THE SUPREME COURT OF **APPEAL OF SOUTH AFRICA**

JUDGMENT

Reportable

Case No: 466/2017

In the matter between:

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

and

KWJ INVESTMENTS SERVICE (PTY) LTD **RESPONDENT**

Neutral citation: CSARS v KWJ Investment (142/2017) [2018] ZASCA 81 (31 May 2018)

Coram: Navsa, Wallis and Mbha JJA and Davis and Makgoka AJJA

Heard: 04 May 2018

Delivered: 31 May 2018

Summary: Gross income – whether a cession of a dividend right constitutes a receipt or accrual for the purposes of gross income – if so, does a practice generally prevailing in terms of provision (iii) to s 79 (1) of the Income Tax Act 58 of 1962 apply.

ORDER

On appeal from: Tax Court held in Cape Town (Van Staden AJ sitting as court of first instance):

1 The appeal is dismissed with costs, including the costs of two counsel

2 The order of the tax court is set aside and replaced with the following order:

'The appeal is upheld and the additional assessments for the 2008 and 2009 years of assessments are set aside and the appellant's original assessments for those years are reinstated.'

JUDGMENT

DAVIS AJA (Navsa, Wallis and Mbha JJA and Makgoka AJJA concurring)

Introduction

[1] Since the introduction of income tax in the early part of the last century, there has been a perennial struggle between revenue authorities seeking to protect the integrity of the tax base and tax consultants who have consistently implemented aggressive schemes to reduce drastically their clients' liability for tax. See Ayrshire Pullman Motor Services and D M Ritchie v Commissioners of Inland Revenue [1929] 14 TC 754 at 763–764

[2] This appeal involves a set of transactions designed to exploit the tax code in ways that would enhance the profitability of the participants, while avoiding any liability for tax. It also concerns the relationship between appellant's response thereto and the right of taxpayers to enjoy certainty in the administration of tax legislation.

[3] The key to the determination of the present appeal is whether, when the respondent obtained certain rights to dividends declared but not yet accrued by way of a cession, the value of these rights constituted 'gross income' in the hands of respondent either in terms of s 24J(3) of the Income Tax Act 58 of 1962 as amended (the Act) or under the definition of gross income as set out in s 1 of the Act.

[4] Depending on the determination of this question a further issue required examination: whether the appellant was precluded from raising an additional assessment against respondent because the original assessments were issued in

accordance with ‘a practice generally prevailing’ at the time, as envisaged in provision (iii) to s 79 (1) of the Act.

[5] In the event that appellant was justified in raising the additional assessments, a further question arises as to whether the appellant should have remitted interest on the tax liability of respondent in terms of s 89(3) of the Act.

The facts

[6] Respondent conducted a business in redeemable preferences shares. Investors who sought a return in the form of dividends subscribed for and were issued preference shares by respondent. Respondent invested the funds so raised from the preference shares and made a profit on the difference between the dividends it received and the dividends it was obliged to pay the holders of its preference shares. As the dividends it received were at the time tax exempt, its only liability for tax related to Secondary Tax on Companies (STC). The investors received a return on their investments in the form of dividends and were entitled to the return of the capital sum which they had invested at the maturity of the investment period.

[7] The transactions giving rise to this case were devised to make use of surplus funds held from time to time by respondent without attracting any liability for tax. Respondent invested the surplus proceeds from the issue of preference shares with Investec Bank Ltd (Investec) in terms of an Amended and Restated Master Investment Agreement (the agreement) entered into between Investec and respondent initially on 24 April 2007, but subsequently amended on 12 November 2007. In terms of this agreement, as a quid pro quo for the monies invested with Investec, respondent was issued with a Composite Note. The Note provided for a return on respondent’s investment in the form of an antecedent cession of rights to identified dividends declared but not as yet paid by entities listed on the Johannesburg Stock Exchange. Investec would acquire the right to receive these dividends from Old Mutual or Sanlam at a premium to face value and in time cede them to respondent. In summary, Investec ceded rights to dividends prior to its entitlement to the dividends themselves; that is: the cession took place prior to the last date for registration of the shareholder, on which date the right to the dividends would have accrued to the registered

shareholder. In addition, the Note provided that the respondent would receive the return of the capital so invested on a specified date.

