IN THE TAX COURT - JOHANNESBURG

CASE NUMBER: 4/2005

In the matter between:

X Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

JUDGMENT

Jajbhay J:

INTRODUCTION

This is an appeal by the taxpayer, the Applicant, against a decision by the Respondent, the Commissioner for the South African Revenue Service in terms of rule 3(2); alternatively rule 3(3). The appeal is in terms of an application on notice, in terms of rule 26(1). (The Rules pertaining to procedures in the Tax Court ("the rules"), promulgated in terms of section 107A of the Income Tax Act, 58 of 1962 ("the Income Tax Act"). The Applicant seeks an order remitting the Applicant's request for reasons for the Commissioner's assessment dated 6

October 2004 ("the assessment"), made in terms of section 31 of the Value Added Tax Act, 89 of 1991 ("the VAT Act") to the Commissioner for reconsideration and with directions to provide such reasons which in the opinion of the Court are adequate.

The Respondent issued assessments in terms of section 31 of the Vat Act for the period November 1998 to July 2001, to the Applicant. In the assessments, exports to customers in Lesotho, purportedly making use of the services of Qwa-Qwa Transport (Proprietary) Limited, were subjected to the standard vat rate. An additional tax calculated at the rate of 200% of the tax payable, was imposed.

The Applicant requested reasons for the assessment issued in terms of rule 3(1) (a) of the rules.

The Respondent furnished a reply to this request in a letter dated 8 June 2005. This letter suggested that the Applicant was informed in December 2004, that adequate reasons had been provided.

The Applicant's allegation that the Respondent *"failed to provide adequate reasons that would enable the Applicant to determine whether or not he agrees with the basis of the assessment and that it fully understands why the decision was taken against it, even if it does not agree with such decision",* places this application in terms of rule 26.

THE JURISDICTION OF THE COURT

The jurisdiction of the Tax Court to hear the appeal, in this application, is based on the following statutory provisions:
Section 33(1) of the VAT Act provides that, subject to the provisions of section 33(A) (which is not relevant here) an appeal against any decision or assessment

of the Commissioner under the VAT Act shall be to this Court. Section 33(4) provides that:

"The provisions of sections 83(8),(11),(12),(14),(17),(18),(19), 84,85, 107A of Part IIIA of Chapter III of the Income Tax Act and any rules under that Act relating to any appeal to the tax court or to the settlement of disputes shall mutatis mutandis apply with reference to any appeal under this section which is or is to be heard by that court or to any settlement of a dispute in terms of this Act."

Rule 3 provides as follows:

"(1)(a) Any taxpayer who is aggrieved by any assessment may by written notice delivered to the Commissioner within 30 days after the date of the assessment, request the Commissioner to furnish reasons for the assessment. The written notice must specify the address at which the taxpayer will accept notice and delivery of such reasons and all documents in terms of the proceedings contemplated in rule 26.

(b) Upon request by the taxpayer, the period prescribed in paragraph (1) may be extended by the Commissioner for a period of not more than 60 days where the Commissioner is satisfied that reasonable grounds exist for the delay in complying with that period.

(2) Where in the opinion of the Commissioner adequate reasons have already been provided, the Commissioner must, within 30 days after receipt of the notice contemplated in subrule (1), notify the taxpayer accordingly in writing, which notice must refer to the documents wherein such reasons were provided.
(3) Where in the opinion of the Commissioner adequate reasons have not yet been provided, the Commissioner must provide written reasons for the assessment within 60 days after receipt of the notice contemplated in subrule (1): Provided that where in the opinion of the Commissioner

more time is required due to exceptional circumstances, the complexity of the matter or the principle or the amount involved, the Commissioner must, before expiry of that 60 day period, inform the taxpayer that written reasons will be provided not later than 45 days after the date of expiry of that first 60 day period.

Rule 26(1)(a) provides as follows:
"Any decision by the Commissioner in the exercise of his or her discretion under rules 3(1)(b), 3(2), 3(3), 5(1) and 5(2)(c) will be subject to objection and appeal, and may notwithstanding the procedures contemplated in rules 6 to 18 be brought before the Court by application on notice."

Rule 26(1)(b) provides in its relevant part as follows:
"The Court may upon application on notice under this subrule and on good cause shown, in respect of a decision by the Commissioner under:
(i) ...
(ii) rule 3(2) or 3(3), make an order remitting the matter for reconsideration by the Commissioner with or without directions to provide such reasons as in the opinion of the Court are adequate; or
(iii) ..."

