Reportable:	YES
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case Nr: CA&R 253/2003
Case Heard: 19/09/2005
Date delivered: 18/11/2005

In the matter:

THE COMMISSIONER: SA REVENUE SERVICE **APPELLANT**

versus

G H AKHARWARAY **RESPONDENT**

Coram: Kgomo JP *et* Majiedt J *et* Tlaletsi J

JUDGMENT

KGOMO JP:

1. The appellant, the Commissioner of the South African Revenue Service (SARS or the Commissioner), appeals to this Court with the leave of the court *a quo* against the judgment and order of the Income Special Tax Court held at Kimberley, Northern Cape. The Tax Court upheld the Respondent's appeal against the assessment of his normal tax returns for the 1995 year of assessment.

2. During 1995 the respondent-taxpayer was and still is a member of the African National Congress (the ANC) political party. He

became an elected member of the Northern Cape Provincial Legislature with the advent of the new democracy in April 1994. At the beginning of May 1994 he was appointed a Member of the Executive Council (MEC) of this Province and remains one to this date. It is common cause that he was a practicing attorney before his switch to politics. It is also common cause and common knowledge that from 1994 – 2004 (ten years) he was the MEC for Finance for the Province. It is therefore unsurprising that the Respondent had the confidence to appear in person to argue his case and, it must be added, proffered an intriguing argument.

3. In his income tax return for the 1995 year of assessment the Respondent claimed a deduction of R12 000,00 (twelve thousand rand) made up of eight equal monthly contributions of R1 500,00 (one thousand five hundred rand) to his party, the ANC. The Commissioner disallowed the deduction so claimed. The Respondent objected to such disallowance. The Commissioner in turn overruled the Respondent's objection – hence the appeal to the Tax Court.

4. The Respondent's professed justification for claiming the deduction arises in the following manner: He maintained that as a member in good standing of the ANC and in accordance with his high ranking, particularly provincially, he bound himself to the terms and conditions of the ANC's "Code of Conduct for Elected Members of the ANC" prior to the elections that took place on the 27th April 1994.

5. What is germane from the said Code of Conduct for purposes of this judgment are the following clauses:

"5. <u>Contributions to the Organization</u>

5.1 *A portion of (the) salary of elected members shall be paid into the (coffers) of the organization. The proportion of taxable salary to be directed to the organization shall be determined from time to time by the NEC and shall be paid by way of compulsory stop-orders.*

6. *<u>Activities of elected members during and outside parliamentary work</u>.*

6.1 *All elected representatives shall make themselves available for work within the Organization and shall accept allocation by the Organization to specific constituencies or areas or organisational functions.*

6.2 *All elected representatives shall be available for parliamentary or governmental or organizational work and activity. They shall be fully accountable to the organizational structures in the regions/provinces where they are located.*

6.3 *Elected members of the assemblies shall not have any other type of full-time employment while they are such members. If they are involved in any other type of gainful activity, such activity shall not involve any disproportionate demand on their time and the provisions relating to disclosure of interests shall clearly state what time is expended on such activity.*

7. *<u>Implementation and Monitoring</u>*

7.1 *Every elected representative shall sign and therefore bind herself/himself to this Code of Conduct as soon as it is promulgated by the National Executive Committee.*

7.2 *Every elected representative shall (be) subject to the disciplinary procedures and any such appropriate mechanism and procedure for the monitoring of the Code of Conduct established by the ANC.*

7.3 Any member of the assemblies shall forfeit his or her place in the ANC list or the senate if he or she fails to sign this code of conduct within one month of its promulgation ….

Adopted by the NEC: 28 August 1994

Promulgated: 8 September 1994"

6. In support of his case and the afore quoted clauses the Respondent tendered the following viva voce evidence under oath:

" The question then arises why do we make this payment, the issue of the monthly levy My Lord, the essence of it is that it is a Code of Conduct. It is a compulsory levy, and the risk of removal is there, if you do not adhere to the Code of Conduct. In practice what would happen is the party would remind you that you haven't paid for last month … you must pay. In our case what they have done is, they just deduct it from your salary before you even received your salary. So there (was) some kind of protection there. The question might also be asked how does the ANC use this money? Obviously the activity of a political organization is vast. There is a lot of things it does, some people might say that it doesn't do as well, but there is a variety of things that a political party does.

