THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 320/2020

In the matter between:

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

and

SPUR GROUP (PTY) LTD **RESPONDENT**

Neutral Citation: *The Commissioner for The South African Revenue Service v Spur Group (Pty) Ltd* (Case no 320/20) [2021] ZASCA 145 (15 October 2021)

Coram: NAVSA ADP and MBHA, MATHOPO and GORVEN JJA and KGOELE AJA

Heard: 17 August 2021

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Summary: Tax Law – Income Tax Act 58 of 1962 (the ITA) – whether there was a sufficiently close connection between the taxpayer's expenditure of a contribution to a trust in respect of the implementation of an employees' share incentive scheme and its income producing operations so as to qualify for a deduction under s 11*(a)* of the ITA – the connection between the contribution and the taxpayer's production not close or immediate enough to justify the deduction – SARS not precluded from raising additional assessments in respect of the taxpayer's 2005-2009 years of assessment by operation of the period of limitations provided in s 99(1) of the Tax Administration Act 28 of 2011.

ORDER

On appeal from: The Western Cape Division of the High Court, Cape Town (Ndita J, Salie-Hlophe J and Sher J sitting as court of appeal):

1 The appeal is upheld.

2 The judgment and order of the court *a quo* is set aside in its entirety and is substituted as follows:

‘(a) The appeal is upheld with costs, including the costs of two Counsel;

(b) The order of the tax court is set aside and substituted as follows: ‘The appeal is dismissed and the additional income tax assessments raised by the Commissioner in respect of Spur’s 2005 to 2012 years of assessment are confirmed.’

3 Spur is ordered to pay the costs of this appeal, such costs to include those of two counsel where so employed.

JUDGMENT

Mbha JA (Navsa ADP and Mathopo and Gorven JJA and Kgoele AJA concurring):

[1] The central question in this appeal is whether a contribution of R48 million made by the respondent, Spur Group (Pty) Ltd (Spur), to a trust established in furtherance of its employee management share incentive scheme, is sufficiently closely connected to Spur’s income

earning operations so as to qualify for a deduction under s 11*(a)* of the Income Tax Act 58 of 1962 (the ITA), in respect of Spur's 2005 to 2012 years of assessment. If it is found that the connection is not sufficiently close, a further issue that must be determined is whether the statutory periods in terms of s 99(1) of the Tax Administration Act 28 of 2011 (the TAA), for the respondent's 2005 to 2009 years of assessment have prescribed and whether the Commissioner for the South African Revenue Service (the Commissioner) is therefore precluded from raising additional assessments for those years (the prescription issue).

[2] On 29 November 2019, the full court of the Western Cape Division of the High Court (Ndita J with Sher J concurring, and Salie-Hlophe J dissenting), hearing an appeal against a decision of the Tax Court, held that the R48 million contribution to the trust was an expense 'in the production of income', and was thus deductible. In light of this finding, it was unnecessary for the majority to make any determination in respect of the prescription issue. The minority judgment held that the contribution did not qualify as expenditure in the production of income for purposes of the ITA. Furthermore, the Commissioner was not precluded from raising the additional assessments on the basis of s 99(1) of the TAA in respect of the taxpayers 2005 to 2009 years of assessment. This appeal, with leave of this Court, is directed against the conclusions reached by the majority. The background appears hereafter.

[3] Spur is the main operating entity in the Spur Group of companies. It is a wholly owned subsidiary of Spur Corporation Limited (Spur HoldCo). In 2004, the Spur Group including Spur and Spur HoldCo, resolved to implement a new share incentive scheme (the scheme), in terms of which eligible employees of Spur (the participants) were afforded the opportunity

of participating in that scheme. The purpose of the scheme was to promote the continued growth and profitability of Spur. It is common cause that the scheme came into being, after 18 months of planning, which included Spur obtaining advice in respect of the tax implications of the scheme.

