

SOUTH AFRICA / JUDGMENT

ABC Trading CC v Commissioner of the South African Revenue Services (1712)

[2020] ZATC 6; 83 SATC 60 (29 April 2020)

[2020] ZATC 6

COURT

Tax Court

BEFORE

Windell, S. Makda, L. Luvono

CASE / FILE NUMBER

VAT 1712

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REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT MEGAWATT PARK, JOHANNESBURG)

CASE NO: VAT 1712

In the matter between:

ABC TRADING CC

Appellant

and

COMMISSIONER OF THE SOUTH AFRICAN

REVENUE SERVICES

Respondent

JUDGMENTBefore: Windell J (President); Ms S. Makda (Accountant member); Prof. L. Luvono (Commercial member)

INTRODUCTION

[1] The appellant, ABC Trading CC (“ABC Trading”), appeals

against Value Added Tax (“VAT”) assessments that the Commissioner for the South African Revenue Services (“SARS”)

issued pertaining to two tax periods. The first tax period ran from August 2014 to March 2015, and the second tax period ran from

December 2015 to March 2016. This judgment deals with the first period.

- [2] ABC Trading is a registered micro refinery with the Diamond and Precious Metal Regulator of the Republic of South Africa (“the Regulator”), and is a registered VAT vendor. The nature of its business is the smelting, assaying and trading of gold and other precious metals. ABC Trading buys gold products from suppliers, who are also VAT vendors, and to whom it pays input VAT as required by the Value Added Tax Act 89 of 1991 (“the VAT Act”). ABC Trading then smelts the gold product, pours the molten liquid into moulds to ultimately produce gold bars. ABC Trading then sells the gold bars to its customers.
- [3] ABC Trading alleges that, during the first VAT period August 2014 to March 2015 (hereinafter referred to as “the VAT period”) it regularly bought gold jewellery from, amongst others, two suppliers, X Gold Trading CC and Z Gold Trading CC (hereinafter referred to as “X Gold” and “Z Gold”). These two entities were, at all relevant times, VAT vendors and tax invoices were provided in respect of each batch of gold jewellery

provided by Z Gold and X Gold to ABC Trading during the VAT period. It is common cause that ABC Trading was permitted to issue “recipient-generated tax invoices” in accordance with the provisions of Interpretation Note 56 (dated 30 March 2014), read with General Binding Ruling VAT No 15 (dated 31 March 2014) issued by SARS.

- [4] During the VAT period ABC Trading submitted eight VAT returns to SARS in respect of which it claimed VAT refunds in terms of section 1 and 16(2) of the VAT Act. The VAT 210 returns reflected that ABC Trading was in a VAT refund situation for each of the returns that it rendered during this period. SARS at first verified the VAT returns in issue and allowed the input tax deductions that ABC Trading claimed, and issued assessments reflecting a refund position in the aggregate amount of R25 966 161.83. In May 2016 SARS however referred the returns in question to a post-verification audit and an auditor was appointed in August 2016 to conduct an investigative audit into the affairs of ABC Trading.
- [5] The investigative audit was finalized on 16 November 2016. SARS issued a letter of “Audit Findings” informing ABC Trading of the outcome of the audit and proposed adjustments which would be made to the assessments. The result of the audit investigation was that, although all the requested invoices were supplied by ABC Trading together with proof of payment, SARS could not satisfy itself that the tax invoices were valid and that supplies actually took place between the vendor, ABC Trading, and the suppliers, X Gold, Z Gold as well as an entity by the name of K Gold. as provided for in section 1 and 16(2) of the VAT Act. As such SARS notified ABC Trading that it intended to disallow the input tax claimed (hereinafter referred to as “the supply dispute”). Furthermore, the investigative audit revealed that ABC Trading did not declare deemed output tax on a fringe benefit during the second VAT period (hereinafter referred to as “the fringe benefit dispute”). The fringe benefit dispute is dealt with in a separate judgment.

- [6] On 7 March 2017 SARS notified ABC Trading that, as far as K Gold was concerned, it had accepted ABC Trading's representation and would therefore not raise any assessment in relation to K Gold. But, as far as Z Gold and X Gold were concerned, it was not satisfied that the entities existed and conducted an enterprise, and that supplies actually took place between ABC Trading and these two suppliers. SARS raised additional assessments in respect of the 2014/08 - 2016/03 VAT periods, in terms whereof input tax was disallowed and output tax on the deemed fringe benefit raised. SARS was requested to furnish reasons for the assessments raised. On 25 April 2017 SARS gave written reasons for, inter alia, disallowing the invoices pertaining to X Gold and Z Gold. On 13 June 2017 ABC Trading filed an objection against the additional assessments raised and, on 25 July 2017, SARS notified ABC Trading that the objection had been fully disallowed. On 5 September 2017, ABC Trading filed a notice of appeal against SARS's decision to disallow the input tax deductions for the VAT periods.
- [7] The subject of this judgment and the factual issue that needs to be determined is the "supply dispute". The question is a simple one: did X Gold and Z Gold make supplies to ABC Trading during the VAT periods? Several witnesses testified on behalf of ABC Trading and SARS, and the hearing stretched over a period of two weeks. Ten bundles containing, inter alia, records of the alleged transactions were filed and hundreds of invoices, photographs and documents were dealt with during evidence. I am grateful to counsel for their extensive heads filed in this matter which were of great assistance to this court.

THE EVIDENCE

- [8] ABC Trading has the onus to prove that the supplies were delivered by X Gold and Z Gold during the VAT period and that it traded with these two

entities. To discharge the onus resting upon it, ABC Trading called three witnesses: Mr M, ABC Trading's only member ("Mr M"); Mr H, an employee of ABC Trading and the person responsible for the assaying and smelting of the gold jewellery ("Mr H") and Ms S, an employee of ABC Trading, and the person responsible for the day-to-day running of ABC Trading's business. SARS called Mr EF, the principal auditor/operational specialist at SARS Investigative Audit Division and the person responsible for

conducting the audit that gave rise to the assessments and for the disallowance of the various objections; Mr L, the manager of a cash-in-transit transit business called K Movers Trading 10 CC ("K Movers"); and Mr C, an employee at SARS. This court was also placed in possession of affidavits filed on behalf of ABC Trading and SARS in various High Court applications brought by ABC Trading against SARS.[1]

- [9] From the evidence presented, ABC Trading's modus operandi during the VAT periods was the following: when the suppliers brought their goods to ABC Trading to sell, Mr H weighed the jewellery in the presence of the supplier and allocated a serial number to the lot. The serial number was obtained from the administrative personnel. The only people allowed to sell to ABC Trading were the people that were pre-screened and approved by Mr M. They

had to complete a “trading application” and had to provide their company name, company documents, their second-hand goods license,[2] bank details, and VAT documents. They also had to provide him with the address from where they were trading from.

- [10] Mr H then took a photo of the jewellery on the weighing scale with the allocated number. (Mr H and Ms S testified that ABC Trading started taking photos of the goods brought in by the suppliers in 2014 after the Regulator gave such an instruction). The smelting process commenced which took between 20 and 30 minutes. During this process the goods were smelted and poured into moulds to produce gold bars weighing between 1 to 15 kilograms. The gold bars took about

four minutes to set. At that time the gold bar received the same unique number as the lot jewellery and Mr H would then take a second photo, this time of the gold bar and the number.

- [11] All purchases and sales of gold effected by ABC Trading were linked to the daily Gold price at the time the transaction was concluded. It was, therefore, important for ABC Trading to determine the gold content of the jewellery. A special “gun” was used for this purpose to take readings to establish the percentage of the Au, the symbol which denotes gold in the periodic table, in the bar.[3] Next, Mr H wrote down the bar number, the weight of the gold bar as well as the fine weight (the content) on a piece of paper, which the supplier provides to the administrative personnel. ABC Trading then purchased the gold at a price linked to the spot gold price on the day of the transaction, and a provisional payment was made to the supplier constituting approximately 95% of the value of gold bar. (The balance of the purchased price was paid once ABC Trading had onward sold the gold bars to its customers and had received the final assay report from its customers).

- [12] The gold bars were kept in a safe until it was transported to ABC Trading’s customers. The customers, at the time were, inter alia, V CC, F Refinery, and W Entity. Mr H, and occasionally Ms S, transported the gold bars to ABC Trading’s customers. A waybill, as well as a declaration, accompanied the gold bars.