In the province we have a variety of offices: We have the provincial office, we have regional offices, we have small branch offices where it is possible to have them. They are administrative costs associated with those offices. There is the issues of policy, the party debates internal policies. We as public figures are party to that debate of public policies. There are other administrative things like paying of rental, electricity, water, lights whatever that might be, making of copies and so on. So the individual MPL does not have (his/her) own offices. I do not go out and open an

office. We use these ANC offices as our basis to function as political office bearers. …

Member: This is now (inaudible) office in regard to your membership as a member of the ANC, this has nothing to do with your office as a member of the local provincial government.

Mr Akharwaray: There are two types of systems that are applicable here. The one is where as a member of the provincial legislature we make contributions to the ANC, and the ANC conducts its business, obviously through structures throughout the province. The other one is referred to as the constituency offices, but that one is funded directly from the legislature, it does not come through our coffers, or my coffers as an individual, as an individual taxpayer. It is referred to as a constituency office but it is not truly a constituency system … The party appoints people into offices; people would go for whatever reasons they have to for that. We can use those offices, but we also use party offices for other purposes as well.

(The other) point, my lord is that the payment that we make, the levy, apart from the fact that where one uses these offices there is no end benefit for the individual payer. I for example, if I leave the party tomorrow, I do not leave with any asset. I cannot say that all the contributions I have made up until now have built up to an asset. You simply leave and there is no benefit in that."

7. The issue before the Tax Court, and before us as well, was whether the monthly contribution of R1 500,00 made by the Respondent to the ANC satisfied the requirements that allow the deduction in terms of section 11 (a) read with section 23 (g) of The Income Tax Act, No 58 of 1962. Section 11 (a) of the Income Tax Act read as follows during the tax year under review:

"For the purpose of determining the taxable income derived by any person from carrying on any trade there shall be allowed as deductions from the income of such person so derived:

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

8. In disallowing the contributions made by the Respondent the Commissioner informed the Respondent on an unspecified date:

8.1. That in order for expenses to be deductible in terms of section 11 (a) such moneys must be expended for the purposes of earning income, in other words in the production of income and found that this was not the case;

8.2. That the membership of a political party is regarded as a matter of a private nature and therefore prohibited from deduction in terms of section 23 (b) and 23 (g) of the Income Tax Act;

8.3. That section 8 (1) (d) of the Income Tax Act makes provision for an allowance to be paid to holders of any public office, which includes a Member of a Provincial Legislature (MPL). That the allowance in question had as its object to defray certain specified expenditure actually incurred in connection with the public office and that such expenditure is not recoverable by the member; and

8.4. That whilst the monthly levies of R1 500,00 were compulsory charges imposed by the ANC upon all members of the various assemblies and that failure to sign the Code of Conduct and to pay the levies may result in the prohibition to becoming an MPL and although the payments were connected with trade, they were too remote to be deductible.

9. From the onset it must be pointed out that counsel were unable to refer us to a single case involving a member of any political party in South Africa in which a similar deduction was claimed and allowed by the Courts nor have we found any. If any existed we would have expected SARS to be aware of it seeing that they are, obviously, always very intimately involved in matters of this nature. The Respondent, no less, who has been waging this crusade for the past 10 years is not much unfavourably circumstanced, regard being had to his career path.

10. The Court *a quo*, as pointed out at the beginning, upheld the taxpayer-respondent's contention that the R1 500,00 monthly levies were deductible and said so in these terms in his judgment:

"9. Failure to pay the levy will inevitably result in the appellant's forfeiture of his office as an elected member of the ANC and consequently as a Member of the Provincial Legislature. His ability to derive any (taxable) income as a Member of the Provincial Legislature is therefore dependent upon his payment of the levy. Payment of the levy can therefore be regarded as a prerequisite to the appellant's ability to earn an income as an elected member of the ANC. There is therefore a direct link between the expenditure incurred (the levy paid) and the income producing act of the appellant, ie the earning of a salary as a Member of the Provincial Legislature.

10. The levies paid by elected members of the ANC are inter alia appropriated by the ANC to provide office facilities for its elected members, and elected members derive other benefits therefrom for instance educational benefits for the betterment of their performance as an elected member of the ANC. ANC members of the Provincial Legislature, and the appellant in particular, make use of these office

facilities on a regular basis, and are directly involved in the ongoing debating process regarding party policies and objectives. It is the duty of the appellant as a Member of the Provincial Legislature to acquaint himself (with) these policies and objectives and to implement same in his capacity as an ANC elected member of the Provincial Legislature. Viewed from this angle, there is again a direct link detectable between the expenditure incurred and the income producing act of the appellant."

