

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 337/2022

SCA CASE NO: 516/2021

TAX COURT CASE NO: IT 24918

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN

REVENUE SERVICE

Applicant

and

THE THISTLE TRUST

Respondent

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PRESENTED FOR SERVICE AND FILING:

The Applicant's Heads of Argument in the Application for Cross Appeal.

DATED AT RIVONIA ON THIS THE 26TH DAY OF SEPTEMBER 2023



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**APPLICANT'S HEADS OF ARGUMENT IN THE APPLICATION FOR CROSS
APPEAL ("SARS")**

TABLE OF CONTENTS

| | |
|---|----|
| INTRODUCTION | 3 |
| LEAVE TO APPEAL | 6 |
| CONSTITUTIONAL MATTER | 6 |
| INTEREST OF JUSTICE | 9 |
| Prospects of Success | 15 |
| CONTEXT OF THIS MATTER | 18 |
| IMPOSITION OF UNDERSTATEMENT PENALTY | 19 |
| Bona Fide Inadvertent Error – Meaning | 23 |
| No reasonable grounds for tax position taken by Thistle | 28 |
| CONCLUSION | 33 |

INTRODUCTION

- 1 This is an application for conditional leave to cross-appeal against part of the judgment and order of the Supreme Court of Appeal (“SCA”), which upheld the applicant’s (“SARS”) appeal on the merits but set aside the understatement penalty that was raised against the respondent (“Thistle”).¹
- 2 As Thistle has lodged an application for leave to appeal against the main judgment of the SCA, leave to cross appeal is sought conditionally in the event that this honourable court grants Thistle leave to appeal.
- 3 The SCA set aside the imposition of the understatement penalty by SARS on *inter alia* the basis that:
 - 3.1 the understatement by Thistle was a *bona fide* and inadvertent error as it had believed that section 25B of the Tax Administration Act, 2011 (“TAA”) was applicable to its case.
 - 3.2 Thistle’s erroneous reliance on section 25B of the TAA was done in good faith and it acted unintentionally.
 - 3.3 SARS was not entitled, under those circumstances, to levy the understatement penalty.²
- 4 The SCA also set aside the understatement penalty on the basis of a purported concession by counsel for SARS that there was a bona fide inadvertent error,

¹ SCA Judgment, Vol 4 page 297 para 29 and 31(a)

² SCA Judgment, Vol 4 page 297 para 29

without enquiring into the meaning and scope of these concepts.

- 5 There was however no concession that the understatement arose from a bona fide inadvertent error thus disentitling SARS from levying the penalty. In this regard, the SCA appears to have elevated SARS' counsel's acknowledgment of Thistle's interpretation whilst maintaining SARS position, as a concession.³
- 6 The understatement in this matter arose as a result of Thistle's failure to declare capital gains that were distributed to it in its capacity as a beneficiary of various trusts which had disposed of their assets ("Tier 1 trusts").
- 7 Thistle however declared no capital gains in its income tax returns for the relevant years of assessment, as it contended that it was left with no capital gain or loss of its own after awarding such amounts to its own beneficiaries (i.e. Thistle's beneficiaries). In relation to the understatement penalties imposed, Thistle contended that its decision not to declare capital gains "*resulted from a bona fide inadvertent error insasmuch as it completed its tax returns based on legal advice it received*".⁴
- 8 The high water mark of Thistle's case, which appears to have found favour with the SCA is this: Thistle had access to a legal opinion (which was not commissioned by it but by another "associated" Trust well before the capital gains

³ FA, Vol 4 para 10 – 11. At worst for SARS and even if it were to be held that there was a concession made, which is not admitted, it is submitted that this would amount to a legal concession, which is not binding on this court. Matatiele Municipality and Others v President of the Republic of South Africa and Others 2006 (5) SA 47 (CC) para 67

⁴ AA, Vol 4 page 370 para 18

that had arisen), accepted the views reflected in that opinion and consequently any understatement by it was *bona fide* and constituted an inadvertent error.⁵

9 Such conclusion is reached without considering the nature of the advice and conclusion reached in the opinion relied upon and whether the facts that were considered in that opinion applied equally to the facts of this matter.

10 SARS submits that it was entitled to impose an understatement penalty as contemplated in section 222 of the TAA, as there was no inadvertent error that caused Thistle's failure to declare the capital gains.⁶

11 The fact that Thistle relied on an opinion that was furnished by counsel to a different entity and several years earlier, indicates that it consciously and deliberately adopted a tax position when electing to distribute the amounts of the capital gains that had vested in it to its beneficiaries.⁷ In doing so, Thistle's conduct did not amount to an inadvertent error or an innocent misstatement.⁸

12 It is common cause between the parties that the issue relating to the understatement penalty raises a constitutional issue and an issue of public importance. To this extent, "*Thistle agrees with SARS that the issue of*

⁵ SCA Judgment, Vol 4 page 297 para 28 and 29; AA, Vol 4 page 369 para 14

⁶ Rule 31 Statement, Vol 1 page 15 para 3.5.2

⁷ The Opinion which Thistle seeks to rely upon did not constitute an opinion as contemplated in section 223(3) of the TAA. An opinion contemplated in section 223(3) is an opinion from an independent registered tax practitioner; that was issued prior the date that the relevant return was due; was based upon full disclosure of the specific facts and circumstances of the arrangement and confirmed that the taxpayer's position is more likely than not to be upheld if the matter proceeds to court. None of these requirements were satisfied *in casu*. Section 223(3) of the TAA accordingly does not find application in this matter.