- [13] The waybill and the declaration were generated by Ms S. The waybill had a date, the gold bar numbers, and the gross weight and fine weight of each gold bar. The date on both the declaration and the waybill was the date on which the gold was delivered to ABC Trading’s customers. The only time the gold bars were delivered to the customers on a date later than the date reflected on the waybill, was when the paper work from the administrative personnel was received too late for delivery. (The gold bars had to be delivered to the customers before 5pm.) The wording used in the declaration was

received from W Entity and was an important document in the event of a robbery or hijacking whilst transporting the gold bars. The gold bar numbers on the declaration corresponded with the gold bar numbers on the waybill.

- [14] Gold bars were also exported to a company in Switzerland, called RT Trading. The exports were dealt with exclusively by a specialist armored transporter, namely, BB (Pty) Ltd.

[15] The evidence showed that during the VAT periods in dispute, ABC Trading mostly on- sold the gold bars to W Entity. When the gold bars arrived at the customer, for example W Entity, the gold bars were weighed and the percentage of gold was determined by performing an initial assay reading which, in the evidence of Mr H and Ms S, corresponded to the assay reading performed by Mr H. The preliminary assay was then sent by W Entity to ABC Trading electronically, and would contain the basic information upon which ABC Trading would prepare a “pro forma” invoice to W Entity. It was a “pro forma” invoice because it did not contain final amounts, and a final tax invoice could be prepared only once the final assay readings had become available from the laboratory of W Entity. W Entity would pay 95% of the ABC Trading “pro forma” invoice into the latter’s bank by electronic funds transfer and from those funds ABC Trading made the first, 95% payment to the relevant supplier. Later in the week, W Entity would then issue a final assay to ABC Trading, stipulating and confirming the final fine weight and purity of the gold bars. Once the final assay reading had been received, ABC Trading could issue its tax invoice to W Entity, and it would then receive the final payment from W Entity. W Entity, and all the other customers, never paid ABC Trading in cash. They always made payment into ABC Trading’s account. The same procedure also applied if the gold bars were sold to V CC, F Refinery and RT Trading.

[16] On receipt of payment from its customers, ABC Trading then paid the balance of the invoices due to the suppliers of the gold jewellery and issued tax invoices to the suppliers (some suppliers generated their own invoices). Ms S testified that the suppliers were pawn shops and gold shops and they, in most instances, wanted cash. Payment to the suppliers was, therefore, mainly effected via two cash-in-transit companies, namely, K Movers and D Transporters, who later changed its name to KMD. The arrangement

with the cash-in-transit companies was as follows: money was transferred into the bank account of the cash-in-transit company. Ms S would then send an email to the cash-in-transit company advising them as to the name of the supplier and the amount to be paid. She would then call the supplier to inform them that she had paid the money over to a cash-in-transit company. The supplier would then make the necessary arrangements with the cash-in-transit company for the money to be delivered to them. The crediting of the cash transporter’s bank account meant that payment to the supplier had taken place. Ms S testified that ABC Trading also had a fair amount of cash available on its premises that was used to pay suppliers with. ABC Trading’s bank account reflected payments made to the cash- in-transit companies but no paperwork from the cash- in-transit company was available during the trial.

[17] As stated earlier, Ms S fixed the price of the gold every day. This was done by phoning either V CC, F Refinery, or W Entity. It depended to whom ABC Trading was going to sell to on that particular day. ABC Trading paid the suppliers the fixed price, less 5% plus VAT. W Entity paid ABC Trading the spot price less 3% plus VAT and V CC would pay ABC Trading the spot price, less 3, 5% plus VAT. (The serial number given to a gold bar also depended on which customer they would sell to on that day. For instance, “DT” stood for RT Trading, the external buyer, “DG” was indicative of W Entity, “AR” for V CC , “JG” for F Refinery and

“GKT” (ABC Trading) for “Smalls”, i.e. amounts less than 1 kilogram which had to be held over to be smelted into a bar together with other gold.)

- [18] Every step, from the bringing in of the gold, until payment to the cash-in-transit company, was documented. This was summarized in “Exhibit A” and handed up during the trial. During argument, ABC Trading made available an updated version of “Exhibit A”. The updated version includes a recordal of the transactions reported to the Regulator that was prepared by ABC Trading’s legal team and handed in to the court in an attempt to make sense of all the documents contained in the transaction files. Mr H testified that he received each and every supply to which an individual number was allocated and Ms S testified on the process followed with each gold bar, supported by the necessary document, until the final invoice was issued.
- [19] Ms S and Mr M testified that during the VAT periods, and in accordance with its business practice, ABC Trading purchased gold jewellery from, inter alia, X Gold and Z Gold, who were both trading at the time. Both Z Gold and X Gold requested payment in cash. Z Gold and X Gold were at all relevant times duly registered for VAT that it paid to its supplier’s vendors. If they made supplies to ABC Trading, ABC Trading was obliged to pay for the supplies plus VAT. Seen from ABC Trading’s perspective, the VAT that it paid to its suppliers is the “Input VAT” contemplated in section 16(3) of the VAT Act. ABC Trading could then set-off the paid input VAT against the output VAT that it received from its customers.
- [20] ABC Trading conducted a substantial business during the VAT periods. A schedule (handed up as “Exhibit B”) set out the supplies and sales by the number of transactions (gold bars in the case of sales) and value. It shows that the supplies over the eight VAT periods, inclusive of VAT was R1 545 144 535.60. The disputed supplies by Z Gold and X Gold make out 13% percent of the total viz. R20 078 950.51 in the case of X Gold and R3 706 188.46 in the case of Z Gold.
- [21] ABC Trading was established by Mr M in 2006. Mr M testified that his duties involved attending to queries from suppliers, sourcing new clients and keeping relationships with current clients and suppliers.

He testified that his sister, Ms S, was mainly responsible for the day-to-day running of the business. He denied that there was no supplies from X Gold and Z Gold during the VAT period and he testified that all the transactions conducted by ABC Trading were reported to the Regulator. In this regard, he explained that he had to keep a register of all the transactions and had to give the Regulator a quarterly report. The register was made available during the trial and shows that reports were sent to the Regulator during the VAT period. The register reflects all the suppliers ABC Trading purchased from, as well as to whom ABC Trading sold to. The names of X Gold and Z Gold, together with the amounts paid to them, were clearly reflected in the register. The register also shows the names of W Entity, F Refinery, RT Trading and V CC as customers ABC Trading sold to.

[22] Mr M further confirmed that it was customary for the cash-in-transit companies to deliver cash to the suppliers, and on some occasions the cash was delivered to the supplier at ABC Trading's premises.

He testified that ABC Trading stopped trading in November 2018, but that the Entity still exists. A new company known as JK Metal was established by him in 2018.

[23] Ms S was employed by ABC Trading from 2014 to 2017. She was the person responsible for the administrative duties at ABC Trading. Prior to joining ABC Trading she had her own business, D Transporters, a shop that dealt in second-hand goods and gold jewellery. In fact, D Transporters used to sell gold jewellery to ABC Trading. She gave up the business in around 2013/2014 but kept the company. After she joined ABC Trading in 2014, Ms T, who at that stage worked at K Movers, bought D Transporters from her and changed the business to that of a cash-in-transit company (now KMD). Mr M was also involved in KMD. He loaned money to KMD after Ms T took it over from Ms S and in return he acquired shares or an interest in KMD. He testified that he was, however, never involved in the running of the company and that since 2016 he is no longer involved in KMD.

[24] Ms S testified that she has been in the second hand gold industry for at least eighteen years. As a result, she knew all the role players. She testified that Z Gold was owned by her sister-in-law, Ms MM, who is married to her other brother, Mr NM. X Gold was owned by her friend and business associate, Mr DD and Mrs. Q.

[25] She met Mr DD in 2004. Mr DD conducted business solely on behalf of X Gold and, although Mrs. Q's family was also involved in the second-hand goods industry, she was a "silent partner" and not actively involved in the business. Ms S was not aware that the address provided by X Gold to SARS was xxx Street in Heidelberg, but she confirmed that the address was that of Mrs. Q. She testified that Mr DD definitely did not trade from this address in Heidelberg

and that he ran the business from somewhere in Randfontein. She was also aware of the fact that X Gold's second-hand goods license was for Randfontein as well. She was aware that Mr DD also had shops in Hillbrow, Edenvale and Germiston.