On a proper interpretation of rule 26(1)(b) in the context of rule 3(2), this Court can, on appeal, find that the Commissioner's decision, suggesting that adequate reasons have already been given, is wrong because his reasons are inadequate, and direct the Commissioner to provide *"such reasons as in the opinion of the Court are adequate"*. The Court can also remit without directions as to what is adequate. On a literal interpretation the words *"are adequate"* imply that the Court should approve the reasons. This result was probably not intended. A more purposive interpretation would be to read rule 26(1)(b)(ii) as meaning that the one option is that the Court can direct the Commissioner to provide reasons, simpliciter, leaving it to the discretion of the Commissioner to decide what

reasons would be adequate. The other option is to give such directions to the Commissioner as would, in the opinion of the Court, ensure as far as possible, that the reasons will be adequate. In either instance, because of the specific wording of the rule, there is no room for the application of the principle in *Maimela's* case that the High Court cannot order an administrative decision-maker who has furnished reasons, to give *"further or better reasons" Commissioner, South African Police Service and Others v Maimela*, 2003 (5) SA 480 (T), 487B-D

FACTUAL BACKGROUND.

Following a SARS VAT audit which lasted several years and during which there was regular communication between the parties, in the form of correspondence, and meetings the Applicant was notified of the assessment on 6 October 2004. The assessment refers expressly to the findings in a previous letter from the Respondent to the Applicant dated 1 April 2004.

In a letter dated 3 November 2004 the Applicant's tax advisers requested reasons for the assessment in terms of rule 3(1)(a). What happened after this is a matter of some controversy. Mr Dunn says the Respondent's response took the form of a letter dated 8 June 2005. Mr Olwage does not deny that the letter constituted a response but says there were prior communications during December 2004 and a letter dated 17 March 2005. The contents of the communications are not revealed except that the essence of the said letter is stated to be that the Respondent informed the Applicant that it *"will utilise a further period as provided for in rule 3(1)(b) of the rules ...."*.

This letter adds to the uncertainty and confusion. The rule referred to is clearly misquoted. Rule 3(1) (b) deals with a request by the taxpayer for an extension of the time limit for requesting reasons. The intention of the

Respondent was probably to act under rule 3(3) which allows the Commissioner to extend the deadline for furnishing reasons. The letter is important because it shows that the Respondent, as at 17 March 2005, recognised the need to provide reasons and intended to provide them. The essential question in this appeal is whether the Respondent carried out his duty as he was obliged to.

The above forms the background to the undated letter received by the Applicant on 8 June 2005, namely the assessment. The letter requires analysis. This will be undertaken below.

THE RELEVANT SECTIONS OF THE VAT ACT

Part 4 of the VAT Act deals with *"RETURNS, PAYMENTS AND ASSESSMENTS"*. An important provision is section 28 which requires the vendor to furnish the Commissioner with the required returns, to calculate the amounts of such tax *"... and pay the tax payable to the Commissioner or calculate the amount of any refund due to the vendor"*. Up to this stage of the administration of the VAT Act the term *"assessment"* is not used. It is provided for the first time, in section 31. Section 31(1) provides as follows:

"Assessments.-(1) Where-

(a) any person fails to furnish any return as required by section 28, 29 or 30 or fails to furnish any declaration as required by section 13(4) or 14; or

(b) the Commissioner is not satisfied with any return or declaration which any person is required to furnish under a section referred to in paragraph (1); or

(c) the Commissioner has reason to believe that any person has become liable for the payment of any amount of tax but has not paid such amount; or

(d) any person, not being a vendor, supplies goods or services and represents that tax is charged on that supply; or

(e) any vendor supplies goods or services and such supply is not a taxable supply or such supply is a taxable supply in respect of which tax is chargeable at a rate of zero per cent, and in either case that vendor represents that tax is charged on such supply at a rate in excess of zero per cent;

(f) any person who holds himself out as a person entitled to a refund or who produces, furnishes, authorises, or make use of any tax invoice or document or debit note and has obtained any undue tax benefit or refund under the provisions of an export incentive scheme referred to in paragraph (d) of the definition of 'exported' in section 1, to which such person is not entitled, the Commissioner may make an assessment of the amount of tax payable by the person liable for the payment of such amount of tax, and the amount of tax so assessed shall be paid by the person concerned to the Commissioner."

