IN THE TAX COURT OF SOUTH AFRICA,

[GAUTENG]

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

05 / 09 / 2014 _____
DATE **SIGNATURE**

CASE NUMBER: 12984

In the matter between:

ABC LIMITED **APPELLANT**

AND

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES **RESPONDENT**

JUDGMENT

MAVUNDLA, J.

[1] The appellant approached this Court on appeal against the assessment on its liability for employees' tax during the period from 1 March 2003 to 29 February 2008 and against the interest and penalties levied by the respondent in respect of the aforesaid liability for the employees' tax, in terms of the provisions of the Fourth Schedule to the Act.

[2] It needs mentioning that before dealing with the merits of the appeal, the court was supposed to deal with two interlocutory issues, the first being an application for amendment, brought by the respondent, and the second one was separation in terms of Rule 33(4) of the Uniform Court Rules and rule 20 of the Tax Court rules brought by the applicant. The respondent's application for amendment was dated the 22 July 2014. The respondent sought to amend paragraph 6 of the statement of the grounds of assessment by inserting the words "According to the appellant" to the said paragraph to read as follows:

"According to the appellant, an ABC employee who chooses the company car scheme will have the vehicle registered in his/her own name, but the company, namely ABC, will remain the titleholder…"

[3] Although the application for amendment was opposed, it was nonetheless granted with the proviso, permitting the respondent to effect the amendment much broader if need be, bearing in mind the concerns raised by the applicant. It is not necessary to tabulate those concerns for purposes of this judgment. The respondent was ordered to pay the costs occasioned by the amendment. The application for amendment was brought without prior seeking the applicant's consent as demanded by the Tax Court rule. Besides, the application was belatedly brought, thus resulting in the matter not being commenced with on the scheduled date of hearing. This court took the view that there was a measure of unreasonableness on the part of the respondent, which was prejudicial to the applicant. Consequently, the court in the exercise of its discretion ordered the respondent to pay the wasted costs occasioned by the amendment.

[4] The amendment resulted in a request for further particulars for trial being sought by the applicant. The requested further particulars were verbally addressed. The applicant placed on record that in the circumstances the application for separation was no longer pursued. This concession obviated having the matter postponed any further and allowed us to deal with the merits of the appeal.

[5] The appellant in its statement of the grounds of appeal in terms of Tax Court Rule 11, stated that the main issue in the appeal is whether, in the circumstances where the appellant's employees elected to receive the benefit of a company motor vehicle as part of their remuneration package, what accrued to each employee who

made such election was the taxable value of such benefit in accordance with the provisions of the Seventh Schedule to the Act (as the appellant contends) or the amount expended by the appellant in order to provide such benefit to the employee concerned (as was contended by the respondent).

[6] The appellant under the heading material facts paragraph 5 and 6 in the statements in terms of Rule 11 stated that it operated an employee remuneration arrangement in terms of which it indicated to its employees that it was prepared to expend a certain amount (hereinafter referred to as the appellant's "costs of employment") in providing employment benefits, and, as far as the company motor vehicle benefits was concerned, the employee could elect either:

6.1 to receive the right of use of a company motor vehicle as a benefit of his or her employment, in which case, the amount expended by the appellant in providing the benefit would be deducted from the said aforesaid costs of employment, the balance being available for the provision of other remuneration benefits; or

6.2 to receive a motor vehicle allowance, in which case the amount of allowance paid each employee who made this election would likewise be deducted from the aforesaid costs of employment, the balance being available for the provision of other remuneration.

[7] It is common cause that the respondent assessed the appellant for the period 1 March 2003 to 29 February 2008 in an amount of R11, 541, 539, 41 on the premises that the amounts allocated to the company motor vehicle scheme or "sacrificed portion" of the total package constituted remuneration which accrued to the employees and are, as such, taxable in terms of the provisions of paragraph (c) of "gross income" as defined in section 1 of the Income Tax Act 58 of 1962.