[26] As far as Z Gold was concerned, she testified that "Mr NM was Z Gold". He worked alone from his home in Boksburg and he did not have a retail business. He would, on a daily basis, go to clients and buy jewellery and then sell it. Mr NM did not only sell to ABC Trading but he also sold to AS Entity Trading. He was what one would call a "runner" (a person who does not necessarily have a static premises and goes from shop-to-shop to buy Gold jewellery and sell it in the afternoon). She always paid Mr NM in cash and he would frequent ABC Trading at least once a week. Mr NM had no computer or printer and she prepared invoices for him. She testified that although Ms M was the sole member of Z Gold, she never

paid any money to Ms M. Mr NM was running the business and Ms M received a salary.

- [27] Ms S testified that both Z Gold and X Gold had second-hand goods licenses. This enabled both Mr NM and Mr DD to conduct their trade from “the boot of a car”.
- [28] Ms S and Mr H testified that all the suppliers’ details that were furnished to ABC Trading were kept in a file. ABC Trading’s office was raided by the Directorate for Priority Crime Investigation, the Hawks, in 2015, and they confiscated all ABC Trading’s files, documents, photos, bank statements, hard-drives, gold and cash. In return, the Hawks gave them discs. Only some of the items were later returned. Mr M testified that he wanted to institute legal process against the Hawks for the return of the outstanding items and he was told, after seeking legal advice, that the Hawks were still busy with their investigation. Although it has been almost five years since the raid, some of the items are still outstanding and ABC Trading has still not been informed of the outcome of the Hawks’ investigation.
- [29] Mr L, previously a member of K Movers, testified on behalf of SARS. He was involved in K Movers during 2014 to 2015. K Movers’s business involved the picking up of cash from the SBV Centre (a cash processing service provider), and delivering it at a specific delivery point. K Movers stopped doing business in May 2015.
- [30] He confirmed that ABC Trading was one of K Movers’s clients during the period 2013 to 2015. ABC Trading emailed all its instructions to K Movers. In the email, ABC Trading would indicate the amount of money that was transferred via Electronic Funds Transfer (“EFT”) into the account of K Movers, as well as the name of the client the cash must be delivered to. He testified that large amounts of cash were delivered to ABC Trading and that no cash was delivered to Z Gold, X Gold or to RE Metals on the instruction of ABC Trading. There were, however, a few instances in which the instructions would be that a small percentage of the funds be delivered to another person/company.
- [31] Mr L testified that the email instructions were dealt with by Ms T, who, at that stage, worked for K Movers. She received the emails and made the necessary arrangements. He himself was involved in the daily management of the business and did not directly deal with any clients, nor did he do any deliveries. The deliveries were done by drivers who did the pickup and delivery of cash. The drivers reported to a certain Mr BAA. Mr L testified that there were no documents available because K Movers’s offices were raided by the Hawks in the beginning of 2015 and all its documents and computers were confiscated. The emails received from ABC Trading were also amongst the documents confiscated.
- [32] Mr EF, as the principal auditor, was instructed to do an in-depth audit of ABC Trading on 8 August 2016. On 7 and 22 September 2016, Mr EF requested certain documents from ABC Trading that were subsequently provided to him. This included the general ledger, trial balance, customer ledger, supplier ledger, tax invoices and detailed VAT reports for the periods March 2014 to March 2016.
- [33] On 10 October 2016 he and a colleague, Mr O, conducted a field audit at the offices of ABC Trading in Nigel Road, Springs. During the field audit a meeting was held with the representatives of ABC Trading. The purpose of the meeting was to, inter alia, get a better

understanding of ABC Trading's business and he therefore requested to see the refinery. An "old man" took them around ABC Trading's premises and showed them what looked like a "machine made to crush and process jewellery". He was told about "the heat" and about the process to turn jewellery into a gold bar. The process was, however, not demonstrated to him and he was not shown any Gold bars or gold jewellery. In addition, he was taken to an adjacent stand where he noticed armoured vehicles.

- [34] During his investigation, Mr EF observed that all of the tax invoices supplied by ABC Trading were in the same format and he raised this issue at the meeting. He testified that Mr M explained to him that ABC Trading provided the same template to all its suppliers. There was also, attached to the invoices, proof of payment to a third party and not to the supplier. He was told that most of the suppliers were paid in cash and that cash-in-transit companies were used for this

purpose.

- [35] In an effort to confirm supplies, Mr EF selected seven of ABC Trading's suppliers to check if supplies were indeed made to ABC Trading. Amongst the seven suppliers were Z Gold, X Gold, K Gold, and RE Metals. The process included checking whether the companies were registered for VAT and if they declared output VAT. He found, in as far as X Gold was concerned, that the returns for the VAT period were outstanding, and as far as Z Gold and K Gold were concerned, not a single VAT return was submitted. RE Metals submitted some returns but others were outstanding.
- [36] Mr EF testified that during his investigations into Z Gold, he established that Ms M was the only member of Z Gold. He accordingly issued a letter requesting certain documents from her in terms of the legislation, but was unable to serve the letter on Z Gold as he was unable to get hold of Ms M. On 28 October 2016, he and one of his team members, Mr C, went to Z Gold's registered business address in Boksburg. The purpose of the visit was to verify if Z Gold was trading and to deliver the letter. He stated that on arrival at the premises, he saw no signage or any indication that business was taking place at that address. However, there was a lady present at the address, presumably a domestic worker, who confirmed that she knew Ms M and provided Mr EF with an alternative contact number for her.
- [37] He eventually got hold of Ms M on or about 14 November 2016, after Ms V, an employee of ABC Trading, provided him with a telephone number. Ms M told him during this telephone conversation that Z Gold was not trading anymore. He told her that he wanted to confirm certain transactions with her and she gave him an email address belonging to Ms AM. Mr EF subsequently sent an email to Ms AM with certain queries. On 16 November 2016, Ms AM sent an email back to him wherein it was confirmed that the invoices in question were indeed issued to ABC Trading. She also informed Mr EF that she was assisting Ms M, as Ms M's child had passed away and she was not in a "mental stable condition to operate her business". Ms AM also explained that the death of Ms M's child was the main reason that the business closed down. Mr EF checked on the SARS system and noticed that Ms AM was an

employee of ABC Trading. On 17 November 2016, he sent an email to Ms M requesting a Power of Attorney ("POA") because he was "uncomfortable with what he discovered". During November 2016 he received an unsigned POA. He queried the unsigned POA and subsequently received a signed POA on 21 December 2016.

- [38] Mr EF confirmed that he was also placed in possession of an affidavit from Ms AM dated 14 March 2017, wherein she confirmed that she was an employee of Z Gold during the 2015 tax year and that Z Gold traded with ABC Trading during December 2014 until February 2015. However, by this date, he had already filed the final audit letter.
- [39] On or about 12 July 2017, Mr EF decided to phone Ms M. He testified that during this telephone conversation she told him that Z Gold already stopped trading in 2013. He immediately sent her an email in which he requested her to confirm the information she gave him over the phone. She did not respond, but soon thereafter made an affidavit in which she denied that she told him that Z Gold did not trade.
- [40] During his investigation into X Gold, Mr EF established that Mr DD and Mrs. Q were the two members of X Gold. He followed the same process as with Z Gold and requested documents from X Gold. He tried to call Mr DD but he could not get hold of him. On 31 October 2016, he conducted a physical verification of X Gold's business address at Heidelberg. He found that the address was that of a residential premises and there was no signage or indication that a business was conducted at the premises. There was no one present at the address. He was therefore unable to serve the request for relevant material on X Gold.
- [41] Mr EF again tried to call Mr DD without any success. He eventually got hold of him sometime during November 2016. He told Mr DD that he wanted to confirm that X Gold was a supplier to ABC Trading. Mr DD gave him an email address to send his request to, which he did. He managed to get hold of Mrs. Q telephonically and asked her to confirm the transactions as well. She too requested Mr EF to send her an email.
- [42] On 21 and 22 November 2016, Mr EF sent Mrs. Q an email wherein he requested confirmation on certain transactions. On 5 December 2016, Mrs. Q informed him in an email, that she had no involvement in X Gold and that she is unable to confirm if the transactions took place. However, on 30 December 2016, Mr DD responded by way of email confirming that X Gold traded with "Gold Kit" during the year 2014/2015 and that X Gold had since been liquidated. Mr EF noticed that the email address used by Mr DD differed from the previous email address Mr DD has provided. He tried to call Mr DD to confirm the email without any success, thus resulting in Mr EF disallowing the input tax claimed in respect of the supplies from X Gold.
- [43] Mr EF held a second meeting with ABC Trading on 15 November 2016. The purpose of the meeting was to get an update on the status of the suppliers. Minutes of the meeting were taken. According to the minutes ABC Trading indicated that they would assist SARS in getting hold of the suppliers.