In essence section 31(1) provides that where the taxpayer does not carry out his obligation to calculate his tax properly, or at all, the Commissioner *"may make an assessment of the amount of tax payable by the person liable"*. What is important is that the factual situations in which the Commissioner can exercise his discretion in terms of section 31(1) are prescribed. Where the taxpayer has made returns the Commissioner in effect overrides the calculation of the taxpayer by making an assessment. In this matter, it may be seen that: the assessment in the present matter; the Respondent's letter of 8 June 2005; and the answering affidavit of Mr Olwage do not set out clearly under what sub-section of section 31 the Respondent purported to act in exercising his discretion to make an assessment and upon what facts he decided to override the Applicant's returns for the relevant period.

The payment of a penalty and interest for failure to pay tax when due is provided for in section 39. The obligations are triggered automatically,

i.e. without the exercise of discretion by the Commissioner, and need not be analysed for present purposes.

Section 60 deals with additional tax in case of evasion and provides as follows:

"Additional tax in case of evasion. -(1) Where any vendor or any person under the control or acting on behalf of the vendor fails to perform any duty imposed upon him by this Act or does or omits to do anything, with intent-

(a) to evade the payment of any amount of tax payable by him; or

(b) to cause a refund to him by the Commissioner of any amount of tax (such amount being referred to hereunder as the excess) which is in excess of the amount properly refundable to him before applying section 44(6), such vendor shall be chargeable with additional tax not exceeding an amount equal to double the amount of tax referred to in paragraph (1) or the excess referred to in paragraph (b), as the case may be.

(2) The amount of the said additional tax shall be assessed by the Commissioner and shall be paid by the vendor within such period as the Commissioner may allow.

(3) The power conferred upon the Commissioner by this section shall be in addition to any right conferred upon him by this Act to institute or take other proceedings under this Act."

It is clear from section 60(1) that there is an implied power conferred upon the Commissioner to exercise discretion to decide whether the taxpayer had the required intention of evading, alternatively obtaining an unjustified refund. Secondly the Commissioner has to exercise discretion under section 60(2) to determine the amount of the additional tax.

Section 73 deals with schemes for obtaining undue tax benefits. If the Commissioner is satisfied that the scheme has been carried out which

created a tax benefit he shall determine the liability for tax and the amount thereof as if the scheme had not been entered into. At least two distinct discretions have to be exercised namely firstly, whether a scheme had been carried out with the required intent and secondly what the amount of the tax is.

From the foregoing it is clear that the making of the *"additional"* assessment by the Commissioner involved the exercise of several distinct statutory powers. The taxpayer by virtue of the provisions of rule 3(1) (a) is entitled to request the Commissioner to furnish reasons for the assessment. This applies to all the aforementioned components of an assessment.

MEANING OF THE PHRASE "ADEQUATE REASONS"

In the matter of *Minister of Environmental Affairs and Tourism v Phambili Fisheries 2003 (6) SA 407 (SCA)* Schutz JA at para [40] said the following; *"what constitutes adequate reasons",* has been apply described by Woodward J, sitting in the Federal Court of Australia, in the case of Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others (1983) 48 ALR 500 at 507 (lines 23-41), as follows:

"*The passages from judgments which are conveniently brought together in Re Parma and Minister for the Capital Territory (1978) 23 ALR 196 at 206-7; 1 ALD 183 at 193-4, served to confirm my view that section 13(1) of the Judicial Review Act requires the decision maker to explain his decision in a way which will enable a person aggrieved to say, in effect: " even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging."*

"This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute) and the reasoning process which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only."

To the same effect but more brief, is Hoexter The New Constitutional and Administrative Law Vol 2 at 244:

"(I)t is apparent that reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken; otherwise they are better described as findings or other information.": See Nkondo and Others v Minister of Law and Order and Another; Gumede and Others v Minister of Law and Order and Another; Minister of Law and Order v Gumede and Others 1986 (2) SA 756 (A) at 772 I-773 A".

In terms of paragraph 5.2 of the Commissioner's *"Guide on Tax Dispute Resolution"* adequate reasons *"requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me'. The aggrieved person, ideally, should be in a position to decide whether that decision is worth challenging."* This is a relatively high standard which the Commissioner set for himself with which to comply in giving reasons.

