts received by the taxpayer, excepting only the amount of R2 300 000 referred to above, as identified in SARS' letter of audit findings of 15 May 2015, are not repayments of loans and are therefore also not capital in nature. The taxpayer failed to give any plausible explanation why these amounts should not be taxed in his hands. An order to that effect should be issued.

[61]. There are a couple of other issues which I am required to deal with, notably a condonation application by SARS and the prescription issue. I now turn my attention briefly to consider those issues.

[62]. The taxpayer contends that the notice of appeal was not filed within the statutory prescribed time period. SARS contends that the notice of appeal was filed within the prescribed time period. SARS therefore contends that it is not necessary for the appeal Court to grant an extension of time (condonation). However, should the Court find that the notice of appeal was not filed within the prescribed time period, SARS requests that condonation be granted on the basis that its non-compliance with the rules is excusable.

[63]. In terms of s 134 of the TAA, a notice of intention to appeal must be delivered within twenty-one days after the Registrar notified the parties of the Court's decision. The parties were notified of the judgment of the Tax Court on 16 July 2021, which is the same day on which the judgment was delivered. SARS filed its notice of intention to appeal on 5 August 2021, therefore well within the twenty-one day prescribed period. In the notice of intention to appeal SARS indicated that it required a transcript of the evidence given at the Tax Court hearing.

[64]. In terms of s 137(2) of the TAA, the Registrar may not give notice, in terms of s 137(1) of the TAA, that a party must note its appeal, until the transcript has been provided to the intending appellant. On 30 November 2021, the Registrar issued a notice in terms of s 137(2) (IT47C). This notice was issued prematurely as the full transcript was not provided to SARS yet.

[65]. On 3 February 2022 SARS addressed a letter to the Registrar of the Tax Court informing that SARS was not yet in possession of the full transcript and that the IT47C that was issued on 30 November 2021 was issued prematurely. On 28 March 2022, the Registrar of the Tax Court addressed a letter to the taxpayer's attorney stating that the IT47C was erroneously issued on 30 November 2021 and that the Registrar withdrew that notice and reissued it on 01 March 2022.

[66]. The taxpayer contends that the Registrar of the Tax Court does not have the power to withdraw the notice that was issued in terms of s 137(1) of the TAA on 30 November 2021. I disagree. Section 9 of the TAA reads as follows: -

'(i) a decision made by a SARS official or a notice to a specific person issued by SARS under a tax Act, excluding ... may in the discretion of a SARS official described in paragraph (a), (b) or (c) or at the request of the relevant person, be withdrawn or amended by-

(a) the SARS official; ...'.

[67]. 'SARS official' is defined in s 1 of the TAA to include 'an employee of SARS'. And in terms of s 121(1) and (2), a person appointed as the Registrar of the Tax Court by the Commissioner is a SARS employee. Consequently, the Registrar, as a SARS official, was fully entitled, in terms of s 9 of the TAA, to withdraw the notice given in terms of s 137 of the TAA on 30 November 2021 and to issue a new notice on 01 March 2022.

[68]. That then means that, in my view, the said notice was only issued on 01 March 2022, therefore SARS' notice of appeal was filed within the prescribed time period and there is no need to apply for condonation.

[69]. The last issue relates to prescription and I now turn my attentions to same.

[70]. In terms of section 92 and 99 of the TAA, SARS is precluded from raising additional assessments after the lapse of a three-year period from the date of the previous assessments. *In casu*, the additional assessments were issued long after the lapse of the three-year period. In view of my foregoing findings, the issue of prescription therefore arises.

[71]. The taxpayer contends that SARS had a duty to plead and adduce evidence to establish the prerequisites for re-opening assessments after three years were satisfied. Therefore, so the contention goes, SARS cannot succeed on the prescription issue because the prerequisites for re-opening assessments after three years have not been established. I disagree.

[72]. Section 92 of the TAA provides thus:

'If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the Fiscus, SARS must make an additional assessment to correct the prejudice.'

