

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: A83/2023

Before:

The Hon Mr Justice Henney

The Hon Mr Justice Nuku

The Hon Mr Justice Sher

In the matter between:

BASELINE CIVIL CONTRACTORS (PTY) LTD

Appellant

and

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

Respondent

Hearing: 26 January 2024

Further submissions: 22 April 2024

JUDGMENT DELIVERED (VIA EMAIL) ON 26 APRIL 2024

HENNEY et SHER JJ (NUKU J concurring):

Introduction and Background:

[1] This is an appeal against a decision of the tax court, in an interlocutory application in a pending tax appeal. The appellant sought a declarator that a ground of appeal which it had noted in the statement which it filed in terms of rule 32 of the

Tax Court Rules ('the TCR'),¹ in which it had set out its grounds of appeal against the disallowance of an objection it had lodged to an income tax assessment, was permissible. The Commissioner of the SA Revenue Service ('the respondent') had contended that it was not. The tax court found in favour of the respondent.

[2] The appellant is in an *en commandite* partnership with an entity known as Baseline Group Limited Liability Partnership (BECP)² in terms of a partnership agreement. In its 2018 annual financial statements the appellant listed a gross income of R 320 846 361,00 and in its income tax return declared that this gross income had been received and/or had accrued to it for the 2018 tax year. Consequently, its income assessment by the respondent for the 2018 tax year also reflected gross income in this amount. The amount was also consistently reflected in subsequent assessments after the partial allowance of the objection which the appellant lodged.

[3] In its return the appellant claimed a total of R 73 215 161,00 in lieu of deductible expenses for the 2018 tax year. The deductions included one in the amount of R 11 072 237,00 ('the disputed amount'), which related to a distribution of profits which the appellant allegedly paid to the BECP.

[4] The appellant sought to deduct the disputed amount from its taxable income on the basis that the deduction was allowed for in terms of section 11(a) read with section 23(g) of the Income Tax Act, 58 of 1962 ('the ITA'), in that the payment of this amount to the BECP was an expenditure which had been incurred in the

¹ Promulgated in terms of s 103 of the Tax Administration Act 28 of 2011 ('the TAA').

² The appellant refers to this entity, in places, as the BG LLP.

production of income. It is trite that the appellant bore the onus of proving that this was a deductible expense.³

[5] The disputed amount was disallowed as a deduction by the respondent because it considered that it constituted an expense that had been incurred after the income had been earned and not during the production thereof. In its view the amount was paid over on a voluntary basis, and if it had not it been paid it would not have affected the production of past or future income.

[6] The appellant objected to the disallowance, which was contained in an additional assessment on 25 March 2020, and which followed upon a verification and audit process which was performed by the respondent. The objection was lodged on 23 June 2020. In terms of it the appellant objected to several aspects of the additional assessment, aside from the respondent's refusal to allow it to claim the deduction of R 11 072 237,00. The appellant was partially successful in its objection. On 28 September 2020 the respondent issued a revised, reduced assessment in terms of which it partially upheld certain aspects of the objection but not others, but its stance regarding the disputed amount remained unchanged. On 9 November 2020 the appellant noted an appeal in response to the

³ in terms of s 102(1)(b) of the TAA, which reads as follows: '**102 Burden of proof.** (1) A taxpayer bears the burden of proving—

- (a) that an amount or item is deductible or may be set off;
- (b) the rate of tax applicable to a transaction, event, item or class of taxpayer;
- (c) that an amount qualifies as a reduction of tax payable;
- (d) that a valuation is correct; or
- (f) whether a 'decision' that is subject to objection and appeal under a tax Act, is incorrect.'

disallowance of the objection pertaining to the disputed amount. In its notice of appeal, the appellant stated the following: ⁴

'REQUEST:

The matters (sic) in dispute relates to complex issues where the taxpayer was and still is of the opinion that the expense claimed in respect of the profit share distribution is deductible in terms of section 11(a) of the ITA.'

[7] On 31 August 2022 the respondent filed its statement in terms of rule 31(2) of the TCR in which it set out its grounds for opposing the appeal. It said the following regarding the disputed amount:⁵

'DISALLOWANCE OF DEDUCTIONS:

19. The Appellant claimed a deduction in terms of section 11(a) of the ITA in the amount of R 11 072 237.00 for the 2018 tax year. The amount relates to the distribution of profits to a related party, referred to in appellant's financial statements, as the Baseline En Commandite Partnership.

20. SARS has disallowed the deduction claimed on the basis that the claim is not in accordance with Sections 11(a) and 23(g) of the ITA.

21. The appellant alleges that it should be entitled to a deduction claimed in terms of Section 11(a) of the ITA and bears the burden of proving such.'

[8] On 30 November 2021 the appellant filed its statement of its grounds of appeal, in terms of the applicable provisions of rule 32 that were in operation at that time, which read as follows:

'32. Statement of grounds of appeal

(1) The appellant must deliver to SARS a statement of grounds of appeal within 45 days after delivery of-

(a) the required documents by SARS, where the appellant was requested to make discovery under rule 36 (1); or

(b) the statement by SARS under rule 31.

(2) The statement must set out clearly and concisely-

(a) the grounds upon which the appellant appeals;

(b) which of the facts or the legal grounds in the statement under rule 31 are admitted and which of those facts or legal grounds are opposed; and

(c) the material facts and the legal grounds upon which the appellant relies for the appeal and opposing the facts or legal grounds in the statement under rule 31.

(3) The appellant may not include in the statement a ground of appeal that constitutes a new ground of objection against a part or amount of the disputed assessment not objected to under rule 7.'

[9] The proceedings before the tax court were conducted in terms of the prevailing provisions of rule 32(3). As a result, its judgment, which was handed down on 29 November 2022, dealt with the interpretation of the subrule as it then stood.

⁴ Page 52 of the record.

⁵ Id, p 58.

The issue for consideration by the tax court was whether the appellant was permitted to rely on a ground of appeal which was set out in its statement in terms of rule 32, which effectively constituted a ground of objection which had not been raised before.

[10] On 10 March 2023, the new i.e. current TCR were promulgated. In its new form rule 32(3) now reads as follows:

'32(3) The appellant may include in the statement a new ground of appeal unless it constitutes a ground of objection against a part or amount of the disputed assessment not objected to under rule 7.'

[11] Rule 66 expressly stipulates that the provisions of the new, amended rules are to apply to any prior, as well as to any continuing 'action' or proceeding. Thus, in terms of rule 66(1) the new rules apply to *'an act or proceeding taken, occurring or instituted before their commencement date, without prejudice to an action taken or proceedings conducted before the commencement date of the comparable provisions'* in the new rules. Rule 66(2) stipulates *inter alia* that any objection, appeal to the tax court, or interlocutory application or application in a procedural matter, which was taken or instituted under the previous rules but not completed as at the date of commencement of the new rules, must be continued and 'concluded' under the new rules, as if it was taken or instituted under them. Given these provisions, the parties agreed that the appeal should be dealt with as if it had been instituted under the legislative regime which is applicable in terms of the new rules, and that the proceedings *a quo* should accordingly be considered in terms of the amended rule 32(3) ('the new subrule 32').

[12] The respondent contends that there is no real difference in the meaning of the old and the new subrule: whereas the subrule was previously worded in prohibitory

or exclusionary terms, the new subrule is worded in permissive terms, but the ambit of what may be raised as a 'new' ground of appeal essentially remains the same. The appellant, on the other hand, contends that the permissive wording of the new subrule is intended to expand upon what may be raised as a new ground, on appeal, and goes further than what was previously envisaged. According to the appellant the effect of the new subrule is to allow an appellant to raise any 'new' ground of appeal which goes beyond what was previously raised as a ground in its notice of objection. The respondent contends that on a proper interpretation the new subrule does not allow an appellant to do this.

[13] In the statement of its grounds of appeal the appellant said that it wished to draw attention to the fact that it was relying on a ground not previously relied upon, to wit that the amount of R 11 072 237,00 was neither received by, nor accrued to it, but had accrued to and was received by the BECP by virtue of the agreement that was in place between it and the BECP.

[14] It claimed that it was entitled to rely on this new ground in terms of rule 32(3), (as it was worded at the time), as it was not a new ground of objection against a 'part or amount' of the disputed assessment which was not previously objected to under rule 7.

[15] The new ground simply allowed it to claim (in the alternative to the claim that that the disputed amount was deductible from the appellant's income as expenditure incurred in the production of income), that it was neither a receipt by, nor an accrual to the appellant 'on its own behalf' or for its 'own benefit'. Rather, the disputed

amount was 'impressed with an obligation' (sic) to be paid over to the BECP and in law it accrued to and was received by the BECP. It therefore did not form part of the appellant's 'gross income' and was accordingly to be excluded from the appellant's taxable income.