[4] On 30 November 2004, in order to implement and regulate the scheme, Spur HoldCo established the Spur Management Share Trust (the trust), a discretionary trust of which, significantly, Spur HoldCo was the sole capital and income beneficiary. The Trust Deed was amended on 13 December 2010 to permit the participants to benefit from dividends received by the trust. However, Spur HoldCo remained the sole capital beneficiary.

[5] The trust, in furtherance of the scheme, incorporated Maxshell 72 Investments (Pty) Ltd (NewCo). The participants were offered the opportunity to acquire ordinary shares in NewCo (the NewCo shares) at par value (ie 1 cent each) in proportions determined by Spur HoldCo. The purchase price of the NewCo shares was settled in cash by each participant upon the issue of the NewCo shares on 15 December 2004. The participants were not entitled to deal freely with the NewCo shares for a period of at least seven years. Those participants who left Spur's employment during this period forfeited their shares, which were then re-allocated to other participants.

[6] On 7 December 2004, Spur concluded a contribution agreement with the trust in terms of which an amount of R48 471 714 (R48 million) was contributed to the trust.

[7] On 20 December 2004, after NewCo's share capital had been altered to create NewCo preference shares, the trust subscribed for 1000 NewCo preference shares for an amount equal to the aggregate of the market price of Spur HoldCo shares, amounting to approximately R48 471 714 in aggregate , to be acquired by NewCo.

[8] The 'dividend rate' of the NewCo preference shares was set at 75% per annum of the prime interest rate. This was a market-related preference dividend rate. The 'redemption date' for the NewCo preference shares was set at five years following their issue.

[9] On 10 January 2005, the share incentive scheme was formally adopted by Spur HoldCo, Spur, the trust, NewCo and Shares Buy-Back (Pty) Ltd (SBBco). NewCo applied the aggregate of the preference share subscription price ie R48 million from the trust, to purchase 8 274 043 ordinary Spur HoldCo shares from SBBco and another seller. NewCo then ceded in security and pledged the ordinary Spur HoldCo shares to the trust until NewCo had complied with all its obligations to the trust in terms of clause 11 of the Preference Share Subscription Agreement concluded between the trustees and NewCo (the preference share agreement).

[10] After the scheme had commenced operating, NewCo received dividends from time to time through its holding of the Spur HoldCo shares. NewCo retained the dividends to assist in meeting its cumulative preference share obligations towards the trust.

[11] On 18 December 2009, the directors of NewCo passed a resolution in terms of which the 1 000 NewCo preference shares, issued five years previously on 18 December 2004, were redeemed in accordance with the

preference share agreement for a total consideration of R48 471 714. In addition, the dividends that had accrued on the preference shares from the date of issue, or as calculated in accordance with the preference share agreement and amounting to R22 562 254, were to be distributed to the trust .

[12] The redemption of the preference shares and the payment of the dividends, as described above, were settled by way of NewCo distributing to the trust a total of 6 688 698 Spur HoldCo ordinary shares. The shares had a total agreed value equal to the redemption and preference dividends amount of R48 471 714 and R22 562 254 respectively.

[13] In terms of the resolution, the directors of NewCo declared a dividend of R286.27 per ordinary share totalling R28 627 000, payable on 22 December 2009 to the ordinary shareholders listed on NewCo's share register on 22 December 2009. These were the participants to the scheme. In order to pay the aforesaid amount, NewCo disposed of 1 585 345 Spur HoldCo shares to SBBco at the ten-day volume weighted average share price calculated as at close of trade on 17 December 2009. In April 2011, a further dividend of approximately R635 000 was declared and paid to the participants in the scheme.

[14] The share incentive scheme has since been terminated and NewCo was deregistered on 10 December 2012. The trust remains extant and continues to hold Spur HoldCo shares that were distributed to it by NewCo.