[8] The appellant objected to the decision of the respondent for the aforesaid assessment and penalties imposed. However, the objection was unsuccessful and disallowed. By way of a letter dated 12 March 2010, the appellant appealed the disallowance of the objection. The grounds of appeal are in substance, to the effect that a valid salary sacrifice agreement between the appellant and the employees came into existence and no accrual of "sacrificed " amounts in respect of the employees' remuneration package took place and therefore no tax liability arose.

[9] The appellant further contended that the costs of employment was an amount which, from the employee's point of view, was subject to a contingency in that an employee had to first make an election before he or she was entitled to anything. Only once the employee concerned had made an election was he or she entitled to the benefit chosen. It further contended that prior to the election being made; the employee's entitlement to employment benefits was contingent on such election being made. Likewise was the appellant's obligation towards the employees, although the quantum thereof was certain, was contingent on such choice being made.

[10] An employee who elected to receive the right of use of a company motor vehicle as a benefit of his or her employment was entitled to use the motor vehicle, which was, however, owned by the appellant. Although the appellant retained the ownership of the vehicle, the registration thereof would be in the name of the employee, for purposes of overcoming administration of traffic fines as well as licencing.

[11] According to the appellant, in order to retain parity between the employees participating in the company motor vehicle scheme and those receiving a car allowance, an employee's total costs of employment" package remains the same, irrespective of the choice made. According to the appellant, by participating in the motor vehicle scheme, the employee is no longer entitled to receive a car allowance, although the value of the employee's package remains the same. On the other hand by receiving the motor vehicle allowance, the employee would receive an allowance of R3000 per month to cover the costs of servicing and maintaining the vehicle. The employee, who participates in the motor vehicle scheme, would receive the right of use of the vehicle where the employee allocates a part of his or her package, as they are contractually free to do, a similar amount to cover costs relating to the company vehicle.

[12] To buttress its case the applicant called its only witness, Mr. X who has been in the employ of the applicant since 1988 and now based at the applicant's Head Quarters. He is the architect of the applicant's motor vehicle scheme. He explained that an appointment letter[1] would be sent to the prospective employee, informing him of the terms and conditions of his employment and that a formal agreement will be entered into in due course. The appointment is subject to a flexible package showing the total costs to company. The flexible package will include component such as use

[1] Paginated page 75-78 is a copy of the relevant letter of appointment.

of a company car, travelling allowance, use of a company computer and cash salary. The employee must complete an allocation form which must be completed within 10 days and returned to management, after having made an informed decision. The employee must indicate in the said form the chosen combination of the components of his flexible package. It is compulsory for the employee to belong to the DFG Medical Scheme. The employee shall be responsible for 20% of the monthly contribution to the Medical Scheme, and the company will bear the costs of the remaining 80%, subject to Fringe benefit Tax being paid by the employee on the amount by which the company contribution exceeds 66%. It is compulsory that the employee becomes a member of Y Retirement Fund, in respect of which his monthly contribution will be 6% and the appellant will contribute 16% to the fund. The employer and the employee will then conclude a written agreement[2] detailing the terms and conditions of employment. In this instance the employee, Mr Z's costs to company was R28000, 00 per month.

[13] Mr. X confirmed, *inter alia*, that an employee and the company would sign a DFG Allocation Agreement[3] just as Mr Z and the company did on 22 January 2008. The relevant agreement is set out herein below. He further stated that the amount of R7, 200 reflected is the monthly amount the employee, Mr Z allocates towards the motor vehicle scheme. He further explained that the company would purchase motor vehicle cash, which would be registered in the name of the employee; however its ownership remains vested with the employer. A notional account would be opened. The relevant notional account is reflected herein below, titled "DFG MVA SYSTEM Employee Motor Vehicle Administration Statement."[4] The amount of R4500 would be credited towards the motor vehicle allocation. The employee is given a MVA Fleet Card and whatever Z would have used through that is then debited against the credit allocated on. His account will also be debited with the interest due in respect of the capital lay out made by the employer for the purchase of the vehicle. The insurance premium is also debited against the vehicle scheme allocation. According to Mr X the amount of R4500 would be the sacrifice allocated by Z towards the motor vehicle scheme. The opening balance in the amount of R97 808. 86 would come from the motor vehicle account and reflect the outstanding balance. The essence of his evidence is that if the employee overspends whatever he has allocated towards the motor vehicle scheme, would be called from him by the employer very third month. If the employee has underspent and his account has a credit balance, is entitled to reclaim such credit balance. X said that the employee would be allocated notional value of the vehicle in an amount of R100, 000. 00. He