[8] The dividend rights were acquired by Investec for 'on-cession' to respondent in terms of Dividend Agreements concluded between it and the untaxed policy funds of Sanlam and Old Mutual, which rights were acquired at a premium to the face value of the dividends that would accrue in the future. The premium took into account the value of the credit for the purposes of the STC that would accrue to the holder of a dividend right on payment of the dividend and would serve to offset its own liability for STC, arising when respondent paid dividends to its own shareholders.

[9] Investec employed the funds which it had received from respondent as part of its floating capital in respect of which it earned taxable income. It deducted the cost of the dividend rights so purchased for income tax purposes on the basis that it was expenditure incurred in order to produce income for income tax purposes; that is, the return from investments made, using the proceeds from the issue of the Note.

[10] To the extent relevant, the Dividend Purchase and Sale Framework Agreement between Investec and Sanlam (The Dividend Agreement) in terms of which Investec purchased dividend rights from Sanlam read thus:

> 'The purchase price payable by the purchaser to the seller in respect of the Dividend Rights acquired in terms of each Dividend Sale Agreement shall be-
>
> a) an amount equal to 102.5% (one hundred and two comma five per centum) of the nominal value of the Subject Dividends; and
>
> b) paid by the purchaser to the seller by electronic transfer directly into the Seller's Account by no later than 15h00 on the applicable Dividend Payment Date.'(clause 5.4)

[11] Stripped to its essentials, the Dividend Agreement provided for an investment to be made by respondent with Investec from the proceeds of the issue of its own preference shares. In terms of the Dividend Agreement the capital which it invested would be returned by Investec on the earlier of the scheduled redemption date, or an early redemption date. In addition, in terms of clause 5.2.4 of the Dividend Agreement, the respondent would receive a return on its investment in the form of a right to

receive dividends declared, but not yet accrued, the face value of which was equal to the dividend amount, calculated in terms of a formula based on a dividend rate specified in the Note.

[12] In effect, this meant that during each dividend period of the investment, Investec would 'endeavour to antecedently acquire Reference Dividend Rights for the purpose of antecedently divesting itself of such Reference Dividend Rights to the Investor, in settlement of the dividend amount which is payable by 'the issuer to the Investor' on the relevant Dividend Payment Date for that investment Transaction' (clause 5.2.4.1).

[13] The Reference Dividend Rights Amount meant all of Investec's 'right title and interest in and to dividends' declared in ordinary shares or preference shares which were listed on the JSE Limited, were acquired by Investec for the purposes of cession to respondent in terms of the Dividend Agreement.

[14] The first issue for determination is the question of whether an amount accrued to respondent, which accrual took place pursuant to the Dividend Agreement. The appellant contended that an accrual took place on the date of the antecedent cession of the dividend rights from Investec to respondent. A second accrual then took place on the date when the companies so declaring the dividends paid them to respondent, being the party so entitled to the dividends upon declaration.

[15] In its tax return, respondent included in its "gross income" (as defined in s 1 of the Act), in particular in terms of paragraph *(k)* thereof, all dividends which had, in due course, accrued to it as cessionary of the rights so ceded. It then treated this gross income as being exempt from tax in terms of s 10(1)*(k)* of the Act (prior to a legislative amendment thereof which took place with effect from 25 October 2012).

[16] The reserves arising from the accrual of these dividends were utilised to pay dividends to the respondent's preferent shareholders, in respect of which no income tax deduction could be, or was, claimed by the respondent. Appellant raised

assessments against respondent on this basis for the 2008 and 2009 years of assessment.

[17] On 2 December 2011 the appellant issued additional assessments in respect of the respondent's 2008 and 2009 years of assessment. For the first time these included amounts equal to the face value of the dividends, on the basis that the dividend rights received by respondent constituted an amount which accrued to it unconditionally, in terms of gross income as defined in s 1 of the Act.

