REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

GAUTENG

APPEAL HELD VIA TELE-CONFERENCE

CASE NO: IT 24918

DATE: 18 MARCH 2021

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

18/03/2021 ....
DATE SIGNATURE

In the matter between:

ABC TRUST APPELLANT

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

J U D G M E N T

WRIGHT J

[1] The appellant taxpayer, the ABC Trust ("ABC") submitted tax returns for the tax years 2014, 2015 and 2016. The Commissioner raised assessments and then additional assessments for each of these years. In the additional assessments the Commissioner assessed ABC for capital gains tax, understatement penalties and interest. ABC objected to the additional assessments. But for one aspect, the objections were dismissed by the Commissioner. ABC now appeals the rejection by the Commissioner of the objections.

[2] Mr A appeared for ABC. Mr B led Mr C for the Commissioner. All three counsel had submitted thorough and learned heads of argument shortly prior to the hearing.

[3] At the heart of the dispute is the correct treatment of capital gains and the consequent taxability or otherwise of these gains in the hands of ABC.

THE FACTS

[4] On 17 February 2021, a pre-trial conference was held between the opposing legal teams. The following common cause facts were minuted:

[4.1] "The appellant is a 'resident' of the Republic, as defined in section 1 of the Income Tax Act, 1962, as were all of its beneficiaries at all times material to this appeal.

[4.2] During the 2014 to 2016 years of assessment, the appellant became entitled to various capital gains by virtue of the fact that it was a vested beneficiary of various vesting trusts, each of which was a 'resident' as defined in section 1, which vested trusts had disposed of certain capital assets.

[4.3] During each of the 2014, 2015 and 2016 years of assessment, the trustees of the appellant in turn awarded the amounts which had thus vested in it (as aforesaid), and to which it had thus simultaneously become entitled as beneficiary of the various resident vesting trusts, to its own resident beneficiaries. Each of these awards was made in the same year of assessment as that in which the vesting in the appellant and the appellant's entitlement thereto arose.

[4.4] The appellant maintained that there was no amount of tax to pay as no capital gain had been received by or had accrued to it because it had merely acted as a 'conduit pipe', and that both the receipts and the accruals of the amounts in question took place only in the hands of the appellant's beneficiaries to whom the awards and the distributions were made by it.

[4.5] Each of the awards made by the appellant to its beneficiaries arose by virtue of the disposal of capital assets giving rise thereto by the resident vesting trusts of which the appellant was a vested beneficiary.

[4.6] The manner in which the capital gains in question were taken into account by the appellant was by awarding such amounts to its own beneficiaries in the same year of assessment, leaving the appellant with no gain or loss of its own.

[4.7] The capital gains that vested in the appellant by the vesting trusts were, in turn, distributed by the appellant to its resident beneficiaries in the same years of assessment as those in which the vesting in the appellant occurred."

[5] At this pre-trial conference it was not expressly agreed that no other facts were relevant. Certain facts of lesser import were recorded as being in issue. During the teleconference hearing, Mr A and Mr B were agreed that:

[5.1] ABC's beneficiaries had in fact paid Capital Gains Tax on the capital gains referred to in the agreed facts as set out above and, importantly

[5.2] There were no relevant disputes of fact between the parties but that

[5.3] I could have regard to the documents uploaded to Caselines.

[6] Section 118(3) of the Tax Administration Act 28 of 2011 reads

> "If an appeal to the tax court involves a matter of law only or is an interlocutory application or application in a procedural matter under the 'rules', the president of the court sitting alone must decide the appeal."

Section 118(4) reads

> "The President of the court alone decides whether a matter for decision involves a matter of fact or a matter of law."

In my view, and it is my view alone and without any input from the assessors, there are no relevant disputes of fact. The disposal of this appeal needs only the application of the law to the agreed facts.

[7] This being the case and given the tightening of the agreed facts during the hearing, the two learned assessors, Ms M and Ms T, although they remained present for the duration of the teleconference hearing and asked questions of counsel at my invitation contributed in no way to the judgment and order.

[8] Neither Mr A nor Mr B suggested, correctly in my view that the fact, agreed during the hearing that ABC's beneficiaries had paid Capital Gains Tax on the capital gains they received should play any appreciable part in this appeal.

[9] ABC, in its return for 2014 stated that no capital gain was made nor capital loss incurred in that year and stated that it had not received any amounts it considered not taxable.

[10] In its return for 2015, ABC stated that no capital gain was made nor capital loss incurred for that year. ABC disclosed that it had received amounts that it considered non-taxable.