[16] The respondent filed a reply in terms of rule 33 on 17 February 2022, in which it denied that the appellant was entitled to raise the purported exclusion of the disputed amount of R11 072 237,00 from its gross income for the 2018 tax year as an issue in the appeal; and denied that the amount had accrued to or had been received by the BECP.

[17] It pointed out that in its 2018 financial statements the appellant had reflected the disputed amount as part of its gross income and had likewise declared the amount as part of its gross income for the 2018 tax year in the ITR14 return which it had submitted. The appellant had only sought to have the amount excluded from its taxable income as a deduction in terms of section 11(a) of the ITA. In the circumstances the appellant had been assessed on the basis that the amount was included in its gross income, and the appellant had never objected to this inclusion in the SARS assessment.

[18] The respondent contended that as the appellant had admitted that the disputed amount had formed part of its gross income in the 2018 tax year, by now seeking to exclude it a misrepresentation was being made in its declarations and as to the nature of its appeal, in its rule 32 statement.

[19] The respondent pointed out that in its notice of objection in terms of rule 7 the appellant had not objected to the disputed amount being included in its gross income, as part of the assessment under dispute, and had not alleged that it had been received by or had accrued to another party. It had instead lodged an objection that made no reference to the amount not forming part of its gross income; and had been silent on its alleged accrual to another party.

[20] The objection only treated the amount as having been received by the appellant as gross income, which was to be deducted as an expense, in terms of section 11(a) of the ITA. The respondent contended that, in the circumstances, the appellant was precluded from relying on this 'new' ground of appeal as, in effect, it constituted a new ground of objection against a 'part or amount' of the original assessment which was not previously objected to under rule 7. These contentions are broadly similar to those which the respondent advances in its opposition to the appeal before us.

The proceedings before the tax court:

[21] The appellant launched its interlocutory application in the tax court in terms of s 117(3) of the TAA, read with rule 51(2). It sought an order directing that it was entitled to rely on the new ground of appeal in its rule 32 statement. The application was dismissed by the tax court, with costs.

[22] In doing so the tax court pointed out⁶ that a deduction in terms of s 11(a) read with s 23(g) of the ITA is founded on establishing that the amount in question was

⁶ Paragraph 69.

expended in the production of income for the purposes of trade. It was the appellant's version during the audit that its payment of the disputed amount to the BECP as a 'profit distribution' met these requirements.

[23] The tax court noted that the appellant had never alleged an alternative manner of accounting for this payment, prior to the averment in its rule 32(3) statement. It was thus not correct to say, as the appellant did, that the dispute between the parties simply related to the correct tax treatment to be applied to the disputed amount which was paid to the BECP, and was otherwise immaterial. The appellant had at all relevant times proposed and declared only one manner of tax treatment for this payment, and that was for it to be regarded as a valid deductible expense, in terms of ss 11(a) and 23(g) of the ITA.

[24] The tax court went on to find that the appellant had never indicated that the payment to the BECP did not form part of its gross income. This would have been relevant for the audit as it would have afforded the Commissioner an opportunity to scrutinize the transaction further, on the basis that it involved an amount which was previously declared as revenue in the hands of the appellant, which now was alleged to be income which accrued to a third party instead. The amount paid as a profit distribution to the BECP had been treated, from the outset, as a deduction and had been queried by the Commissioner during the verification and audit process, on that basis only.

[25] The tax court pointed out that the exercise of determining whether an amount qualifies as an expense is to be contrasted with the test for determining gross

income. The two processes are distinct. In its view, it was not correct to assert that an objection against an amount which is claimed as a deductible expense, but which is disallowed, is to be treated as equivalent to an objection against the amount being included as part of gross income, for the purposes of rule 32(3).

[26] It referred to the decision in *Matla Coal Ltd v Commissioner of Inland Revenue*⁷ and stated that the correct approach that should be followed in dealing with the provisions of rule 32(3), as outlined in *Matla*, was that it should consider the substance of the objection to determine whether it covered the point which the appellant wished to advance on appeal, and that in each case the matter was to be adjudged on its own, particular facts.

[27] It expressed the view that in following this approach within the ambit now posed by the new rule 32(3) - the previous rule must still be valid, otherwise new grounds of appeal would be permissible irrespective of whether they bear any relation to the pleaded case. It held that the appellant did not have a blanket right to introduce any new ground of appeal, because it was limited by the confines of the subrule.

[28] The wording of the subrule clearly indicated that a connection should remain between amounts previously disputed in the tax assessment and the new ground raised on appeal; in essence a taxpayer could not make out an entirely new case on appeal.

⁷ 1987 (1) SA 108 (A).

[29] In the tax court's view this interpretation of the ambit of the subrule was confirmed in *ITC 1912*,⁸ where the taxpayer introduced a new ground in respect of the same disputed amount, which it had alleged was a capital receipt. With reference to the *Matla Coal* case, the tax court pointed out that the initial ground of objection there was that the disputed amount was capital in nature, as it had been received in the course of a restraint agreement. The new ground which was raised on appeal was that the disputed amount was still a capital receipt, but on the basis that it related to the sale of coal rights on capital account. Thus, in *Matla Coal* the new ground related to the same amount which had been received and the same treatment thereof as a capital receipt, with the only difference being the basis upon which the amount could be regarded as capital, or the manner in which capital status was to be conferred on it.

[30] The tax court held that in this matter the new ground sought an alteration on appeal of a different part of the assessment (i.e gross income), although the appellant relied on the same, disputed amount of R 11 million odd as a tool to achieve such alteration. It held that, having regard to the substance of the appellant's objection, it could not be correct that an objection to the disallowance of an amount which was claimed as an expense (for failing to meet the requirements of ss 11(a) and 23(g) of the ITA), should be considered equivalent to an objection against the gross income part of an assessment, on the basis that the quantum thereof was similarly to be reduced in the same, disputed amount, as it accrued to a non-taxpayer third-party, the BECP and not the appellant. In the proceedings before us,

⁸ 80 SATC 417.

the dispute hinges on the same issue, but in relation to the interpretation thereof in terms of the new version of rule 32(3), which came into operation on 10 March 2023.

Appellant's submissions in the appeal:

[31] The appellant submits that, in dismissing its application, the tax court erred on the following grounds:

- a) It interpreted the appellant's case under rule 32(3) in an unduly technical and rigid manner in circumstances where the authorities clearly held that this was not the correct approach and that a court should look at the substance thereof;
- b) As the appellant objected to a specific amount in the disputed assessment, rule 32(3) permitted it to 'reframe or repackage' its arguments on appeal in relation to the amount, and SARS was not disadvantaged in relation to the new ground of appeal as it had a right to call for discovery in terms of rule 36, and had a right to file a statement in reply, in terms of rule 33;
- c) The 'amount' contemplated in rule 32(3), correctly interpreted, referred to an actual amount as stated in the disputed assessment and not an amount that required the application of law to define, in other words it was an ingredient of the general formula for the definition of 'gross income';
- d) The tax court failed to appreciate that the provisions of rule 32(3) should not be interpreted in a manner that resulted in the appellant being prohibited from fully ventilating the dispute in trial proceedings in the tax appeal, as it would otherwise not be able to raise points which were objectively available to it. In this regard, it relied on the decision in *ITC 1912*⁹ and its constitutional right of

⁹ Id.

access to court,¹⁰ which guarantees a fair hearing, and the requirement that legislation should be interpreted in a constitutionally compliant manner, through the prism of the Bill of Rights.

[32] The appellant admitted that the ground of appeal which is in contention was 'new' in the sense that it had not previously relied on it in its objection to the disputed assessment. It submitted that even though the rules were amended on 10 March 2023, after the tax court handed down judgment on 29 November 2022, the appeal fell to be determined in terms of the provisions of the new subrule i.e. the amendment to rule 32(3), in terms of the provisions of rule 66(2), as previously alluded to. The appellant submitted that even under the previous iteration of subrule 32(3) the 'new' ground of appeal would have been permitted.