[18] Appellant's case on the question of the taxation of the dividend rights is that the receipt by the respondent of the rights acquired in respect of dividends prior to the last day of registration as a shareholder, did not constitute dividends but stood to be classified as a separate and distinct amount which had accrued to respondent: that is, dividend rights which were a return on its investment with Investec. This constituted an unconditional receipt or accrual of an amount which was taxable, either as 'interest' in terms of s 24J of the Act, or as gross income under the definition thereof set out in s 1 of the Act.

The Tax Court's decision

[19] The respondent lodged an appeal against these additional assessments on 2 December 2011, that is, against the additional income tax liability imposed for the 2008 and 2009. In upholding its appeal, the Tax Court found, on the basis of the judgment in *Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A), that a right to receive a payment in the future which accrues to a taxpayer can fall within the scope of gross income, notwithstanding that the value thereof may be affected by the lack of its immediate enforceability. However, the accrual only takes place in respect of the right to receive payment in the future when that right is unconditional. The Tax Court held that the dividend rights could not be considered to be unconditional, since the last day for registration of the shareholders had not yet arrived when the rights to dividends were ceded to respondent.

[20] The Tax Court found that the payment of the dividends was conditional, as the identity of the shareholder entitled to the dividends had not been established at the date of cession. Furthermore, s 90(2) of the Companies Act 61 of 1973 (which was in

force at the time) provided that the payment of dividends was prohibited, if a company was unable to pay its debts or its liabilities were greater than its assets after the dividend payment was made. Thus, the entitlement to what the Tax Court considered to be a contingent right did not give rise to an accrual as envisaged in the definition of gross income.

[21] The Tax Court also held that this conclusion was applicable to both arguments, namely, the initial argument that the dividend right fell within the definition of gross income and the further argument that these rights fell within the scope of s 24J of the Act In the latter case, s 24J (3) gives rise to an inclusion in gross income. However, only an amount unconditionally received or accrued may form part of gross income in terms of s 24J(3). On the same reasoning as applied to the argument concerning gross income, this section was held to be inapplicable to the dividend rights as received by respondent.

The accrual of dividend rights

[22] On appeal, appellant contended that the rights transferred from Investec to respondent were rights to receive whatever dividends were paid by the JSE listed companies. The subject of the rights was an entitlement to be paid money as a dividend by that company. The right had a value, notwithstanding any conditionality, as was evidenced by the acquisition of the dividend right by Investec and the subsequent disposal thereof to respondent. This value was evidenced by the price Investec paid for the dividend rights which price included a premium as provided for in clause 5.4 of the Dividend Agreement. When respondent received the right to dividends, what it received was ‘an amount’ which fell within the scope of gross income and was therefore taxable in its hands. Subsequently, when it received the dividend payment, it likewise, received ‘an amount’ but, by virtue of s 10 (1)*(k)*(i) of the Act, this amount was exempt from tax.

[23] The first question which has to be answered in the affirmative in this case in order for the appeal to succeed, is whether the dividend right constituted ‘an amount’ that accrued to respondent; that is, an independent amount from the dividend ultimately received by respondent.

[24] The definition of gross income includes 'the total amount in cash or otherwise, received by or accrued to or in favour of any person'. This amount includes 'not only money but the value of every form of property earned by the taxpayer, whether corporeal or incorporeal which has a money value'. See *People's Stores* at 363 I-J.

[25] An amount accrues to a taxpayer once the taxpayer becomes unconditionally entitled to such an amount; that is, a taxpayer's right must be unconditional in order for the right to fall within the scope of gross income. To put it in the terms of *People's Stores*; 'no more is required for an accrual in terms of a definition "gross income" than that the person concerned has become entitled to the amount in question'.[1]

[26] Appellant's case is that the dividend rights ceded to the respondent constituted incorporeal property which had a money value created by an arm's length willing buyer – seller transaction. Incorporeal property constitutes 'an amount' for the purposes of gross income. In this case a value could be placed on these dividend rights, that is an amount could be obtained for the dividend rights on the open market if they were to be sold under a reasonable method of sale. *Lace Proprietary Mines Ltd v CIR* 1938 AD 267 at 281.

