

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT337/2022

In the matter between:

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

Applicant

and

THE THIRSTLE TRUST

Respondent

FILING SHEET

PRESENTED FOR SERVICE AND FILING -

THE THIRSTLE TRUST SUBMISSIONS IN THE CROSS-APPEAL

DATED at JOHANNESBURG on this the 2nd day of OCTOBER 2023.



WERKSMANS ATTORNEYS

Attorneys for the Respondents

11th Floor, The Central

96 Rivonia Road

Dennehof

Sandton

Ref: Mr E Mazansky/ ZENP1100.133

Email: emazansky@werksmans.com/nharduth@werksmans.com

TO:

**REGISTRAR OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA
JOHANNESBURG**

AND TO:

MADIBA MOTSAI MASITENYANE GITHIRI INCORPORATED

Attorneys for the Applicant

381 Rivonia Boulevard

Unit 15 Rivonia Gate

First Floor, Block B

Rivonia

Ref: Ms Motsai/SARS/CMP113 C/O

RECEIVED BY:

Name: Nokwanda V Mthembu

Date: 02/10/2023

Time: 13:33

MMMG ATTORNEYS

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT337/2022

In the matter between:

THE COMMISSIONER OF SARS

Applicant

and

THE THISTLE TRUST

Respondent

THISTLE'S SUBMISSIONS IN THE CROSS-APPEAL

TABLE OF CONTENTS

THE ISSUE	3
“A BONA FIDE INADVERTANT ERROR”	4
THE BURDEN OF PROOF	5
THE PLEADINGS.....	5
ANALYSIS.....	7
PRAYER	8
LIST OF AUTHORITIES.....	9

THE ISSUE

- 1 The Supreme Court of Appeal's primary finding was that Thistle was liable for capital gains tax on the distributions it received from the level one trusts. Its secondary finding was that, although Thistle had made an understatement of its tax liability, it is not liable for understatement penalties in terms of sections 222 and 223 of the Tax Administration Act 28 of 2011.
- 2 Thistle applied for leave to appeal against the SCA's primary finding. If its appeal is upheld, it will be the end of the matter. If its appeal fails, however, SARS applies conditionally for leave to appeal against the SCA's secondary finding. The question will then be whether Thistle was liable for penalties on the amount of the understatement of its tax liability.
- 3 Section 222(1) of the TAA reads 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." (Emphasis added)

- 4 Thistle contends that it is not liable for penalties because its understatement, if any, resulted from a bona fide inadvertent error. It relied in good faith on an opinion given by the late Advocate David Meyerowitz SC, a highly regarded tax expert.¹ SARS accepts that Thistle relied in good faith on the Meyerowitz opinion. It contends nonetheless that, merely because Thistle deliberately adopted the tax position it did, it could not have been inadvertent.

¹ Meyerowitz opinion p83

5 We submit with respect that SARS is mistaken. The question is not whether the taxpayer deliberately adopted the tax position it did. The question is whether its error in doing so was bona fide and inadvertent. That was clearly so in this case.

“A BONA FIDE INADVERTANT ERROR”

6 Justice Poqwana held in ABC Holdings² that a bona fide inadvertent error is “*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*”.³

7 Justice Windell quoted this definition with approval in ABC Mining.⁴ She went on, however, to uphold a contention advanced by SARS, that a taxpayer who intentionally adopts a certain tax position, albeit bona fide, can never be regarded as having done so inadvertently.

8 We submit with respect that she was mistaken. The question under section 222(1) is not whether the taxpayer inadvertently made the understatement. The question is whether the understatement resulted from an inadvertent error. The section forgives a taxpayer who deliberately and carefully adopts a tax position but makes a bona fide inadvertent error in doing so.

9 We submit that an error may be bona fide and inadvertent even if it was negligently made. The issue, however, does not arise in this case because SARS does not contend that it was negligent for Thistle to rely on the Meyerowitz opinion. Our courts have indeed held that taxpayers cannot be said to have been

² ABC Holdings v The Commissioner for the South African Revenue Service [2016] ZATC 7 (4 November 2016)

³ para 45

⁴ ABC Mining v The Commissioner for the South African Revenue Service [2021] ZATC 12 (25 February 2021) para 90

negligent merely because they relied on tax opinions which turned out to be wrong.⁵ In this case, Thistle's tax position was moreover upheld by the Tax Court. It can accordingly not be said to have been an unreasonable position even if ultimately held to have been wrong.

THE BURDEN OF PROOF

10 Both sections 102(2) and 129(3) make it clear that, in an appeal against an understatement penalty imposed by SARS, the latter bears the burden of proving the factual justification of its imposition of the penalty. Our courts have also held that to be so in ABC Mining⁶ and ITC 1926.⁷ It means that SARS bears the burden of proving that Thistle's understatement did not result from a bona fide inadvertent error.