[2] A copy of the agreement is at paginated pages 79-85 of the trial bundle.
[3] Vide paginated page 74 of the trial bundle.
[4] Vide paginated page 91 of the trial bundle.

further stated, inter alia, that the employee is at liberty, to purchase the relevant vehicle from the employer at a later stage. He further stated that the opening balance of R5, 754. 32 in Z's Employee Motor Vehicle Administration Statement reflect what was still outstanding towards the value of the motor vehicle as at the time in 2007.The running expenses of R4, 209. 97[5] would be recovered from the employee.

[14] The following is the Employee Motor Vehicle Administration Statement and Agreement:

ANGLO PLATINUM MVA SYSTEM

Employee Motor Vehicle Administration[6]

Statement September 2004

Employee Name:	**GF Z**	**Purchase Price:**	**100,000.00**
Employee No:	**99000125**	**Residua l:**	**0.00**
Agreement No.:	**AN200407005**	**Interest Rate :**	**9.00**
Agreement Date:	**01.08.2004**	**Interest Type :**	**FLOATING**

DATE	TRANSACTION DESCRIPTION	DEBIT	CREDIT
01.09.2004	MVA Opening Balance	97,808.86	
21.09.2004	Car Scheme Allocation		4,500.00
21.09.2004	MVA Interest Due	721.54	
21.09.2004	MVA Insurance Premium 1st	333.17	
21.09.2004	MVA Fleet Card 1st	278.44	
30.09.2004	MVA Closing Balance	94,642.01	
30.09.2004	Optimal Value of Vehicle	95,140.37	
30.09.2004	Available for Running Expenses		498.36 -

Age Analysis of Overdue Debits

120 Days	90 Days	60 Days	30 Days	Current	**OVERDUE**
0.00	0.00	0.00	207.51	498.36-	0.00

Please be advised that the interest rate of the MVA scheme was adjusted, with reference to a change in the prime interest rate, from 9.50% to 9.00% on interest payable and from 6.50% to 6.00% on interest earned, effective as from 1st September 2004

[5] Paginated page 144 of the trial bundle.
[6] Paginated page 91 of the trial bundle.

DFG Annual Total Package Allocation Agreement[7]
Employee Name: Mr Z
Company Number: xxx
Occupation: Management Accountant
Job Grade / Level: 4

This serves to confirm that your Total Package for the period 00-Jan-00 to 00-Jan-00
Has been agreed to between the company and yourself as follows:

Your total employment costs will be R1,171,071 per annum

This will comprise the following:

	COST / VALUE	
	Monthly	Annually
1. You will be paid a Cash Salary of	78,919	947,031
2. You are a compulsory member of the …… Retirement Fund, Contributions to this fund will be based on your Agreed Pensionable Emoluments (PE) of R68,312 per month. Which equals 70.0% of your Total Package. You selected the following Option: Corporate Office ("OLD" Employee 10% Company 17.6% member) In terms of the rules of the fund, the company will contribute 16.00% of your PE to the fund and you will contribute 7.50%	 10,930 5,123	 131,160 61,481
3. You are a member of the ….. medical Aid Scheme Enhanced Option. Member – Adult: 1 and Minor: 0 The Company will make all the contributions as required by the scheme, in respect of your membership. Should the contribution be increased or decreased by the medical aid scheme, the Company contribution and your cash salary will be adjusted accordingly without a fresh agreement having to be signed.	 540	 6,480
4. If applicable, you will continue to participate in the Deferred Compensation Scheme. The Company's total liability in terms of contributions will be limited to	 -	 -
5. If applicable, you will receive a Car Allowance that will be limited to	-	-
6. If applicable, you will be allocated a Company Car, in terms of the rules Of the car scheme. The Company's total liability in terms of capital, Running and insurance costs of such a car will be limited to	 7,200	 88,400
7. If applicable, you will be allocated a Second Company Car in terms of The rules of the car scheme. The Company's total liability in terms of Capital, running and insurance costs of such a car will be limited to	 -	 -
8. If applicable, you will receive a 13th Cheque equal to one (1) month's Cash salary, payable annually during December, This bonus will be Provided for on a monthly basis. The tax on the 13th Cheque will be deducted	 -	 -
9. If applicable, you will be provided with Company Accommodation. Company's deemed cost of this benefit is valued at	 -	 -
TOTAL EMPLOYMENT COSTS	97,589	1,171,071

I hereby confirm that it is required of me to travel for business purposes as stipulated in my employment agreement (as amended). I confirm that I have provided the required details (input sheet) regarding my travel allowance requirements as requested by the company.

I acknowledge that the content of this agreement is correct and has been agreed to.
I accept that my remuneration and the fringe benefits provided by the company as agreed
to above will be subject to taxation as determined by applicable legislation.

Employee: …….. Date: ……

Signed for and on behalf of the company ……
Date: ……

Witnesses 1. …….. Date: ……
2…… Date: ……

[7] Paginated page 74 of trial Bundle.

[15] According to X, every year the parties enter into a package agreement because there would be salary increase adjustments. The same process as before would be embarked upon.[8] He further stated that the PRMAF deductions are agreed upon.[9] Exhibit A is the Estimate Vehicle Expenses. The vehicle although registered in the name of the employee, its ownership vests with the company. The vehicle is reflected as an asset and its depreciation would be claimed by the company. In this regard he referred to the registration documents of Mr J. Exhibit A is a notional sale agreement. He further explained that the employee is provided with A TT Fleet Management Vehicle Transaction Report card. Whatever amounts reflected as used in this card would be debited in the relevant employee's Motor Vehicle Administration statement,[10] against the car scheme allocation credited. The MV Admin Statement is a notional account. He further stated that the employee may purchase the vehicle if he so wishes, at the outstanding balance of the vehicle[11].

[16] Under cross examination he conceded that the notional account is fictitious and has no legal standing. A notional account is therefore purely speculative and exists purely in thought; *vide Afrisure CC v Watson*[12]. He said that this document is relied upon by the employer to determine at the end of the year the credits and debits due to the employee. He was referred to the management account appearing at page 74 (vide herein above). He conceded that the employee paid 16% as shown at item 2 of this statement and the employer also contributes 7.60%. The employee paid R7, 200 from his total package but the employer did not make any contribution towards the motor vehicle scheme. He grudgingly conceded that the R540 on item 3 (page 74) is from the employee and the employer did not contribute, and said that both items 2 and 3 are compulsory. He was referred to another E MV Admin Statement of Z which showed, inter alia, a debit opening balance of R5, 754.32 entries and the car allocation credit entry of R7200. This account has various debit entries in respect of the MVA Interest Due, MVA Insurance premiums; MVA Fleet Card 1st with a MVA closing negative balance of R1046.96 and a negative available for running expenses amount of R4, 209.97.

[8] At paginated page 162 is a salary adjustment letter to Mr Z advising him to restructure his salary accordingly.
[9] Paginated page 165, showing the salary pay slip of Z, with all relevant details including the total tax deduction of R32, 620. 96; the 3802 motor vehicle use deduction and cash salary of R83, 252, 47.
[10] Vide paginated pages 90 and 91 which are respectively TT Fleet Management Vehicle Transaction Report and Employee Motor Vehicle Admin Statement of Mr K.
[11] Vide Anglo Platinum Policies and procedures of the Moto Vehicle Scheme document at para 4.13.
[12] 2009 (2) SA 127 at 142.