[15] The actual cause of the dispute in this matter occurred when Spur claimed the contribution of R48 million it made to the trust as a deduction against its income in terms of s 11*(a)* of the ITA. The claimed deduction

was spread over the period of the anticipated benefit to be derived from the payment, from and including 2005 to 2012, in terms of s 23H[1] of the ITA. The deductions were as follows: R3 462 265 in 2005; R6 924 531 for the years 2006 to 2011; and R3 462 265 in 2012.

[16] The Commissioner originally issued assessments allowing the claimed deduction. However, following an audit, the Commissioner issued additional assessments and disallowed the deductions claimed in terms of the provisions of s 11*(a)* of the ITA, and brought the deductions back into account as additional taxable income. The basis of the disallowance was that the expenditure (i.e. R48 million contribution) was not incurred in the production of Spur's income as required by s 11*(a)* of the ITA, in that '. . . there is no direct, causal link between the contribution and the production of [Spur's] income'.

[17] In disallowing the deductions, the Commissioner reasoned as follows: Spur made the contribution to the trust, of which Spur HoldCo was the sole beneficiary; Spur HoldCo was the only party to have benefited directly from the contribution to the trust in that it would receive the investment in the NewCo preference shares ie the contribution of R48 million and the preference share dividends at the time when NewCo redeemed the NewCo preference shares; and the trust distributed the preference share capital and the preference share dividends to its beneficiary, Spur HoldCo. The participants, the Commissioner concluded, were thus not the beneficiaries of the contribution. The causal link referred to at the end of the preceding paragraph was thus lacking.

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[1] Section 23H refers to prepaid expenses. It limits the deduction of an expense where none of the benefits (or part of the benefits) arise in the years of assessment. The general rule is that one cannot prepay business expenses for a future year and deduct them from the current year's taxes.

[18] The majority in the court *a quo* was satisfied that Spur had established a sufficiently close connection between the contribution and Spur's income earning operations. The majority found that the purpose of the expenditure, ie the contribution of R48 million, directly served to incentivise the participants, key managerial staff, and to promote the continued growth of Spur. As such, it was expenditure incurred in the production of the income of Spur.

[19] In arriving at its finding, the majority relied on the evidence by Spur's witnesses, namely, Mr Alan Field (Mr Field), a tax practitioner at KPMG, and Ms Ronel van Dyk (Ms van Dyk), the chief financial officer and a director of Spur, who testified that the object and purpose of the scheme was to provide an incentive to the participants and promote the growth of Spur. It found that their evidence unequivocally established that the scheme had achieved its intended purpose. The majority in the court *a quo* had regard to the submission on behalf of SARS that the purpose of the contribution could just as easily have been to retain the money within the Spur Group and rejected it. They held that the dominant purpose was, as testified to by Mr Field and Ms van Dyk, in line with prevailing authority, and that the deduction was therefore justified.

[20] Before us, the Commissioner submitted that the contribution was not expenditure incurred in the production of Spur's income as required by s 11*(a)* of the ITA, and that there was only an indirect and insufficient link between the expenditure and any benefit arising from the incentivisation of Spur's key staff. Thus, it would not be proper, natural and reasonable to regard the expense as a justifiable deduction.

[21] On the other hand, it was submitted on Spur's behalf, *inter alia*, that, on the evidence, the dominant purpose in the establishment and implementation of the scheme was to protect and enhance Spur's business and its income by motivating its management employees to be efficient, productive and remain in Spur's employ. That the incentive offered to and in fact received by such employees was the financial benefits, which would flow from the success of Spur's business and the growth in the value of the shares in Spur HoldCo, cannot detract from the fact that the expenditure was incurred by Spur for the purpose of earning income. In summary, Spur's case was that the expenditure made in order to establish and implement the scheme was so closely linked to the acts required to be performed to produce Spur's income, that it constituted part of the cost of performing those income-producing acts.

[22] Section 11*(a)* of the ITA provides as follows:

'**11. General deductions allowed in determination of taxable income**

For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived –

(a) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature.'