[73]. Section 99 of the TAA provides that:

'99 **Period of limitations for issuance of assessments**

- (1) An assessment may not be made in terms of this Chapter –
 - (a) three years after the date of assessment of an original assessment by SARS
- (2) Subsection (1) does not apply to the extent that –
 - (a) in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to –
 - (i) fraud;
 - (ii) misrepresentation; or
 - (iii) non-disclosure of material facts.'

[74]. It is clear from the foregoing provisions that additional assessments can only be raised outside of the three-year period if SARS is satisfied that: (1) there had been a non-disclosure of material facts by the taxpayer; and (2) the income in question was not assessed prior to the expiration of the three years due to such non-disclosure. The non-assessment must therefore, of necessity be causally related to the non-disclosure of material facts.

[75]. On the evidence before the Tax Court, and in light of my above findings relating to the loan repayments dispute, I am of the view that SARS raised the additional estimated assessments after the three-year period, because there

was a non-disclosure of material facts. Once SARS became aware of these material facts, it was able to raise the additional estimated assessments for 2007 – 2011.

[76]. In *Wingate-Pearse v C:SARS*⁴, the Court held as follows: -

[54] Mr Wingate-Pearse argues that the “satisfaction” contemplated in s 79(1) of the Income Tax Act, and now in s 92 read with s 99 of the Tax Administration Act, sets a very high hurdle for SARS to jump before it may reopen an original assessment and issue an additional one. SARS, he argues, must be satisfied on reasonable grounds, which test according to him is objective, that the original assessment is “wrong”. SARS, he argues, reopened the assessments for the relevant period of assessment on the basis that the full amount of the tax chargeable was not assessed due to fraud, material misrepresentation or non-disclosure of material facts on his part. SARS’ allegations of fraud, misrepresentation and non-disclosure, he argues, “are very heavy allegations that require substantial evidence” and are “not likely inferred”, which evidentiary burden, he contends, is not met. He relies on the decision of *Natal Estates Ltd v Secretary for Inland Revenue* 1975 (4) SA 177 (A) at 208 and *Secretary of Inland Revenue v Trow* 1989 (4) SA 821 (A) at 825I-826B, as authority in support of the meaning of the phrase “is satisfied” in s 79(1) of the Income Tax Act, and now in s 92 read with s 99(1) and (2) of the Tax Administration Act.

[55] Mr Wingate-Pearse, in my view, reads too much into *Natal Estates and Trow*. Those judgments do not support his argument on how the jurisdictional prerequisite of SARS’ satisfaction for its power to make an additional assessment must be met; whether the jurisdictional facts are objective or subjective. Both judgments concern similar, but repealed, provisions and rather suggest that the required jurisdictional fact is subjective.

... ..

[61] Although the words “is satisfied” used in s 79(1) of the Income Tax Act – and now s 92 read with s 99(1) and (2) of the Tax Administration Act – confer a subjective discretion on SARS, except that the discretion is not unfettered, and an objective approach must be adopted to that subjective discretion. SARS, therefore, must show that its subjective satisfaction was based on reasonable grounds. ... But, given the wording of s 79(1) ... and presently s 92 of the Tax Administration Act and the subjective nature of the discretion conferred on SARS, the scope for judicial review is limited ...

... ..

[64] The resultant substantial increase in Mr Wingate-Pearse’s assessed tax liability for the relevant period of assessment inferentially establishes SARS’ required satisfaction that the full amount of tax chargeable was not assessed due to fraud or material misrepresentation or non-disclosure of material facts, and the statutory immunity enjoyed by him from further assessments was thus displaced. Having regard to the subjective nature of the discretion

⁴ *Wingate-Pearse v C:SARS* 2019 (6) SA 196; 82 SATC 21;

conferred on SARS and the limited scope for judicial review as well as the principles enunciated in *Bato Star*, and giving due weight to the finding made by those with special expertise in taxation and accountancy, SARS' decision to issue the additional assessments can, in all the circumstances, not be said to be one that a reasonable decision-maker could not reach. SARS' required subjective satisfaction has been shown to have been founded on reasonable grounds.'

[77]. As already indicated, in light of my findings relating to additional assessments, there can, to my mind be little doubt that SARS has established the required satisfaction that the full amount of tax chargeable was not assessed due to fraud or material misrepresentation or non-disclosure of material facts. The resultant substantial increase in the taxpayer's assessed tax liability for the relevant period of assessment inferentially establishes such 'satisfaction'.