[17] He further conceded that the MVA Policies document provide that the employee who terminates, or retires from his employment with the company is required to purchase the motor vehicle or sell it to a third party at the lowest amount of the optimal value of the vehicle or the balance on the employee motor vehicle account. The outstanding amounts in the employee vehicle account must be cleared by means of payment by the employee of deductions from his salary. An amount to the value of one month's company car scheme salary sacrifice will be retained from three months to cover any related costs to the motor vehicle which may still come through the fleet card system.[13] He conceded, *inter alia*, that the insurance premium, fleet card expenses and interest charges are debited against the amount allocated to the motor vehicle scheme by the employee.

[18] It needs mentioning that Mr X was in my view not an impressive witness. He was evasive and some questions had to be unnecessarily repeated to him. He conceded that the notional account was fictitious. He would however not concede when it was pointed out to him that in essence, the employee was carrying the costs of the vehicle which the employer had financed. He was not prepared to concede that the employee was carrying the insurance liability, whilst it was obvious that it is indeed so. Whatever interpretation X sought to give to documents, must be ignored and the documents must be seen for what they contain and present[14]. He conceded, after a lengthy debate under cross examination, that all the costs to the company must be recovered from the employee. I must hasten to point out that X left a poor impression in my mind. I find that he does not measure to acquit the *onus* resting on the appellant on the balance of probabilities, that the respondent was wrong in its assessment and that the appeal must succeed. I find Mr X to be an unsatisfactory witness. In this regard vide *CSARS v Pretoria East Motors (Pty) Ltd*[15] where the Supreme Court of Appeal held, as propounded in the *Mallan v Kommissaris van Binnelandse Inkomste*[16], as follows:

"[8] It is so that the taxpayer's ipse dixit will not be lightly being regarded as decisive. But it must be considered together with all of the other evidence in the case. And, given the unfavourable position of having the onus resting upon it—a "formidable and difficult" one to discharge (per Trollip JA; *Barnato Holding's Ltd v Secretary for Inland Revenue* 1978 (2) SA 440 (A) at 454a-b [also reported at [1978] 3 ALL SA 11(A)-Ed])-the interest of justice require that the taxpayer's evidence and questions of its credibility be considered with great care. Indeed, the taxpayer's evidence under oath

[13] Paginated page 36 of the trial bundle.
[14] vide Lowrey v Steedman 1914 AD at 543; Sealed Africa (Pty) Ltd v Kelly & Another 2006 (3) SA 65 (W) at pra[15].
[15] 2014 (3) ALL SA 266 (SCA) at 271.
[16] 1983 (3) SA 1 (A) at 18E.

and that of its witnesses must necessarily be given full consideration by the court, and the credibility of the witness must be assessed as in any other case that comes before the court. (See *Mallan v Kommissaris van Binnelandse Inkomste* 1983 (3) SA 1 (A) at 18E [also reported at [1983] 4 ALL SA 235 (A)-Ed].) It remains the function of the court to make a determination of the issues that arise for consideration on objective review of all of the relevant facts and circumstances. Not least important of the facts, according to Miller J (ITC 1185 (1952 35 SATC 122 (N) at 124):

"will be the course of conduct of the taxpayer in relation to the transaction in issue, the nature of his business or occupation and frequency or otherwise of his past involvement or participation in similar transactions. The facts in regard to those matters will form an important part of the material from which the court will draw its own inferences against the background of the general human and business probabilities."

[19] The respondent contended that the benefit paid by the employer in terms of the company car option scheme, remains as part of the accrued income, and that the "sacrifice", if any, is not a genuine diminution in the remuneration package arising from the costs to company.