Here the view promoted by Iain Currie and Jonathan Klaaren *Promotion of Administrative Justice Act Benchbook (2001) para 5.12* is apposite. According to the learned authors *"a single line statement of reasons may*

quite adequately explain a straightforward decision with far reaching consequences, while a decision involving complex assessments of fact and the exercise of considerable interpretive discretion will take a great deal more explaining, no matter what its consequences are."

It is difficult to lay down a general rule as to what could constitute adequate or proper reasons. Each case must depend upon its own facts: *R an International Supply Company (Pty) Ltd and Others v Mpumulanga Gaming Board*, 1999 (8) BCLR 918 T, 926F (per Kirk-Cohen J)

De Ville suggests that the adequacy of reasons should be determined with reference to the rationale for the duty to provide reasons. These are, firstly, that it encourages rational and structured decision making; secondly, it encourages open administration; thirdly, it satisfies the desire on the part of the individual to know why a decision was reached, and fourthly it makes it easier for that person to appeal against the decision. In this regard it also assists a Court in reviewing administrative action. De Ville, *A Judicial Review of Administrative Action in South Africa,* p 287, 293.

In *Moletsane* Hancke J suggested that the gravity of an administrative act will determine the degree of particularity of reasons required. *Moletsane v Premier of the Free State and Another*, 1996 (2) SA 95 (O), 98G-H. De Ville suggests that this approach is too narrow and that other factors should also have an influence such as whether the issue involved an application for a benefit or a deprivation of a right, the nature and complexity of the decision and the nature of the authority taking the decision.

The approach of De Ville, coupled with Currie and Klaaren is the sensible approach to follow in matters such as the present. The hand of the

Commissioner can rest heavily on the taxpayer. The assessment of the Commissioner may be based on highly complex facts, and legal considerations, such as those in the present case. The view promoted by Schutz JA in the *Phambili Fisheries* matter above, offers a persuasive approach. The reasons furnished by the Respondent must be clear and unambiguous.

In my judgment this corresponds with the reasons that the Commissioner set out in the *"Guide"* referred to above. When this requirement is complied with, then an aggrieved taxpayer will be in a position to decide whether the Commissioner's decision is worth challenging. The following dictum of Kirk-Cohen J in the *R an* case, referred to above, is also relevant:

"On the one hand it is not necessary for an administrative body to spoon-feed an aggrieved party seeking reasons; on the other hand the administrative body cannot expect an aggrieved party to seek justification for the reasons from a myriad of documents where such reasons cannot reasonably be determined." R an International, supra, 927H.

The Respondent submitted that the correct approach to be followed in construing the phrase, “adequate reasons” is the approach indicated by Lord Greene MR *In re Bidie [1949] Ch 121 at 129*, which *dictum* was approved in *Jaga v D nges NO and Another* 1950 (4) SA 653 (A) at 663 - 4 and recently in *C: SARS v Dunblane (Transkei) (Pty) Ltd* 2002 (1) SA 38 (SCA) at 46 E - G:

“The first thing to be done, I think, in construing particular words in a section of an Act of Parliament is not to take those words in vacuo, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that their meaning is entirely independent of their context. The method of construing statutes that I myself prefer is not to take out particular words and

attribute to them a sort of prima facie meaning which may have to be displaced or modified, it is to read the statute as a whole and ask myself the question: 'In this statute, in this context, relating to this subject-matter, what is the true meaning of the word?' ..... The real question that we have to decide is, what does the word mean in the context in which we here find it, both in the immediate context of the subsection in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy."

The Respondent further relied on the principles set out by Kriegler J in *Metcash Trading Limited v C:SARS 2001 (1) SA* 1109 (CC) at 1121 G - 1122 A:

"It would be convenient to pause at this point to recapitulate and fill in some details before moving onto the next phase of the Act, which deals with assessments by the Commissioner and what they may set in train. The first significant point to note is that VAT, quite unlike income tax, does not give rise to a liability only once an assessment has been made. VAT is a multi-stage tax, it arises continuously. Moreover VAT vendors/taxpayers bear the ongoing obligation to keep the requisite records, to make periodic calculations of the balance of output totals over and above deductible input totals, (and any other permissible deductibles) and to pay such balances over to the fisc. It is therefore a multi-stage system with both continuous self-assessment, and predetermined periodic reporting/paying".

KRIEGLER J also mentioned the following at 1125 A - C:

"Because VAT is inherently a system of self-assessment based on a vendor's own records, it is obvious that the incidence of this onus can have a decisive effect on the outcome of an objection or appeal. Unlike income tax, where assessments can elicit genuine differences of opinion about accounting practice, legal interpretations or the like, in the case of a VAT assessment there must invariably have been an adverse credibility finding by the Commissioner; and by

like token such a finding would usually have entailed a rejection of the truth of the vendor's records, returns and averments relating thereto."