[23] It was common cause that expenditure was actually incurred and that it was not of a capital nature. The sole issue for determination by this Court is accordingly whether the court *a quo* correctly held that there was a sufficiently close causal link that existed between Spur's expenditure of the contribution and its income producing operations.

[24] The law governing the approach to be adopted when determining whether an expense was incurred in the production of income, as

contemplated in s 11*(a)* of the ITA, is clear. In *Port Elizabeth Electric Tramway Co Ltd v Commissioner for Inland Revenue (PE Tramway),*[2] Watermeyer J explained the position as follows:

'[I]ncome is produced by the performance of a series of acts, and attendant upon them are expenses. Such expenses are deductible expenses, provided they are so closely linked to such acts as to be regarded as part of the cost of performing them.

A little reflection will show that two questions arise (a) whether the act, to which the expenditure is attached, is performed in the production of income, and (b) whether the expenditure is linked to it *closely enough*.' (Emphasis added.)

[25] Clearly, there must be a sufficiently close connection or link between the expenditure and the income earning operations of a taxpayer. The determination of whether the necessary link exists will require an examination of all the facts of a particular case. In this regard, Corbett JA's *dictum* in *Commissioner for Inland Revenue v Nemojim (Pty) Ltd,*[3] is apposite:

'It is correct . . . that in order to determine in a particular case whether moneys outlaid by the taxpayer constitute expenditure incurred in the production of income important, sometimes overriding factors are the purpose of the expenditure and what the expenditure actually affects.'

Corbett JA then quoted with approval Schreiner JA's *dictum* in *Commissioner for Inland Revenue v Genn and Co (Pty) Ltd,*[4] where he said the following:

'In deciding how the expenditure should properly be regarded the Court clearly has to assess the closeness of the connection between the expenditure and the income-earning operations, having regard both to the purpose and to what it actually effects.'

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[2] *Port Elizabeth Electric Tramway Co Ltd v Commissioner for Inland Revenue (PE Tramway)* 8 SATC 13 at 16.

[3] *Commissioner for Inland Revenue v Nemojim (Pty) Ltd* 1983 (4) SA 935 (A) at 947F-H; 45 SATC 241 at 254.

[4] *Commissioner for Inland Revenue v Genn and Co (Pty) Ltd* 1955 (3) SA 293 (A) at 299G; [1955] 3 All SA 382 (A) at 386; see also A de Koker *et al Silke on South African Income Tax* vol 1 para 7.8.

[26] Importantly, Schreiner JA explained that:

'If I am right in understanding the words "they may be regarded" as connoting that it would be proper, natural or reasonable to regard the expenses as part of the cost of performing the operation this passage seems to state the approach to such questions correctly. Whether the closeness of the connection would properly, naturally or reasonably lead to such treatment of the expenses must remain dependant on the Court's view of the circumstances of the case before it.'[5]

[27] What can be gleaned from the authorities referred to above is that the deductibility of expenditure in terms of s 11*(a)* of the ITA is dependent upon two criteria that must be considered on the particular facts of the case. First, the purpose of the taxpayer in incurring the expenditure in question, and whether the purpose was to produce an income. Second, whether a sufficiently close nexus or link exists between the expenditure and the ultimate production of income. These criteria clearly establish that a mere existence of a nexus or link between the expenditure and the earning of income is not, on its own, sufficient to justify a deduction under s 11*(a)* of the ITA. A taxpayer must show an adequate closeness between the expenditure and the production of income.

[28] It was submitted that the contribution by Spur to the trust effected this purpose by providing the necessary funds to the trustees. In the result, there was a sufficiently close causal link therefore existed between Spur's expenditure of the contribution and its income producing operations.

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[5] *Commissioner for Inland Revenue v Genn and Co (Pty) Ltd* fn 4 above at 299C-D1. To rank as a deduction, the expenditure must not only have been incurred for the purpose of earning income as defined, but there must be a sufficiently distinct and direct relationship or link between the expenditure incurred and the actual earning of the income. These restrictive tests result in the disallowance of a vast number of business expenses that are necessarily incurred in carrying on business but fail to satisfy a requirement that they be laid out for purposes of earning income.