[20] The respondent further contended that such "sacrifice portion" properly construed, is income in that the divestment in favour of the motor vehicle scheme was not antecedent divestment of the right to the money making up the sacrificed portion. In substance, the employees are entitled to an amount equal to the sacrificed portion in that the unused or credit balance in the suspense account is not forfeited in favour of the employer, but accrues to the employees as a right to claim such monies and upon demand are in fact paid such monies. This submission, in my view, has merit, seen in the background of the terms of the employment agreement which provides, *inter alia*, that: "7. The Company shall be entitled to deduct from the Employee's cash salary and travelling allowance components of the flexible package or other moneys payable to the employee, an amount that may be owing to the Company and may be lawfully set off against remuneration or any other moneys payable to the Employee and likewise any contributions, subscriptions or amounts owing to any pension or medical aid scheme contemplated by this agreement."[17]

[17] Paginated page 79 of the trial bundle clause 7 of the employment agreement.

[21] The basis of taxation is the total value of what the person earned during the tax year of assessment, be it in the form of actual money received or otherwise received or accrued to him, her or it. Money is given a wide meaning, it may be actual cash or 'otherwise'. A right to something which the employer gives to a person, be it in the form of corporeal or incorporeal, the value of which can be determinable in monitory form, will fall within the term "otherwise. 'Receipt and accrual both form part of the gross income'; *vide Commissioner for Inland Revenue v People's Stores (Pty) Ltd*[18]; In *CSARS v Brummeria Renaissance (Pty) Ltd and Others*[19] it was pointed out that in *Cactus Investments (Pty) Ltd v Commissioner for Inland Revenue*[20] it was held that the definition of gross income '**Includes, as explained in *Commissioner for Inland Revenue v People's Stores (Walvis Bay*) 1990 (2) SA 353 (A), not only income actually received, but also rights of a non-capital nature which accrued during the relevant year and are capable of being valued in money.'**

[22] A thing accrued to as soon as the person has a right of entitlement to a thing; *vide Lategan.*[21] *In casu*, once the employee made a choice, he became entitled to the use of the car subject to the payment of an amount to be administered on his behalf towards defraying whatever expenses are incurred. Debits were made against his allocation and any credit balance remained he still had a right to claim payment thereof. The employer made no contribution at all. I agree with the submission made on behalf of the respondent that the employee is entitled to the monies he agreed to allocate to the motor vehicle scheme as part of his gross income. This right accrued to the employee. The employer on the other hand is entitled to set-off the expenses the employee incurred for the private use of the employer's motor vehicle. This is a debt owed to the employer, but does not affect or impact on the definition contained in s1 paragraph (c) of the Income Tax Act that any amount received or accrued in respect of services rendered or to be rendered is taxable. The definition of remuneration in paragraph 1 of the Fourth Schedule to the Act provides that an employee's remuneration includes any amount of income which is paid or is payable, including any amount required to be included as referred to in paragraph (c) of the definition of gross income. Vide the matter of *Cactus Investments (Pty) Ltd v CIR*[22] where it was held that:

[18] 1990 (2) SA 353 (AD) at 364C-366I.
[19] 2007 (6) SA 601 (SCA) at 609C-D.
[20] 1999 (1) SA 315 (SCA); 61 SAT 43.
[21] 1926 CPD 203 (2 SATC 16).
[22] Volume 6 (1999) 43 at 45.

"Normal tax is levied in terms of s5(1) of the *Income Tax Act* 58 of 1962, as amended, on income received by or accrued to a person during the year of assessment. 'Gross income' is defined in s 1 as:

' the total amount, in cash or otherwise, received by or accrued to or in favour of such person during [any] year or [period of assessment… excluding receipts or accruals of a capital nature.'

This includes, as explained in *Commissioner for Inland Revenue v People's Stores (Walvis Bay) Ltd* 1990 (2) SA 353 (A) t 364C-366I, not only income actually received, but also rights of a non-capital nature which accrued during the relevant year and are capable of being valued in money."