11. The obligation to pay the monthly levy is however not a once-off obligation, but is a recurrent and continuous one. The appellant is obliged to pay the levy every month for as long as he earns an income as an elected member of the ANC.

Neither can it be said that the relevant expense was incurred for the purpose of acquiring some income producing concern. The purpose for the payment of the levy was not to acquire the income derived as an elected member of the ANC, but rather the consequence thereof.

The relevant expenditure is therefore not of a capital nature.

By reason of the aforesaid, I am of the opinion that the Commissioner wrongfully disallowed the deduction of the monthly levies paid by the appellant to the ANC during the 1995 year of assessment." (My underlining).

The Legal Principles

11. Over the years the Courts developed the following principles, criteria, guidelines and approaches in an effort to distinguish whether the layout was capital expenditure or expenditure and losses actually incurred in the production of the income:

11.1. In **CIR V George Forest Timber Co Ltd** 1924 AD 516 at 525 **Innes CJ** held:

"In the absence of any authoritative and comprehensive definition of capital expenditure, it is well to bear in mind the characteristic quality of capital; that it is wealth employed in creating fresh wealth, invested to produce an income. As already pointed out, the proceeds of merchandise sold in the course of trade are included in the gross income of the trader, because they are not receipts of a capital nature, within the meaning of sec. 6. Similarly, the cost of merchandise thus disposed of would be an outgoing not of a capital nature within the meaning of sec. 17 (1) (a); and having been incurred in producing the income would be properly deducted under that clause.

For the respondent it was urged that the present calculations should follow the same lines; that the transaction concluded in 1916 was, in effect, a purchase of stock in advance, as if a trader had anticipated the requirements of his business: and that the fact of a lump payment made no difference, because the expenditure should be regarded as recurrent.

But, as already pointed out, the asset acquired by the company stood in a different position from the stock purchased by a merchant for the ordinary requirements of his business. Land with a valuable forest upon it was bought in order that a revenue might be obtained from it by felling, working-up and then selling the timber. No doubt the trees constituted the chief value of the property, and formed the inducement for its acquisition. But the same might be said of the stone or the clay in land purchased for the purpose of a quarry or a brickfield. They formed part of the realty to which they acceded, and they passé with it. Now, money spent in creating or acquiring an income-producing concern must be capital expenditure. It is invested to yield future profit; and while the outlay does not recur the income does. There

is a great difference between moneys pent in creating or acquiring a source of profit, and money spent in working it. The one is capital expenditure, the other is not. … In terms of the definition money spent on administration and management prior to production, or during a period of non-production is capital expenditure, whereas money spent for exactly the same purposes during production would obviously be working expenditure.

The reason is plain; in the one case it is spent to enable the concern to yield profits in the future, in the other it is spent in working the concern for the present production of profit."

11.2. In **New State Areas Ltd v CIR** 1946 AD 610 at 620-621 **Watermeyer CJ** stated:

"Save in the case of the leasing or the loan of capital in some form or other, income is produced by work or service or activities or operations and as a rule expenditure is attendant upon the performance of such operations some times necessarily, sometimes not. Expenditure may also occur in the acquisition by the taxpayer of the means of production, ie., the property plant, tools, etc., which he uses in the performance of his income earning operations and not only for their acquisition but for their expansion and improvement. Both these forms of expenditure can be described as expenditure in the production of the income but the former is, as a rule, current or revenue expenditure and the latter is, as a rule, expenditure of a capital nature. As to the latter, the distinction must be remembered between floating or circulating and fixed capital. When the capital employed in a business is frequently changing its form from money to goods and vice versa (e.g., the purchase and sale of stock by a merchant or the purchase of raw material by a manufacturer for the purpose of conversion to a manufactured article), and this is done for the purpose of making a profit, then the capital so employed is floating capital. The expenditure of a capital nature, the deduction

of which is prohibited under sec. 11 (2), is expenditure of a fixed capital nature, not expenditure of a floating capital nature, because expenditure which constitutes the use of floating capital for the purpose of earning a profit, such as the purchase price of stock in trade, must necessarily be deducted from the proceeds of the sale of stock in trade in order to arrive at the taxable income derived by the taxpayer from that trade. The problem which arises when deductions are claimed is, therefore, usually whether the expenditure in question should properly be regarded as part of the cost of performing the income earning operations or as part of the cost of establishing or improving or adding to the income earning plant or, machinery."