⁸ ITC 1948 84 SATC 110 as to the meaning of *bona fide* inadvertent error.

understatement penalties raises an issue of public importance as it engages SARS' statutory and constitutional powers and obligations to collect taxes effectively and efficiently".⁹

13 It is accordingly apparent also that in addition to raising a constitutional issue, this matter deals with an "*important issue of principle*".¹⁰

14 We therefore submit that the application for conditional leave to appeal stands to be granted, in the event that Thistle's application for leave to appeal is granted.

LEAVE TO APPEAL

15 It is now trite that leave to appeal to this Court will be granted:

15.1 where the intended appeal raises a constitutional issue; and

15.2 where it is in the interests of justice for such leave to be granted.

CONSTITUTIONAL MATTER

16 SARS, as defined in section 1 of the TAA, is the Republic's tax-collection authority. It is responsible for administering the South African tax system and customs service.

17 Section 213 of the Constitution provides for the creation of a National Revenue Fund for the collection of all money paid to the national government. The provisions of the Constitution read with the fiscal statutes impose a duty and an

⁹ AA, Vol 4 page 366 para 3

¹⁰ National Education Health and Allied Workers Union v University of Cape Town and Others 2003 (3) SA 1 (CC) at para 31

obligation on the state to impose tax, and on SARS to exercise its powers in collecting taxes effectively and efficiently.

- 18 SARS' object is to efficiently and effectively collect revenue and administer the tax laws of South Africa. To this end, the South African Revenue Service Act 34 of 1997 ("the SARS Act") was promulgated to make provision for the efficient and effective administration of the revenue-collecting system of the Republic.
- 19 Tax legislation, such as the TAA, therefore seeks to enable SARS to achieve its constitutional objectives.¹¹
- 20 These constitutional obligations have recently been restated in Lifman And Others v Commissioner For South African Revenue Service,¹² where it was held that:

"It is common cause that [SARS] is tasked by legislation to provide for the effective and efficient collection of tax; to make provision in respect of tax assessment; to make provision for the payment of tax; to provide for the recovery of tax; and to recover interest on outstanding tax debts amongst the others"

- 21 It accordingly follows that a finding which deprives SARS from raising an understatement penalty effectively prevents it from exercising its statutory and constitutional powers and obligations of collecting taxes effectively and

¹¹ Preamble to the TAA

¹²Lifman And Others v Commissioner for South African Revenue Service and Others
77 SATC 383 para 23

efficiently.¹³

- 22 The imposition of understatement penalties accordingly serves the important purpose of ensuring that returns are honest and accurate, thus advancing the constitutional objective of collecting taxes effectively and efficiently and preventing prejudice to the fiscus.¹⁴
- 23 The importance of such objective is furthermore highlighted by the fact that where taxes are due in a particular year and are not recovered in that year, the delay affects SARS' ability to collect the revenue, which ultimately affects government's ability to fulfil its constitutional obligations to its citizens.¹⁵
- 24 As it was held by this court in Steenkamp NO v Provincial Tender Board of the Eastern Cape, when an organ of state performs a duty on behalf of government it wields power derived first from the Constitution itself and next from legislation in pursuit of constitutional goals. The exercise and control of public power is always a constitutional matter. Section 195 of the Constitution further qualifies the exercise of public power by requiring that public administration be

¹³ FA, Vol 4 page 355 para 24

¹⁴ CBA (Pty) Ltd v Commissioner for the South African Revenue Service (24674) [2020] ZATC 21 (25 November 2020) para 46

¹⁵ (LDC Taxpayer v Commissioner for the South African Revenue Service (IT 24888) [2021] ZATC 6 (18 June 2021) para 42

accountable, transparent and fair.¹⁶

- 25 This case accordingly raises the interpretation and application of a provision that was enacted to discharge a constitutional obligation, as section 222 of the TAA was enacted to collect taxes efficiently and effectively. On this basis also, it is submitted that this case raises constitutional issues of importance.¹⁷

INTEREST OF JUSTICE

- 26 We submit that it is in the interests of justice for leave to cross appeal to be granted.

- 27 The order of the SCA has wide ranging consequences for national finances and the government's ability to discharge its Constitutional Obligations.

- 28 The SCA's order would suggest that simply because a taxpayer has regard to a legal opinion before completing its tax returns, any understatement by it would be *bona fide* and would constitute an inadvertent error, thus preventing SARS from imposing an understatement penalty.¹⁸

- 29 The judgment of the SCA also has the effect of setting a precedent and thus influencing other courts when dealing with the imposition of understatement

¹⁶ Steenkamp NO v Provincial Tender Board of the Eastern Cape (CCT71/05) [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) (28 September 2006) para 20; Mudau v Municipal Employees' Pension Fund and Others [2023] ZACC 26 para 47

¹⁷ Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another 2014 (2) SA 603 (CC) para 37

¹⁸ SCA Judgment Vol 4 page 297 para 28 and 29

penalties.

30 The effect of such judgment was recently demonstrated in Commissioner for the South African Revenue Service v Coronation Investment Management SA (Pty) Ltd,¹⁹ where the SCA held that:

30.1 CIMSA stated that it relied on a tax opinion procured from a leading tax expert in the country. However, it did not disclose the contents thereof, or make the opinion available to SARS.

30.2 Insofar as the tax opinion is concerned, it was not incumbent on CIMSA to disclose a tax opinion that it had obtained, any more than it would be on any other party which litigates on the basis of a procured legal opinion.