[23] X grudgingly conceded that the notional sale agreement is not subject to the National Credit Act because it is simply a notional agreement, as pointed out herein above. This was also conceded by a senior employee of the appellant, Mr L who on the 4TH June 2010 concluded that: "The credit facility by the Group Companies to the employees under the current MVA scheme is as a result not in compliance with the Act."[23]

[24] It was quite correctly submitted on behalf of the respondent that the *Credit Act* 75 of 1980 commenced on 2 March 1981, which was subsequently replaced on I June 2006 by the *National Credit* Act 34 of 2005. On the applicant's own admission, it was purchasing the vehicle, then debit the employee with this capital amount. The employee would then pay interest over this capital amount. The applicant was therefore financing this vehicle. The employee was obliged to purchase the vehicle at depreciated value, as when he either retired, or resigned from his employment or is he so wished. In the relevant sale agreement Exhibit A, insufficient details, as envisaged in s5 (2) and 6(6) of the Credit Agreement are contained, thus making it noncompliant to the Act and therefore unenforceable as it undermined the purpose of the Act; vide *Oostehuizen & Another v Standard Credit Corporation Ltd*[24]; *Afrisure CC v Watson N.O.*[25].

[25] The respondent in its assessment of the applicant premised its decision on the Lategan case and concluded that the employee's income accrued to him when he became unconditionally entitled thereto and that the exercise of option for allocation purposes thereafter did not alter the liability thereon. It further relied on

[23] Vide paginated page 40 of the Trial Bundle.
[24] 1993 (3) SA 891.
[25] supra at 142

the *Witwatersrand Association of Racing Clubs; SIR v Smant*[26] to conclude that the divestment in favour of the motor vehicle scheme was not an antecedent divestment of the right to the money. The employees became entitled to the income but did not antecedently divest themselves of the right to the money since entitlement on the motor vehicle scheme account credit balance was not forfeited but awarded or paid out to them on request of instruction from the respondent. This assertion, in my view, was not disputed by the applicant and must therefore be accepted as factually correct. The employees did not antecedently divest themselves of the right to the money allocated to the vehicle scheme.

[26] The respondent further took into account the fact that paragraph 2(4) of the Fourth Schedule specifically refers to remuneration used to determine employees' tax in view of the specific deductions allowed in terms of section 11(k) and 11 (n) for employees' contributions to pension and retirement annuity funds. It further had regard to the fact that *in casu* the amounts were deducted from the gross income by virtue of the provisions of the Act (not by virtue of divestments in favour of the vehicle scheme) and are therefore specifically excluded in the calculation of remuneration for employees' tax purposes. It proceeded to conclude that pension contributions are calculated on the higher pre-sacrifice or pre-antecedent divestment amount. The amounts restructured or allocated as company car accrued to the employees and taxable in terms of the provisions of paragraph (c) of "gross income" as defined in section 1 read with paragraph 1 of the Fourth Schedule to the Act—definition of 'remuneration', subparagraph (a).

[27] The respondent further had regard to the fact that certain employees were granted company cell phones for business use. Billing limits are provided by the employer which is not based on actual business expenditure or calls. The employee and respondent agreed on the estimate business usage and the company pays the entire cell phone bill, which includes private usage. The method of the estimating the costs limits is not necessarily justified and reasonable. Employees do not pay for the private usage of the phones. In terms of paragraph 2 (b) of the Seventh Schedule to the Act, the employees have been granted the right of use to an asset for his private usage at no costs. In terms of paragraph 6 (1) of the Seventh Schedule the cash equivalent of this benefit is value of the private use of the asset in question. No

[26] 1973 (1) SA 75 (A), 35 SATC 1.

taxable benefit is disclosed on the IRP5 certificate of the employees.[27] This too was not disputed by the applicant.