[78]. SARS had also notified the taxpayer that it intends to reopen the assessments as there was non-disclosure of material facts, as the taxpayer failed to declare all the income earned during the said periods. This was done pre-litigation in a number of documents, which was also introduced into evidence during cross-examination. So, for example, the finalisation of audit letter of 15 May 2015 states the following:

'SARS has reopened these periods in terms of section 99(2) of the TA Act on the basis of non-disclosure of material facts for the following reasons:

- (a) The taxpayer has a duty to disclose material facts which fall within its exclusive knowledge and not to make any misrepresentations to SARS. ...;
- (b) The taxpayer has failed in disclosing income received and as a result substantially under declared income in the 2007 – 2010 years and there has thus been a non-disclosure of material facts and in relation to certain facts;
- (c) The under-declaration would not have been uncovered had it not been for the audit conducted by SARS;
- (d) The facts uncovered during the audit were material in nature in relation to the respective years of assessment and they were within the exclusive knowledge of the taxpayer and were not voluntarily disclosed to SARS by the taxpayer;
- (e) The non-disclosure of the said material facts resulted in the assessments in all the years under review not reflecting the correct application of a tax Act to the prejudice of SARS;
- (f) The TA Act and previous provisions of the IT Act require the taxpayer to submit a full and true return; however, the taxpayer failed or neglected to do so.'

[79]. This, in my judgment, spells the end of the taxpayer's prescription point *in limine*, which falls to be rejected.

Conclusion and Costs

[80]. The appeal therefore stands to be upheld and the additional assessments pertaining to the 2007, 2008, 2009 and 2010 tax years of assessment should be confirmed.

[81]. As for costs, same is ordinarily not awarded in favour of any of the parties in the tax court, unless a party shows that the other party's grounds of assessment or appeal are unreasonable. In this matter, it cannot be said with any conviction that the taxpayer, in objecting to the additional assessment for the 2007 to 2010 tax years, acted unreasonably or that his grounds for the objection were unreasonable.

[82]. Each party should therefore bear his own costs in both the Tax Court and in this appeal.

Order

Accordingly, I make the following order: -

- (1) The appeal of the appellant (SARS) against the order of the Tax Court dated 16 July 2021 is upheld.
- (2) The order of the Tax Court of 16 July 2021 is set aside and in its place and stead is substituted the following order: -
 - '(a) The appeal of the appellant (the taxpayer) against the additional assessments in respect of the 2007, 2008, 2009 and 2010 tax years of assessment are dismissed;
 - (b) SARS is ordered to alter the assessments to reflect the amounts reflected in the following table;

YEAR	Investec	Nedbank	Schedule from FX Africa Foreign Exchange (Pty) Ltd	TOTAL	Revenue declared as per IT12	Amount of adjustment
2007	963 300.00	35 346.00	39 378.57	1 038 024.57	455 472.00	582 552.57
2008	1 130 250.00	35 000.00	1 348 500.00	2 513 750.00	768 810.00	1 744 940.00
2009	2 153 732.15	25 600.00	160 500.00	2 339 832.15	922 839.00	1 416 993.15
2010	56 408.05	47 127.12	642 608.85	2 496 815.02	1 750 671.00	746 144.02

	6 702 941.79	143 073.12	2 190 987.42	8 388 421.74	3 897 792.00	4 490 629.74
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(c) The understatement penalty imposed by SARS is confirmed as well as the interest imposed in terms of section 89quat of the Income Tax Act;

(d) There shall be no order as to costs.'

(3) Each party shall be his own costs of this appeal.

L R ADAMS
*Judge of the High Court,
Gauteng Division, Johannesburg*

HEARD ON:	8 th March 2023
JUDGMENT DATE:	6 th July 2023
FOR THE APPELLANT	Advocate C Louw SC
INSTRUCTED BY:	The State Attorney, Johannesburg
FOR THE RESPONDENT:	Advocate Nxumalo SC
INSTRUCTED BY:	Garlicke & Bousfield Incorporated, Umhlanga Rocks