30.3 In Commissioner for the South African Revenue Service v The Thistle Trust, an argument was presented on behalf of SARS that the taxpayer in that matter had consciously and deliberately adopted a certain position when it elected to distribute the capital gains. The SCA held that it was correctly conceded that the understatement was a bona fide error and that SARS was not entitled to impose the understatement levy.²⁰

31 The imposition of an understatement penalty was then set aside solely on the basis that the taxpayer had relied on a tax opinion and in reliance on paragraph

¹⁹ Commissioner for the South African Revenue Service v Coronation Investment Management SA (Pty) Ltd (1269/2021) [2023] ZASCA 10 (07 February 2023)

²⁰ Commissioner for the South African Revenue Service v Coronation Investment Management SA (Pty) Ltd para 60 - 63

28 of the SCA's judgment in *Thistle*.

32 The Coronation Investment Management judgment, as is the case with the *Thistle* Judgment, arrive at such conclusions without inquiring into the meaning and scope of the words "*bona fide inadvertent error*". They are accordingly precedent setting without providing the necessary reasoning and basis for the conclusion reached.

33 Furthermore, these issues of law have been the subject of divergent views and findings by the Tax Court. To mention a few:

33.1 In CBA (Pty) Ltd v Commissioner for the South African Revenue Service,²¹ it was held that:

33.1.1 Although the TAA requires a bona fide inadvertent error, the duty of the Court is still to analyse the entire evidence and to establish whether it shows intention or bona fide inadvertent error. A finding that the error was intentional will exclude bona fide inadvertent error and will not assist the taxpayer. A finding that there was indeed a bona fide inadvertent error will exclude intention.

33.1.2 The conduct of the appellant does not qualify as a *bona fide* inadvertent error. The inclusion in the 2016 tax year of assessment of the sum of R17,564,370, which had been previously under claimed in 2013, 2014, 2015 years of

²¹ CBA (Pty) Ltd v Commissioner for the South African Revenue Service (24674) [2020] ZATC 21 (25 November 2020) para 30

assessment was done intentionally and not by mistake. The motive was to claim allowances not claimed in the past. It is important that motive is not confused with intention.

33.1.3 Intention, in this regard, comprises of the appellant directing its will towards achieving the prohibited result or towards the performance of the very prohibited act. The result of such conduct is the appellant's goal. The appellant is fully aware that he commits a prohibited act and that notwithstanding he performs it.²²

33.2 In ABC (Pty) Ltd v Commissioner for the South African Revenue Service, it was held that:

33.2.1 according to the Oxford Dictionary the origin of the word '*bona fide*' is Latin and literally means 'with good faith'. The word is also defined as 'genuine'; 'real'; 'without intention to deceive'. 'Inadvertent' is defined as 'not resulting from' or 'achieved through deliberate planning'. The Merriam-Webster online dictionary gives the following as some of the synonyms for the word inadvertent: 'accidental' 'unintentional', 'unintended', 'unpremeditated', 'unplanned' and 'unwitting'. Error is defined by the Oxford Dictionary as 'a mistake'. It also gives the following

²² CBA (Pty) Ltd v Commissioner for the South African Revenue Service para 49

synonyms: 'the state or condition of being wrong in conduct or judgement'.

33.2.2 It follows from the above that the *bona fide* inadvertent error has to be an innocent misstatement by a taxpayer on his or her return, resulting in an understatement, while acting in good faith and without the intention to deceive.²³

34 The findings in ABC (Pty) Ltd v Commissioner for the South African Revenue Service (IT113772), referred to above, were then criticised by the Tax Court in ITC 1948, where the following was held:

34.1 In the *ABC Holdings* case the court looked at the dictionary meanings of the words "*bona fide*", "inadvertent" and "error," and concluded that it must follow therefrom that a "*bona fide* inadvertent error has to be an innocent misstatement by a taxpayer on his or her return, resulting in an understatement, while acting in good faith and without the intention to deceive. This definition is with respect not very helpful. It goes no further than giving the meaning to the words "bona fide" and "error, and still begs the question when an error is, or is not said to be inadvertent. The inclusion of the word 'inadvertent' in section 222(1) cannot simply be ignored. The legislature chose to include it as a component of what is considered to be an excusable error, and it must be given meaning to.²⁴

²³ ABC (Pty) Ltd v Commissioner for the South African Revenue Service (IT113772) [2016] ZATC 7 (4 November 2016) para 44 and 45 (also reported as ITC 1890 79 SATC 62)

²⁴ITC 1948 84 SATC 110, para 26

- 34.2 The context of what will classify as an honest mistake must be provided by the provisions which follow on subsection (1) of section 222, and more specifically what the legislature has identified in the Table as constituting punishable behaviour. This is in my view an instance where the determination of what an inadvertent error is, must be done with reference to what it is not, that is, it is to be defined in the negative. In other words, an error is not inadvertent, and therefore inexcusable, where the taxpayer's action or omission can be classified as a failure to take reasonable care in the completion of his or her tax return, or as being intentional or grossly negligent. This approach to the question is in my view consistent with the dictionary definitions of the word 'inadvertence', in that the meanings ascribed thereto are generally concerned with the nature of the attitude or disposition with which the person concerned acts or fails to act. This is in turn consistent with what underlies the forms of legal blameworthiness set out in the Table.²⁵
- 35 Subsequently thereto, it was held in ABC Mining (Pty) Ltd v Commissioner for the South African Revenue Service that grammatically contextualized, an inadvertent error, in the context of Chapter 16 of the Tax Administration Act, and specifically section 222 and 223, is an unplanned, accidental, involuntary, uncalculated mistake. By intentionally adopting a certain tax position, albeit *bona fide*, it can never be regarded as "inadvertently". If it was the intention of the legislature that the adoption of a specific tax position should be construed as

²⁵ ITC 1948, para 34

a *bona fide* inadvertent error, there would have been no need to include item (iii) in section 223 of the Tax Administration Act, namely “no reasonable grounds for tax position taken”. It is under this section that the *bona fides* of the taxpayer will be examined to determine whether the adoption of a specific tax position was reasonable.²⁶

36 In the face of these conflicting judgments, we then have the SCA judgments in Thistle and Coronation, which find that there was a bona fide inadvertent error, without engaging any of these judgments.

