



Republic of South Africa
In the Western Cape High Court of South Africa

In the matter between

Case No: 22556/09

The Oceanic Trust Co. Ltd N.O.
[In its capacity as the trustee for the time being of
Specialised Insurance Solutions (Mauritius) Trust, MOBAA/OT/338]

Applicant

And

The Commissioner for the
South African Revenue Service

Respondent

Judgment delivered: 13 June 2011

Louw J

[1] In this application for declaratory relief, the applicant is a company registered and incorporated under the company Laws of Mauritius with its principle place of business in Port Louis Mauritius. The applicant is the sole trustee of a trust, Specialised Insurance Solutions (Mauritius) ('SISM'), which was established and registered on 23 November 2000 in Mauritius.

[2] The respondent is the Commissioner for the South African Revenue Services (SARS).

[3] SISM was established by a Deed of Settlement dated 31 October 2000 entered into between the applicant and Monument Trust Company Limited, acting in its capacity as trustees for the International Investment Trust. The agreement provides that the applicant is the original trustee of SISM and (in clause 23) that the proper law of the deed of settlement is that of Mauritius, that the Laws of Mauritius govern the validity of the settlement, its construction, effects and administration and (in clause 24) that the trustees shall maintain their principal place of business at, and shall conduct their affairs from premises in Mauritius.

[4] SISM conducted business as captive reinsurer to mCubed Life Limited (formerly mCubed Capital Life Limited) ('mCubed Life') from its inception in 2000 until 2006, when its reinsurance agreement with mCubed Life was terminated and it thereafter transferred the reinsurance business to Emerald Insurance Company. The premiums of the policies of reinsurance by mCubed Life with SISM were transferred to SISM and constituted assets invested by SISM in South Africa and elsewhere in a variety of investments. SISM utilised an asset manager in South Africa to manage the assets invested in South Africa. When any policy came to an end, SISM was obliged in terms of the agreement with mCubed Life, to return the assets to mCubed Life, together with any growth

thereon, less the fees to which it was entitled and all expenses incurred by it in terms of the policy.

[5] During the period of its business operations, SISM prepared financial accounts and rendered income tax returns to the revenue authorities in Mauritius. SISM considered throughout that it only had tax obligations in Mauritius and that it did not have any tax obligations in South Africa.

[6] On 4 March 2008 SISM received a notice of audit in terms of section 74A of the Income Tax Act, 58 of 1962 (the Act) from SARS informing it that SARS intended conducting an audit/inspection of SISM and requesting certain information from SISM. The applicant as the sole trustee of SISM responded and correspondence ensued pursuant whereunto SISM, without conceding that SARS was entitled thereto, provided certain information to SARS. SARS thereupon issued a letter stating that it believed that it had a tax claim against SISM and asked for reasons why SISM should not be taxed. The applicant responded with detailed reasons.

[7] After some further delay, on 20 July 2009, SARS issued an assessment letter (the letter of assessment) wherein it raised an assessment of income tax, additional tax and interest for the tax years 2000 to 2007 for R1 506 900 973,10 (the R1,5 billion). One of the bases for the assessment was that SISM was a 'resident' in the Republic because it had its 'place of effective management' in the

Republic' and that it derived income from a South African source which was not exempt from tax. A further, alternative basis for the assessment was that SISM derived income from a South African source and that it carried on business through a permanent establishment in the Republic, within the meaning of section 10 (1)(h) of the Act.

[8] In response to the assessment, SISM filed a detailed objection on 28 August 2009.

[9] Soon after the date of the assessment, on 23 July 2009 SARS appointed Standard Bank of South Africa Ltd (Standard Bank), the South African bankers of SISM, as SISM's agent in terms of section 99 of the Act and required Standard Bank to remit the R1,5 billion to SARS. Pursuant to the appointment and request, Standard Bank paid an amount of R20 655 150, 00 (the R20m) out of SISM's account to SARS on 23 and/or 24 July 2009, leaving R739, 11 in the account.

[10] On 16 September 2009 SARS gave written notice to SISM that it was proceeding with legal action against SISM. The legal action mentioned in the notice included the liquidation of SISM to recover the tax debt, criminal and/or civil summons for an outstanding return for 2008 and for the outstanding income tax of R1 486 204 823,10 and the filing of statements in terms of section 91 (1)(b)

of the Act with the clerk or registrar of a competent court, which statements, once filed, will have the effect of civil judgments against SISM.