[27] In appellant's view, clause 5.4 of the Dividend Agreement revealed clearly that the dividend rights ceded to respondent had a value which could be obtained on an open market when Investec disposed of these dividend rights by way of the cession to respondent. Respondent could have disposed of these right in the market prior to the accrual of the dividends.

[28] The agreement between Investec and Sanlam provided that Investec acquired the dividend rights. Investec was to be the beneficial owner of the dividend rights and 'shall be entitled to sell and cede the dividend right' (Clause 6.3.1 of the Dividend Agreement).

---

[1] *People's Store* at 364 A – 365 C.

[29] In summary, appellant's case is that respondent acquired an unconditional entitlement to each dividend right upon the cession to it by Investec. This stood to be classified in terms of the approach set out by Hefer JA in *People's Stores* at 365 A-C:

> '[A]ny right (of a non capital nature) required by a taxpayer during the year of assessment and to which a money value can be attached forms part of "gross income" irrespective of whether it is immediately enforceable or not but that its value is affected if it is not immediately enforceable.'

[30] Much of the debate centred on the decision of this Court in *Mooi v Secretary for Inland Revenue* 1972 (1) SA 675 (A). In that case a mining company, for which the appellant was a secretary, had by resolution passed in June 1963, granted to the appellant by letter of 25 July 1963 an option to subscribe for 500 ordinary shares of R 1 each at a price of R 1.25 on certain conditions being:

(i) the option was not to be exercised until six months after the completion of the construction of the company's mine;

(ii) it would be capable of being exercised during the period of three years from the date when the directors decided the date of the completion of the mine; and

(iii) the option could only be exercised if the appellant was still in the company's employ or contributed to the project in some way.

[31] On 27 July 1963 appellant accepted the option. The company's mine was completed on 1 March 1966. On 1 September 1966 the value of the share was R6.40. On 1 October 1966 appellant exercised his option. The evidence showed that the difference between the aggregate price of the share calculated at R1.25 per share and the aggregate market value with the share now worth R6.40 per share as at 1 September 1966 was R2575,00, which amount respondent had included as part of appellant's gross income.

[32] The main contention advanced on behalf of appellant was that the only taxable accrual from the services rendered or to be rendered by him to the company was the value, if any, of the legal right which appellant acquired upon acceptance of the option on 27 July 1963. That right, so appellant argued, was capable of being turned into a

monetary amount. Thus it had a value to be determined but would form part of the appellant's gross income for the tax year ending 28 February 1964.

[33] Ogilvie-Thompson CJ expressed considerable doubt as to whether the right acquired by appellant on 23 July 1963 had a monetary value. Nonetheless he assumed that the 'contingent right' appellant acquired on 27 July 1963 had 'some monetary value'.[2] However, because the right was acquired, pursuant to services which still had to be rendered by appellant after July 1963, Ogilvie-Thompson CJ found:

> 'In my view, the contingent right which appellant required in 27 July 1963 did no more than … "set up the machinery for creating the benefit", which said benefit only accrued when the option became exercisable. Accordingly, I am of the opinion that no accrual within the meaning of the definition of 'gross income" occurred in July 1963.'[3]

[34] Appellant's counsel contended that the judgement in *Mooi* confirmed the principle that an accrual takes place when the taxpayer is unconditionally entitled to claim payment of an amount. He emphasised that the court in *Mooi* had held that a distinction should be drawn between a right that vests immediately, but relates to a payment in the future, and a right which does not come into existence at all until a condition has been fulfilled.

[35] The appellant in *Mooi* fell into the latter category, whereas respondent in the present case fell into the former category. According to appellant, the dividend rights the respondent obtained by way of the cession to Investec were not of the kind with which the *Mooi* case was concerned. The dividend rights so ceded to respondent were vested unconditionally in the respondent, albeit that related to payment of dividends in the future.