37 The jurisprudential implications of this matter accordingly dictate that it is in the interests of justice to hear it.²⁷

38 As it was noted by this court in Sebola and Another v Standard Bank of South Africa Ltd and Another, the meaning this Court assigns to the statutory provisions will have significant practical impact. There has been uncertainty for some years about their meaning, with conflicting first-instance decisions.²⁸

Prospects of Success

39 SARS also has good prospects of success in this matter.

40 Section 221 of the TAA defines ‘understatement’ as any prejudice to SARS or

²⁶ ABC Mining (Pty) Ltd v Commissioner for the South African Revenue Service (IT 24606) [2021] ZATC 12 (25 February 2021) para 95

²⁷ Gcaba v Minister for Safety and Security and Others (CCT64/08) [2009] ZACC 26; 2010 (1) SA 238 (CC) para 17 – 18

²⁸ Sebola and Another v Standard Bank of South Africa Ltd and Another (CCT 98/11) [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (7 June 2012) para 34

the *fiscus* as a result of—

- (a) *a default in rendering a return;*
- (b) *an omission from a return;*
- (c) *an incorrect statement in a return; or*
- (d) *if no return is required, the failure to pay the correct amount of 'tax'.*

41 'Substantial understatement' is in turn defined as a case where the prejudice to SARS or the *fiscus* exceeds the greater of five per cent of the amount of 'tax' properly chargeable or refundable under a tax Act for the relevant tax period, or R1 000 000.

42 'Tax position' means an assumption underlying one or more aspects of a tax return, including whether or not—

- (a) *an amount, transaction, event or item is taxable;*
- (b) *an amount or item is deductible or may be set-off;*
- (c) *a lower rate of tax than the maximum applicable to that class of taxpayer, transaction, event or item applies; or*
- (d) *an amount qualifies as a reduction of tax payable.*

43 Section 222(1) of the TAA provides as follows:

"In the event of an understatement by a taxpayer, the taxpayer must pay, in addition to the tax payable for the relevant tax period, the understatement penalty determined under subsection (2) unless the understatement results from a bona fide inadvertent error."

- 44 Section 222 accordingly creates an obligation upon a tax payer, to pay an understatement penalty, in the event that his audit revealed an understatement as defined. Simply put, where there is an understatement, the tax payer must pay an understatement penalty.
- 45 Section 223 of the TAA in turn draws a distinction between different kinds of behaviour and the penalty percentages that flow from such behaviour. The understatement penalty that may be imposed by SARS depends on whether the understatement results from the taxpayer failing to take reasonable care to one where the taxpayer was grossly negligent.
- 46 The SCA, despite having found that the capital gains vested in Thistle and that it was required to declare such gains in its returns, held that SARS was not entitled to levy an understatement penalty as the understatement arose from a *bona fide* inadvertent error.
- 47 In so doing, the SCA ignored the legislative scheme referred to above and failed to interpret the meaning and scope of the words “*bona fide* inadvertent error”. More importantly, it also failed to appreciate that with Thistle having taken a deliberate decision not to declare the capital gains,²⁹ its conduct could not have been “inadvertent”.
- 48 Separately from the alleged inadvertence, the SCA failed to recognize that a taxpayer’s reliance on advice does not mean that it is excused from the

²⁹ AA, Vol 4 page 369 page 15

imposition of an understatement penalty.

49 To the extent necessary, the existence of advice could only play a role in relation to section 223 and not section 222 of the TAA.

50 Once it is shown that there is no inadvertence, it must follow that an understatement penalty, in one form or another stands to be imposed. This much is accepted by Thistle.³⁰

51 This, we submit indicates that SARS has good prospects of success.

52 Against this background and in accordance with the Court's directions, we proceed to deal with the merits of the cross appeal.

CONTEXT OF THIS MATTER

53 During the 2014, 2015 and 2016 years of assessment, the Tier 1 trusts sold or disposed of some of their properties and vested Thistle with the capital gain that arose from the disposal of those assets. Thistle however declared no capital gains in its income tax returns for the 2014, 2015 and 2016 years of assessment. It contended that because it had awarded the amounts received by it from the Tier 1 trusts to its own beneficiaries, it was not liable for any capital gains.

54 Thistle placed reliance on:

54.1 Section 25B(1) and (2) of the Income Tax Act 58 of 1962 ("ITA");

54.2 paragraphs 80(1) and (2) of the Eighth Schedule to the ITA;

³⁰ AA, Vol 4 page 374 para 28

54.3 the common law conduit pipe principle.

55 At the heart of Thistle's case was the proposition that because it had passed on to its beneficiary in the same year of assessment that which it received from the Tier 1 trusts, any capital gain that may have accrued would have accrued to its beneficiary as opposed to it. In other words, it was no more than a conduit and was accordingly not to be taxed on the amount that flowed through from the Tier 1 trusts to it and ultimately to its beneficiary. Rather, it was its beneficiary that should have been taxed.

56 Given the position adopted by Thistle, it did not declare any capital gains in respect of its 2014, 2015 and 2016 years of assessment. Its failure to have done so resulted in an understatement as contemplated in section 222 of the TAA.