[11] In its 2016 return, ABC disclosed that it had disposed of two “local assets attracting capital gain or loss”. ABC disclosed that it had received amounts which it considered non-taxable.

[12] In my view, for the purposes of this appeal nothing turns on these portions of the returns, given my findings below.

THE LAW

[13] On 20 January 2021, an amendment to section 25B(1) of the Income Tax Act, 58 of 1962 was promulgated. The relevant parts of section 25B now read – with the new amendment in bold between square brackets :

> “**Taxation of trusts and beneficiaries of trusts.**—(1) Any amount **[other than amount of a capital nature which is not included in gross income or an amount contemplated in paragraph 3B of the Second Schedule]** received by or accrued to or in favour of any person during any year of assessment in his or her capacity as the trustee of a trust, shall …. to the extent to which that amount has been derived for the immediate or future benefit of any ascertained beneficiary who has a vested right to that amount during that year, be deemed to be an amount which has accrued to that beneficiary, and to the extent to which that amount is not so derived, be deemed to be an amount which has accrued to that trust.
>
> (2) Where a beneficiary has acquired a vested right to any amount referred to in subsection (1) in consequence of the exercise by the trustee of a discretion vested in him or her in terms of the relevant deed of trust, agreement or will of a deceased person, that amount shall for the purposes of that subsection be deemed to have been derived for the benefit of that beneficiary.”

[14] There is no warrant for reading the newly worded section 25B(1) retrospectively. Mr B did not suggest otherwise. In my view, the Legislature, when enacting the January 2021 amendment sought to cure what in its eyes was the mischief of being unable to trap capital gains where the Commissioner seeks now to place them. The Legislature, in the 2021 amendment seems impliedly to recognize that absent the recent amendment the capital gains flow rather than become trapped.

[15] In my view, the words "Any amount " which open section 25B(1) include capital gains as:

[15.1] The words themselves are as wide as they could be when considered literally.

[15.2] The word "any" has been held to be "a word of wide and unqualified generality. It may be restricted by the subject-matter or the context, but prima facie it is unlimited". (Per Innes CJ in *R v Hugo* 1926 AD 268 at 271.) "In its natural and ordinary sense, any – unless restricted by the context – is an indefinite term which includes all of the things to which it relates." (*Per* Innes JA in *Hayne & Co v K Steam Mill Co Ltd* 1914 AD 363 at 371)". See *Commissioner for Inland Revenue v Ocean Manufacturing Ltd* 1990 (3) SA 610 (A) at 618 G – H.

[16] Section 26B reads:

> "Inclusion of taxable capital gain in taxable income.—There shall be included in the taxable income of a person for a year of assessment the taxable capital gain of that person for that year of assessment, as determined in terms of the Eighth Schedule."

In my view, at least for the purposes of this case, if not generally, this section operates to leave the determination of the taxability of capital gains to be made with reference to the Eighth Schedule, read not in a vacuum but with reference to other applicable law.

[17] In *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC) the Constitutional Court said the following about the interpretation of statutes:

> "[29] The principles of statutory interpretation are by now well settled. In *Endumeni*, the Supreme Court of Appeal authoritatively restated the proper approach to statutory interpretation. The Supreme Court of Appeal explained that statutory interpretation is the objective process of attributing meaning to words used in legislation. This process, it emphasized, entails a simultaneous consideration of (a) the language used in the light of the ordinary rules of grammar and syntax; (b) the context in which the provision appears; and (c) the apparent purpose to which it is directed.
>
> [30] What this Court said in *Cool Ideas* in the context of statutory interpretation is particularly apposite. It said: 'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely: (a) that statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualized; and (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'

[31] Where a provision is ambiguous, its possible meanings must be weighed against each other given these factors

...

[33] Considering the textual or ordinary grammatical meaning of a provision is to give that provision a plain, natural and literal interpretation

…

[37] In *Afriforum*, Mogoeng CJ said: 'Contextual interpretation requires that regard be had to the setting of the word or provision to be interpreted with particular reference to all the words, phrases or expressions around the word or words sought to be interpreted. This exercise might even require that consideration be given to other subsections, sections or the chapter in which the key word, provision or expression to be interpreted is located.' "

[18] The relevant legislation in this appeal is accordingly to be read in the light of the above authorities.

[19] Sub-paragraphs 80(1) and 80(2) provided as follows during the appellant's 2014 to 2016 years of assessment.