[28] The respondent further took into account that a number of employees received travel allowances and are entitled to elect this allowance as a percentage of their package. The policy limits the allowance to 25% of the package. Depending on the employees' grade, allowance became an automatic elective and in some instances the quantum of the allowance is unrealistic or considered excessive, e.g. Havenstein—R680 000 p.a. It further took into account the fact that the provisions of Section 8(1)(b)(ii) of the Income Tax provides that the principal (employer) has made payment a payment to recipient (employee) to be utilised for the defrayment of expenditure with regards to any motor vehicle for business purposes. The advance or allowance is based on actual expected business travel. An example, a person has been in the same position for two years, on the average the employee travel 20 000 km for that year, no material change has occurred to duties and obligations, thus an allowance based on 32 000 km would be viewed as excessive. Clause 3.2 of the car allowance scheme reads "the full value of the amount required by the employee to finance and run his car is paid via the payroll as a car alliance. Fifty per cent (50%) of this allowance is subjected to PAYE and the *onus* is on the individual to justify business travel to render the remainder of allowance tax deductible at the end of the tax year. The applicant makes use of a percentage methodology to quantify the travel allowance. It is a requirement that the allowance or advance be based on expected business travel. The respondent took the view that the allowance subjected to tax at fifty per cent is not expended on actual business travel as contemplated in section 8(1)(b) of the Act.[28]

[29] In my view, the applicant has not discharged the *onus* resting upon it to prove that the conclusion on facts and in law reached by the respondent in assessing the applicant as it did was wrong. In the circumstances the appeal must fail.

[30] It was submitted on behalf of the appellant that in the event of the appeal not being upheld, the interest and penalties imposed, should however be remitted to the appellant. The motivation for this submission being that there was no ill intent but misinterpretation of the applicability of the law on the fact, and therefore a genuine

[27] Vide paginated pages 156 relating to Z's IRP5s; paginated pages 39, 45, , 101 & 110 of the supplementary bundle

[28] Paginated page 1 of the supplementary bundle is the respondent's letter of findings addressed to the applicant, dated 15 September 2008.

error on the part of the appellant. It was further submitted that the appellant immediately paid the imposed interest and penalties as demanded by the respondent.

[31] Section 6 of the Fourth Schedule provides as follows: "6(1) If an employer fails to pay any amount of employees' tax for which he or she is liable within the period allowable for payment thereof in terms of paragraph 2 SARS must in accordance with Chapter 15 of the Tax Administration Act , impose a penalty equal to ten per cent of such amount."

[32] In the matter of *Ruyobeza v Minister of Home Affairs*[29] the court held that: "Normally, where the legislature has entrusted a particular function to a statutory body a court will not, in the exercise of its review powers, usurp that function unless there are exceptional circumstances justifying such action." In the matter of *Minister of Environmental Affairs &Tourism v Smith*[30] it was held that the word "you must" in a statute do not afford discretion but are peremptory. In my view, *in casu*, s6(1) of the Fourth Schedule is peremptory and therefore there is no room for the respondent not to levy interest and penalties where there has been no compliance. I am further of the view that the reasons advanced on behalf of the applicant why this court should order remittance of the penalties and interest levied; do not amount to exceptional circumstances. I am equally of the same view with regard to interest.

[33] The respondent employed the services of a senior counsel and junior counsel. I am of the view that the services of the two counsels were justified. In the result, the appellant must be mulcted with the costs including those of employing the services of two counsels.

[34] In the result I make the following order that: The appeal is dismissed with costs including the costs of employing the services of senior counsel and junior counsel, save the costs occasioned by the amendment application.

[29] 2003(2) ALL SA 696 (C) at 706H-I.
[30] 2008 (2) SA 308 (SCA) at G-H.

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N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

I agree

MR I NKAMA

ASSESSOR

I agree

MS S MAKDA

ASSESSOR

HEARD ON THE : 18 /08 / 2014

DATE OF JUDGMENT : 05 / 09 / 2014

APPELLANT'S ADV : TS EMSLIE SC

INSTRUCTED BY : WEBBER WENTZEL ATTORNEYS

RESPONDENT'S ADV : ADV. NA CASSIM SC with ADV H MPSHE

INSTRUCTED BY : STATE ATTORNEY