[44] Mr EF testified that he was at no stage provided with any copies of agreements between ABC Trading and the suppliers or any documents

confirming that cash was paid to the suppliers. There was, however, an instance where Ms LM, an employee at ABC Trading, sent him a document signed by a certain Mr VD from RE Metals confirming that he received payment from ABC Trading in cash. He subsequently contacted Mr VD and Mr VD confirmed that he requested ABC Trading to pay RE Metals in cash so that it could pay their suppliers.[4]

[45] Mr EF conceded that when he issued the “Letter of Findings” on 16 November 2016, a day after the second meeting, he had not yet received an update on ABC Trading’s undertaking to assist in finding the suppliers. He had, however, received additional information from ABC Trading about the two entities after 16 November 2016.

[46] SARS attempted to rely on the recordal of an interview that was held with a shareholder or director of “D Transporters” (now KMD). The evidence are clearly unadulterated hearsay and is excluded.

THE PLEADINGS

[47] The outcome of the audit was that SARS disallowed input tax deductions for the VAT period relating to supplies that had been made by Z Gold and X Gold. The factual basis upon which it was disallowed was that these two entities did not make any supplies to ABC Trading during the periods in question (“the supply dispute”). SARS has committed its reasons for disallowing the disputed supplies in a number of different formulations. In the assessment[5], dated 7 March 2017 (which formulation is the same as that in the audit findings dated 16 November 2016), SARS adopted the formal wording of the VAT Act by stating that SARS was not “satisfied” that the supplies, such as they may have been, complied with the requirements of “Input Tax”. It gave three grounds for its dissatisfaction: (i) The tax invoices issued were not valid; (ii) Z Gold and X Gold did not exist or conduct enterprises; and (iii) No supplies were made to ABC Trading.

[48] In the written reasons SARS provided to ABC Trading on 25 April 2017, SARS stated that it took the following facts into consideration when disallowing the invoices from X Gold and Z Gold. Firstly, SARS (through Mr EF) visited the two premises that were registered on its system on 28 October 2016 (Z Gold) and on 31 October 2016 (X Gold), and found that no trading activities took place at the addresses at the time of the visits. Secondly, ABC Trading issued the recipient-generated invoices relating to the disputed supplies. In respect of the allegation that SARS could find no evidence of the two suppliers trading at the time, SARS specifically stated, with reference to Z Gold, that it did not hold a certificate under the Second Hand Goods Act[6]; that contact could not be made with the member, Ms M; and that Z Gold did not receive payments from ABC Trading. In respect of X Gold, the central point made was that the member, Mrs. Q, had no knowledge of the transactions. The notice of disallowance of the objection did not take the identification of the issues further.

SARS statement of grounds of assessment and opposing appeal i.t.o Rule 31

[49] SARS statement of grounds of assessment and opposing appeal is dated 9 April 2018. Under the heading, “Issues in Dispute”, SARS listed the following:

“14. Whether ABC Trading is entitled to claim input tax in terms of section 1 read with section 16(2) of the VAT Act in respect of the supplies made by Z Gold and X Gold(“the alleged suppliers”) in instances where the supply of goods or services has not been made.

15. Alternatively, whether the invoices issued to ABC Trading by the alleged suppliers, alternatively, whether the invoices issued by

ABC Trading to the alleged suppliers in respect of the alleged supplies are valid in terms of section 20 of the VAT Act.

16. Whether ABC Trading is liable to declare deemed output tax in respect of the fringe benefit.

17. Whether the Respondent is entitled to impose understatement penalty in respect of section 222 read with section 223 of the TAA on

the incorrect input tax claim and the non- declaration of the fringe benefit”.

[50] The material facts relied upon in the grounds of assessment were the following:

50.1 The member of Z Gold, Ms M, is a sister in law of ABC Trading’s member and CEO, NM.

50.2 Z Gold never submitted VAT returns since its registration on 1 January 2009.

50.3 Officers in the employ of SARS visited the premises of Z Gold and X Gold and found that the entities were not operating from the registered business addressed. The addresses belonged to other “unrelated people” with no knowledge about the suppliers.

50.4 SARS subsequently established that Z Gold had stopped trading in 2013.

50.5 SARS established that X Gold was not trading during the periods of dispute and that it was subsequently liquidated.

50.6 SARS was not satisfied that Z Gold and X Gold made supplies to ABC Trading.

50.7 The invoices were fictitious.

[51] In SARS’s response to ABC Trading’s request for further particulars, it added two further factual considerations. The first was that Ms M had confessed to SARS that Z Gold had stopped trading in 2013 and had not made the disputed supplies during a telephone conversation on 12 July 2017. The second was that Mr DD admitted to Mr EF that X Gold had ceased trading before the VAT period in question.

The Law

[52] For the sake of fairness and proper court procedure, SARS must clearly state the grounds on which it bases its assessments and make it clear to the taxpayer what it disputes. This must be done so that the taxpayer can know what is required from it to discharge the onus of proof. In terms of the Rule 34 of the Rules of the Tax Administration Act 28 of 2011 (“the TAA”) [7], the issues in an appeal to the Tax Court will be those contained in the statement of the grounds of assessment and opposing the appeal (Rule 31), read with the statement of the grounds of appeal (Rule 32) and, if any, the reply to the grounds of appeal (Rule 33). Together these pleadings delineate the issues in dispute between the parties.

[53] The Supreme Court of Appeal, in the matter of CSARS v Pretoria East Motors (Pty) Ltd,[8] stressed the importance of the taxpayer knowing what disputes was truly in issue and what needed to be produced in order for it to discharge the burden of proof that rested upon it. The court found that:

“the taxpayer was left none the wiser as to what the issues were and therefore adopted a general approach that as the auditor had

misunderstood the accounts and ignored the provisions in particular of the VAT Act, it sufficed for it to demonstrate that through the evidence of its auditor”.

[54] The SCA held that as the taxpayer was not alerted to any other issue it was certainly not called upon to produce every underlying voucher or invoice or to reconstruct its accounts from scratch for the Tax Court. At paragraph [14] Ponnann JA found that:

“[14] Everything will depend upon the nature of the dispute between the parties as defined by the grounds of assessment and the grounds of appeal. Where, for example, the SARS auditor has based an assessment upon the taxpayer’s accounts and records, but has misconstrued them, then it is sufficient for the taxpayer to explain the nature of the misconception, point out the flaws in the analysis and explain how those records and accounts should be properly understood. That can be done by a witness such as Dr Gouws who, as a qualified chartered accountant, is capable of giving such an explanation after a full and proper consideration of the accounts. If there are underlying facts in support of that explanation that SARS wishes to place in dispute, then it should indicate clearly what those facts are so that the taxpayer is alerted to the need to call direct evidence on those matters. Any other approach would make litigation in the Tax Court unmanageable, as the taxpayer would be left in the dark as to the level of detail required of it in the presentation of its case. It must be stressed that SARS is under an obligation throughout the assessment process leading up to the appeal and the appeal itself to indicate clearly what matters and which documents are in dispute so that the taxpayer knows what is needed to present its case.”

[55] Upon a proper reading of the pleadings, in casu, it is clear that the only issue that ABC Trading needs to prove is that X Gold and Z Gold supplied jewellery to ABC Trading during the VAT period.