[29] Finally, it was submitted that although Spur foresaw that Spur HoldCo would potentially also benefit from the redemption of the NewCo preference shares, this did not negate Spur's purpose and intention. Such purpose and intention, so it was submitted further, was actually effected by the scheme insofar as the value of NewCo shares increased significantly and this benefit, together with the dividends declared by NewCo on the remaining Spur HoldCo shares following the redemption of the preference shares, actually accrued to the participants.

[30] The detail of how the scheme was established and implemented is set out above. Clearly the contribution of R48 million by Spur to the trust was central to the scheme. However, the participants did not benefit directly, and even indirectly for that matter, from the making of the contribution. Ms van Dyk, testifying for Spur, confirmed as much. She went further in confirming that as at the date of hearing in the court below, that '[t]he 48 million in the form of now Spur Corporation shares is still sitting in the trust *so directly they [the participants] have not benefited from the 48 million*'. (Emphasis added.)

[31] The contribution of R48 million was used, wholly, to subscribe for preference shares in NewCo. Only the trust held the NewCo preference shares, and only *it* was entitled to the return of the R48 million contribution, plus the preference dividend on those shares. The participants had no right to any part of the contribution, nor to the preference dividends that flowed from the investment thereof. Ms van Dyk testified that the fact that the scheme did not permit the participants to share in the R48 million contribution made by Spur to the trust, was known to her as a participant.

[32] Importantly, in terms of the trust Deed, only Spur HoldCo would, as capital beneficiary, have any right to the ultimate delivery of the R48 million contribution and any yield therefrom. The participants were neither capital nor income beneficiaries of the trust at that stage. It must be noted, however, that they might have become entitled to dividends accruing to the trust from 2010 onwards, following upon an amendment to the trust deed to this effect. However, this latter fact is irrelevant as the concern must obviously be in relation to what was done when the contribution of R48 million was made in 2004.

[33] The indisputable factual position therefore is that the participants benefitted directly from their separate investment, at par value in ordinary shares in NewCo. Mr Field confirmed that '. . . [t]he participants benefited through NewCo. There was no ways they could directly benefit from the trust. There had to be funding that flowed through to NewCo, and they would then benefit in their participation in NewCo.'

[34] There was a potential benefit to the participants which lay in the possibility of growth in the value of the NewCo ordinary shares. That would in turn arise to the extent that the value of NewCo's assets, namely, the Spur HoldCo shares in which NewCo invested, increased above what was required by NewCo to meet its redemption and preference dividend obligations to the trust. Furthermore, the participants were not exposed to the risk of a decrease in the price of Spur HoldCo shares. NewCo bore this risk. The participants, who had only invested nominal amounts for their shares, could not lose anything more than the nominal amounts.

[35] However, as was confirmed by Mr Field in his testimony, the contribution by Spur was in effect a funding mechanism for the scheme,

which was to remain in place for most of the duration of the scheme. The purpose was always for the R48 million to remain within the Spur Group and not to transfer it to the benefit of the participants. As shown above, that is ultimately what the contribution achieved, ie the R48 million was returned to the trust where it still resides, in the form of shares, with Spur HoldCo as the sole capital beneficiary.

[36] In my view the majority erred in finding that the expenditure directly served the purpose of incentivising the participants, and that a sufficiently close nexus existed between the expenditure and the production of income by Spur. As demonstrated earlier, the R48 million contribution did not itself serve to incentivise the participants. It was an amount that would never accrue to the participants. Instead, it ultimately became available for the benefit of Spur HoldCo as the capital beneficiaries of the trust.

[37] In *Solaglass Finance Co (Pty) Ltd v Commissioner for Inland Revenue*,[6] this Court made it clear that the deduction of expenditure in relation to monies spent for the purposes of advancing the interests of the group of companies to which the taxpayer belongs is precluded.