Sub-paragraph 80(1)

"Subject to paragraphs 68, 69, 71 and 72 [none of these being relevant here], where a capital gain is determined in respect of the vesting by a trust of an asset in a trust beneficiary (other than any person contemplated in paragraph 62(*a*) to (*e*) [these provisions being irrelevant here] who is a resident, that gain—

(*a*) must be disregarded for the purpose of calculating the aggregate capital gain or aggregate capital loss of the trust; and

(*b*) must be taken into account for the purpose of calculating the aggregate capital gain or aggregate capital loss of the beneficiary to whom that asset was so disposed of."

Sub-paragraph 80(2)

"Subject to paragraphs 68, 69, 71 and 72 [none of these being relevant here], where a capital gain is determined in respect of the disposal of an asset by a trust in a year of assessment during which a trust beneficiary (other than any person contemplated in paragraph 62(*a*) to (*e*) [not relevant here]) who is a resident has a vested interest or acquires a vested interest (including an interest created by the exercise of a discretion) in that capital gain but not in the asset, the disposal of which gave rise to the capital gain, the whole or the portion of the capital gain so vested—

(*a*) must be disregarded for the purpose of calculating the aggregate capital gain or aggregate capital loss of the trust; and

(*b*) must be taken into account for the purpose of calculating the aggregate capital gain or aggregate capital loss of the beneficiary in whom the gain vests."

[20] In my view, what passed from the vesting trusts to ABC and then to ABC's beneficiaries were capital gains "determined in respect of the disposal of an asset" and which constituted "capital gain but not an asset" within the meaning of these words in the main body of paragraph 80(2) rather than "an asset" as these words were used in the main body of paragraph 80(1). This finding flows from the agreed facts set out above. On these facts, the vesting trusts disposed of certain capital assets and in consequence thereof made capital gains. What the trustees of the vesting trusts awarded to ABC were the realised proceeds of these capital gains. These proceeds are in my view accurately described by the parties as "amounts" in the agreed facts. What was awarded from vesting trust to ABC and then on to ABC's beneficiaries were amounts being the proceeds of and representing capital gains.

[21] In short, the capital gains in question fall within the purview of section 25B(1), section 25B(2) and paragraph 80(2) but not within paragraph 80(1) at least as these sub-sections and sub-paragraphs read for the years under consideration.

[22] Mr B argued that income as defined in section 7(1) of the Income Tax Act includes capital gains and that it follows that the capital gains so included need to be disclosed in returns and attract taxability accordingly. This argument leaves out of account the wide ambit of the words "any amount" in section 25B which words must necessarily include income as defined in section 7(1) as well as capital gains.

[23] It was held by Stratford CJ in *Armstrong v Commissioner for Inland Revenue* 1938 AD 343 at 348-9, in relation to dividends received by the beneficiary of a trust, that:

> "In the simple case I am now examining, namely, that of a trio comprising a company, the intervening trustee, and the beneficiary, it is manifest that in the truest sense the beneficiary derives his income from the company, for that income fluctuates with the fortunes of the company and the trustee can neither increase nor diminish it, he is a mere 'conduit pipe'."

[24] In *Secretary for Inland Revenue v Rosen* 1971 (1) SA 172 (A) at 188C and 190H-191A Trollip JA held that:

> "Consequently Armstrong's case in my view authoritatively established the conduit principle for general application in our system of taxation in appropriate circumstances."

[25] The words "authoritatively established the conduit principle for general application in our system of taxation in appropriate circumstances" encourage me to hold that what is applicable to dividends is equally applicable to the capital gains at issue in the present appeal. To hold otherwise would be to adopt an overly narrow approach to the words of Trollip JA.

[26] These findings make it unnecessary for me to deal with other matters raised in the objection and on appeal by ABC. It follows that the additional assessments and consequent understatement penalties and interest must fall.

COSTS

[27.1] The relevant part of section 130 of the Tax Administration Act reads:

> "**Order for costs by tax court.**—(1) The tax court may, in dealing with an appeal under this Chapter and on application by an aggrieved party, grant an order for costs in favour of the party, if—
>
> (*a*) the SARS grounds of assessments or 'decision' are held to be unreasonable;
>
> (*b*) the 'appellant's' grounds of appeal are held to be unreasonable."

[27.2] In my view, both sides took reasonably arguable positions. Mr A did not seek costs for ABC.

ORDER

1. The appeal is upheld.

2. The additional assessments for the appellant for the 2014, 2015 and 2016 years of assessment are set aside.

3. There is no order as to costs.

WRIGHT J

Deciding the matter alone on fact and law

Date of Hearing: 16 March 2021

Date of Judgment: 18 March 2021