At p 627 the Court summarized its analysis thus:

"The conclusion to be drawn from all of these cases, seems to be, that the true nature of each transaction must be enquired into in order to determine whether the expenditure attached to it is capital or revenue expenditure. Its true nature is a matter of fact and the purpose of the expenditure is an important factor; if it is incurred for the purpose of acquiring a capital asset for the business, it is capital expenditure, even if it is paid in annual instalments; if, on the other hand, it is in truth no more than part of the cost incidental to the performance of the income-producing operations, as distinguished from the equipment of the income-producing machine, then it is revenue expenditure, even if it is paid in a lump sum."

11.3. In **SIR v Cadac Engineering Works (Pty) Ltd** 1965 (2) SA 511 (A) **Ogilvie Thomson J A** (as he then was) stated at 523C-524A:

"The expenditure in issue, directed as it was towards the protracted, if not permanent, elimination of Homegas as a competitor, was, in my view, expenditure to protect, and perhaps expand, the taxpayer's existing market and goodwill. The

expenditure was directed towards preserving, and perhaps expanding, the field in which the taxpayer's business operated. In short, the expenditure was incurred in order the better to exploit the taxpayer's existing capital assets, which latter included the exclusive licence to manufacture the Marcovitch cooker. So regarded, the expenditure would appear to me to be more closely related to the taxpayer's income-earning structure than to its income-earning operations. Money expended in buying out a competitor will, I think, ordinarily fall into the category of capital expenditure. It has, indeed, been said that such a transaction 'must of its very nature affect the value' of the purchaser's goodwill (see ***Associated Portland Cement Manufacturers Ltd v Inland Revenue Commissioners****, (1946) 1 All E.R. 68 at p. 71E). In the present instance, the expenditure in issue was incurred in an endeavour to eliminate the competition of Homegas by litigation. The difference in the means employed does not appear to me to be decisive. Under both methods, the object is the same and, if successful, the result enures, as it seems to me, to augment the income-earning structure of the taxpayer rather than to pertain to the operation of that structure. For it does not appear to me that, having regard to the nature of the taxpayer's business operations, the expenditure in issue can rightly be regarded 'as part of the cost of performing those operations' (see* ***Port Elizabeth Electric Tramway Co v C.I.R*** *1936 CPD 241 at p. 246, which was again approved by this Court in the African Oxygen case, supra at pp. 689 - 90). In an enquiry such as the present, the Court must always assess*

'the closeness of the connection between the expenditure in issue and the income-earning operations, having regard both to the purpose of the expenditure and to what it actually affects'

*(****C.I.R v Genn and Co. (Pty.) Ltd*** *1955 (3) SA 293 (AD) at p. 299). When regard is had to the purpose of the expenditure in*

issue in the present case and to what it was designed to effect, I am unable to find any sufficient link between that expenditure and the taxpayer's income-earning operations which is so close as to warrant the conclusion that it formed part of the cost of the taxpayer's income-earning operations, as distinct from the cost of expanding its income-producing structure. (Cf. the ***African Oxygen*** *case, supra at p. 690). The costs in issue were of course expended with the object of increasing the taxpayer's profits. But, save for that overall objective and with due deference to the contrary view of the Special Court, it does not appear to me that those costs can rightly be regarded as*

'incidental to the performance of (the tax payer's) income-producing operations'

as that expression was used by ***WATERMEYER, C.J.****, in the* ***New State Areas*** *case, supra."*

11.4. In **ITC 890: 32 SATC 351** (25/01/1960) the taxpayer was employed as a manager of an hotel. One of the guests bilked and the hotel was unable to recover £410 owed by the guest. The taxpayer reimbursed the hotel the amount so owed on condition that he could retain his employment with the hotel. It was common cause that the payment was made in order to prevent the appellant's dismissal. **Fieldsend J** made the following observation at p353:

"I was not referred to any specific authority dealing with the nature of a payment of this type, but on principle I can see no basis for distinguishing between a sum paid in order to obtain the right to work, and a sum paid in order to retain the right to continue working, and in the former case I do not think that there can be any doubt but that the expense is of a capital nature. A payment made to obtain the right to earn an income is always a capital expense, see for example IT Case 429, 10 SATC 355, and

the cases referred to in Gunn's Commonwealth Income Tax Law and Practice, 5th ed, paras 1177 and 1201 to 1205."