THE PLEADINGS

11 Rule 31(2)(c) of the Tax Court Rules provides that SARS must, in its grounds of assessment, "*set out a clear and concise statement of... the material facts and legal grounds upon which SARS relies in opposing the appeal*".

12 It means, in an appeal against its imposition of understatement penalties, SARS must plead all the material facts upon which it relies for its contention that the taxpayer's understatement did not result from a bona fide inadvertent error. In ITC 1926⁸, Justice Unterhalter put it as follows:

⁵ ABC Holdings v The Commissioner for the South African Revenue Service [2016] ZATC 7 (4 November 2016) para 48; Attieh v The Commissioner for the South African Revenue Service [2016] ZAGPJHC 371 (11 August 2016) paras 26 to 29

⁶ ABC Mining v The Commissioner for the South African Revenue Service [2021] ZATC 12 (25 February 2021) para 88

⁷ ICT 1926 82 SATC 161 paras 9 and 10

⁸ ITC 1926 82 SATC 161

“It is common ground between the parties that the onus rests upon SARS in respect of the imposition of an understatement penalty....”⁹

“It is accordingly clear that SARS must ultimately satisfy the court that there are facts that suffice for the imposition of the understatement penalty that SARS wishes to have proposed.”¹⁰

“It seems clear to me that the Rule 31 statement must set out a clear and concise statement of the material facts and legal grounds upon which SARS relies in opposing the appeal....”¹¹

- 13 In its grounds of assessment, filed in terms of rule 31, SARS accepted that Thistle had acted in good faith on the basis of the Meyerowitz opinion.¹² It did not advance any facts in support of its contention that Thistle’s understatement had not resulted from a bona fide inadvertent error. Its position was that, merely because Thistle had intentionally adopted its tax position, it was not inadvertent. SARS put it as follows:

“The fact that the Taxpayer may have believed that the misstatement was correct because of an opinion does not detract from the fact that the misstatement itself was intentionally made. It was thus not inadvertent, and SARS must, under section 222(1), levy an understatement penalty.”
(our emphasis)¹³

- 14 SARS, in other words, conflated and confused the taxpayer’s tax position and the error on which it was based. It clearly intentionally adopted the tax position it did. But, if its tax position was erroneous, then it was clearly also a bona fide and inadvertent error.
- 15 That was what Thistle pleaded in its grounds of appeal filed in terms of rule 32. It said that, if its tax position had been incorrect,

⁹ para 9

¹⁰ para 10

¹¹ para 11

¹² Grounds of assessment p7 para 2.5 and p15 para 3.5.2

¹³ Grounds of assessment p8 para 2.5

“this was the result of a bona fide inadvertent error as contemplated in section 222(1) of the TAA, in circumstances where the appellant took steps to gain access to, and relied upon, a written opinion furnished by the late Adv Meyerowitz SC, as well as the advice of independent professional accountants, on the direct point in question.”¹⁴

ANALYSIS

16 It is clear that, on the pleadings, the only issue between the parties was a very narrow one:

16.1 It was common cause or, in any event, not disputed, that Thistle had reasonably and in good faith relied on the Meyerowitz opinion in coming to the conclusion that it was not liable for capital gains tax.

16.2 Thistle accordingly submits that its mistake, if it made one, was bona fide and inadvertent. It was not liable to any penalties under section 222(1).

16.3 SARS does not deny that Thistle’s error was bona fide and inadvertent. It insists nonetheless that its understatement attracted penalties merely because Thistle had deliberately taken the tax position it did.

17 We submit with respect that SARS’s contention is indefensible. The question under section 222(1) is not whether the taxpayer had deliberately taken the tax position it did. The question is whether the mistake it made, in doing so, was bona fide and inadvertent. That was clearly the case here. That much is undisputed.

¹⁴ Grounds of appeal p30 para 37

PRAYER

18 Thistle asks that SARS's conditional application for leave to appeal be dismissed or, if leave is granted, that its appeal be dismissed, and in either event that SARS be ordered to pay Thistle's costs including the costs of two counsel.

Wim Trengove SC

T Emslie SC

Carol Steinberg SC

M Sibanda

Respondent's Counsel, Sandton and Cape Town

2 October 2023

LIST OF AUTHORITIES

- 1 *ABC Holdings v The Commissioner for the South African Revenue Service*
[2016] ZATC 7 (4 November 2016)
 - 2 *ABC Mining v The Commissioner for the South African Revenue Service* [2021]
ZATC 12 (25 February 2021)
 - 3 *Attieh v The Commissioner for the South African Revenue Service* [2016]
ZAGPJHC 371 (11 August 2016)
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