[56] The Tax Court is not a court of appeal in the ordinary sense, it is a court of revision.[9] In *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue*,[10] the court held that it was the Legislature's intention that there should be a re-hearing of the whole matter by the Special Court and that the court could substitute its own decision for that of the Commissioner.[11] Ponnann JA, in the Pretoria East Motors matter, set out the approach the Tax Court should take in deciding whether the taxpayer has discharged its onus. He stated as follows:

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

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

[57] Ponnann JA also criticized the approach that SARS adopted in respect of the audit and in raising the assessments. The learned Judge stated that it did not appear as if the SARS auditor "sought to familiarize herself with the workings of the accounting system utilized by the taxpayer, even though the information available to her" and that she 'ignored the internal character' of certain transactions. He went on to state the following:

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

subject to penalties at the maximum rate of 200 per cent, absent any explanation as to why the taxpayer's conduct was said to be dishonest or directed at the evasion of tax."

- [58] With these principles in mind it is this court's task to evaluate the evidence produced by ABC Trading and to establish whether it has discharged its onus.

EVALUATION

- [59] Of all the witnesses called to testify, the person best suited to tell the court whether supplies were made was Mr H. Mr H had been working at ABC Trading (now JK Metals) since 2006. He was the only person responsible for receiving the gold jewellery from the supplier and for the weighing, smelting, and assaying of all the gold products. He was also the person mainly responsible for the transport of the gold bars to ABC Trading's customers (i.e, W Entity, F Refinery and V CC). Every batch of jewellery received, as well as each gold bar made during the VAT period, was photographed by him. When he testified he took the court through each photo and accompanying document and explained the process he followed in producing a gold bar from scrap jewellery. According to him every photo was taken at the time the jewellery was brought in by the supplier. His evidence was mainly left unchallenged during cross- examination and there was no evidence to gainsay his testimony about what type of supplies were made, and that supplies were, in fact, made.
- [60] SARS submitted during argument that, because Mr H conceded during cross- examination that W Entity did not acknowledge receipt of the gold bars, his evidence somehow indicates that the gold bars either never existed, or that it was never delivered to W Entity. This argument has no merit. The evidence and documents presented during trial proved that millions of rands were paid to ABC Trading during the VAT period. Not only by W Entity, but also by V CC, F Refinery and RT Trading. These payments were not made in cash, but by way of EFT into ABC Trading's bank accounts. If there were no gold bars delivered to ABC Trading's customers, why did they make payment to ABC Trading? If SARS is to be believed, ABC Trading was involved in an elaborate fraudulent scheme, not only involving X Gold and Z Gold, but also W Entity, F Refinery, V CC, BB (Pty) Ltd and RT Trading. The only logical conclusion that can be drawn from this evidence is that ABC Trading sold gold bars to its customers for which it received payment.
- [61] SARS further contended that the court should reject Mr H's testimony because he testified that he did not know any suppliers with the names X Gold and Z Gold. That was not his evidence. Mr H did concede during his testimony that he could not remember the names of the two ladies to whom he referred to as "the ladies upstairs", and it is true that he had an overall difficulty in remembering the names of people, places and dates. But, he also testified that he remember dealing with Mr NM M. And when he was asked during cross- examination if he could recall an entity by the name of Z Gold, he answered in the affirmative.

- [62] However, the importance of Mr H's evidence does not lie in whether he can remember the names of the suppliers, or whether he was able to recall dealing with X Gold and Z Gold. His evidence is crucial when it comes to determining whether supplies were made to ABC Trading during the VAT period. Because if it is accepted that Mr H received jewellery and smelted it into gold bars, as we do, it is possible to trace the gold bars back to the original supplier. This is where the evidence of Ms S comes into play.
- [63] Ms S was the person responsible for the day-to-day running of ABC Trading's business. She was the backbone of the business and dealt with the suppliers as well as the customers on a daily basis. She had vast experience in the second-hand gold industry and she knew all the role players. She painstakingly took the court through the procedure followed by ABC Trading from the time the jewellery was brought in, until the final payment was made to the supplier. Her evidence was supported by documents for each transaction, which according to her, was meticulously recorded at the time it occurred. All the documents were made available to SARS and was conveniently summarized in "Exhibit A". She emphatically denied that X Gold and Z Gold did not supply jewellery to ABC Trading.
- [64] The majority of the suppliers were paid in cash. The reason why the suppliers were paid in cash must be discerned in the context of the second-hand goods industry. The suppliers were "pawn shop" and "gold shop" owners. Their clients are people that sell gold jewellery to access cash. Ms S also once had a second-hand goods shop, and she operated in the same manner. That is the reason why she understood the workings of Mr NM and Mr DD. They were, like her, "runners", which also meant that they sometimes conducted their business from the "boot of a car". This is why she did not find it strange that that Mr EF was unable to find any evidence of a business being run from the registered addresses of X Gold and Z Gold.
- [65] Both X Gold and Z Gold wanted to be paid in cash for their supplies. Ms S testified that she regularly paid Mr NM and Mr DD from the cash that was available in the safe at ABC Trading's premises. Mr DD's handwritten invoices are testimony to this. She also paid cash into the cash-in-transit companies' accounts to be later delivered to the suppliers. This payment was always accompanied by an email informing the cash-in-transit company of the payment and to whom the money must be delivered to. Proof of these emails were not produced, but Mr L from K Movers corroborated Ms S's version in this respect. He testified that the only reason he was unable to produce the emails, was because the Hawks confiscated all K Movers's documents and computers.
- [66] SARS's main contention, and the high watermark of their case, was that ABC Trading failed to produce any documentary evidence showing that the money transferred into the bank account of the cash-in-transit companies, was paid to X Gold and Z Gold. It was submitted that ABC Trading and its witnesses have either opted not to disclose such material evidence for fear that such disclosure would reveal foul-play, or that Ms S did not take the court into her confidence. It was SARS's contention that because there was no proof of payment to X

Gold and Z Gold, there was no proof that there was any supplies to ABC Trading.

[67] To contradict Ms S's evidence, and in support of its contention, counsel for SARS placed considerable stress upon Mr L's evidence. Mr L was the office manager at K Movers and he confirmed that ABC Trading was one of its customers. He testified that K Movers did not deliver cash to ABC Trading's suppliers but to ABC Trading itself. Mr L later conceded that he himself never made any deliveries to the clients and that K Movers employed drivers for that purpose. There were three drivers and they reported to a certain Mr BAA. Mr BAA was present during the trial but was not called as a witness.

[68] It is, first of all, necessary to revisit Ms S's evidence in respect of payment. She dealt with the payment of supplies as one step in the total administrative process that ABC Trading followed at the time. As the suppliers wanted cash, ABC Trading would arrange for the cash to be delivered to the suppliers by the cash transport service companies that ABC Trading used, one of which was K Movers. K Movers would then deliver the cash to the suppliers. The proof of

payment thus resides in the EFT of the amount payable to a supplier from ABC Trading's bank account to that of the cash transporter. The electronic transfer of the funds was documented in respect of each of the questioned transactions and was dealt with during the trial. The physical handing over of the cash was not observed by Ms S.

[69] Ms S's evidence was furthermore that ABC Trading, itself, kept a float of cash and that cash deliveries were made to ABC Trading by the cash-in-transit companies, for which she signed receipts. She was adamant that the suppliers' cash was not delivered to ABC Trading.

[70] Insofar as X Gold is concerned, the position was that a refinery, "AS Entity" was also one of K Movers's clients. Ms S's evidence was that there was a close historical link between Mr DD and AS Entity. Mr L could not dispute the probability of Z Gold's cash being delivered to AS Entity. He, himself, did not know Mr DD.

[71] At best for SARS, there is a contradiction between Ms S's evidence about cash deliveries to Z Gold and that of Mr L. The question that arises in this context is what the effect of accepting Mr L's version would be on the case.

[72] To answer this question the court needs to go back to the pleadings in this matter. The case of SARS, as delineated in the pleadings, is that there were no supplies, i.e. no jewellery, made to ABC Trading and that neither X Gold nor Z Gold traded at all. There was thus no product for which payment could be made. Mr H's evidence, however, clearly shows that supplies were made, melted, the bars on-sold, and that funds were received for these transactions, which were paid to cash-in-transit companies. (My emphasis).

[73] Mr L's evidence, in fact, corroborated ABC Trading's version in that payments were made to K Movers. Ms S testified that the payments made were for the amounts owing to the suppliers. She was not tested on this point and no proposition was put to her that she did not

make the payments that are reflected in the bank statements. Ms S's evidence has to be accepted that when ABC Trading paid the funds across to K Movers, ABC Trading had made payment of the debts due to the suppliers. Whether the money was taken in cash to the suppliers or to ABC Trading would, in light of the case ABC Trading was asked to prove, not matter at all, because payment was, on either version, made, which means that supplies were made.