11.5. In **ITC 1139 : 32 SATC** (19/11/1968) p83 the taxpayer had incurred electioneering expenditure in successfully securing election to a seat in the House of Assembly in a Parliamentary general election and sought to deduct the amount so incurred from his salary as a member of that house. The Secretary for Inland Revenue refused to allow the deduction claimed, on appeal the Court, **Watermeyer J**, held (at 85):

"Returning to the problem of whether the election expenses are sufficiently closely linked to the earning of the salary in order that they may properly be regarded as part of the cost of performing the income-earning operations, it seems to me that the only link is that a Parliamentary candidate must usually incur these expenses before he can take his seat and commence earning his salary, but apart from this the expenditure has no direct link with the performance of the operations which entitle him to be paid his salary. In my view this connection is not sufficiently close for it to be said that the expenditure is incurred in the production of the income.

*Furthermore it seems to me that the expenditure is in reality of a capital nature. In order to determine whether this is, or is not, so various tests have been laid down by the Courts, such as, whether the money has been spent in creating or acquiring an income-producing concern (see **CIR v George Forest Timber Co Ltd** 1924 AD 516), or an income-earning machine or structure (see **Nchanga Consolidated Copper Mines Ltd v COT** 1962 (1) SA 381), whether te expenditure is incurred once and for all (see **Vallambrosa Rubber Co v Farmer** 1910 S C 51 9), and whether it is expenditure for bringing into existence an asset or advantage of enduring benefit (see **British Insulated & Helsby Cables Ltd v Atherton** [1926] AC 205).*

Applying these tests to the expenditure presently under consideration it seems to me that the expenditure was clearly of a capital nature. It was incurred to secure the appellant's election to an office, and as the holder of that office he became entitled to draw the salary attached to it provided he performed the duties required of him, The case is not dissimilar to that of the acquisition of an income-earning machine or structure, the purchase of a partnership or a right to trade or the expenditure of money on qualifying to earn an income."

The Court also remarked that a similar question arose in 1925 in **Income Tax Case No 29, 1 SATC 224** which was decided against the taxpayer.

12. The Respondent has referred to numerous cases in his Heads and subsequently in his argument before us in order to persuade us to rule in his favour and against the Commissioner. I find it unnecessary to deal with all these cases because some of them have been adverted to above but most of them do not find application in this matter:

12.1. Amongst others Respondent has cited the works of **Meyerowitz on Tax Law** in support of his contention that *"conditionality"* is indicative of *"sufficient link"* and that the requisite link has been established by him in his case. The 2000/2001 Edition has substantially been reproduced in the 2004/2005 update at B11- 39 (Par 109) . I quote the extract earlier than the Respondent has done and also incorporate the Foot Notes in brackets to capture the full essence. It reads:

*"An entrance fee paid by a taxpayer to a trade or profession association has been held to be of a capital nature, **[ITC 111 SATC 60; ITC 323 8 SATC 244; CIR v Tranxvaaal Bookmarkers Association 19 SATC 14]** but the annual subscription is deductible if the expenditure is so closely linked*

with the production of income as to be part of the cost of the performing the income-earning operations. ***[It is difficult to distinguish in principle between an entrance fee and an annual subscription except on the ground that because of its recurrence the latter can be regarded as more closely linked to income earning operations.]*** *Thus where membership is a condition for the exercise of a profession for example, in the case of attorneys membership of the Law Society or the Attorneys Fidelity Fund, the annual subscription and fees are deductible. Where membership is not a condition for the practice of a profession or to being employed, a subscription is not deductible since it is not sufficiently linked to the production of income.* ***[In practice the Revenue does not require that there must be a condition in the case of self-employed taxpayers. SARS Income Tax Practice Manual A-328]****. So, for example, a medical practitioner who is employed under contract in a hospital cannot deduct a subscription paid to the SA Medical Association if membership is not connected with his employment, or right to be employed****. [ITC 787 1955 Taxpayer 71, 19 SATC 423]****. So also in the case of a taxpayer employed as an accountant who voluntarily subscribes to the Society of Accountants.* ***[ITC 671 16 SATC 224]****. The annual levy paid by a professional, whether practicing for himself or employed in a professional capacity, to his professional body (eg the SA Medical Council) is, however, deductible where it is a compulsory levy and failure to pay it can result in being barred from carrying on his profession.* ***[ITC 787 1955 Taxpayer 71, 19 SATC 423]****. As to subscription to clubs, see 12.110."* (My underlining)

12.2. The Respondent has also relied on **Smith v SIR** 1968 (2) SA 480 (A) more particularly the passage at 491A -C whereat Steyn CJ held:

"There is a r eference to his good name, both private and professional, b ut, in r egard to th is str ucture as a w hole, it is merely said that it can be likened to the go odwill o f a bus iness, and according to t he sta ted case the appe llant's accou ntancy practice did not suffer during his trial. In fact, his clients lent him money t o p ay hi s ex penses. Th ere i s al so a reference to the appellant's right to remain on the register of accountants, and in Income Tax Cas e 992, s upra, wh ich the Cou rt followed, t here i s mention of the ri ght of a p rofessional m an t o p ractise h is profession lawfully. I do not conceive of this as property employed by the appellant to produce an income. His right to practise is the right to enter into co ntracts o f e mployment as an acco untant. That ri ght i s not a c ommercial c ommodity. The requirement of registration under the Public Accountants' and Auditors' Act, 1951, imposes a limitation upon that right. This limitation does not alter its nature, so as to turn it into a right of property. The control of his activities arising from registration and the power of the Public Accountants' an d Au ditors' B oard to r emove his name from the register o r to suspe nd hi m fr om pr actice do es no t a lter the fact that his inco me is produced by his trained wits and labour. These are no t pr operty and do no t constitute capi tal in the o rdinary sense, as contemplated in sec. 11 (2) (b) bis."

13. The R espondent argued that his situation is analogou s to t hat of an accountant or an a ttorney in the instances cited in paras 12.1 and 12.2 (above). H e contended therefore that in the same way as the C ourt fo und in **Smith v SIR** (*supra*) at 491H t hat the taxpayer-accountant's e xpenditure, i n de fending h imself against fraud charges preferred against him in order to retain his name on the register of public accountants, was not of a cap ital nature but was i ncurred i n t he p roduction of a n in come an d therefore

deductable and urged that we ought therefore to uphold the Tax Court's ruling.

14. I do not think that the Respondent's testimony and subsequent argument that he signed the Code of Conduct and undertook the obligation to pay a portion of his salary on a monthly basis were made in order to obtain nomination as a member of the provincial legislature (MPL). This is so because Respondent became an MPL consequent upon the April 1994 elections and became an MPL and MEC at the latest at the beginning of May 1994 when he was sworn in as such. However, as can be discerned from the extract of the Code of Conduct in para 5 (supra), clause 7.3 thereof states that a member of the "assemblies shall forfeit his or her place in the ANC list or the senate if he or she fails to sign this Code of Conduct within one month of its promulgation …" The Code was adopted on the 28th August 1994 and only promulgated on the 8th September 1994. This means that the risk of removal could only be triggered if a member defaulted in signing the Code by the 8th October 1994.

15. What all these tell us are the following:

15.1. Signing the Code of Conduct was not a prerequisite to becoming an MPL or an MEC as the Respondent contended and the Court *a quo* found in its judgment. See the underlined portion at para 10 (above);

15.2. This Code of Conduct applied only to the elected members of the ANC in the National Assembly, the Senate National Council of Provinces (NCOP) and the Provincial Legislative Assemblies. Nowhere does the Code even remotely suggest that elected members would forfeit their membership of the African National Congress if they fail to sign the Code of pay the levy. In other words the de-listed MPLs would still retain their membership of

the Organization. It is not for this Court to second-guess what the further repercussions, if any, would be for elected defaulters.

15.3. There is therefore a clear distinction to be drawn between the monthly R1 500,00 contributions in question and the membership subscription through which a member remain a member in good standing of the ANC, which latter levy was broached but not persisted in.

15.4. The monthly contribution of R1 500,00 and other matters traversed in the Code of Conduct are described as "interim measures" in "Note 2" of the preamble to the Code. It is unclear from the record whether the contributions became a permanent feature or were discontinued and if so when did it happen.

16. The Respondents' case is in principle and in essence not dissimilar to the **ITC 890** case quoted at para 11.4 (*supra*). In my view at best for the Respondent it could be said that he maintained the obligation to pay the 1995 tax year monthly contributions to the ANC in order to retain the right to earn the salary of an MEC and if not re-appointed to that position by the Premier of the Province to relegate to being an MPL and still earn a salary at that level. I concur in the pronouncement of **Fieldsend J** in the **ITC 890** case that an expense incurred in order to obtain a right to continue working is an expense of a capital nature and not revenue expenditure.

17. The fact that the taxpayer-respondent undertook to make periodic R1 500,00 payments instead of a lump sum for the 1995 tax year, in return for procuring the same right or, perhaps more appropriately, privilege, does not and cannot alter the nature of the payment. By the same token, the fact that the payments might not have brought about on enduring benefit, did not result in such payment being of a non-capital nature. It will be recalled

that the taxpayer stated in his testimony that he acquired *"no end benefit"* as a contributor and that if he left the party *"I leave with no asset."*

18. It is correct, as the Respondent has submitted, that in certain circumstances recurrent expenditure may be an indication that the expenditure is not of a capital nature. It is also correct that the fact that such expenditure does not bring about an enduring benefit may be a factor to be taken into account in deciding the capital or revenue nature of such expenditure. However, these factors alluded are not decisive. See **CIR v Managnese Metal Co (Pty) Ltd** 1996 (3) SA 591 (T) at 598D-E.