In regard to vat relating to exports, the following has been mentioned: KRIEGLER J in *Metcash Trading Limited v C:SARS (supra)* at 1122 E-G: *"A special feature of VAT relates to exports. VAT is payable only on consumption in South Africa and as a result output tax is not payable on goods sold and exported. In the arcane language of the Act, they are zero-rated. Therefore a merchant who buys and sells goods in South Africa and also sells some goods that are exported does the periodic calculation by adding up all input taxes for deduction from the sum of output taxes, but, in calculating the latter, excludes no output tax on the value of the exports. No output tax is payable on the exported goods but a full credit is given for the input tax. This exemption, which aims at promoting exports and enhancing their competitiveness in a world market, hold self-evident benefits for export-orientated vendors. Unfortunately those benefits not only attract honest exporters but are a notorious magnet for crooks who devise all manner of schemes to exploit the system to their advantage."*

The Respondent further referred to *Alliance Cash and Carry (Pty) Ltd v C: SARS* 2002 (1) SA 789 (TPD),where the following was stated at 796 D - F:

"The issue before the Court is simply whether the appellant has exported goods in respect of which he claims to be entitled to be zero-rated in terms of s 11 of the VAT Act. The Commissioner denies that the goods, in respect of which the appellant contends a zero-rating should apply, were exported. It is difficult to imagine what documents other than witnesses' statements and appellant's own documentation can be in the Commissioner's possession to assist the appellant. The appellant should be in a position to prove the export by its own documents. It is the keeper of those records upon which the Commissioner is substantially

dependent. The appellant seems to be after other evidence that is in the Commissioner's possession to assist the appellant".

This argument cannot be sustained on the facts of the present matter. It is not correct to state that *"the vendor would know exactly why the assessments were issued"* this begs the question. Here, no adequate reasons have been furnished to support and explain: the decision in terms of section 30(1) to override the Applicant's calculation of the tax; the determination of the amount of the tax in terms of section 30(1); the exercise of the discretion in terms of section 60(1) that the taxpayer had the intent to evade the payment of tax; and determining the amount of the additional tax in terms of section 60(2) as a result thereof.

Upon the request for reasons by the Applicant, the Respondent has either decided in terms of rule 3(2) to notify the Applicant that adequate reasons have already been provided or to provide reasons in terms of rule 3(3). It is not clear which. If rule 3(2) applies, the findings of fact and the Commissioner's reasoning proceeding from those facts together with his understanding of the relevant statutory provisions have not been set out clearly and unambiguously. The taxpayer has been referred to a myriad of documents from which to discern by himself what those reasons might be. The various responses of the Respondent including the answering affidavit of Mr Olwage contribute to the uncertainty. If rule 3(3) applies, the reasons furnished in response to the request are also inadequate.

THE LETTER FROM THE RESPONDENT DATED 8 JUNE 2005

The Respondent's letter received on 8 June 2005 does not contain adequate reasons. The heading refers to a *"REQUEST FOR ORIGINAL*

DOCUMENTS". The second unnumbered paragraph reminds the Applicant's tax consultants that their client had been furnished with adequate reasons for the assessments during December 2004. The letter then proceeds to deal with the results of a further *"verification process"* and in conclusion proposes a settlement in terms of which the taxpayer is required to accept a reduction of the assessment by some 1,8 million by undertaking to pay the balance. As stated, the balance of the letter sets out the findings of the additional *"verification process"*. It is not possible from the document, itself, or its context, to determine whether the Respondent purported to give reasons in terms of rule 3(3) or to notify the Applicant that adequate reasons have already been provided as contemplated in rule 3(2).

It is clear from the answering affidavit of Mr Olwage that he does not regard the letter of 8 June 2005 as embodying the reasons for the exercise of the discretion referred to above. Paragraph 13.2 of the affidavit of Mr Olwage makes his position clear: *"The reasons for the assessment were furnished in the following correspondence:"* Then follows a list of 20 letters some from the Commissioner to the taxpayer and some from the taxpayer to the Commissioner. If the intention with the letter of 8 June 2005 was to act in terms of rule 3(2) the list should have been referred to in that letter. The list, however, constitutes exactly what Kirk-Cohen J, described as a myriad of documents where the reasons cannot reasonably be determined.