[74] But, and this is an important issue: The Z Gold and X Gold payments were nothing out of the ordinary, seen from an administrative perspective. The Z Gold and X Gold transactions were about 13% of the overall transactions. SARS accepted that 87% of the transactions took place, i.e. that there were supplies for which payment was made. Mr

L's evidence seemed to be that no supplier was paid, yet 87% of the suppliers must have been paid for there to be supplies at all.

[75] Mr EF seemingly based his decision to disallow the invoices based on site inspections, his interaction with the representatives of the suppliers, and the absence of a second-hand goods license. But, one of the reasons why Mr EF was apparently instructed to perform an audit, was the fact that ABC Trading issued recipient-generated invoices. The issue of the recipient-generated invoicing was, however, deprecated by SARS as reason for the disallowance of the input Tax in its Statement of Grounds of Assessment pursuant to Rule 31 of the Income Tax Court Rules. At page 191 of the dossier SARS stated the following:

"The respondent's disallowance of the input tax claim is not based on the fact that the invoices were recipient-created, as ABC Trading desperately wants the Honourable Court to believe. The respondent is not satisfied that the supplies even took place."

[76] The fact that invoices were generated by ABC Trading is thus of no consequence for present purposes.

Second-Hand Goods License/Certificate

[77] The second-hand goods license issue was raised in the request for further particulars. It does not form part of the pleadings. It is unclear why SARS stated that Z Gold did not have such a certificate. Ms S testified that Mr NM had a license and Mr M confirmed during his evidence that such a certificate was on file, a statement that was not tested under cross-examination. ABC Trading's evidence was not countered by SARS. Mr EF could have easily ascertained this aspect by doing some investigations. There is, therefore, no evidence to suggest that Z Gold did not have such a certificate.

[78] For the purposes of this matter, it would in any event not have been of any consequence if Z Gold did not have a certificate. It might have been committing an offence, but it does not mean that supplies were not made to ABC Trading.

The Site inspections

- [79] SARS's case, as contained in the pleadings, is that X Gold and Z Gold did not at all operate businesses during the VAT period in question and that they could therefore not make supplies, and did not make supplies.
- [80] Mr EF came to this conclusion based on two site inspections during October 2016. The site inspections were done approximately eighteen months after the actual supplies took place. He testified that he concluded that no businesses were conducted at these premises, because there were no signage or billboards outside the premises indicating that businesses were conducted from there.
- [81] To establish if a business was conducted, one has to check for more than billboards. Logic dictates that even if one sees no sign of a business today, it does not mean there was no business eighteen months ago. Mr EF should have realized that the circumstances of the two entities could have changed in the last eighteen months. In fact, it did change; X Gold was liquidated and Z Gold was terminated. If Mr EF had acquainted himself with the business of X Gold and Z Gold, he would have discovered that Mr DD and Mr NM were both "runners", and that they were not office bound at all.
- [82] Mr EF could, therefore, not have reasonably come to a conclusion based on this information obtained from the site inspections. He had to investigate further and he failed to do so.

Interaction with representatives

- [83] Mr EF was able to make contact with Ms M, the sole member of Z Gold during November 2016. Ms M gave him the email address of Ms AM to send his enquiries in relation to Z Gold. Ms AM informed him that Ms M was not in a stable mental condition to engage with him, because of the death of her disabled child. On Mr EF's insistence he was placed in possession of a POA, as well as an affidavit deposed to by Ms AM. For some reason, however, he decides that the POA is not sufficient. He does not investigate the circumstances under which the POA was provided, or speak to Ms S who was a witness to the POA. He does not consider the fact that Ms M had lost a child or that there might be someone else that can provide him with information. The uncontested evidence of Ms S is that it was Mr NM that ran the business of Z Gold. Mr EF, despite his investigations, did not discover this vital piece of information. He was not aware that Mr NM was in control of Z Gold because he did not investigate properly.
- [84] He therefore decided to reject the POA and affidavit. The questionability of his decision to reject the POA and affidavit came to the fore after the court was made aware of the fact that Mr EF made similar queries in relation to other suppliers, one of which was K Gold. To verify whether K Gold was one of the suppliers, Mr EF attempted to do a physical verification of its business address. He could not find K Gold's premises and he subsequently discovered

that the address provided to SARS was that of a school. He also sent an email to K Gold with a request to confirm certain transactions

with ABC Trading. K Gold replied and confirmed the transactions. Mr EF decided to accept their “say so” and found their

response to be sufficient. He, however rejected the information provided to him by Z Gold, despite having a POA as well as an affidavit. This discrepancy and inconsistency in the treatment of the suppliers could not be explained by Mr EF during his testimony.

[85] More curiously, however, is Mr EF’s decision to make further contact with Ms M in July 2017, four months after he has made his assessment. It was during this telephone conversation that she apparently confessed to him that there were no supplies made to ABC Trading. In her affidavit to the High Court she denied that she made this confession and stated that supplies were made. Mr EF, on his version, is now faced with a contradiction. How would an objective person deal with such a contradiction? Any reasonable auditor in Mr EF’s position would have realized that he needed to investigate further and gather more information.

[86] He had all the invoices from Z Gold, a POA, and an affidavit from Ms AM. The proper course of action, under the circumstances, would have been to qualitatively test the conflicting versions of Ms M and then make a decision. SARS and Mr EF clearly decided to pick and choose from Ms M’s evidence that suited their theory and disregarded

the rest.

[87] The alleged confession of Ms M, which SARS held against ABC Trading, was in any event hearsay and SARS should have been slow to base any findings thereon. This is all the more so, taking into account the real and substantial possibility that Ms M had every reason to lie to protect herself and her close corporation. Z Gold had never submitted

any VAT return. Ms M had furthermore suffered major emotional trauma which would explain why she asked Ms AM to deal with SARS’s

enquiries by way of the POA. SARS should not have followed a form over substance approach to Ms AM’s affidavit and should not have discarded it for the frivolous reason which Mr EF put up.

[88] I agree with ABC Trading’s submission that for Mr EF to ignore ABC Trading’s version, and the mass of information in its possession, was a compound methodological error.[12] The raising of an assessment must be based on a proper, objectively reasonable, factual basis and if competing evidence is presented to SARS, SARS must deal with it rationally. Mr EF could therefore not have come to a conclusion that there was no supplies made by Z Gold based on the information available to him.

[89] Then, as far as X Gold is concerned, X Gold was liquidated in May 2016. Mr EF testified that he was unaware of this fact and that SARS did not have proper systems in place to inform him of the position.

But Mr DD sent Mr EF an email in December 2016 wherein he confirmed that supplies were made and that X Gold had been liquidated. The basis upon which Mr EF decided to reject this information was because it was sent from a different email address. This is irrational. Mr EF ought to have investigated further. If he had done so he would have found that X Gold was indeed liquidated and he could then have made contact with the liquidator who had been in possession of all the documents.

[90] Once again, SARS selectively discarded evidence that supplies were made and raised assessments based on insufficient information. Moreover, SARS brought Mr DD to court but failed to lead his evidence. The only conclusion that can be drawn from this failure is that Mr DD did not support SARS's case when push came to shove and accordingly that supplies were made by Z Gold.

CONCLUSION

[91] The Input Tax claim in respect of the VAT period was disallowed by SARS on the premise that the provisions of section 1 in the definition of "supply" and "enterprise" and section 16(2) of the VAT Act were not complied with in that X Gold and Z Gold did not make any supply of goods and services to ABC Trading.

[92] When an audit against a taxpayer is conducted in terms of the TAA Act, it comes with massive power. It allows the auditor to investigate and interrogate, making full use of the machinery of the Act. However, the power to investigate comes with a huge responsibility. It must be done in a proper, reasonable and responsible manner.

[93] SARS's finding is that the two entities, X Gold and Z Gold did not trade at the time supplies were made to ABC Trading. It is an extremely serious allegation as it amounts to fraud. The question is, did Mr EF conduct a proper investigation or did he just scratch the surface? Was his investigation not too superficial to make a finding?

SARS contends that Mr EF did his best to accumulate the information. But what was the extent of his investigation?