[33] According to the appellant the new subrule is more explicit in permitting taxpayers to include new grounds of appeal in their rule 32 statements, than was permitted by the previous one. If regard was had to the historical development of the TCR it would be noted that there has been a gradual progression which clearly demonstrates a move towards greater flexibility regarding the contents of the 'pleadings' before the tax court. Initially the TCR made no provision for the inclusion of 'new' grounds of appeal in rule 32 statements, but this rigidity was abandoned in

¹⁰ Recently this Court (per Binns-Ward J), held in *Poulter v CSARS* [2024] ZAWCHC 97 para 52 (following earlier decisions of the Appellate Division in *Commissioner for Inland Revenue v City Deep* 1924 AD 298 at 302 and *Rand Rose (Pty) Ltd v Commissioner for Inland Revenue* 1944 AD 142, in respect of the 'special' tax courts provided for in the previous Income Tax Acts nos. 41 of 1917 and 58 of 1962), that a tax court is not a court of law, but an administrative tribunal. Although it is established as a court and as such is called upon to discharge its functions in a judicial manner, it falls outside of the judicial court system and hierarchy envisaged by s 106 of the Constitution.

three consecutive amendments which culminated in the new TCR.¹¹ Furthermore, the appellant submitted that even under the most rigid, initial version of the TCR tax courts allowed the inclusion of 'new' grounds of appeal, and the approach adopted in the case law had never been unduly technical or rigid but rather realistic and pragmatic.

[34] The most important aspect of this progression was that the new TCR (as did the previous ones), expressly catered for the inclusion of 'new' grounds of appeal to be lodged in rule 32 statements and made corresponding allowances in rule 33 to ensure fairness towards SARS, by providing it with a right of reply in respect of any such new grounds.

[35] Furthermore, rule 36(2) provides that within 10 days of delivery of a rule 32 statement SARS can call for discovery of all documentation relevant to any new ground of appeal that has been raised, which will ensure that SARS is not 'ambushed' in the ensuing trial (appeal) proceedings. Initially, there were no TCR and the procedure for tax appeals was set out in the Act, a period which the appellants described as the 'no rules period'. Under this dispensation the Act provided that, for the purpose of the proceedings in the tax court, taxpayers were limited to the grounds they set out in their notice of objection.

[36] The appellant pointed out that already during the 'no rules period' Corbett JA (as he then was) noted, in *Matla Coal*, that there had been a shifting of attitude towards grounds of objection which were filed in response to an assessment, to one

¹¹ Promulgated on 10 March 2023 in Government Notice R 3146.

where the tax court was not unduly technical or rigid in its approach thereto but would have regard to the substance of the objection; and the issue as to whether it covered the point which the appellant wished to advance on appeal was adjudged on the particular facts. During this period a flexible approach was adopted in instances where a taxpayer wished to introduce a 'new' ground of appeal, other than a ground on which it had initially objected to an assessment. With the shift to the so-called 'first rules period' a more 'progressive' system of pleadings was introduced, in that they made provision (in then rule 13) for the amendment of the relevant statements which were to be lodged by the parties (in terms of rules 10 and 11, which were the predecessors of the current rules 31 and 32).

[37] The appellant submitted that although the dispensation under the 'first rules period' was less stringent than that which applied during the 'no rules period', it should be noted that the previous rules 10 and 11 contained no provisions equivalent to those in rules 31(3) and 32(3), which expressly afford both parties the flexibility, when filing their appeal statements in the tax court, to expand on their positions as previously articulated during the objection procedure.

[38] The appellant pointed out that during the period when the previous TCR were in force the tax court held, in *ITC 1843*,¹² that where a taxpayer objected to the inclusion by SARS of new grounds in its rule 10 statement, on the basis that this burdened the taxpayer with an unfair disadvantage, this cut both ways because the taxpayer would be entitled, in response, to add additional grounds or additional defences in its statement.

¹² 72 SATC 229.

[39] The appellant further relied on the decision in *ITC 1912*¹³ where the court had occasion to consider the previous iteration of subrule 32(3). The appellant submitted that the facts in that matter were analogous to those in the present matter, as the taxpayer had included a new ground of appeal in its rule 32 statement which had not been included in either its rule 7 notice of objection or its rule 10 notice of appeal. This was expressly pointed out by the taxpayer in its rule 32 statement, where it had claimed that the new ground it raised was not prohibited, because it related neither to a part nor an amount that had not been objected to under rule 7. As in this matter, SARS had brought an interlocutory application to strike out the new ground on the basis that it was not permissible in terms of the rules.

[40] The appellant relies on this decision for its submission that it is apparent, from the scheme of the rules, that taxpayers are no longer restricted, on appeal, to the grounds of objection originally filed by them, as provision is made for new grounds to be advanced in terms of both rules 10(3)-10(4) and rule 33, which provides that SARS may file a reply to the taxpayer's rule 32 statement, which must deal with any new grounds advanced by the taxpayer.

[41] Further innovations were introduced in terms of rule 31(3) and 32(3), and it was also significant that in terms of rule 35 the statements lodged under rules 31 and 32 can now be amended, either by agreement or upon application to the tax court. According to the appellant, this was a further indication of an intention to broaden, rather than to limit, the ambit of the issues that can be dealt with in the tax appeal

¹³ Note 8 para 26.

process. The changes demonstrated a new flexibility in the process and a move away from the rigidity which characterised the previous regime.

[42] The appellant contended that the interpretation which the tax court adopted in *ITC 1912* of (the previous) rule 32(3)) was correct and more consistent with the established, unitary approach to statutory interpretation, whereby the language of the subrule must be considered in the context of the TCR as a whole and the circumstances attendant upon their coming into existence. In this regard, the appellant relied on the oft-cited decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality* ('*Endumeni*').¹⁴

[43] The appellant submitted that the historical development of the TCR indicates a gradual change which has been aimed at achieving a fairer and more accommodating dispensation than that which initially applied. During the 'no rules' period taxpayers were strictly constrained to the ambit of their objections even where they often only engaged professional advisers at the stage when their statements of appeal had to be prepared.

[44] The fundamental difficulty with the respondent's approach to the interpretation of the subrule, according to the appellant, is that it simply does not account for its actual wording, which provides that an appellant taxpayer can include in its statement a 'new' ground of appeal unless it constitutes an objection against a part or amount of the disputed assessment not previously objected to under rule 7 i.e. a 'new' ground of objection. According to the appellant, the respondent has failed to

¹⁴ 2012 (4) SA 593 (SCA) paragraph 18.

ascribe a proper meaning to the phrase 'against a part or amount of the disputed assessment not objected to' under rule 7.

[45] The appellant placed great reliance on the decision of Keightley J in *ITC 1912* with regards to the interpretation of rule 32(3). According to it, the linguistic problems inherent in the respondent's interpretation of rule 32(3) cannot be ascribed to bad drafting. This is clear if one considers that the import of rules 10(3) and 10(4) is substantially the same as rule 32(3), yet rule 10(4) expressly provides that if the taxpayer relies, in a notice of appeal, on a ground which was not raised in its objection under rule 7, SARS can require it, within 15 days after delivery of its rule 10 notice, to produce the 'substantiating documents necessary to decide on the further progress' of the appeal. The appellant submits that, in the light of this rules 10(3) and 10(4) would be contradictory and would nullify one another unless the former was read and interpreted to allow *any* new grounds to be put forward on appeal, as envisaged in rule 10(4), which had not been raised in terms of a notice of objection under rule 7.

[46] Thus, the appellant reiterated that it was apparent from the scheme of the rules that taxpayers were no longer restricted, on appeal, to the grounds of objection originally filed by them. According to it, the position which obtained under the previous rule 32(3) has now been cast in a more direct, assertive, and permissive manner. Thus, rule 32(3) is not aimed at prohibiting the introduction of a new ground of objection not previously raised under rule 7. Its ambit is more limited, because what a taxpayer only cannot do is to use rule 32 to appeal against a portion of an

assessment not previously objected to under rule 7. But it may do so in respect of an amount which was previously objected to.

[47] Thus, according to the appellant a taxpayer can raise a new ground in its rule 32 statement if it relates to a 'part or amount' in the assessment which had been placed in dispute, by the objection which it lodged in terms of rule 7. The change places the taxpayer in an equivalent position with SARS which, under rule 31(3), can include a new ground in its statement, provided that it does not amount to a 'novation of the whole of the factual or legal basis' (sic) of the assessment.

[48] In respect of this matter, the appellant contended that it was common cause that the new ground it advanced was one raised in respect of an amount which was the same as the one in the assessment, which had been objected to under rule 7, and it was therefore a permissible ground. In this regard, both the previously raised 'deduction' ground (of objection) and the new, alternative 'receipt/ accrual' ground (of appeal) postulated that the same, disputed amount should be excluded, ultimately, from the appellant's taxable income.

[49] The distinction between the two grounds was that whereas the deduction ground was aimed at having the disputed amount excluded directly from the appellant's taxable income via, and as, a deductible expense, the receipt/accrual ground aimed at having it excluded indirectly from it, via and as, a first deduction from the appellant's gross income. But, on either ground the net result would be the same.