[38] Applying *PE Tramway*, I find that the purpose of Spur in incurring the expenditure was not to produce income, as required by s 11*(a)* of the ITA, but to provide funding for the scheme, for the ultimate benefit of Spur HoldCo. There was only an indirect and insufficient link between the expenditure and any benefit arising from the incentivisation of the participants. The contribution was therefore not sufficiently closely

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[6] *Solaglass Finance Co (Pty) Ltd v Commissioner for Inland Revenue* 1991 (2) SA 257 (A); [1991] 1 All SA 339 (A); See also *Warner Lambert SA (Pty) Ltd v Commissioner, South African Revenue Service* 2003 (5) SA 344 (SCA) para 11.

connected to the business operations of Spur such that it would be proper, natural and reasonable to regard the expense as part of Spur's costs in performing such operations.

[39] It now becomes necessary to deal with the prescription issue. This relates to additional assessments that the Commissioner made on 28 July 2015 in respect of Spur's 2005-2009 years of assessment. The original assessments were raised on 31 May 2007 (2005), 7 August 2007 (2006), 12 May 2009 (2007), 24 February 2010 (2008) and 16 January 2010 (2009).

[40] Spur contended that the Commissioner was precluded from issuing the additional assessments in respect of the 2005-2009 years of assessment by virtue of the provisions of s 99(1) of the TAA. The complaint is that the additional assessments were raised after the period of three years from the date of the original assessments.

[41] Section 99(1) of the TAA provides that the Commissioner may not make an assessment three years after the date of the original assessment by SARS. However, s 99 (2)*(a)* of the TAA, provides that the Commissioner is not bound by the three-year period of limitation where '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.'

[42] The Commissioner avers that the amount of tax chargeable in terms of the additional assessments were not so assessed by SARS in the

2005- 2009 years of assessments due to misrepresentation and non-disclosure of material facts by Spur. This claim was specifically formulated as follows in SARS' finalisation of audit letter (i.e. the letter of assessment) dated 28 December 2015:

'As a result of the misrepresentation and non-disclosure in the tax returns the Commissioner was unable to make a full and proper consideration of the tax consequences of the Contribution and the share incentive scheme. These misrepresentations and non-disclosures therefore caused SARS to assess the Taxpayer on a different basis to what it would have assessed had the facts been properly disclosed in the tax years.'

[43] It is common cause that Spur, in submitting its 2005 income tax return, (IT14), answered 'no' to the following questions:

'Were any deductions limited in terms of s 23H?;

. . .

Did the company make a contribution to a trust?

. . .

Was the company party to the formation of a trust during the year?'

[44] In the 2006 income tax return, Spur answered 'no' to the question: 'Were any deductions limited in terms of s 23H?'

[45] Lastly, in each of the 2005-2008 income tax returns, the amount of deductions claimed in respect of the contribution, which were limited by s 23H of the ITA, were disclosed by Spur under the category 'other deductible items' and not under the line item 'prepaid expenditure (as limited by s 23H)'.

[46] Spur's defence to the allegation of misrepresentation and non- disclosure of material facts was that the aforesaid statements were negligently and inadvertently made. Spur also asserted that the Commissioner failed to establish the requisite causal nexus, in that it is unclear how Spur's inadvertent and incorrect disclosures would have altered the basis of the Commissioner's assessment in the affected years. Spur submitted that as the onus to establish a causal nexus to displace the statutory immunity conferred by the TAA has not been met, the additional assessments issued in respect of Spur's 2005-2009 years of assessment were unlawful, invalid and cannot be confirmed.