[36] Respondent's counsel contended that *Mooi* could not be distinguished from the present case. While the cession as the mode of delivery was unconditional, the right ceded was conditional and therefore respondent held no more than a contingent right.

---

[2] See *Mooi v Secretary for Inland Revenue at* 683 F

[3] *Ibid* 684 D – E

The 'true and real benefit' as contemplated in the judgment in *Mooi* was the ultimate receipt of dividends as opposed to the contingent rights thereto. Until the last day of registration, these rights remained contingent rights to the payment of dividends in the future.

[37] The dispute reduces to the following: did the antecedent cession of dividend rights constitute a form of property that had a monetary value attached thereto at the time respondent became entitled to these dividend rights? The starting point for any analysis is that the right to the dividends to be declared in the future which were ceded by Investec to respondent cannot be classified as dividends. The dividend definition as set out in s 1 of the Act expressly refers to 'the amount transferred or applied by a company for the benefit of any shareholder in relation to that company'. That transfer was from the company paying the dividend to the respondent. It took place subsequent to the cession of rights by Investec and hence constituted a separate amount that fell to be taxed in terms of the definition of gross income and which was then exempt from tax in terms of s 10 (1)*(k)*(i) of the Act.

[38] The dividend right ceded to respondent in terms of the agreement with Investec was a separate amount. It was ceded as the return which respondent obtained for the capital sum invested by respondent with Investec. As set out earlier in this judgement, it is clear from clause 5.4 of the Dividend Agreements entered into between Investec and Sanlam and Old Mutual respectively, that these rights had a defined monetary value. Furthermore, Investec issued a reference dividend rights notice to respondent informing the latter, for example that 'it has acquired Reference Dividend Rights in respect of the Dividend Period commencing on 31 January 2008 and ending on 30 April 2006 as follows'. Acceptance of that notice and the resulting cession clearly carried a value with it. Had respondent sought to sell it on the open market it would clearly have carried a monetary value of a kind that falls within the scope of the definition of gross income.

[39] The cession of these dividend rights constituted an unconditional right described by Hefer JA in *Peoples Stores* at 365 A-C as follows: 'any right (of a noncapital nature) acquired by a taxpayer during the year of assessment and to which a money value can be attached, forms part of the "gross income" irrespective of

whether it is immediately enforceable or not, but that its value is affected if it is not immediately enforceable'.

[40] Appellant's counsel further contended that the dividend rights constituted interest in terms of s 24J of the Act, a submission for which he sought support in respondent's own financial records which treated these rights as interest, being the return received from Investec for the use of respondent's money invested pursuant to the issue of the Note. In this way the dividend rights could be seen to represent compensation received for the use of money advanced to Investec by respondent in terms of the latter's investment as set out in the Dividend Agreement.

[41] The only distinction between the dividend rights being taxed in terms of s 24J or within the scope of gross income in terms of s 1 of the Act was that there is no distinction drawn between a capital or revenue receipt or accrual in the case of taxation under s 24J of the Act. Manifestly, in this case the dividend right was a return for the investment made by respondent and thus was a receipt or accrual of a revenue nature. Hence, in this case, as the dividend rights fell clearly within the scope of gross income, there is no need to deal with the application of s 24J. In principle, the dividend rights stood to be taxed as they constituted an unconditional receipt of a right which has a monetary value.

Practice Generally Prevailing

[42] This leads to the second question: even if the dividend rights stood to be taxed as forming part of respondent's gross income, did appellant issue its revised assessments rendering respondent liable to tax on the dividend rights in a manner which was contrary to its generally prevailing practice at the time of the issue of the original assessments?

[43] Section 79(1) of the Act, to the extent relevant ,reads:

'Provided that the Commissioner shall not raise an assessment under this subsection

(i) after the expiration of three years from the date of the assessment (if any) in terms of which any amount which should have been assessed to tax under such assessment was not so assessed or in terms of which the amount of tax assessed was less than the amount of such tax which was properly chargeable, unless the

Commissioner is satisfied that the fact that the amount which should have been assessed to tax was not so assessed or the fact that the full amount of tax chargeable was not assessed, was due to fraud or misrepresentation or non-disclosure of material facts; or

(ii) …

(iii) if the amount which should have been assessed to tax under the assessment referred to in para (i) of this proviso was, in accordance with the practice generally prevailing at the date of the assessment, not assessed to tax, or the full amount of tax which should have been assessed under such assessment was, in accordance with such practice, not assessed….'