NO PROOF OF ADEQUATE REASONS

There is a further reason why the relief claimed by the Applicant should be granted: Even if the list of letters contain adequate reasons, the Respondent has not in these proceedings identified the reasons as

contained in the letters. The letters do not speak for themselves. The Court is not in a position to decide what reasons were provided.

This objection goes back to the requirements for proof in application proceedings (the prescribed procedure for appeals of this nature). In the *Swissborough* case Joffe J said the following:

"The facts set out in the founding affidavit (and equally in the answering affidavit and replying affidavit) must be set out simply, clearly and in chronological sequence and without argumentative matter: See Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) at 781. A distinction is drawn between primary facts and secondary facts. 'Facts have conveniently been called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts.' See Wilcox and Others v Commissioner for Inland Revenue 1960 (4) SA 599 (A) at 602A. In the absence of the primary fact, the alleged secondary fact is merely a conclusion of law. Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793D.

Regard being had to the function of affidavits; it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met: Swissborough Diamond Mines v Government of the RSA, 1999 (2) SA 279, 324D-G; *Lipschitz and Schwarz NNO v Markowitz*, 1977 (3) SA 772 (W), 775H

With regard to clear and unambiguous requests for reasons on aspects of the case, Mr Olwage simply refers to previous communications.

It follows that it is not incumbent on the Applicant or the Court to sift through the list of letters, many of which, I was informed had annexures which are not now attached, in search of the Respondent's findings of fact, understanding of the law, and reasoning towards the result. The approach of the Respondent to the Applicant leaves the Court in the position where, at best for the Respondent, it must conclude that there might be adequate reasons in the letters but because it has not been proved to be the case, the application must succeed.

THE LETTER DATED 1 APRIL 2004

The only prior letter which can with some justification be relied upon by the Respondent as containing the reasons, is the letter dated 1 April 2004. The justification lies in the fact that it can be said that because it was referred to, expressly, in the assessment of 8 June 2005 it can be regarded as an integral part thereof. Its contents have to be analysed.

Paragraph 1 deals with the sales amounts. It leads nowhere because the Respondent did apparently calculate an amount on which to base their assessment of R9 661 329, 42.

In paragraph 2 the first sentence is ambiguous but, if anything, means that the Applicant presented its case for zero rating on the basis of indirect exports (to which the export incentive scheme ("EIS") would be applicable) whereas the Respondent concluded that the goods were directly exported (to which the practice note applied). No facts or law are advanced for this conclusion and it is totally unhelpful to the Applicant to understand the case against him.

The statement that the Respondent concluded that the Applicant did not comply with section 11(1)(a) is equally unhelpful. No facts are stated.

Furthermore the quoted section deals with both direct and indirect exports. The reference to the practice note suggests that the Applicant is applying the requirements relating to direct exports. No facts or legal contentions are advanced as to why these requirements are applied and not those relating to indirect exports with the zero rated option. The final conclusion is even more vague:

> *"We have received sufficient proof that the vendor did not deliver the goods in accordance with the specific requirements of the VAT Act."*

I now deal with paragraphs 3 to 12. If the intention was that these paragraphs, which all deal with Qwa-Qwa Transport (Pty) Limited, contain the reasons why there is a non-compliance with the direct export requirements, the objective was not achieved. The role that the Respondent attributed to Qwa-Qwa Transport (Pty) Ltd in its assessment of the Applicant's VAT liability is not clear. The implication is that a scheme was being carried on. This is precisely why the Applicant, in its request for reasons asked the following questions:

"7.1 Does SARS contend that our client entered into a scheme or carried out a scheme which had the effect of granting a tax benefit to any person as envisaged in section 73 of the Value Added Tax Act, No 89 of 1991 ("the VAT Act")?

7.2 If so, SARS is required to identify:

- The person or persons who received a benefit of such scheme;

- What facts are relied upon by SARS to contend that the alleged scheme was entered into or carried out by means or in a manner which would not normally be employed for bona fide business purposes, other than the obtaining of a tax benefit;

- *What facts are relied upon for the contention that rights or obligations were created which would not normally be created between persons dealing at arm's length;*

- *The facts relied upon for the contention that the scheme was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit.*

7.3 If this is indeed SARS' contention, as it appears to be having regard to the prior correspondence and in particular paragraph 20 of SARS' letter dated 1 April 2004, what precisely does SARS contend constituted the scheme that was allegedly created? In other words, how is the scheme alleged to have operated?