[47] With regard to SARS auditing system, in terms of which a taxpayer's return is initially accepted at face value and an assessment is issued accordingly, whereafter during the ensuing three years the return and assessment must be reconciled, Spur submitted as follows: No SARS official applied his or her mind to the assessments issued for the 2005-2009 tax years and no audit was performed within three years after the aforesaid assessments had been raised. Had SARS done so, it would have become aware of the contribution made in respect of the scheme and the deduction. Furthermore, it was not the errors made in response to the questions raised in the tax return forms which caused SARS to assess Spur on a different basis and to allow the deductions claimed, but rather the decision by SARS not to consider the tax returns and supporting documents filed, namely, Spur's annual financial statements, and not performing an audit despite answers to the other questions in the tax returns raising red flags.

[48] Spur's assertion that the wrong entries in the tax returns were negligent and inadvertent is patently false. Central to this entire dispute is the contribution of R48 million that Spur made to the trust in 2005. The

answer 'no' to the question whether any contribution was made to a trust or whether the company was party to the formation of a trust, is, in my view, plainly false and a misrepresentation. These were questions pertinently, and for tax purposes, seriously raised. It required specific attention and an honest answer. Strikingly, the answers were repeated.

[49] In each of the 2005 to 2009 years of assessments, deductions claimed by Spur were in fact limited in terms of s 23H of the ITA. It simply boggles the mind that Spur answered 'no' to the relevant question for each and every subsequent year from 2005 to 2009. Moreover, Spur's failure to include the said amounts in a separate line item which specifically required a disclosure of deductions limited by s 23H, and their inclusion in a general line item, amounts in my view, to a deliberate misrepresentation and a non- disclosure of material facts. It simply could not, by any stretch of imagination, be ascribed to any inadvertent error.

[50] Similarly, Spur's answer 'no' to the question whether a trust had been formed, was also plainly false and a misrepresentation. Spur was intimately involved in the conceptualisation of the share incentive scheme. In its letter of objection, under the heading '***Background information***', on its version it stated that '[t]he Spur Group (which, for the purposes of this objection, includes [Spur]) . . . resolved, in 2004, to implement the Spur management incentive share scheme . . .'. It follows that it cannot be said that Spur was not involved in the formation of the trust.

[51] Spur's attempt to put the blame for the so-called errors in the entries on a new accountant, Ms Novos, who had recently taken over the role, on the basis that she was not fully appraised of the details of the scheme, cannot succeed. First, Ms Novos was never called to testify in the court *a*

quo on this aspect. Second, Ms van Dyk, as Spur's public officer, signed off the relevant tax returns as being correct.

[52] Spur's further argument that the Commissioner had all the relevant and correct facts at his or her disposal because Spur's annual financial statements were submitted together with the tax returns, and that the correct information could be distilled from them, is unhelpful. The mere fact that an astute auditor or assessor could have been able to ascertain from supporting documentation the fact that the return contains a misrepresentation, cannot mean that there is no misrepresentation in the first place.

[53] It is trite that SARS bears the onus to show that the non-assessment within the requisite three-year period was the result of the aforesaid misrepresentation and non-disclosure referred to earlier. In addressing this issue, it is apposite to consider SARS' relevant internal processes in the years in question pertaining to the making of original and additional assessments.

[54] SARS led the evidence of Mr Venai Singh (Mr Singh), a senior manager in its Large Business Centre. Mr Singh testified that until 2009, returns were completed and filed manually which were then captured into SARS computer system by a data-capturer. An original assessment would then be issued on the basis of the captured information. From 2009 onwards, the SARS e-filing system was introduced and returns are now filed electronically. The system now assesses the returns electronically, without any human intervention.

[55] It is clear from Mr Singh's testimony that the making of the original assessment is not the outcome of anything more than the capturing and processing of the information provided by the taxpayer in its return. The process was one of SARS accepting such return at 'face value', and issuing an original assessment (IT34). I pause to mention at this stage that it must be kept in mind that the basic legal requirement is that taxpayers must submit an annual return of income in terms of s 25(1) of the TAA, which return is required by s 25(2) of the TAA to be 'full and true'. Furthermore, the return itself requires the public officer to make a declaration, *inter alia*, that the information and particulars furnished in the return are true and correct. In this regard, Spur's returns for the 2005 to 2009 years of assessment, contain a statement just after the signature of the public officer, that 'it is a serious offence to make a false declaration or fail to render a return within the prescribed period'.