[50] SARS was not prejudiced by this because it could respond to the new ground in its reply in terms of rule 33, and it would have the full armoury of amendment, further discovery and the leading of evidence to assist it to deal with both the main and the alternative grounds at the hearing of the appeal. There was thus no merit in the respondent's submission that insofar as the rule permitted new grounds to be raised in the rule 32 statement, this did not extend to new grounds that were in substance not the same as those which were contained in the objection.

[51] There was nothing in the language or the structure of the tax appeal process, established under the previous rules, to suggest that any distinction should be drawn between grounds that were covered in substance in the objection and those that were not. The provisions offered no assistance as to where the line should be drawn between these categories, and there was no hint in their language that they were ever intended to have this limited purpose.

[52] According to the appellant, in *ITC 1912* the tax court held that, on a proper comparison of the old and the new grounds which had been raised, the new ground simply involved a 'repackaging' of the 'legal basis' on which the taxpayer had contended that the losses it suffered in executing a scheme amounted to capital losses. In substance, the new ground thus reflected that the same issue was before the tax court, on appeal, as had been raised on objection to the assessment.

[53] The appellant submitted that the circumstances of this matter were analogous to those in *ITC 1912*, in that it has simply adopted a different approach to the same issue and amount, which will not place SARS at an unfair disadvantage. It will have

all the tools at its disposal to ensure that the issues are fully ventilated at the appeal hearing. SARS had conceded at the hearing a *quo* that if the application to strike the new ground was not successful, there would be no prejudice to it in the ensuing appeal.

[54] Given the circumstances, by upholding the application to strike out the new grounds of appeal from the rule 32 statement the tax court placed form and technicality over substance, and it would be contrary to the interests of justice to allow its decision to stand. The clarification brought about by the new subrule made it clear that the taxpayer may introduce new grounds of appeal as long as it previously objected to the (i) part or (ii) the same amount of, or in, the disputed assessment, in relation to which it seeks to introduce such new grounds. Purposively, the object of both the previous and the current tax court rules (especially rules 10, 31, 32 and 33) was/is to allow for a proper ventilation of the issues in a tax court appeal, while ensuring that neither party is ‘ambushed’ during the litigation process.

[55] Whilst the appellant was not able to rely on any decision that has dealt directly i.e. four-square with the new subrule, it referred to the decision in *Commissioner, South African Revenue Service v Free State Development Corporation*¹⁵ (*Free State Development Corporation*), which concerned an amendment to a taxpayer’s rule 32 statement, where the SCA held that no amendment could validly be allowed if it did not meet the requirements of rule 32(3) in the first place.

¹⁵2024 (2) SA 282 (SCA).

[56] The appellant relied on paras 40-41 of the judgment, which held that if an issue has been foreshadowed in an objection, albeit not expressly stated, there will be no prejudice to the other party in allowing an amendment to a statement which was filed in terms of rule 32 and it should be granted, in order to allow the true legal issues between the parties to be ventilated.

The respondent's case:

[57] The respondent submits that although rule 32(3) has been amended since the hearing of the matter before the tax court, the new rule does not confer any greater scope for the appellant to include new grounds in its rule 32 statement. Instead, it leaves in place the same limitations on the introduction of new grounds that were present in the previous rule.

[58] According to the respondent the issue that needs to be dealt with is an acceptable interpretation of rule 32(3), which includes the terms 'part' and 'amount' as used in the provision. The respondent contends that the appellant has not provided an acceptable interpretation of the subrule which would allow it to introduce the new ground it has.

[59] The respondent reiterates that the appellant listed a gross income of R 320 846 361,00 for the 2018 tax year, in its tax return for that period. It therefore declared this amount of gross income had been received by, or had accrued to, it. This was consistently reflected in assessments up to and including the revised assessment which was issued, after the partial allowance of the objection. This was so also after SARS undertook an audit into the appellant's tax affairs for the 2016 to

2018 tax years. A letter dated 2 March 2019 was sent to the appellant wherein it was afforded the opportunity to submit a revised ITR14 return if there were errors present in its original return. The appellant did not submit an amended return. On none of the available opportunities did the appellant allege any errors in its ITR14 return, in which it declared that gross income in the amount of R320 846 361,00 was received by or accrued to it, in the 2018 tax year. As a result, the additional and revised assessments did not effect any adjustment to the appellant's gross declared income of R 320 846 361,00.

[60] Consequently, SARS only disallowed the deduction of R 11 072 237,00 as referred to previously. The appellant never objected to the gross income part of the assessment, and it did not allege that the gross income amount had been reflected incorrectly therein, even when it lodged its notice of appeal in terms of rule 10, against the respondent's disallowance of the deduction.

[61] It was only when pleadings were filed in the tax appeal and the appellant delivered its rule 32 statement in respect thereof, that it sought to introduce a new ground of appeal in which it alleged that the gross income declared in the disputed assessment was incorrect and should be reduced on appeal by R 11 072 237,00.

[62] The appellant was therefore attempting to retroactively challenge the gross income amount in the disputed assessment, by claiming in its rule 32 statement that the expenditure of R 11 072 237,00 which was paid as a profit distribution to BECP, was neither a receipt nor an accrual by, or to, it. The new ground was raised against

the gross income part of the disputed assessment in a manner or form which was not specifically disputed before.

[63] The respondent noted the appellant claimed that, as it had objected to the 'whole' of the disputed assessment, there accordingly was no 'part or amount' of it which was not objected to under rule 7, as contemplated in subrule 32(3).

[64] However, the respondent contended that during argument (both a *quo* and at the appeal) the appellant abandoned this submission, as the evidence showed overwhelmingly that it had only objected to the disallowance of the disputed amount as a deductible expense, and certain other aspects of the assessment. Such a stance would in any event be contrary to its clear intention as evinced in its rule 32 statement, where it declared that it relied on 'a ground of appeal not previously relied upon'¹⁶ in relation to the disputed amount and claimed that it was entitled to do so in terms of rule 32(3).¹⁷

Evaluation:

[65] The central issue in this appeal, as in the tax court, concerns the proper interpretation of rule 32(3), as amended, and the circumstances under which a taxpayer may raise a new ground of appeal in terms of the subrule. As a starting point the language of the subrule appears to limit its reach, in line with the principles applicable generally in regard to pleadings. It is well established, as set out in

Endumeni, that:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the

¹⁶ Paragraph 11 page 77.

¹⁷ Paragraph 12 page 78.

particular provision . . . in the light of the document as a whole and the circumstances attendant upon its coming into existence'.¹⁸

This is a unitary exercise which is required to have regard for the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose at which it is directed, and the material known to those responsible for its production. In this regard context does not mean only those provisions of the subrule which immediately precede and follow it but includes the entire legislative enactment i.e. the TCR, in which they appear.¹⁹

[66] As a starting point one must consider the provisions of rule 7, which set out the requirements for the lodging of an objection against an assessment. An interpretation of rule 32(3) without having regard to the provisions of rule 7 would not be proper, as it lays the foundation for the appeal process that follows in the event of the disallowance of an objection. Rule 7(2) states that:

'a taxpayer who lodges an objection to an assessment must –

(a) complete the prescribed form in full;

(b) set out the grounds of objection in detail including-

(i) specifying the part or specific amount of the disputed assessment objected to;

(ii) specifying which of the grounds of assessment are disputed; and

(iii) submitting the documents required to substantiate the grounds of objection that the taxpayer has not previously delivered to SARS for purposes of the disputed assessment.' (our emphasis)

[67] Rule 7 clearly stipulates that the grounds of objection must specify the 'part' and/or the 'amount' of the disputed assessment which is objected to, in order for

¹⁸ Note 14 para 18.

¹⁹ *Democratic Alliance v Speaker of the National Assembly* [2016] ZACC; 2016 (3) SA 487 (CC) para 27.

SARS to be able to deal with the objection. It does not leave room for any uncertainty or ambiguity.

[68] An objection by a taxpayer in an unspecific form, either in respect of a part or an amount of an assessment which is disputed, would therefore seemingly fall foul of the provisions of rule 7 and would be regarded as invalid for lack of compliance with the rule. As we see it, an objection may, therefore, not be a globular one i.e. one raised against the 'whole' of an assessment without more, but must be specific, in that the part and/or amount which is disputed must be specified. In the circumstances, a simple claim that the appellant's objection in terms of rule 7 was against the 'whole' of the disputed assessment, and as such thereby also implicitly included an objection against the assessment of its gross income, either in part or in respect of an amount contained in it, would not be valid or permissible, on a proper application of rule 7(2)(b). As is evident from the assessment which is in issue (which dealt with income tax), it consists of very many parts which contain many items and amounts.

