

The consequences of not completing the “yes/no” questions accurately on your tax return

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FACTS

The Respondent is Spur Group (Pty) Ltd (Spur). The Commissioner for the South African Revenue Service (SARS) approached the Supreme Court of Appeal of South Africa (SCA)¹ seeking to appeal the judgment and order of the Western Cape Division of the High Court, Cape Town.

In 2004, Spur implemented a share incentive scheme where their eligible employees would have the opportunity to participate in said scheme. In order to implement and regulate this scheme, Spur established a discretionary trust. Subsequently, Spur concluded a contribution agreement with the trust and an amount of about R48 million was contributed to the trust.

Spur thereafter claimed the contribution made to the trust as a deduction against its income in terms of section 11(a) of the Income Tax Act, 58 of 1962 (the ITA). This deduction was claimed over the period 2005 to 2012.

Despite SARS initially allowing the claimed deduction, additional assessments were issued disallowing the deduction following an audit by SARS.

ISSUE

The central issue in this appeal is whether the contribution made by Spur to the trust is sufficiently closely connected to Spur’s income earning operations thus qualifying as a deduction under section 11(a) of the ITA.

¹ Case citation: *CSARS v Spur Group PL [2021] ZASCA 145 (15 October 2021)*

If the court determines that the connection is not sufficiently close, the secondary issue is whether the 2005 to 2009 years of assessment have prescribed in terms of section 99(1) of the Tax Administration Act 28 of 2011 (the TAA). If it is determined that these years have prescribed, SARS will be precluded from raising additional assessments for these years. This article will focus on the latter issue of prescription.

JUDGMENT

In order to claim a deduction under section 11(a) of the ITA, there must be a sufficiently close connection or causal link between the expenditure claimed by the taxpayer and the production of the taxpayer's income.

The court held that the contribution amount incurred by Spur was not to produce income but rather to provide funding for the scheme. The link between the contribution and the business operations of Spur was thus found to be indirect and insufficient.

The court thereafter turned to the second issue of prescription. In terms of section 99(1) of the TAA, SARS may not make an assessment three years after the date of the original assessment issued by SARS. However, section 99(2)(a) of the TAA provides an exception to this rule under circumstances where the full amount of tax chargeable was not assessed due to either fraud, misrepresentation, or the non-disclosure of material facts.

The additional assessments were made by SARS in 2015. Spur, therefore, contended that SARS was precluded from issuing these additional assessments in respect of the 2005 to 2009 years of assessment in accordance with the provisions of section 99(1) of the TAA.

SARS avers that the full amount of tax chargeable was not assessed in the 2005 to 2009 years of assessment due to the misrepresentation and non-disclosure of material facts by Spur. Specific reference was made to the submission of Spur's income tax returns for these years of assessment. Upon submission of these returns, Spur answered 'NO' to various questions relating to the formulation of a trust, contributions to the trust and any limitations of the deductions claimed. Spur further disclosed the deduction claimed in respect of the contribution under the category 'other deductible items' instead of 'prepaid expenditure'.

SARS submitted that the answering of 'NO' to certain questions contained in the tax return would not trigger a risk alert for SARS which is why SARS had not been alerted to the scheme and contribution of R48 million until Spur was placed under audit for the 2011 year of assessment.

While Spur did accept that false statements were contained in the returns, it rebutted the allegations of misrepresentation and non-disclosure by stating that the aforesaid statements were negligently and inadvertently made. Spur went on to further state that its annual financial statements were submitted together with the tax returns

therefore SARS would have been able to distil the correct information from the supporting documentation.

The Court held that the fact that one may have been able to ascertain misrepresentations in the return from the **supporting documentation does not negate the fact that there was a misrepresentation** in the first place. Held further that the **misrepresentations and non-disclosures by Spur caused SARS not to assess Spur correctly within the three-year period** following the original assessments. **Spur could therefore not be protected under the general prescription rules**. Accordingly, the Court upheld the appeal. We note however that this case has now been referred to the Constitutional Court for review and we await the outcome thereof.

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