



**THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA**

**MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME
COURT OF APPEAL**

From: The Registrar, Supreme Court of Appeal
Date: 28 March 2017
Status: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

New Adventure Shelf 122 (Pty) Ltd

v

The Commissioner of the South African Revenue Services

In 1999 the appellant purchased a piece of immovable property near Stilbaai at a price of R185 000. Subsequently, in the 2007 tax year, the appellant sold the property to a development company at a price of R17 720 000, with certain payments due to be made after registration of transfer. Transfer was effected but the purchaser defaulted on making due payments and, on 18 November 2011, the appellant concluded a written agreement of cancellation with the purchaser. In terms of this agreement the immovable property was returned to the appellant who retained the amount of R4 549 082 that had been paid by then as agreed damages. It was also agreed that no further amounts would be owing.

The problem facing the appellant was that during the 2007 tax year it had been taxed on a capital gain arising from the sale of the property that it did not in fact ultimately receive, and that all it could obtain as a result of the cancellation was an assessed capital loss with no corresponding gain to set off against the loss. This led to the appellant seeking to have its tax liability for the 2007 year revised and reduced. Its negotiations with SARS to re-open its 2007 assessment proved fruitless and, in due course, it instituted proceedings in the Western Cape High Court, Cape Town seeking an order setting aside its 2007 assessment. This relief was refused. The appellant appealed to the Supreme Court of Appeal against such refusal.

SARS argued on appeal that under s 81(1) of the Income Tax Act 58 of 1962, as more than three years had elapsed from the date of the 2007 assessment of the appellant's tax, such assessment was final and conclusive and could not be revisited. The appellant, however, sought to overcome the provisions of that section by arguing that it did not apply in respect of the tax levied on the capital gain. This argument was founded in the main upon the provisions of paragraph 35 of the Eighth Schedule to the Income Tax Act.

The Supreme Court of Appeal analysed the provisions of the Eighth Schedule and concluded that they did not oblige SARS re-open 2007 tax assessment. It held that the change in circumstances due to the cancellation was relevant to the capital loss that would have accrued during the year the cancellation occurred, and not to the year that the initial capital gain had accrued. SARS's argument was upheld and the appeal was dismissed.