[69] But, even if a taxpayer is not precluded from lodging an unspecific objection against the 'whole' of an assessment (in this regard there may, for example, be instances where an assessment only has one part and/or amount in it, which is disputed, and an objection against the 'whole' assessment would effectively amount to an objection to the part and/or amount therein), it is evident that the appellant did not do so in this matter, as its grounds of objection pertained to specific parts of, and amounts in, the additional assessment. In this regard, in its letter of objection ²⁰ it

²⁰ Annexure 'MML 2' to the founding affidavit, pages 25 -31.

complained about 5 specific parts and amounts of, and in, the assessment: (i) the inclusion of an amount of R 4 197 000 in its gross income, which it contended was exempt from tax²¹ as an employment tax incentive credit (ii) the disallowance of an amount of R 300 000 (paid as rental for a property it occupied) as a deductible expense from taxable income²² (iii) the disallowance of the disputed amount of R 11 072 237 (paid to BECP) as a deductible expense from taxable income (iv) the levying of an understatement penalty of 10% of the tax value of the disputed amount and (v) the levying of interest on the basis of an underestimation of provisional tax. In regard to its treatment of the disputed amount which is in issue in this matter it specified that the 'part' and the 'amount' which it objected to was the assessment made in respect of its *taxable income*, due to the disallowance of the claimed deduction of the disputed amount, as an expense. Insofar as its gross income was concerned, it lodged no objection against the 'whole' thereof (either in amount and/or part). It objected (only) to the inclusion of a specific amount therein, as referred to in paragraph (i).

[70] As we see it, given the provisions of rule 7(b)(i) any 'new' ground of appeal noted in a rule 10(3) notice of appeal and a statement in terms of rule 32(3) by a taxpayer must be against a specified or identified 'part' and/or 'amount' of, or in, the disputed assessment referred to in rule 7. Any new ground of appeal which the appellant sought to raise in its rule 32(3) statement could therefore only be noted in relation to the *selfsame* part of and amount in the assessment, which was previously objected to. We will revert to this aspect shortly.

²¹ In terms of s 10(1)(s) of the ITA read with the Employment Tax Incentive Act of 2013.

²² In terms of s 11(a) of the ITA.

[71] The appellant concedes that rule 32(3) should not be interpreted in isolation and must be considered in the context of rules 10(3) and 10(4), which deal with the noting of an appeal to the disallowance of an objection. Notwithstanding this, as pointed out the appellant contends, relying on *ITC 1912*, that if regard should be had to the scheme of the TCR, taxpayers are no longer restricted on appeal to the grounds of objection that are filed by them in terms of rule 7. This may be so as a general proposition, as stated by Keightley J in *ITC 1912*, however in our view the subrules do not assist the appellant in the interpretation it seeks. In this regard, the appellant submits that the contents of rules 10(3) and 10(4) should be regarded merely as an interpretive aid which impels one to conclude that *any* new, perceivable ground of appeal may be raised by a taxpayer in an appeal before a tax court, even one that was not previously raised in an objection under rule 7. We do not agree with this submission, and this is not what Keightley J held in *ITC 1912*.

[72] Rule 10(3) only permits a taxpayer to lodge an appeal against the disallowance of an objection, on a 'new' ground which was not previously raised in respect of a disputed assessment, *if it does not constitute a 'new' objection* against a specific part or amount of the assessment, which was not objected to under rule 7. Put differently, (in the context of the new, permissive wording of the subrule), a taxpayer is allowed to appeal on a new ground not raised in its notice of objection under rule 7, as long as the new ground does not effectively constitute a new objection against a 'part or amount' that was not previously objected to.

[73] Thus, in our view, any new ground of appeal that may be raised is therefore subject to the bounds and limitations set out in rule 10(3) and must be a new ground

raised in relation to the *selfsame* part of, and/or amount in, the disputed assessment that was initially objected to under and in terms of rule 7.

[74] In our view, rule 10(3) does not give a taxpayer an unrestricted right, on appeal, to effectively raise new grounds of objection not originally lodged by them in terms of rule 7. Such an interpretation would render rule 10(3) and rule 7 nugatory and meaningless. The same goes for rule 32(3), thus as was stated by Keightley J in *ITC 1912*:²³

'This must mean that the excised phrase, "a part or amount of the disputed assessment", is the working part, or focus, of the prohibition. In other words, what is prohibited is for a taxpayer to appeal against a portion of the assessment in respect of which no objection was ever raised. For example, if an objection was raised to the penalties imposed but not to the VAT portion of the assessment, an appellant is not permitted, through the guise of an appeal, effectively to raise a subsequent objection to the VAT portion. This is essentially what occurred in the Computek case, relied on by SARS. . .' (footnotes omitted- our underlining)

[75] As the court in *ITC 1912* similarly stated:²⁴

'An appellant may raise a new ground of objection in the TCR 32 statement, provided that it relates to a part or an amount in the assessment that was placed in dispute by the objection stated under TCR 7.'

In the circumstances, we do not agree with the submission that it is clear from the scheme of the rules that taxpayers are no longer restricted, on appeal, to the grounds of objection originally filed by them, because provision is made for new grounds to be advanced in terms of rule 10(3) and rule 32(3). These rules were clearly enacted for the purpose of allowing new grounds of appeal to be added, only as contemplated within the confines of, and subject to, the limitations set out in these subrules, read with rule 7.

²³ Paragraph 23.

²⁴ Paragraph 30.

[76] As for the discovery provision in rule 10(4), its purpose is to allow SARS to call for the necessary information to enable it to make a decision as to the merits of any new ground of appeal which has been raised, as envisaged by rule 10(3). The subrule does not allow for grounds of appeal to be raised beyond the confines of those referred to in subrule 10(3). Rule 10(4) simply allows SARS to call upon the taxpayer to produce substantiating documents in order to ascertain whether a genuine, new ground not previously raised in respect of a part of an assessment, or an amount therein, has been established. It is a process which SARS may activate before it has to file its statement in terms of rule 31, in which it is required to set out, clearly and concisely, its grounds for arriving at its assessment and which of the facts or legal grounds in the taxpayer's notice of appeal are admitted and which are opposed, together with the material facts and legal grounds on which it opposes the appeal. SARS might, after having received the documents substantiating the appellant's new ground(s) of appeal, reconsider its position and concede the appeal, either in whole or in part, or it may in turn set out in its rule 31 statement a new ground for (i.e. justifying) its assessment, or the basis of its disallowance of the appellant's objection, in whole or in part, in terms of rule 31(3).²⁵

[77] But, just as the taxpayer is restricted from raising (new) grounds on appeal that amount to new objections not previously raised, in terms of subrule 31(3) SARS too does not have an unfettered right to raise new grounds on appeal: these may not constitute 'a novation of the whole of the factual or legal basis of the disputed assessment,' or grounds which require the issue of a revised assessment.

²⁵ If the appeal is to proceed, SARS must in terms of rule 31(1) deliver to the appellant its statement of the grounds of assessment and opposition to the appeal, within 45 days after the substantiating documents which have been called for have been delivered in terms of rule 10(5).

[78] The appellant submits that permitting a taxpayer to raise a totally new ground of appeal in terms of rule 32(3), was aimed at placing the taxpayer in an equivalent position to SARS, which under rule 31(3) can now include any new ground justifying an assessment or the disallowance of an objection. The bald statement made by the appellant is not correct: as previously pointed out a taxpayer is not unrestricted regarding which grounds of appeal it may include under rule 32(3). The appellant wants to argue in effect that, as SARS is entitled to file a new ground of assessment in its rule 31 statement, this paves the way for the appellant to include *any* new grounds of appeal in its rule 32 statement, in response thereto. This, in our view, is an exaggerated and misplaced interpretation of the import of subrule 31(3).

[79] We say this because SARS is clearly also not permitted to include, in an unrestricted manner, any new ground of assessment, on appeal. It is placed under a similar restriction as the taxpayer. A new ground of assessment that SARS wishes to raise is not permissible if it amounts to a novation of the factual or 'legal' basis of the assessment it levied. But, even if it does not go that far but would be a ground which, if upheld, would be sufficient to cause or result in a revised assessment, it may not be raised. This is a serious limitation on the introduction of any new ground by SARS, in response to an appeal. In essence therefore, it seems to us that the factual and/or legal basis of any new ground of assessment which is put forward by SARS in its rule 31 statement must not be such as to contradict the original basis or grounds upon which it assessed the taxpayer. Just as the taxpayer is confined, on appeal, to the grounds of dispute it raised in its objection to an assessment, SARS is confined to the basis of the assessment it levied, to which objection was taken. This makes

sense: what is intended is that the parties are to set out and traverse the basis of their positions in the dispute resolution process which is provided for by way of objection, so that if unresolved during this process, these may then be contested on appeal. To allow an unfettered right to raise a fundamentally new basis for contestation on appeal would defeat the object of giving the parties an equal, transparent and fair opportunity to resolve their differences before then, by means of the dispute resolution process provided for in raising and dealing with objections. Allowing the parties to have an unfettered right to raise any new grounds of contestation at the 'appeal' stage would undermine the whole pre-appeal objection dispute resolution process, and discourage the parties from engaging in it responsibly and with due care and diligence.