19. It is significant that ordinary members of the ANC, ie non-elected members to the assemblies or the Senate, were not required to pay the R1 500,00 in terms of the Code of Conduct. It is evident that the members from whom the contributions were exacted occupied a certain privileged position or belonged to a particular category of members of the ANC. The contributions, in my view, were a quid pro quo for their retention of those positions. If this unprincipled deduction agitated for by the Respondent was allowed it would find general application; in the sense that all members of all other political parties would justifiably claim entitlement to such tax deductions. The political parties could, if they wished, make the contributions permanent and increase the premiums exorbitantly knowing that the taxpayer was subsidizing them. The Respondent's construction of section 11 (a) to the effect that the contribution made to his party was revenue expenditure is untenable.

20. The Respondent was unable to point us to any misdirection by **Watermeyer J** in **ITC No 1139** (*supra*). Nor could he proffer

any cogent reason why the principle and approach respecting to parliamentarians are not by parity of reasoning applicable to a member of a political party who is also a parliamentarian or MPL or a member of the NCOP. In his testimony the Respondent distinguished the R1 500,00 monthly contributions to the ANC and payments for *"the constituency offices … funded directly from the legislature (which) does not come form (the ANC's) coffers."* This distinction serves to underscore the fact that the Respondent's aforesaid R1 500,00 monthly contribution was clearly a private internal party political arrangement not to be equated with the statutorily imposed levies paid by attorneys, accountants etc in the authorities cited by Respondent in paras 12.1 and 12.2 (above).

21. South Africa is a multi-party democracy with democratic representation in parliament and the assemblies. The Constitution enjoins that there shall be conducted regular elections which may be contested by all registered political parties. Members of the National Assembly and Provincial Legislatures are elected by a system of proportional representation on candidate lists drawn up by such registered political parties. It is therefore axiomatic that an individual seeking political office will either as an independent member or collectively with his political party and its members do the things that Respondent testified to like setting up offices, establishing party branches, participate in party debates and formulation of internal party policies etc and concomitantly incur expenditure for transport, rental, and other utility services.

22. It is through hard work in the recruitment of members, canvassing voters, the fulfilment of other duties such as the promotion of the interests of his constituents (irrespective of the

proportional representation system), disseminating information concerning current events to them that, it appears to me, a member would ordinarily earn his/her ranking on the party list and therefore his passport to one of the assemblies or the NCOP.

23. I am in the result in full agreement with **Watermeyer J**, and adopt and approve his ratio at p85 of the **ITC Case No 1139** (supra) and by parity of reasoning and applying the tests set out in the cases referred in para 11.1 (**CIR v George Forest Timber** (*supra*)), para 11.2 (**New State Areas Ltd v CIR** (*supra*)) and para 11.3 (**SIR v Cadac Engineering Work** (*supra*)), I come to the conclusion:

    23.1. That the Respondent's expenses as motivated by him in his evidence and the further documentation on record were not sufficiently close to the earning of his salary or income in order that they may properly be regarded as part of the costs of performing the income-earning operations. As I have pointed out his salary is a *quid pro quo* for the fulfilment of his *"constituency"* work and other duties. On the other hand the Respondent's party demanded of him to make the contribution for the privilege of being an MPL and an MEC. It is commendable sometimes for people in privileged positions to make some sacrifices.

    23.2. That the Respondent's case *"is not dissimilar to that of the acquisition of an income earning machine or structure, the purchase of a partnership or right to trade, or the expenditure of money on qualifying to earn an income"* as stated by **Watermeyer J** in ITC Case No 1139 (supra).

24. It follows from what has gone before that the Court *a quo* erred in not having found that the contributions in monthly premiums of R1 500,00 was in reality of a capital nature.