7.4 Does SARS contend that the goods forming the subject matter of the VAT assessment did not physically leave the borders of the Republic of South Africa?

7.5 If so, on what <u>factual basis</u> does SARS contend that the exports did not take place?"

These questions remain unanswered. The Applicant in my view, required the answers to these questions in order to frame a proper objection.

The following comments are appropriate when considering paragraphs 13 and 14. The allegations in these paragraphs relate to insufficiency of documentation. No particulars are provided. The vagueness gives rise to the following questions in the Applicant's letter of 3 November 2004:

"7.6 Insofar as SARS contends that our client did not comply with the relevant export incentive scheme it is required:-

- For each assessment period to identify the precise provisions of the Export Incentive scheme that were not complied with

- In relation to those provisions to state the nature of our client's non compliance.

7.7 When did SARS establish that the exports did not take place? Alternatively, if it is not SARS' contention that the exports did not take place has SARS satisfied itself that the exports did in fact take place, and if not, why not?

The questions remain unanswered.

Paragraphs 15 to 17 appear under the heading *"CONCLUSION"*. They deal with competition issues which, *prima facie*, do not seem to be relevant.

Paragraphs 18 to 25 contain a vague mixture of argument and factual inferences without any indication of the applicable rules which determine their relevance. The Applicant cannot from these paragraphs determine the case it has to meet.

Finally, the following comments may be raised in regard to paragraph 27. Bearing in mind that in annexure "CO9" of 1 April 2003 the Respondent intended to impose additional tax at the rate of 100%, the imposition of the maximum additional tax of 200% as envisaged in "ND4" of 1 April 2004 is totally unmotivated. This prompted the reasonable and justified questions set out in paragraph 7.9 of the Applicant's letter of 3 November 2004. They are the following:

"7.9 What factors were taken into account by SARS in relation to the decision to impose additional tax? In particular:-

- *Is it alleged that our client was involved in any dishonest or improper conduct - if so, could you please identify precisely the improper conduct alleged.*
- *Does SARS contend that our client failed to perform any duty imposed upon it under the Act or that it did or omitted to do anything required in terms of the Act with intent to evade payment or to cause a refund by SARS?*
- *When did SARS take the decision to impose the 200% penalty?*
- *Who at SARS took such decision (please identify the persons and capacity in which they took such decision)?*
- *What factors were taken into account in considering the 200% additional tax? I.e. why was it decided to impose additional tax at the particular level imposed and not any other?"*

These questions also remain unanswered.

CONCLUSION

An offer to accept a proposal to reduce an assessment does not constitute reasons. Here, I do not believe that the taxpayer is in a position to determine with any degree of certainty that *"even though I may not agree with it, I now understand why the decision went against me."* The Applicant is not ideally placed in a position to decide on the basis of the information supplied by the Respondent whether the decision is worth challenging.

For the above reasons the Applicant was, and still is, entitled to answers to its questions. They are essential to enable the Applicant to formulate its objection to the assessment. If the Court sanctions the Respondent's attitude, the Applicant will have to perform the impossible task of distilling the Respondent reasons from twenty letters which do not speak for themselves

and none of which contain clearly formulated reasons before formulating its objection.

ORDER:

1. The Applicant's request for reasons contained in its letter dated 3 November 2004, is remitted to the Respondent for reconsideration with the direction to give adequate reasons for the exercise of the various statutory powers embodied in the assessment of 6 October 2004;

2. The Respondent is further directed to structure his reasons so as to motivate his assessment clearly dealing with the exercise of each statutory power and setting out:

    1. the relevant statutory provisions or applicable requirements of the practice note;

    2. the findings of fact on which his conclusions depend; and

    3. the reasoning process which led him to those conclusions;

3. The Respondent is ordered to pay the costs of the application.

_____

JAJBHAY J

JUDGE OF THE HIGH COURT

(WLD)

On behalf of the Applicant: Advocate SJ du Plessis

Instructed by: Knowles Husain Lindsay Inc

5th Floor, The Forum

2 Maude Street Sandown.

On behalf of the Respondent: Advocate PJJ Marais SC with Advocate NL Tshombe

Instructed by The State Attorney

10 Floor North State

Building 95 Market

Street corner Kruis Street.

Date of Hearing: 18 November 2005

Date of Judgment: 28 November 2005