[56] The issue of face value assessments was recognised in *Commissioner for Inland Revenue v Mutual Unit Trust Management Company Ltd*,[7] in the context of a defence of a 'practice generally prevailing'. The court accepted that the return can thereafter be reconsidered more thoroughly in the three-year period following the original assessment.

[57] Mr Singh testified that only the tax return, and not any supporting documents or schedules, is taken into account for purposes of issuing an original assessment. Clearly, the integrity of the SARS assessment process depends largely on the correctness of the information provided in the

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[7] *Commissioner for Inland Revenue v SA Mutual Unit Trust Management Company Ltd* 1990 (4) SA 529 (A); 52 SATC 205.

return, and on SARS' ability to conduct audits of returns in the ensuing three-year period to ensure a proper tax treatment.

[58] Mr Singh further testified that typically in a day, over one hundred thousand returns would be received at SARS. As such, it was not possible for the auditors to perform a manual check of every return to ensure that it did not contain any errors. Instead, the tax return contains various rand value fields and specific questions which were inserted deliberately. These questions were so called triggers, depending on the manner in which the questions were answered by the taxpayers. Mr Singh explained how these triggers were activated and how risks were assessed.

[59] According to Mr Singh, should a trigger arise when a particular code is activated, further steps would then be taken and the matter could either be resolved at that stage or could proceed to an audit. Thus, the 'yes' or 'no' questions included for the purposes of identifying a specific risk relative to the question asked.

[60] The Commissioner submitted that in the present case a 'yes' answer to the s 23H question, and to the question whether a contribution was made to a trust, are risk factors which, according to Mr Singh's testimony, would have triggered a risk alert for SARS at the time when the returns were submitted for the relevant year of assessment. Mr Singh's evidence makes perfect sense. I am satisfied that a 'no' answer to these questions would not, accordingly, have triggered a risk alert for SARS.

[61] SARS was thus not alerted to the existence of the 2004 and 2005 share scheme transactions and particularly the contribution of R48 million. This persisted until the true position was picked up in the course of an audit,

which was only in respect of the 2011 tax year, but was extended to the 2010 and 2012 tax years, and later to the 2005 to 2009 tax years. The audit gave rise to the additional assessments, which are the subject of this appeal.

[62] Spur accepted that false statements were contained in the returns. Against that, it contended that scrutiny of the financial statements and a more alert auditing process would and should have ensured a proper assessment within the prescribed period. It overlooked the face value assessment process understandably undertaken by SARS. Audits are implemented because of triggers caused by specific answers in tax returns. If the questions that would give rise to the triggers are wrongly answered, as happened in this case, the matter may not come before an auditor within the three-year period, and the clarification questions will therefore never be asked.

[63] I should also add that as a matter of policy, a court would be loath to come to the assistance of a taxpayer that has made improper or untruthful disclosures in a return. Clearly, this would offend against the statutory imperative of having to make a full and proper disclosure in a tax return.

[64] In light of what I have stated above, I therefore find that the misrepresentations and non-disclosures by Spur caused the Commissioner not to assess Spur correctly within the three-year period after the original statements. I accordingly make the following order:

1 The appeal is upheld.

2 The judgment and order of the court *a quo* is set aside in its entirety and is substituted as follows:

‘(a) The appeal is upheld with costs, including the costs of two Counsel;

(b) The order of the tax court is set aside and substituted as follows:

'The appeal is dismissed and the additional income tax assessments raised by the Commissioner in respect of Spur's 2005 to 2012 years of assessment are confirmed.'

3 Spur is ordered to pay the costs of this appeal, such costs to include those of two counsel where so employed.

B H Mbha

Judge of Appeal

APPEARANCES:

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