[80] By way of illustration of what we are saying, the basis upon which SARS is permitted to include a new ground of assessment was discussed in *Sasol Oil (Pty) Ltd v CSAR*.²⁶ SARS had in its (then rule 10(3)) statement, in which it set out why it had disallowed the taxpayer's objections, included new grounds of assessment which, according to it, pertained to the same disputed amount and emanated from the same agreements in respect of which it had already assessed the taxpayer. It submitted that it was permissible for it to do so because any sustainable grounds for disallowing a taxpayer's objection could surely be raised, even grounds that had not previously been relied upon. The taxpayer made application to review and set aside the rule 10(3) statement. The Court held that as the factual and legal basis of the new grounds was completely different from the initial grounds of the assessment, it was impermissible for SARS to include them in the statement.

²⁶ [2012] ZAGPPHC 321 paras 21 -25.

[81] From this, and on a proper reading of the provision, it appears that the enactment of rule 31(3) was indeed aimed at placing the taxpayer in an equivalent position to SARS, in that it equally seeks to prevent SARS from impermissibly including new grounds of appeal which are founded on a completely different factual or legal basis, or which would materially alter the assessment that it made and which is being disputed. It restricts SARS from raising a new ground of assessment, on appeal, on a legal and factual basis that did not form the basis of or underpin the assessment it levied. It certainly does not place SARS in a better position than the taxpayer or grant it an unfettered right to raise new grounds of assessment on appeal.

[82] This harmonizes with the overall interpretation set out above, that any new ground of appeal which is raised by the taxpayer is restricted to the specific part or amount of the disputed assessment previously objected to under rule 7.

[83] If rule 32(3) should be interpreted to grant a taxpayer an unrestricted right to raise *any* new ground of appeal, even one not originally noted as a ground in its rule 7 grounds of objection, SARS will in turn be prejudiced and not be in an equivalent position to that of the taxpayer. As Corbett JA said in *Matla*²⁷ (during the 'no rules' period), in relation to a predecessor provision in the ITA which provided that in an appeal against the disallowance of an objection the taxpayer was limited to the grounds raised in its notice of objection:

'It is naturally important the provisions of s 83(7)(b) be adhered to, for otherwise the Commissioner may be prejudiced by an appellant shifting the grounds of objection to the assessment in issue. . .'

²⁷ Note 7 at page 125 H-J.

In *HR Computek (Pty) Ltd v The Commissioner for the South African Revenue Service*²⁸ Ponnar JA reiterated this in the context of appeals against revised VAT assessments where he said:

'Here, although we do not have a similar statutory provision to that encountered in Matla Coal, I can conceive of no reason why the principle that is established there should not apply with equal force to an objection and appeal under the VAT Act. The rationale for such a principle is explained by Cloete JA (Commissioner, South African Revenue Service v Brummeria Renaissance (Pty) Ltd & Others 2007 (6) SA 601 (SCA) para 26) thus:

“. . . It is obviously in the public interest that the Commissioner should collect tax that is payable by a taxpayer. But it is also in the public interest that disputes should come to an end – interest reipublicae ut sit finis litium; and it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to change the basis upon which the taxpayer were assessed until the Commissioner got it right – memories fade; witnesses become unavailable; documents are lost. That is why s 79(1) seeks to achieve a balance: it allows the Commissioner three years to collect the tax, which the Legislature regarded as a fair period of time; but it does not protect a taxpayer guilty of fraud, misrepresentation or non-disclosure. If either of the Commissioner's arguments were to be upheld, this balance would be unfairly tilted against the honest taxpayer.'

In *HR Computek* the SCA held that, having not raised an objection to a capital assessment in its notice of objection, the taxpayer was precluded from raising it on appeal before the tax court.

[84] In the same vein, we are of the view that the provisions of rule 33 similarly cannot come to the aid of the appellant, in order to conclude that rule 32(3) properly interpreted, permits a taxpayer to include new grounds of appeal on an unrestricted basis.

[85] Rule 33(1) states that SARS may, after delivery of the statement of grounds of appeal under rule 32, deliver a reply to the statement within the prescribed period. As previously pointed out, rule 33(2) provides that the reply must set out a 'clear and concise' response to any new grounds which were raised by the appellant taxpayer and the 'material facts or applicable law' it set out in its rule 32 statement. In its

²⁸ [2012] ZASCA 178 para 11.

formulation this is clearly a provision which is akin to a replication in answer to the appellant's stated case on appeal. It allows SARS a right to reply to a 'new ground' as contemplated in rule 32(3), under circumstances where the new ground raised is a permissible one. It does not afford SARS a right to reply to a new ground which is not permissible i.e. one which falls outside the bounds of rule 32(3), as it amounts to a ground of objection that was not previously raised.

[86] As we understand it *Matla*, *HR Computek*, *ITC 1912* and *Free State Development Corporation* essentially held that where a new ground is advanced by a taxpayer on appeal, it must in substance still amount to a/the ground(s) of objection which was/were initially advanced in terms of rule 7, or it must at least, in the words of Weiner JA in *Free State Development*²⁹ have been 'foreshadowed' in the initial grounds. Ultimately, the test is whether, on a proper interpretation the 'substance of the initial objection covers the (new) point which the appellant wishes to advance on appeal.'³⁰ In our view, and in a nutshell, what subrule 32(3) therefore effectively permits is the raising of a *new reason or argument on appeal* for why the Commissioner was wrong in disallowing an objection to an assessment, but does not permit the raising of a new factual or legal basis for objecting to the assessment, which amounts to a *new objection* to it, which was never raised at the time.

[87] We further do not agree with the appellant's submission that there is nothing in the language or the structure of the tax appeal process established under either the previous or the current rules to suggest that any distinction should be drawn between grounds that cover, in substance, the objection and those that do not. This

²⁹ Note 15 paras 12 and 40.

³⁰ *Matla* n 7 page 125 H-J.

is clearly not what the courts held in *Matla*, *ITC 1912*, *HR Computek*, and *Free State Development Corporation*. The last decision illustrates the point we made in the previous paragraph. It was given in the context of the filing of an amended statement of the appellant's grounds of appeal, in which a new legal ground of appeal was advanced. In its original rule 32(1) statement the taxpayer's grounds of appeal were that the Commissioner had erred in levying VAT, in an assessment, as the services which it supplied were not taxable in terms of the VAT Act and were 'zero-rated', as it was merely a conduit for providing state funds for development purposes and had not derived any financial benefit or advantage therefrom. In its reply in terms of rule 33 SARS averred that as the appellant was a designated entity in terms of the Act the services it supplied were not 'zero-rated' and were taxable. After it obtained a second legal opinion the appellant sought to withdraw its rule 32 statement and to lodge an amended one in its place, in which it conceded the services were not 'zero-rated' but contended, as a 'new' ground of appeal, that the services were not taxable as they did not fall within the definition of 'supply' or 'deemed supply' in terms of the VAT Act. The Court held that as the amended statement was based on the same facts and transactions as the first one, and merely sought to contend that the transactions were not liable for VAT on a different legal ground in terms of the VAT Act, the taxpayer did not seek to raise a new ground of appeal that was impermissible. The amended, new ground of appeal had been 'foreshadowed' in the objection which the appellant had lodged to the assessment, as it had there contended that (as a matter of law) it was not liable for VAT, in terms of the provisions of the VAT Act. On appeal it simply sought to rely on a new, alternative legal provision in the Act for why it contended it was not so liable.

[88] In this matter the appellant's contention is that, as the disputed amount which was raised in its objection (under the original 'deduction' ground), is the same as that which is now raised in its statement of appeal (under the new 'receipt/accrual' ground), in terms of subrule 32(3) it is therefore an 'amount of the disputed assessment' which was objected to under rule 7, as on either basis it falls to be excluded from the appellant's income. Therefore, it falls within the ambit of what is allowed in terms of the subrule.