[94] Mr EF received instruction to conduct the audit in August 2016. He subsequently had two meetings with ABC Trading. During the first meeting in October 2016, he questioned the similarity of the invoices and was taken on a tour through the refinery. At the second meeting, on 15 November 2016 he sought assistance from ABC Trading to make contact with the suppliers, and ABC Trading said it would assist. At this point it must be kept in mind that by the time the second

meeting was held he had already visited the premises of X Gold and Z Gold and he had managed to make contact

with Ms M and Mrs. Q. When he visited the premises he found no sign of any enterprise

or business being conducted from these addresses. It is common cause that these two entities, by the time he visited their registered business addresses, were no longer trading. This aspect must have concerned him greatly because that is one of the reasons he gave for raising the assessments. But what further enquiries did he make after finding that no business were being conducted? He certainly did not raise it at the second meeting, because the minutes would have reflected it. Did he try and find out who the faces were behind X Gold and Z Gold? Because if he had done so, and if he had familiarized himself with the second-hand gold industry, he would have realized three important facts: firstly, it was Mr NM and Mr DD, and not Ms M and Mrs. Q that ran the businesses of the two entities; secondly, that X Gold had been liquidated in May 2015; and thirdly, that both entities stopped trading in early 2015.

[95] But what other steps did Mr EF take before he raised the additional assessments? He wrote emails. And when he eventually got confirmation from both entities, he was not satisfied with their answer. Why was he not satisfied? Was it because he had no proof that the suppliers had been paid? Clearly not, because if that was an issue he would

have raised it with X Gold and Z Gold. Instead, he rejected the information he received from Ms M and Mr DD for the flimsiest of

reasons. And this is why it is so peculiar that, in the end, the payment issue turned out to be the high water mark of SARS's

case.

[96] SARS's principal case is that there was no product supplied. If there were no supplies, there could have been no product to smelt and then pour into bars and on-sell to ABC Trading's clients. Everything relating to the disputed supplies as reflected in ABC Trading's books of account – from the receipt of the supply including the photographs taken of it, through the allocation of a number to the supply, the smelting of the supply into a bar, the sale of the bar (to an entity such as W Entity), the receipt of the monies as purchase consideration for the supply, the payment to the

cash-in-transit companies of the amounts in question and the communications concerning the content, weight and price of the gold – all have to be discarded. If any one of these elements remain standing, then there must have been a supply. It would appear that SARS could fix its cannon on only one of these elements during the course of the hearing, namely, payment of cash to the suppliers.

[97] The payment issue was not the case ABC Trading was asked to meet. The SCA in the Pretoria East Motors *supra* matter stressed the importance of this factor in the following manner:

"[14] If there are "underlying facts in support of that explanation that SARS wishes to place in dispute, then it should indicate clearly what those facts are so that the taxpayer is alerted to the need to call direct evidence on those matters. Any other approach would make litigation in the Tax Court unmanageable, as the taxpayer would be left in the dark as to the level of detail required of it in the presentation of its case. It must be stressed that SARS is under an obligation throughout the assessment

process leading up to the appeal and the appeal itself to indicate clearly what matters and which documents are in dispute so that the taxpayer knows what is needed to present its case.”[13]

- [98] The approach adopted by SARS in this appeal was not fair towards ABC Trading. Fairness demands that ABC Trading must be informed, in no uncertain terms, what underlying facts are placed in dispute so that ABC Trading knows what should be proved and which witnesses to call to discharge its onus. This was not done. Instead general allegations were made regarding recipient generated invoices, entities that did not exist or conducted enterprises, and that there was no supply.
- [99] Fairness also demands that there must be a proper investigation into the affairs of the taxpayer. As far as Z Gold is concerned, the fact that Mr EF found no trace of any trade being conducted at the address registered for VAT with SARS of Z Gold, is of no moment. He conducted his investigations in October 2016, whilst the three months in which Z Gold made supplies to ABC Trading were December 2014, January 2015 and February 2015. This is more than a year and a half before Mr EF conducted his investigations. The evidence further shows that the business of Z Gold was conducted by Mr NM, who Ms S referred to as a “runner”. He did not operate from static premises. Mr EF already knew in November 2016 that Z Gold ceased trading a year before. The mere fact that there was no business conducted at the time of the inspection in October 2016 does not mean that Mr NM, on behalf of Z Gold, did not act as a “runner” during the VAT period in issue.
- [100] SARS contended that because Ms M gave Mr EF’s contradictory information, SARS was entitled to reject the invoices. Despite the fact that the contradiction was allegedly only made in July 2017, four months after the additional assessments were raised, there could be many reasons why Ms M made contradictory statements. Except for the fact that she suffered from emotional trauma, it appears from Mr EF’s own evidence that Z Gold was in deep trouble with SARS. It had not rendered any VAT returns. Unless Z Gold could set off the output VAT (seen from its perspective) that was paid to it, against input VAT that Z Gold had paid to its suppliers (the pawn shops etc.), it would have to make payment of the output VAT to SARS. But, again, the fact that Z Gold may not have complied with its statutory obligations, does not mean that ABC Trading received no supplies. The point is that Mr EF should have investigated this issue more fully.
- [101] Mr EF’s evidence in respect of X Gold was also unconvincing. If it is accepted, as it must be, that X Gold had been liquidated more than a year before Mr EF started with the audit, it is understandable why there would be no trade being conducted at the time of his visit to the Heidelberg property. Mr EF should not have requested Mrs. Q and Mr DD to supply information. The only representative of a close corporation after its liquidation was its liquidator. Mr EF did not go to the trouble of identifying the liquidator.

- [102] The fact that Mrs. Q informed Mr EF, already in November 2016, that she knew nothing about the supplies, does not mean that there were no supplies. She was, according to Ms S, the “silent partner”. Mr EF received confirmation from Mr DD that supplies were made. His rejection of the handwritten invoices that X Gold provided for all the VAT period in issue save the last one viz March 2015, remains unexplained. These were invoices that obviously complied with the requirements of section 20 of the VAT Act, and to merely reject them without proper investigation was irrational.
- [103] ABC Trading submitted that Mr EF did not act in the manner required in our law of someone fulfilling this extremely important and responsible position. It is submitted that the provocative language used by him (through Ms TY), in the answering affidavit in the second High Court application, was indicative of his mindset with which he approached the audit. It is contended that Mr EF postulated himself as a judge, receiving and dismissing evidence at a whim, and he therefore closed his mind to the actual facts available to him to consider.
- [104] SARS contended that the court should accept the evidence of Mr EF as he was an honest witness. It is submitted that he knew exactly what he did, understood his responsibilities, and gave his evidence in a reasonable manner. It is further submitted that he took concerted steps by having two meetings with ABC Trading in October and November 2016, but that he received no co-operation from both Z Gold and X Gold.
- [105] The judgments in which the concept of “satisfaction” had been considered, all signify one thing; if there is reasonable doubt about something or the other, there cannot be satisfaction that it occurred.[14] The test whether an official can be satisfied about something or not is objective. It is based on reason and reasonableness. It invokes the concept of rationality and, thus, legality under the Constitution. In *Wingate-Pearse v SARS*, [15] Meyer J held that:
- “[61] Although the words 'is satisfied' used 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 - confer a subjective discretion on SARS, I accept 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. The raising of an additional assessment in the case of income tax, as was said by Ponnann JA in *Commissioner, South African Revenue Service v Pretoria East Motors (Pty) Ltd* 2014
- (5) SA 231 (SCA), para 11, 'must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified'. But, given the wording of s 79(1) of the Income Tax Act, and presently of s 92 of the Tax Administration Act the subjective nature of the discretion conferred on SARS, the scope for judicial review is limited. (See *Laingville Fisheries (Pty) Ltd v Minister of Environmental Affairs and Tourism*

[2008] ZAWCHC 28 (30 May 2008) paras 74-6.)”.