IMPOSITION OF UNDERSTATEMENT PENALTY

57 The starting point is to identify whether there had been an understatement as defined in section 221 of the TAA. Once an understatement is established, SARS must, in terms of section 222 impose an understatement penalty, unless the understatement resulted from a *bona fide* inadvertent error. If this proviso does not find application, SARS must then determine the applicable percentage of the penalty to be paid, with reference to the behaviour stipulated in section 223.

58 This course of events were explained in Lance Dickson Construction CC v

CSARS³¹ as follows:

“It follows that in circumstances where an alleged understatement of tax has occurred, a three phase process is contemplated by the Legislature. Firstly, SARS must consider whether the understatement constitutes an “understatement” as defined in s221 of the TAA. If it does, SARS must then consider whether the understatement results from a “bona fide inadvertent error”. If such an error is established, that is the end of the inquiry, and no understatement penalty may be levied. However, where there is no such error, SARS is then required to identify the appropriate behavioral category under which the taxpayer’s conduct allegedly resorts in terms of the table set out in section 223 before it can impose a penalty”

59 This accords with the earlier judgment of the SCA in Purlish Holdings (Proprietary) Limited v The Commissioner For The South African Revenue Service, where it was held that:

“I am accordingly satisfied that SARS has proven that there were understatements as contemplated by s 221. I am unable to find that the understatements were as a result of a bona fide inadvertent error, as the appellant did not adduce any evidence to that effect. There is nothing, in the evidence, that suggests an error of that nature. It follows that the Tax Court correctly found that SARS had discharged its onus of proving the appellant’s ‘understatement’ of its CIT and VAT within the contemplation of s 221 of the TAA”³²

60 The duty to show that the understatement resulted from a *bona fide* inadvertent

³¹ Lance Dickson Construction CC v CSARS (A211-2021) [2023] ZAWCHC 12 (31 January 2023) para 13

³² Purlish Holdings (Proprietary) Limited v The Commissioner For The South African Revenue Service (76/2018) [2019] ZASCA 4 (26 February 2019) para 24

error lies with the taxpayer. This was explained in CBA (Pty) Ltd v Commissioner for the South African Revenue Service,³³ where it was held that:

“The understatement penalty was imposed because it was found that there was no bona fide inadvertent error; that there was an understatement and prejudice to SARS and fiscus. The applicable behaviour was determined to be “no reasonable grounds for the tax position taken” and the conduct was determined to be “standard”. A penalty was determined at 50% of the tax of R17,564,368.00.³⁴

I now turn to the reasons why SARS imposed 50% USP. In the first place, it is contended by Mr Tshilonga (and here I agree with him), that the duty is on the appellant to satisfy the Court that a bona fide inadvertent error was made. The TAA does not define a bona fide inadvertent error. ...

Although the TAA requires bona fide inadvertent error, the duty of the Court is still to analyse the entire evidence and to establish whether it shows intention or bona fide inadvertent error. A finding that the error was intentional will exclude bona fide inadvertent error and will not assist the taxpayer. A finding that there was indeed a bona fide inadvertent error will exclude intention. I will come back to this point later in the judgment³⁵

61 In arriving at this conclusion, the court distinguished between motive and intention and held that the inclusion of the claim for allowances was done intentionally and not by mistake.

“The motive was to claim allowances not claimed in the past. It is

³³ CBA (Pty) Ltd v Commissioner for the South African Revenue Service (24674) [2020] ZATC 21 (25 November 2020)

³⁴ CBA (Pty) Ltd v Commissioner for the South African Revenue Service para 18

³⁵ CBA (Pty) Ltd v Commissioner for the South African Revenue Service para 30

*important that motive is not confused with intention. Intention comprises of the taxpayer directing its will towards achieving the prohibited result or towards the performance of the very prohibited act. The result of such conduct is the taxpayer's goal. The taxpayer is fully aware that he commits a prohibited act and that notwithstanding he performs it. In the premises the conclusion is inescapable that the decision to claim the allowance in 2016 was made by the appellant*³⁶

62 It is thus apparent that SARS does not have to prove the qualification in subsection 222(1), ie. that the understatement resulted “from a *bona fide* error”.³⁷

63 This was aptly explained in Taxpayer H v Commissioner for the South African Revenue Service, where the following was stated:

*“I do not accept the appellant’s contention that prior to levying the USP, SARS had a duty to satisfy itself that the understatement did not result from a bona fide in advertent error. The appellant’s assertion amounts to turning the burden of proof set out in section 102(2) of the TAA on its head. The burden remains with the appellant to prove that the interest expense is deductible and hence no understatement of its income. In the event the appellant had provided evidence that the understatement was due to an inadvertent bona fide error, in terms of section 221, it would not be competent of the respondent to levy the USP. The appellant led no such evidence”*³⁸

³⁶ CBA (Pty) Ltd v Commissioner for the South African Revenue Service para 41 - 51

³⁷ CZY v Commissioner for the South African Revenue Service (IT 24988) [2021] ZATC 18 (5 August 2021) para 17

³⁸ Taxpayer H v Commissioner for the South African Revenue Service (IT 14213) [2022] ZATC 5; 85 SATC 35 (9 February 2022) para 40

Bona Fide Inadvertent Error - Meaning

64 The words “*bona fide* inadvertent error” were considered in the judgment of ITC 1948, which drew a distinction between a *bona fide* error and an inadvertent error, and held that:

“an error is not inadvertent, and therefore inexcusable, where the taxpayer’s action or omission can be classified as a failure to take reasonable care in the completion of his or her tax return, or as being intentional or grossly negligent. This approach to the question is in my view consistent with the dictionary definitions of the word ‘inadvertence’, in that the meanings ascribed thereto are generally concerned with the nature of the attitude or disposition with which the person concerned acts or fails to act. This is in turn consistent with what underlies the forms of legal blameworthiness set out in the Table”³⁹

It can be accepted on the evidence that the incorrect statement in the respondent’s tax return was an honest mistake. The question is whether the mistake was also inadvertent. The focus is accordingly on the standard of care taken by the taxpayer and the measures adopted by it to avoid errors in the submission of its tax return”⁴⁰

65 The importance of distinguishing between a *bona fide* error and one that is inadvertent is indicated by the fact that all understatements result from a trigger that has already been determined to be a mistake. The error from which the understatement results, is therefore insufficient to exempt it from a penalty – the

³⁹ ITC 1948, para 34

⁴⁰ ITC 1948, para 36

trigger must be *bona fide* inadvertent.⁴¹

66 Grammatically contextualized, an inadvertent error, in the context of Chapter 16 of the TAA and specifically section 222 and 223, is an unplanned, accidental, involuntary, uncalculated mistake. Intentionally adopting a certain tax position, albeit *bona fide*, can never be regarded as “inadvertently”. If it was the intention of the legislature that the adoption of a specific tax position should be construed as a *bona fide* inadvertent error, there would have been no need to include item (iii) in section 223 of the TAA, namely “no reasonable grounds for tax position taken”. It is under this section that the *bona fides* of the taxpayer will be examined to determine whether the adoption of a specific tax position was reasonable.⁴²

67 As correctly held in ITC 1948, *the inclusion of the word ‘inadvertent’ in section 222(1) cannot simply be ignored. The legislature chose to include it as a component of what is considered to be an excusable error, and it must be given meaning to.*⁴³

68 Such approach accords with the judgment of this court in National Credit Regulator v Opperman and Others, where it was held that:

68.1 A longstanding precept of interpretation is that every word must be given

⁴¹ ABC Mining (Pty) Ltd v Commissioner for the South African Revenue Service (IT 24606) [2021] ZATC 12 (25 February 2021) para 94

⁴² ABC Mining (Pty) Ltd v Commissioner for the South African Revenue Service (IT 24606) [2021] ZATC 12 (25 February 2021) para 95

⁴³ ITC 1948, para 26

a meaning.

68.2 Words in an enactment should not be treated as tautologous or superfluous.

68.3 It has to be assumed that the legislator's enacted text includes only words that matter. For to enact words that do not would violate the most basic supposition of the shared enterprise. Hence none can be ignored.

68.4 Everything the legislator has enacted must be included in the meaning assigned to the whole.

68.5 if the language used by the lawgiver is ignored in favour of other pursuits, the result is not interpretation but divination.⁴⁴

69 The approach that was adopted by the SCA and which is advanced by Thistle in this court falls foul of this dictum, as it ignores the requirement that for an understatement penalty not to be imposed, the error that led to the understatement must not only be *bona fide* but must also be inadvertent.⁴⁵

70 In light of the above discussion, we submit that the fact that a party relied upon advice in completion of its returns cannot and does not mean that the error was inadvertent. To the contrary, reliance on advice indicates that the party

⁴⁴ National Credit Regulator v Opperman and Others 2013 (2) BCLR 170 (CC) para 99 – 100

⁴⁵ By its nature, inadvertent mistakes includes unintentional mistakes such as clerical errors. See McCaughey Corporation Ltd v Brickor Precast (Pty) Ltd 1989 BP 314 (CP) at 332C–G and Hokuriku Pharmaceutical Co Ltd v Cipla-Medpro (Pty) Ltd 1999 BIP 384 (CP) at 386A–387C.

concerned applied its mind and acted intentionally in the completion of its returns.

71 Notionally, such advice could however play a role in relation to the determination of the taxpayer's behaviour and the percentage of the penalty to be imposed. This however depends on a variety of factors such as the nature of the advice provided and the steps that were taken by the taxpayer to ensure that it discharges its obligations to ensure that the tax position adopted is reasonable.

72 This distinction was explained in ABC Mining (Pty) Ltd v Commissioner for the South African Revenue Service (IT 24606) where the court held that the understatement was not as a result of a *bona fide* inadvertent error, but then proceeded to hold that the tax position that was adopted by the taxpayer, although mistaken, was reasonable, as it had been advanced in terms of well-reasoned arguments that supported its views.⁴⁶ The court then proceeded to reduce the penalty imposed from "*no reasonable grounds for the tax position taken*" to "*substantial understatement*".⁴⁷

73 Also in ITC 1948, the court dealt with a tax return that was completed on the basis of specialist advice. The court firstly found that there was no inadvertent error. It then framed the next question by stating that "*the taking of an incorrect tax position is dealt with in item (iii) of the Table. The question to be determined in that context is whether or not there were reasonable grounds for taking the tax*

⁴⁶ ABC Mining (Pty) Ltd v Commissioner for the South African Revenue Service (IT 24606) para 98

⁴⁷ ABC Mining (Pty) Ltd v Commissioner for the South African Revenue Service (IT 24606) para 100

position".⁴⁸

74 Having considered the facts of that matter, the court then concluded that "we accordingly find that the incorrect statement in the appellant's tax return did not constitute a bona fide inadvertent error as envisaged in section 222(1) of the Act, and that the appellant failed to take reasonable care in completing its return".⁴⁹

75 Also in ITC 1906, the court noted that the tax position adopted by the taxpayer was the product of advice given by the accountant.⁵⁰ This notwithstanding, and having considered the nature of the advice given, it concluded that "*this is a case where there is an absence of reasonable grounds for the tax position taken by the appellant*", thus warranting the imposition of a 50% penalty.⁵¹

76 These authorities, we submit, indicate that the SCA erred in merely setting aside the understatement penalty on the basis that Thistle had relied on legal advice.