[44] The purpose of these provisions is clear[4]. The Commissioner was precluded from raising an additional assessment, notwithstanding that such an assessment may be justified in terms of the relevant provisions of the Act, where (a) the prescription period of three years from the date of the original assessment applied or (b) where the original assessment was issued in terms of a practice generally prevailing at the time of issuing the original assessment. In short, in these two sets of circumstances, the legal consequences of the transaction so assessed gave way to the principle of certainty which justified the principle of prescription or of a practice generally prevailing at the time the original assessment was issued.

[45] For this reason, appellant was precluded from contending that, if there was a practice generally prevailing at the time that it issued the original assessments in respect of respondent, it operated under an incorrect interpretation or application of applicable provisions of the Act. Section 92 of the Tax Administration Act which repealed s 79(1) makes this clear in the way it has sought to abolish the principle of practice generally prevailing:

'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'.

[46] In *CIR v SA Mutual Unit Trust Management Co Ltd* 1990(4) SA 529 (A) at 536F-H, Corbett CJ said the following about the meaning of 'practice generally prevailing': 'a

---

[4]As they read at the time the additional assessment was raised. Subsequently s79 was repealed with effect from 01 October 2012 in terms s 271 of the Tax Administration Act 28 of 2011.

practice "generally prevailing" is one which is applied generally in the different offices of the Department in the assessment of taxpayers and in seeking to establish such a practice in regard to a particular aspect of tax assessment it would not be sufficient to show that the practice was applied in merely one or two offices. Moreover, the word "practice", in this context, means "a habitual way or mode of acting" (see Oxford English Dictionary, meaning 2.c); and consequently, in general, it would also not be sufficient to show that, in regard to an aspect of assessment, a certain attitude had been adopted by the assessors concerned only in some instances.'

[47] It was common cause between the parties that respondent bore the onus to show, on a preponderance of probability, that the original assessments were in accordance with a practice generally prevailing at the time of the assessment. See *SA Mutual Unit Trust Management Co Ltd* at 538-539 where what is required of a taxpayer seeking to rely on a practice generally prevailing was set out thus:

'The existence of such a practice could be established by showing that the Commissioner, or someone in the Department with the necessary authority, had issued a departmental directive to that effect and that this directive was being followed generally in the assessment of taxpayers; or by showing that in the general process of assessment dividend stripping losses were consistently allowed in a sufficient number of cases to lead to the inference that such a practice was authorized and generally prevailed.'

[48] Respondent presented a range of evidence to discharge the onus resting on it. In the first place, there was evidence of five transactions, all of which included a cession of rights to receive dividends which had not yet been declared. Appellant assessed these cases on the basis that exempt dividends were received. In none of these separate transactions did the cession of a dividend right trigger an assessment for tax.

[49] A ruling issued in respect of transactions relating to the Stanlib Dividend Income Fund is illustrative of appellant's approach to these transactions. The Fund applied for a ruling in August 2003. In a statement of agreed facts relating to this transaction, the proposal put to appellant was described thus:

'The proposal was for the Stanlib Fund to invest in an indivisible composite instrument issued by Investec whereby Investec would inter alia antecedently divest itself of dividend rights on

local preference share investments made by Investec in favour of the Stanlib Fund and the capital amount would be repaid at a future date.

Investec sought a ruling as to the tax implications of the proposed Stanlib Fund, as set out in paragraph 6 of the letter (B). Inter alia a ruling was sought that the dividend income received by the Stanlib Fund would be exempt in terms of section 10(1)(k) of the Act and that no interest would arise in the hands of the Stanlib Fund as a result of the transactions.'