The Respondent's Alternative Argument

25. The Respondent has claimed in the alternative that the R12 000,00 he contributed to the ANC and extracted from him through the Code of Conduct was an expenditure which is deductible in terms of section 8 (1) (d) of the Income Tax Act. Section 8 (1) (d) cannot be considered in isolation but must be construed in the context of section 8 (1) (a) which is a deeming provision. Section 8 (1) (a) provides:

"8 Certain amounts to be included in income or taxable income

(1) (a) So much of any amount which has been paid by any person as an allowance or advance to a director, holder of any office, manager, employee or other person in respect of the expenses of any traveling on business or of any other service or any expenses incurred by reason of the holding of any office (excluding any allowance or advance included in the gross income of the recipient under the provisions of paragraph (iii) of the proviso to paragraph (c) of the definition of "gross income" in section 1) as was not actually expended by the recipient on such traveling or in the performance of such service, or by reason of the duties attendant upon his office, shall be deemed to be part of the taxable income of the receipient."

26. What section 8 (1) (a) says is that if an employee receives an allowance or advance towards certain specified expenses incurred by him or her in the course and scope of the functionary's employment or the office held by him or her the amount not utilized resort under the gross income or taxable income.

27. Section 8 (1) (d), which is relied upon by the Respondent, on the other hand stipulates that:

"(d) Any allowance granted to the holder of any public office contemplated in paragraph (e) to enable him to defray expenditure incurred by him in connection with such office shall for the purposes of paragraph (a) be deemed to have been so expended by him to the extent that expenditure relevant to such allowance and not otherwise recoverable by him has actually been incurred by him for the purposes of his office in respect of" the categories enumerated in subparagraphs (i) to (v) of 8 (1) (d) like secretarial services, duplicating services, traveling, hospitality or entertainment etc.

28. Section 8 (1) (e) provides that for purposes of the quoted section 8 (1) (d) (above) the holder of a public office includes a Minister, Deputy Minister, a member of Parliament, a member of the Provincial legislature etc. If the official or functionary expends the money as required then that expenditure is deemed to have been incurred for the purposes of section 8 (1) (a).

29. In the premises, for the Respondent to bring himself under the stipulations of section 8 (1) (d) he would have had to show that he received the contemplated allowance in his capacity as the holder of a public office and that he used the particular allowance or a portion thereof within the prescripts of section 8 (1) (d). If he used up the allowance appropriately no part thereof would be transmitted to his taxable income. In casu the Respondent paid the contribution as a member of the ANC. He did not receive an allowance in his capacity as holder of a public office.

30. I am therefore inclined to agree with Mr Solomons, for the Commissioner, that section 8 (1) (d) does not give the

Respondent the right to claim a deduction for the expenditure that he incurred but it is, on the contrary, incumbent upon the Respondent that he, and not the ANC, incurred the expenditure for, inter alia, traveling, official entertainment, secretarial services, rental and all other kinds of items listed in section 8 (1) (d) (i) to (v).

31. The Respondent sought to persuade us further that in terms of section 82 of the Act the onus rests on the Commissioner of proving that the expenditure was not utilized as "deemed". This is not correct. The section is clear that the onus is borne by the person or body claiming the exemption, non-liability, deduction etc. An appeal against the decision of the Commissioner does not reverse the onus. At pp 98 (1) – 103 (9) the Respondent is very vague on how the contributions made to the ANC by the affected members are expended. Finally, he contended himself with the following during cross-examination:

"Ms Collins: So, in summary we can say that the funds are utilized by the ANC, running its political program, advancing its objectives and its aims generally?

Mr Akharwaray: That is correct, as well as the MPL, because we are part of the process."

32. In conclusion I make the following findings:

32.1. In respect of the main argument, pertaining to section 11 (a) of the Income Tax Act, No 58 of 1962, I am satisfied that the contributions in the total amount of R12 000,00 made by the taxpayer-respondent to his party, the ANC, was an expenditure of a capital nature and therefore not deductable;

32.2. In respect of the Respondent's alternative argument, pertaining to section 8 (1) (d) of the Act, I am satisfied that that section has no application to the contributions made to the ANC

by the Respondent and are therefore also not deductable under this provision.

Costs

33. By prior agreement between the parties there shall be no order as to costs, in view of the importance and somewhat novelty of the main issue raised.

Order:

1. The order of the Special Income Tax Court is reversed. The appeal by the appellant (the Commissioner of the South African Revenue Service) is upheld.

2. By prior consent between the parties there shall be no order as to costs.

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F D KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

I concur:

_____

S A MAJIEDT
JUDGE
NORTHERN CAPE DIVISION

I concur:

_____

P L TLALETSI
JUDGE
NORTHERN CAPE DIVISION

For the Appellant:	**Adv Solomons, SC**
Instructed by:	**Elliot Maris Wilmans & Hay**
For the Respondent:	**Mr G H Akharwaray**
	In Person