77 They also indicate that even if it were to be found that Thistle relied on legal advice, the court was still enjoined to enquire into the appropriate penalty to be imposed i.e. no reasonable grounds for tax position adopted or substantial understatement. What the court could not do was to simply absolve Thistle of an obligation to pay the understatement penalty, having already found that the tax position adopted was incorrect and which thus resulted in an understatement.

⁴⁸ ITC 1948 para 43

⁴⁹ ITC 1948 para 47

⁵⁰ ITC 1906 80 SATC 256 para 38

⁵¹ ITC 1906 80 SATC 256 para 39

78 Differently put, once the understatement was made, and given that it was not as a result of “a *bona fide* inadvertent error”, the understatement as a matter of law had to be paid. The quantification of the understatement penalty would then be determined by reference to the Table set out in section 223 of the TAA. Although it was found that the taxpayer took reasonable care in completing the return, the court held that “this does not absolve it from having to pay the UP.”⁵²

79 This approach is also accepted by Thistle, wherein it contends that the facts of this matter do not justify the imposition of a 50% or 25% penalty. As such, “*the only alternative behaviour described in the understatement penalty percentage table in section 2231 is substantial understatement, for which an understatement of 10% is prescribed*”.⁵³

80 Whilst there might be a disagreement about the percentage of the penalty to be imposed, Thistle thus accepts that it cannot be absolved from paying any understatement penalty, once it has been found that the tax position that was adopted was incorrect and that there was an understatement.

No reasonable grounds for tax position taken by Thistle

81 We submit that the imposition of an understatement penalty at the rate of 50% was correct on the facts of this matter. This is so having regard to following:

⁵² CZY v Commissioner for the South African Revenue Service para 36; ABC Mining (Pty) Ltd v Commissioner for the South African Revenue Service (IT 24606) [2021] ZATC 12 (25 February 2021) para 100

⁵³ AA, Vol 4 page 374 para 28

81.1 Thistle relied on an opinion that had been furnished by counsel to another trust in 2009 i.e. the Avin Lieberman Trust.⁵⁴

81.2 Such opinion was accordingly not prepared for purposes of advising Thistle in relation to the issues that form the subject of this matter. To the contrary, it dealt with issues that affected the Avin Lieberman Trust and its beneficiaries, who were non residents.⁵⁵

81.3 The opinion dealt with other factors such as whether the Avin Lieberman Trust deed should be amended to convert it into a vested trust, in preparation for the time when the gain is distributed to its beneficiaries.⁵⁶

81.4 Counsel then provided his advice on what he considered to be “*the better course*” on how the Avin Lieberman Trust should arrange its affairs.⁵⁷ His advice was not unequivocal. He alerted the Avin Lieberman Trust to the fact that “*SARS may decide to dispute this, but if it does and succeeds in court, the taxation will be no worse in quantum unless there is an increase in rates than it would be where the trust converted to a vested one*”.⁵⁸

81.5 Despite this warning by counsel, Thistle adopted the the advice and consciously and deliberately adopted a tax position by electing to distribute

⁵⁴ Meyerowitz SC Opinion, Vol 1 page 84

⁵⁵ Meyerowitz SC Opinion, Vol 1 page 86 and 88

⁵⁶ Meyerowitz SC Opinion, Vol 1 page 98 para 8.3

⁵⁷ Meyerowitz SC Opinion, Vol 1 page 98 para 8.3

⁵⁸ Meyerowitz SC Opinion, Vol 1 page 100 para 8.4

the amounts of the capital gains that had vested in it to its beneficiaries and not paying any capital gains tax.

82 Evidently, this is not a case where the taxpayer was advised on how to deal with the issues that would later form the subject of a dispute with SARS. Moreso, there was no advice provided to Thistle in relation to the issues which it later sought to advance at the objection stage and before the Tax Court.

83 The inconclusive advice in the opinion could thus not have given an impression that this position would more than likely be upheld in court.⁵⁹

84 As indicated in ABC (Pty) Ltd v Commissioner for the South African Revenue Service (IT113772), the nature of the advice which the taxpayer seeks to rely upon and its reasonableness must be considered to determine if it was reasonable for the taxpayer to rely on such advice in the first place.⁶⁰

85 Having regard to the Guide on Capital Gains⁶¹ that has been issued by SARS, which was considered by Adv Meyerowitz SC as part of his opinion,⁶² and which clearly showed that SARS did not agree with the approach that would later be adopted by Thistle, we submit that it was not reasonable for Thistle to merely rely

⁵⁹ ABC (Pty) Ltd v Commissioner for the South African Revenue Service (IT113772) [2016] ZATC 7 (4 November 2016) para 48

⁶⁰ ABC (Pty) Ltd v Commissioner for the South African Revenue Service (IT113772) [2016] ZATC 7 (4 November 2016) para 38 and 48; Taxpayer H v Commissioner for the South African Revenue Service (IT 14213) [2022] ZATC 5; 85 SATC 35 (9 February 2022) para 41; ITC 1906; 80 SATC 256 para 29 and 38

⁶¹ <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-CGT-G01-Comprehensive-Guide-to-Capital-Gains-Tax.pdf>

⁶² Meyerowitz SC Opinion, Vol 1 page 90 para 5.1; 94 para 8.2

on a third party's opinion, draw its own conclusions and then seek to absolve itself from the decision that it took.⁶³

86 The fact that Thistle may have considered the opinion that had been given to the Avin Lieberman Trust is unhelpful in the circumstances. There is no evidence of what steps it took to address the equivocation by counsel. On the contrary, the probabilities are that it latched on to that portion of the opinion that appeared was most favourable to it and it proceeded to adopt a tax position in line therewith. In doing so, it would have appreciated that it ran the real risk of SARS contesting its tax position. That, we submit, is hardly conduct that can be said to have been inadvertent, let alone reasonable in the circumstances.