The ruling sought included the following:

'that the Dividend income received by the CIS will be exempt in terms of section 10(1)*(k).*

That no interest arises in the hands of the CIS in terms of either section 24J or section 24K as a result of the transactions.'

A ruling was then issued on 21 October 2003 by members of the Corporate Tax Centre of appellant that the dividends received would be exempt from tax in terms of s 10(1)*(k)* of the Act and that neither s 24J nor s 24K at the Act would apply to the transaction as set out in the statement of agreed facts.

[50] The Sanlam Dividend Income Fund similarly applied for a ruling from appellant in October 2003. The fund invested capital in a money market fund. It ceded the return on that investment to a bank in exchange for the right to dividend income which the bank had acquired. The bank did this by ceding dividend rights. In that case Sanlam had initially adopted the view that the receipt of rights to dividend constituted a separate accrual. Thereafter, there was an exchange of correspondence between Sanlam and appellant, culminating in appellant concluding that there was no separate accrual of dividend rights, whether under s 24J or otherwise. Appellant's counsel submitted that the ruling was based on the view that the receipt of the dividend right was of a capital nature and hence it could neither be taxed under the definition of gross income nor in terms of s 24J of the Act, which at the time of the ruling, provided only for the inclusion of amounts in gross income of a revenue nature. As s 24J(3) was amended thereafter to include amounts of a capital nature, appellant's counsel contended that this ruling was hardly evidence of a practice generally prevailing. However, even after s 24J was amended, appellant continued to treat the taxation of the fund on the basis of its ruling.

[51] Significantly, respondent sought a formal admission from appellant as to whether it had, up until the time of the original assessment for the 2008 and 2009 years of assessment, adopted a different approach to that contained in these rulings:

'[p]rior to and at the time when the original assessment for [KWJ's] 2008 and 2009 years of assessment were issued, [SARS] had not issued assessments on any South African taxpayer …, who had obtained, whether by cession or otherwise, rights to dividends (as contemplated in paragraph (k) of the definition of 'gross income''…), whether contingent or not, on the basis that such rights constituted a receipt or accrual of 'gross income' separate from and independent of the dividends which subsequently accrued as dividends…'.

Appellant answered that it was unable to identify any taxpayers so assessed, other than respondent and fellow subsidiaries of Investec.

[52] On 2 November 2009 appellant sent a letter to the public officer of Investec headed 'Dividend Questionnaire (Phase 1).The first paragraph thereof contained the following:

'This letter constitutes a questionnaire in relation to specific transactions prevalent in the financial services industry which contain identified tax risk from SARS's perspective. The questionnaire is applicable to transactions entered into on or after 1 January 2005.'

This awareness by appellant of the prevalence of transactions similar to that confronting this court was confirmed by Dr Matthew Marcus, a senior specialist in investigative audits on behalf of appellant, who was responsible for the revised assessments in respect of respondent's liability for tax. The following passage from his evidence under cross examination is illustrative of this awareness:

Mr Janisch: So you would accept that the Commissioner was throughout that period from 2000 through to when the last ruling was obtained, aware of the existence of dividend income funds in the market?

Dr Marcus: I would say that the people that issued the ruling were aware of it, on behalf of the Commissioner.

Mr Janisch: Yes but you've agreed with me that they were acting on behalf of the Commissioner.

Dr Marcus: That's correct.

Later in his evidence Dr Marcus was asked:

you accept that we had found five dividend income funds that operated, each of which received a similar ruling or response from SARS

Mr Janisch: each of which resulted in identical tax treatment.

Dr Marcus: That's correct
Mr Janisch: Neither SARS nor – no, SARS has not put up any adverse ruling or any indication of a dividend income fund that was treated any differently from that.
Dr Marcus: Not that I'm aware of

[53] Appellant's counsel sought to argue that, notwithstanding this evidence regarding other transactions, when it initially assessed respondent, appellant would not have been in possession of sufficient evidence to know about the cession of dividend rights and hence to levy tax thereon. This submission does not take account of the fact that the annual financial statements of respondent were submitted to appellant together with its income tax returns. In the 2008 financial statement the following appears as a note in these statements:

'12.1Investec Bank Limited (IBL) (continued)
The interest rate on the loans to IBL are as follows:
Intercompany loan – 0% payable on demand
Composite note 003B – 3 month Jibar plus 0.4%
The terms of the composite note repayments are contained in the contracts. No security was obtained as these are intergroup loans'.