[89] We do not agree. In our view the contention is untenable. The distinction is that whereas the 'deduction' ground contends that the disputed amount falls to be excluded from taxable income because it is a deductible expense, the 'receipt/accrual' ground contends that it should be excluded from the appellant's gross income as it never accrued to, or was received by, it. The terms on which each 'deduction' is calculated have different legal bases. The exercise does not amount to a simple mathematical deduction, but a calculation that must be arrived at by the application of different legal formulae, provided for in the ITA. The appellant cannot have it both ways, it must either be the one or the other, and as a matter of law the two are not legally equivalent, although they may arrive at the same result mathematically.

[90] We agree with the tax court and the respondent that the inclusion of the new ground, on appeal, constitutes a fundamentally different ground of objection to the one which was filed in the appellant's rule 7(2)(b) notice of objection. This is clearly what rule 10(3) as well as rule 32(3) prohibits.

[91] In *Matla Coal* the taxpayer introduced a new ground in relation to the same disputed (gross) income item which it initially alleged, in its objection, constituted a capital receipt, as it was received in the course of the performance of a restraint of trade agreement. When the Commissioner disagreed it still sought to contend that it was a capital receipt, but on the basis that it related to the sale of coal rights on capital account. Thus, the new ground which was raised related to the same receipt and the same treatment of the receipt, with the only distinction being the basis upon which it was to be treated as capital. Put simply, the taxpayer still sought to argue that the amount was not subject to tax as it was capital, and not income, but for different reasons.

[92] In *HR Computek*³¹ the disputed amount was similarly assessed as a capital amount which was liable for VAT, to which the dissatisfied taxpayer ought to have objected, but did not.

[93] After referring to the decision in *Matla Coal*, Ponnann JA held (with reference to the forerunner to the current rules), that the resultant effect was that:

'It follows that not having raised an objection to the capital assessment in its notice of objection, the taxpayer was precluded from raising it on appeal before the tax court. That that must be so finds support in rule 6(3) (a), which provides:

"(3) In the taxpayer's notice of appeal in terms of sub rule (2), he or she-

(a) must indicate in respect of which of the grounds specified in his or her objection in terms of rule 4 he or she is appealing."

Thus, when the taxpayer challenged the capital amount for the first time in its 11 statement, it effectively raised a "new objection" directed at an individual assessed amount that had not previously been objected to. . .'³² (our emphasis)

[94] In our view, the effect of this is that an amount which is raised in a new ground of appeal must, in substance, be the *same* amount, the disallowance of

³¹ Id, paragraphs 10-11.

³² *Matla Coal* n 7 para 12.

which was objected to under rule 7. In this case the amount objected to pertained to a deduction that was claimed and disallowed, from the taxable income part of the assessment. The fact that the amount that is now referred to in the new ground of appeal in the rule 32 statement is *numerically* the same, does not make it the same amount that was objected to. The amount that is the subject of the new ground of appeal is an amount that pertains to an exclusion that is now sought from the gross income part of the assessment. The fact that it is numerically the same does not permit the taxpayer to raise it in a new ground of appeal, in respect of a different part of the assessment that was not objected to in relation to that amount, under rule 7. In our view there was no permissible amendment of an existing ground but the introduction of a totally new one. This is therefore not a case where the point that is now sought to be argued on appeal in respect of the disputed amount was 'foreshadowed' in the objection (as per *Free State Development Corporation*), nor does the objection cover it, in substance (per *Matla Coal*).

[95] In coming back to the issues at hand, it bears repeating that, what the appellant seeks to retrospectively challenge is the gross income part of the disputed assessment. In respect of its new ground the appellant now states that the disputed amount of R11 072 237,00 paid as a profit distribution to the BECP was neither a receipt by, nor an accrual to, it for its own benefit. The new ground is that the amount must be excluded from the appellant's gross income. The new ground is therefore an attempt to raise a new objection, against the gross income part i.e. a different part of the disputed assessment.

[96] In this regard, the definition of gross income in terms of the Act is as follows:

“**gross income**”, in relation to any year or period of assessment, means –

- (i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or
- (ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic, during such year or period of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of the capital nature or not) so received or accrued as are described hereunder,...

[97] A taxpayer’s gross income for a tax period is thus determined by establishing the amount, in cash or otherwise, that was received by, or which accrued to, or in favour of it, for its benefit during the relevant tax period, excluding capital amounts.

[98] At the risk of again belabouring what is common cause, the appellant declared and consistently reflected in its 2018 return (and AFS) an amount of gross income of R 320 846 361,00 for that tax year. In its original grounds of objection it claimed that the R 11 072 237,00 which was paid to the BECP was an allowable deduction by virtue of ss 11(a) and 23(g) of the ITA, in that it was an expense incurred in the production of income from trade.

[99] Section 11(a) (which pertains to the so-called ‘general deduction formula’), reads as follows:

‘General Deductions allowed in determination of taxable income. For the purpose of determining the taxable income derived from any person from carrying on any trade, there shall be allowed as deductions from the income such a person so derived-

(a) expenditure and losses actually incurred in the production of income, provided such expenditure and losses are not of a capital nature.”

Section 23(g) of the Act provides:

23. Deductions not allowed in determination of taxable income

No deductions shall in any case be made in respect of the following matters, namely-

(g) any moneys claimed as a deduction from income derived from trade, to the extent to which such moneys were not laid out or expended for the purposes of trade...’

[100] A determination as to whether an amount may validly be deducted as an expense under ss 11(a) and 23(g) of the Act therefore depends on establishing whether it was expended in the production of income for the purpose of trade. This was the appellant's version throughout and as stated by the tax court and the respondent, the appellant never alleged any alternative manner of accounting for this payment, prior to the filing of its rule 32 statement. There was never an issue with regard to the respondent's tax treatment of the gross income part of the assessment.

[101] The attempt to now exclude the disputed amount from gross income is an aspect that would have been relevant in the course of the audit, as it would have afforded the respondent an opportunity to scrutinize the transactions between the appellant and the BECP further, on the basis that they involved amounts which had previously been declared as revenue which accrued to the taxpayer, but which were now alleged to be income accruing to, or received by, or in favour of, a third party.

[102] The appellant correctly never challenged the finding of the tax court (and never tried to convince this Court otherwise), that the exercise of determining a deductible expense is to be contrasted with the test for determining what forms part of gross income. As is clear from the relevant provisions of the ITA, and as the tax court correctly found, the two processes are separate and distinct.

[103] The appellant's claim that the new ground and the original ground would achieve the same result, is thus not a valid reason to render the new ground permissible under rule 32(3).

[104] On this aspect, aside from the cases we have already referred to, we may also refer to the decision in *PM v Commissioner for the South African Revenue Service*,³³ where the taxpayer initially alleged that certain disputed amounts were capital receipts in the form of loans and therefore did not form part of his gross income. He later attempted to introduce a new ground on appeal, in which he claimed that because the receipts were received whilst he was insolvent, they should not be regarded as part of his gross income as they did not accrue to him, but to the trustee of his insolvent estate.

[105] He submitted that the introduction of this new defense by way of an amendment would provide greater clarity to the appeal and should be allowed as it would occasion no prejudice to the Commissioner which could not be remedied by an order for costs. These facts were always known to the Commissioner and the taxpayer would be prejudiced if the amendments were not granted.

[106] Lopes J, with reference to *ITC 1912*, confirmed³⁴ that although the taxpayer was entitled to raise a new ground of appeal in his proposed amendment, it had to 'relate' to an objection to a part or amount of the disputed assessment, which was included in his notice of objection in terms of rule 7. If it was not raised in the objection, it could not be raised by way of an amendment, on appeal. In addition, it had to be a ground of appeal which was sustainable in law.

[107] He held that if the new 'incorrect taxpayer' ground was raised in the taxpayer's rule 7 notice, it had been done so 'very obliquely'. However, even if it was

³³ [2019] ZATC 19; 85 SATC 535.

³⁴ *Id.*, para 15.

to be considered to have been sufficiently raised in the notice of objection, it was not a valid ground in law, because the fact that the taxpayer was declared insolvent did not prevent him from accruing a new estate immediately thereafter, albeit one that was under the control of his trustee, and in terms of s 23(9) of the Insolvency Act³⁵ he was entitled to recover any remuneration or monies owing to him at the time, in his own name and right. In the result, the court was of the view that the new ground of appeal was not a valid one and should be excluded, even though, as is contended in this matter, the amount which was referred to in the new ground of appeal remained the same as that which was raised on objection, albeit that the appellant sought to have it excluded from gross income because it had accrued to a different party, as the appellant in this matter seeks to do.