87 Furthermore, in terms of section 66 of the ITA, each tax payer is responsible for its own return, whether such return was based on advice or not.⁶⁴

88 A tax payer cannot simply accept advice without satisfying itself with the reasonableness of such advice. To do so, we submit, is to adopt an unreasonable tax position.

⁶³ ITC 1948 para 45 and 46

⁶⁴ Section 66(6) - *Any return furnished as contemplated in this section shall be signed by the tax payer or by his agent duly authorised in that behalf and any person signing any such return shall be deemed for all purposes in connection with this Act to be cognizant of all statements made in that return;*

(7) Any return made or purporting to be made or signed by or on behalf of any person for the purposes of this Act shall be deemed to be duly made and signed by the affected person unless such person proves that such return was not made or signed by him or on his behalf.

- 89 In the alternative and if it were to be held that the facts of this matter do not justify the imposition of a 50% understatement penalty, we submit that the penalty to be imposed is 25% penalty, i.e. reasonable care not taken. This is so because once it is determined that the established behavior does not warrant the imposition of a 50% penalty, the next step is then to determine the next applicable percentage penalty in terms of section 223 of the TAA, with the lowest applicable penalty being 10% for substantial understatement.⁶⁵
- 90 On all of these bases, we submit that the understatement penalty was correctly imposed by SARS.
- 91 Lastly, Thistle contends that SARS failed to plead facts which support the conclusion that Thistle had no reasonable grounds for the tax position taken.⁶⁶
- 92 This contention, with respect is opportunistic. It ignores the agreement reached between the parties that the issues in this matter would be determined without leading evidence, on the agreed common cause facts,⁶⁷ and with reference to the documents uploaded onto Caselines.⁶⁸
- 93 All the facts relied upon as evincing that there were no reasonable grounds for the tax position taken are apparent *ex facie* the documents which it was agreed the court could have regard to.

⁶⁵ LDC Taxpayer v Commissioner for the South African Revenue Service para 49

⁶⁶ AA, Vol 4 page 367 para 7

⁶⁷ Tax Court Judgment, Vol 4 page 302 para 4

⁶⁸ Tax Court Judgment, Vol 4 page 304 para 5.3

94 These include, the Finalisation of Audit,⁶⁹ Objection outcome,⁷⁰ and the opinion which Thistle alleges to have relied upon. The contents of the Finalisation of Audit and the Objection outcome were in turn incorporated by reference in the Rule 31 Statement.⁷¹

95 But for the agreement between the parties as to how the appeal was to be adjudicated upon, these are the facts that would have been referred to in evidence in the course of the trial. With the parties agreeing that the filed documents could be considered by the court and relied upon, it followed that the necessary evidence was placed before the court.

96 Thistle's contention accordingly stands to be dismissed.

CONCLUSION

97 In the circumstances, we submit that:

97.1 The conditional application for leave to cross appeal should be granted;
and

97.2 The cross appeal should be upheld with costs, including the costs of two counsel.

M A CHOCHAN SC

L KUTUMELA

Applicant's Counsel

Sandton Chambers
26 September 2023

⁶⁹ Finalisation of Audit, Vol 2, page 104

⁷⁰ Objection Outcome, Vol 2, page 130 para 2.5

⁷¹ Rule 31 Statement, Vol 1, page 6 para 2.9.2 – page 9 para 3.5; page 15 para 3.5

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2. National Education Health and Allied Workers Union v University of Cape Town and Others 2003 (3) SA 1 (CC)
3. ITC 1948 84 SATC 110
4. Lifman And Others v Commissioner for South African Revenue Service and Others 77 SATC 383
5. CBA (Pty) Ltd v Commissioner for the South African Revenue Service (24674) [2020] ZATC 21 (25 November 2020)
6. LDC Taxpayer v Commissioner for the South African Revenue Service (IT 24888) [2021] ZATC 6 (18 June 2021)
7. Steenkamp NO v Provincial Tender Board of the Eastern Cape 2007 (3) SA 121 (CC)
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9. Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another 2014 (2) SA 603 (CC)
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12. ABC Mining (Pty) Ltd v Commissioner for the South African Revenue Service (IT 24606) [2021] ZATC 12 (25 February 2021)
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16. Purlish Holdings (Proprietary) Limited v The Commissioner For The South African Revenue Service (76/2018) [2019] ZASCA 4 (26 February 2019)
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18. Taxpayer H v Commissioner for the South African Revenue Service (IT 14213) [2022] ZATC 5; 85 SATC 35 (9 February 2022)
19. National Credit Regulator v Opperman and Others 2013 (2) BCLR 170 (CC)
20. McCauley Corporation Ltd v Brickor Precast (Pty) Ltd 1989 BP 314 (CP)
21. Hokuriku Pharmaceutical Co Ltd v Cipla-Medpro (Pty) Ltd 1999 BIP 384 (CP)
22. ITC 1906 80 SATC 256