[106] It is clear that Mr EF had already made up his mind about ABC Trading even before he had his second meeting with the representatives of ABC Trading on 15 November 2016. I say so for the following reason. The purpose of this meeting was to discuss the status of the investigation. The minutes of the meeting seem to indicate that there was still time for ABC Trading to provide and assist with the obtaining of further evidence, before Mr EF makes his finding. However, at that point, Mr EF was already busy finalizing his letter of audit findings. The letter was sent to ABC Trading the next day, 16 November 2016. In the letter Mr EF concluded that there was fraud. Not a word was spoken on 15 November 2016 about the fact that the horse had bolted and that it mattered not what ABC Trading’s representatives would say or do after the meeting. Mr EF was clearly not interested in receiving any information from ABC Trading. The meeting on the 15 November 2016 was a ruse.

[107] It is regrettable that Mr EF’s audit file was not disclosed to the court. He testified without any of his investigation documents before him. The audit file should have been disclosed. It would have given the court insight into Mr EF’s investigations and would have been a valuable tool against which his evidence could have been tested. The auditing of vendors and taxpayers is a serious business. The absence of the audit file left many aspects of this case unanswered. Mr EF spoke in vague terms about the risks that led to the audit of ABC Trading by SARS’s special unit, but there was not a clear indication what these risks were. ABC Trading consistently argued in the various High Court cases that the whole audit was a trumped-up affair to get back at ABC Trading for the temerity of having brought an application in the High Court (in the first application) for payment. ABC Trading accused SARS of acting mala fide in a number of places in the papers. It would have been the easiest thing in the world for SARS to disclose the audit file in order to establish if there was any truth in these allegations made against SARS and whether the purpose of the audit was indeed bona fide.

[108] Mr EF clearly had a one-sided approach to the matter. He only took into consideration facts that were prejudicial to ABC Trading’s relationships with X Gold and Z Gold and nothing in their favour. He ignored the mass of evidence that ABC Trading produced to him and he clearly did not familiarize himself with the second-hand goods industry and the process followed to transform jewellery into gold bars. He completely ignored the evidence of Mr H and failed to properly analyze and investigate the documentation provided to him. Mr EF conducted an imperfect audit and his suspicions do not meet the high yardstick of reasonableness that is set in law.

[109] “Exhibit B”, set out the supplies and sales by number of transactions (gold bars in the case of sales) and value over the eight VAT periods. Z Gold made supplies for fourteen bars during the VAT period December 2014, January 2015 and February 2015. The total amount of input VAT disallowed was R3 706 188.46. This formed 2% of the transactions conducted during the relevant VAT period. The disputed supplies by Z Gold and X Gold combined only

makes out 13% percent of the total sales for that period. SARS was satisfied with all the other invoices relating to all the other suppliers. It is unclear why a business practice that was acceptable to SARS in respect of 87% of the transactions in question, was not acceptable in respect of the balance of 13%.

- [110] Mr H and Ms S gave compelling evidence. Their evidence is supported by transaction documents that paint a complete picture from the time that the gold jewellery was brought to Mr H, to the time that the second payment was made to the suppliers. ABC Trading's case literally begins and ends with Mr H. Mr H was consistent in his evidence and the material aspects of his testimony was not contested. His evidence, undoubtedly, proves that supplies were made. If supplies were made, suppliers had to be paid and if the suppliers were VAT registered entities, they had to charge VAT on the supplies. Both X Gold and Z Gold were VAT registered entities, and they had to charge VAT on the supplies.
- [111] The nature of ABC Trading's business demanded that suppliers be paid in cash. There is no evidence that ABC Trading treated Z Gold and X Gold any differently from all the other suppliers that supplied jewellery to ABC Trading. The allegations of fraud that were made against ABC Trading is a serious allegation. "Exhibit A" the updated version, includes a recordal of all the transactions reported to the Regulator on a quarterly basis. There is no evidence to support SARS's contention that the transactions reflected in the transaction files were fictitious and part of fraudulent activities. There can be no realistic dispute that these transactions occurred as recorded.
- [112] Mr H, Ms S and Mr M corroborated each other in all material aspects. SARS had not led any evidence to contradict ABC Trading's evidence. We find the evidence of ABC Trading's witnesses to be truthful and credible, and in line with the probabilities. It follows that there is no reason not to accept their evidence.
- [113] ABC Trading bears the onus, to show on a preponderance of probability, that the decision of SARS against which it appealed was wrong.[16] In *CIR v Middleman*, [17] the court held that the onus is discharged where the court has no reason to disbelieve the taxpayer and his evidence is not contradicted by the objective facts. In our view, ABC Trading has met the onus required to establish that supplies were made by X Gold and Z Gold during the VAT period and that it traded with these two entities.
- [114] Understatement penalties could, of course, only be posed if there was an over- declaration of input VAT. There was no such proof.

COSTS

- [115] In terms of section 130 of the TAA, the court may grant an order for costs if "the SARS grounds of assessment are held to be unreasonable.[18]

[116] SARS's statement of grounds of assessment are unreasonable for the following reasons: SARS contended in the Letters of Assessments that the tax invoices were not valid; that the suppliers Z Gold and X Gold did not exist or conduct enterprises; and that no supplies were made. These grounds were carried through to the Statement of Grounds of Appeal. It was not put to any of ABC Trading's witnesses that no supplies were made and no positive evidence was led by SARS

that there were no supplies. The evidence of Mr H stands uncontroverted. The evidence of Ms S on the manner that X Gold and Z Gold conducted their business, was not questioned or interrogated.

[117] Mr EF rejected the information provided to him that both Z Gold and X Gold traded in the 2014/2015 periods. The reasons provided by Mr EF for rejecting all the information provided to him were unreasonable. SARS's conduct, both in raising the assessment and its reliance on statements of grounds of assessment, which were not sustained in the course of evidence, falls within the parameters of section 130(1)(a) of the TAA, rendering the statement of grounds of assessment unreasonable.

[118] In the result the following order is made:

1. The appeal in respect of the VAT periods 2014/08, 2014/09, 2014/10, 2014/11, 2014/12, 2015/01, 2015/02, 2015/03 is upheld.
2. The assessments for the VAT periods 2014/08, 2014/09, 2014/10, 2014/11, 2014/12, 2015/01, 2015/02, 2015/03 are altered by:
 - 2.1 reducing each additional assessment to R0; and
 - 2.2 remitting the understatement penalty and accrued interest in its entirety.
3. The respondent is ordered to pay the appellant's costs, including the costs of two counsel, which includes the costs of senior counsel.

L. WINDELL JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

MS S. MAKDA

PROF. L. LUVONO

Date of hearing:

2 November 2019 to 15 November 2019

Date of judgment: 29 April 2020

[1] Case numbers 31842/2016 and 40732/17.

- [2] Every person who runs a business of dealing in second-hand goods in South Africa, has to apply to be registered under the provisions of the Second Hand Goods Act, 2009 (Act No 6 of 2009).
- [3] Rumble, J. 7 June 2019. "CRC Handbook of Chemistry and Physics". London, United Kingdom. CRC Press.
- [4] See also affidavit filed by Mr EF in High Court GLD Case number 31842/16.
- [5] This letter is entitled "finalisation of Audit". It constitutes an assessment as defined in s1 of Tax Administration Act 28 of 2011. Commissioner SARS v South African Custodial Services 2012 1 SA 522 (SCA) at para [29] – [32].
- [6] Act 6 of 2009.
- [7] Promulgated with effect from 11 July 2014.
- [8] 2014 (5) SA 231 (SCA) at [8].
- [9] See Bailey v Commissioner for Inland Revenue 1933 AD 204 at 220.
- [10] 1944 AD 142 at 150.
- [11] See Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue 1944 AD 142 at 150.
- [12] CSARS v Pretoria East Motors (Pty) Ltd 2014 5 SA 231 (SCA) [11]; CSARS v Klüh Investments (Pty) Ltd 2016 4 SA 580 (SCA); CSARS v Capstone 556 (Pty) Ltd 2016 4 SA 341 (SCA) and Wingate-Pearse v CSARS 2019 6 SA 196 (GJ).
- [13] At [14].
- [14] See Mr. BAA v Attorney-General Transvaal 1994 1 SA 306 (A).
- [15] 2019 (6) SA 196 (GJ).
- [16] CIR v SA Mutual Unit Trust Management Co Ltd [1990] ZASCA 76; 1990 (4) SA 529 (A) at 538D.
- [17] 1991 (1) SA 200 (C).
- [18] The court's discretion in granting costs are limited by the provisions of Section 130. See VAT304 – decision of Southwood P in the Pretoria Tax Court, ITC 1806 (68 SATC 117).

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