[108] Shortly before judgment was to be handed down the appellant drew our attention to the recent decision of the Constitutional Court ('the CC') in *Capitec Bank Ltd v Commissioner, South African Revenue Service*³⁶ which it contended supported its case. Before setting out, in brief terms, what the facts in that matter were and what the import of the decision therein was, insofar as they may be relevant, it is important to point out what it did not concern. It did not concern a dispute about the terms of the rule 32 statement which the taxpayer, Capitec, filed in its appeal in respect of the disallowance of 'input' deductions it had claimed under s 16(3)(c) of the Value-Added Tax Act ('the VAT Act'),³⁷ and neither the tax court nor the Supreme Court of Appeal³⁸ or the CC were called upon to rule on this aspect. The

³⁵ Act 24 of 1936.

³⁶ [2024] ZACC 1 (delivered on 12 April 2024).

³⁷ Act 89 of 1991.

³⁸ Its decision is reported *sub nom Commissioner, South African Revenue Service v Capitec Bank Ltd* [2022] ZASCA 97; 2022 (6) SA 76 (SCA).

dispute concerned the merits of the findings and the decision of the tax court, as to whether SARS had correctly disallowed the deductions claimed, in whole or in part.

[109] As to the facts, the following. Where a charge or fee is levied in the supply of a service which forms part of a provider's 'enterprise' i.e. business, it qualifies as a taxable one in terms of the VAT Act, on which VAT is payable. However, in terms of a specific provision the supply of financial services in the form of credit, for interest, is exempt from VAT.

[110] Capitec lent money to clients in terms of short-term, unsecured loans in return for which it levied interest and fees. To protect itself against losses it took out insurance cover over these loans, which would settle the amount of a client's indebtedness in the event of their death or retrenchment. The cover was provided to clients free of charge, as a standard term of their loan agreements.

[111] Over the period November 2014-November 2015 Capitec paid out R 582.3 million in premiums to its insurers in respect of which it sought to claim R 71.5 million as a notional VAT input tax deduction. In an additional assessment SARS disallowed the claim, on the grounds that the loan cover was not a taxable supply as it had been provided free of charge and not in the course and furtherance of Capitec's enterprise. Capitec lodged an objection against the 'whole' of the disallowance, which was dismissed. It then lodged an appeal to the tax court against the 'whole' of the dismissal of its objection. The tax court was of the view that, inasmuch as the loan cover had been provided to promote Capitec's business, it was supplied in the course and furtherance of its enterprise, within the meaning of the Act, as it did not

only seek to advance an activity that was exempt from VAT (the provision of credit for interest) but also one that was taxable (the provision of credit for a fee). Consequently, the tax court held that the deduction should have been allowed and it set aside the additional assessment.

[112] On appeal the SCA reversed the decision on the basis that the fact that no consideration was charged for the provision of loan cover, which was supplied in the course of providing credit, rendered it a VAT-exempt supply, and the bank was consequently not entitled to claim VAT input deductions thereon.

[113] In a further appeal the CC in turn reversed the SCA and remitted the matter to SARS for re-assessment in the light of the findings it arrived at. It held that, on a proper interpretation of the relevant provisions of the VAT Act, the fact that the loan cover was provided for free did not render it an exempt supply of services. The Act provides that where a service is supplied for no consideration the value thereof will be deemed to be nil, but it may still be taxable, as long as it occurs in the course or furtherance of an enterprise which is liable for VAT. Consequently, the CC held that the SCA had erred in holding that simply because the loan cover was supplied free of charge it was not a taxable supply.

[114] It went on to hold that, properly construed, the services supplied by Capitec were of a mixed nature as they consisted of both exempt and non-exempt supplies. In its view Capitec was accordingly entitled to claim input tax deductions *pro rata* in respect of the tax fraction which pertained to the fees that it had charged. The

question that then arose was whether the CC could hold that an apportionment should be made on re-assessment.

[115] SARS contended that this was not permissible as Capitec had failed to plead for an apportionment. The SCA had agreed with this contention. The CC noted that the objection which Capitec had lodged had been against the 'whole' of the disallowance and it had appealed on the same basis to the tax court. In its view, Capitec's failure to plead an apportionment by advancing an alternative objection against a part of the disallowance should not serve to non-suit it, as this failure would not have prevented it from arguing the point before the tax court on appeal, had it been raised. In this regard the CC pointed out that rule 32(3) only precluded the raising of a new ground, on appeal, which constituted a new objection against a part or amount of the disputed assessment that had not previously been raised under rule 7. Since Capitec had objected to the 'whole' of the assessment, had the alternative ground been raised in its appeal to the tax court it would not have involved an attack on a part (or amount) of the assessment to which objection had not previously been taken.³⁹

[116] From a conspectus of the available facts, as set out in the judgments of the SCA and the CC, it appears that although this was a matter where the objection which was lodged was against the 'whole' of the disallowed deduction which was claimed, it was specific in relation to the part of, and the amount in, the disputed assessment (as required by rule 7), and was clear and sufficient in the way it was presented: first on objection and then on appeal. In its presentation it made clear that

³⁹ Paragraph 93.

what was being objected to was the disallowance, in its entirety, of its notional input tax deduction, as it contended that it was a taxable supply, at least in part. This argument was reiterated on appeal before the tax court. This was therefore not an instance where the taxpayer sought to advance a new factual basis for the grounds of its appeal, other than the one it advanced on objection, nor did it in substance seek to raise a new objection when prosecuting its appeal in the tax court. It seems to us that, if the point had arisen in the proceedings before the tax court, the riposte would have been that the grounds of appeal were foreshadowed in, and covered by, the grounds of objection.

[117] In any event, the CC held that it was not precluded as a Court, from directing that an apportionment should be made. Although this was not specifically provided for in terms of the Act there was well-established precedence for this in tax case law,⁴⁰ and s 72(1)(a) and (b) of the VAT Act allowed the Commissioner to make a decision as to the manner in which the provisions of the Act should be applied and how the payment of VAT should be calculated, where 'difficulties, anomalies or incongruities' arose in regard to the manner in which a vendor (or class of vendors) conducted their business, trade or occupation.

[118] The CC held that as SARS was an organ of state which was subject to the Constitution it could not seek to exact tax which was not due and payable to it, and Capitec should accordingly not be penalized for its failure to have pleaded an alternative objection of apportionment.⁴¹

⁴⁰ Vide *Commissioner for Inland Revenue v Nemojim (Pty) Ltd* 1983 (3) SA 935 (A) at 951B-C.

⁴¹ Paragraph 94.

[119] In its supplementary submissions the appellant now contends that the 'practical effect' of the CC's ruling is that an amendment to an appellant's rule 32(3) statement should be permitted where there is a danger that SARS might exact tax which is not due and payable to it, were the amendment not to be allowed. Aside from the cynical opportunism inherent in the submission it is an obvious fact that a Court will not, in the exercise of its function, countenance the extraction of tax to which SARS is not entitled i.e. where that would be contrary to the law and the Constitution. But this truism surely cannot translate into a principle that allows taxpayers to include any new grounds of appeal in their rule 32 statements, on this basis. Were it to be allowed it would render the provisions of rules 7, 10(3) and 32(3) meaningless and subvert the scheme of the dispute resolution processes of objection and appeal which are provided for by the TAA and the TCR. As there is always a danger that, when disallowing an objection SARS might be seeking to lay claim to tax which is not due to it, adopting such a principle would mean that it would always be open to a taxpayer to raise a new ground of appeal on this basis.

[120] From our exposition of the judgment it will thus be apparent that the CC did not rule that the apportionment ground of appeal, which was raised before it and the SCA, but not the tax court, was one that fell within or outside of the bounds of the appellant's rule 32(3) statement. The matter was not decided on that basis, but on the basis of whether, in fashioning an appropriate order that would do justice to the appellant the CC was precluded from ordering a remittal and an apportionment, given the appellant's failure to plead for such relief. The CC's ruling was about its powers and not about the bounds and confines of rule 32, or the statement which was filed by the appellant in terms thereof. In the circumstances we are of the view

that the decision is of no assistance to the appellant and does not controvert the views we have expressed and the findings we have arrived at as to our interpretation of the relevant rules.

Conclusion:

[121] For the above reasons, we are of the view that the tax court was correct in dismissing the application and in holding that the new ground of appeal which was raised by the appellant in its statement in terms of rule 32 was impermissible, as it fell outside the bounds of rule 32(3). As the respondent was represented by a tax official in its employ there is no need to make a costs order in its favour.

In the result we make the following order:

The appeal is dismissed.

HENNEY, J

I agree.

NUKU, J

SHER, J

Appearances:

Appellant's counsel: TS Emslie SC and R Kotze

Appellant's attorneys: Werksmans (Stellenbosch)

Respondent's representative: Z Vadachia (SARS High Court Litigation Unit Tshwane)