[54] Thus, appellant was provided with sufficient information about the composite note in terms of which the dividend rights were ceded to respondent when it considered the original assessments issued against respondent. This information must be evaluated further in terms of the evidence of Mr Riedewaan Semaar, a consultant at the Large Business Centre of appellant. He confirmed that, as respondent had lodged a tax return in 2008 which included R151,020 749 of dividend income, respondent would have been subjected to an audit which would have included an examination of its financial statements.

[55] To return to the approach to a practice generally prevailing as set out in *SA Mutual Unit Trust*, at 539 A – B, respondent placed a significant amount of evidence before the Tax Court which showed that, in cases involving a cession of dividend rights, a consistent approach was applied by the appellant and in particular, the Large

Business Centre that was responsible for these taxpayers. For a relatively lengthy period appellant did not levy tax on these rights.

[56] Dr Marcus was candid in providing reasons for what had triggered a revised assessment in this case:

'it's obvious from the concept of the rulings that had been placed before the Court that this concept if you like or particular analysis of the transactions simply wasn't thought of at the time of the …. And I've confirmed that with discussions with some of the people that wrote those rulings. So all I meant was that that statement was the law that we applied was nothing particularly controversial or avant-garde, but I believe that when we started auditing these transactions in 2011 and onwards, whenever it was, it was the first time it had been audited'.

According to Mr Marcus, his arrival as someone responsible for dealing with these kinds of transaction prompted a reversal of the prevailing practice which had applied when the original assessment of respondent was generated.

[57] In the circumstances, respondent placed sufficient evidence before the court to require appellant to provide evidence to contradict the clear inference that otherwise must be drawn from the evidence presented by respondent That it failed to do and for this reason, the additional assessments must be set aside on the basis of proviso (iii) to s 79(1) of the Act.

Costs

[58] Given this conclusion, the only remaining issue concerns the costs order against appellant which was made by the Tax Court on the basis that, in terms of s130(1) (a) of the Tax Administration Act, appellant's grounds of assessment were unreasonable.

[59] The only reason that respondent has been successful on appeal is because of recourse to provision (iii) to s 79(1) of the Act. Were it not for the existence of a practice generally prevailing, the transaction into which respondent had entered would have been subject to tax. It was an aggressive tax scheme which sought to exploit a practice which, upon subsequent consideration of the relevant legislation, has proved to be wrong in law. Not only did it obtain a significant tax benefit from the non-taxation

of the dividend rights ceded to it, but in addition, when the actual dividends accrued, these were exempt from tax. Furthermore, respondent was entitled to receive a credit on any liability on STC of 12.5 percent that had been paid by the company declaring dividends. This STC credit could then be used to minimise any STC liability it would incur when it paid dividends to its preference shareholders.

[60] Given these significant benefits which ultimately were paid for by other taxpayers when taxes are invariably increased (or not reduced) to fill the gap created by this form of aggressive tax planning, it does not appear to be justified to mulct appellant with the costs of seeking to protect the integrity of the tax base.

[61] In the result the

1 The appeal is dismissed with costs including the costs of two counsel
2 The order of the tax court is set aside and replaced with the following order:
   ‘The appeal is upheld and the additional assessments for the 2008 and 2009 years of assessments are set aside and the appellant’s original assessments for those years are reinstated.’

D Davis
Acting Judge of Appeal

APPEARANCES

For the Appellant:	A R Sholto-Douglas SC with H Cassim
Instructed by:	State Attorney, Cape Town
	State Attorney, Bloemfontein
For the respondent:	T S Emslie SC with M W Janisch SC
Instructed by	Bowman Gilfillian, Johannesburg
	McIntyre van der Post Attorneys, Bloemfontein