[11] After a further exchange of correspondence between the attorneys acting for SISM and the state attorney on behalf of SARS, the applicant in its capacity as the trustee of SISM, launched this application as a matter of urgency on 29 October 2009. The application was brought in two parts. In Part A an urgent interim order was sought pending the determination of the relief sought in Part B, restraining SARS from taking any of the steps mentioned in the notice of 16 September 2009 to enforce payment of any amount of income tax under the assessment to which SISM has objected. In Part B the applicant seeks declaratory orders declaring that:

1. SISM is not a 'resident' of South Africa as defined in section 1 of the Act;
2. SISM has not carried on business through a permanent establishment as defined in section 1 of the Income Tax Act, in the Republic, as contemplated in section 10(1)(h) of the Act;
3. SARS is liable to repay the amount of R20m removed from SISM's Standard Bank account.

[12] The relief sought under Part A of the notice of motion was disposed of by agreement between the parties and by the respondent providing the applicant

with certain undertakings that it would not implement the steps against SISM set out in the notice of 16 September 2009. The issue of costs in respect of Part A stood over and remains in issue.

[13] The substantive relief sought in Part B concern two separate but related issues. The first concerns SISM's status and liability as a taxpayer in South Africa and involves the questions whether SISM is a 'resident' of, or whether it carried on a business in the Republic through a 'permanent establishment', both as defined in section 1 of the Act. The second issue concerns the respondent's action in terms of section 99 of the Act and the removal of the R 20m from SISM's bank account.

[14] The essential differences between the parties in their approach to the relief sought in regard to the first question, namely SISM's status and liability as a taxpayer in South Africa is that the applicant contends that this court is not called upon to adjudicate on the tax assessment made by the respondent but is merely requested, in the exercise of its discretion, to pronounce on what SISM contends are purely legal questions, namely whether the applicant is a 'resident' or whether it has carried on business in the Republic through a 'permanent establishment'. In argument Mr. Emslie, who appeared with Mr. Smalberger on behalf of the applicant drew attention to the provision of section 74A of the Act which provides that the respondent may

'for the purposes of the administration of this Act in relation to any taxpayer, require such taxpayer or any other person to furnish such information ... documents or things as the Commissioner or such officer may require'

The respondent has required certain information from SISM and has complained that SISM has not given the requested information in full. Section 74A relates to a 'taxpayer' and Mr. Emslie submitted that SISM is entitled to know whether it is obliged to respond to the respondent's request. The issue of whether SISM is a taxpayer as defined is therefore not academic and SISM is entitled to know its status by way of a declarator even before the matter comes before the Tax Court. SISM is therefore not assailing the assessment. That is a matter, he submitted, for the Tax Court to decide. At this stage, SISM, in effect, simply asks for a declaration whether or not it is a taxpayer, which in this case turns on whether SISM's place of effective management was in South Africa and whether or not SISM conducted business in South Africa through a permanent establishment in South Africa.

[15] Mr Gauntlett, who appeared with Mr Snyman on behalf of the respondent, contended that this court is indeed called upon to adjudicate on integral aspects of the tax assessment made by the respondent and that in addition, the first two declaratory orders sought by the applicant require this court first to decide certain factual disputes and thereafter to decide the relevant legal issues. There are therefore mixed questions of fact and law and not purely legal questions before

this court. The disputes of fact are to be decided in SISM's appeal before the Tax Court and will crystallise and be defined in the pending proceedings before the Tax Court with the filing of the respondent's statement of grounds of assessment and SISM's statement of grounds of appeal, in terms of the Tax Court rules. The questions this court is called upon to decide, the respondent contends, are questions that are properly within the jurisdiction of the Tax Court and are questions destined to be determined by the Tax Court in SISM's appeal against the assessment.

[16] In order to determine whether the declaratory relief sought by the applicant in this court should be granted, it is necessary to consider some of the bases upon which SARS has assessed SISM for tax. In raising the assessment, SARS relied on the facts set out in the letter of assessment and on the provisions of the Act, the Double Tax Agreement (the DTA) between South Africa and Mauritius and the Organisation for Economic Co-operation and Development (OECD) guidelines.

[17] The respondent relies first on the definitions in section 1 of the Act of 'gross income' and 'resident':

'Gross income', in relation to any period or year 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 or deemed to be within the Republic ...' (my emphasis)

"Resident' means any-

(b) person (other than a natural person), which is incorporated, established or formed in the Republic or which has its place of effective management in the Republic, but does not include any person who is deemed to be exclusively a resident of another country for purposes of the application of any agreement entered into between the government of the Republic of South Africa and that other country for the avoidance of double taxation. (my emphasis).

[18] The respondent further relies on the definition of 'resident' as it appears in article 4 of the DTA:

'1. For the purposes of this agreement:

(a) The term 'resident of Mauritius' means any person who, under the laws of that state, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. This term does not include any person who is liable to tax in Mauritius in respect only of income from sources in Mauritius; and

(b) The term 'resident of South Africa' means any individual who is ordinary resident in South Africa and any legal person which has its place of management in South Africa ...

3. Where by reason of the provisions of paragraph 1 of this Article a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the State in which its place of effective management is situated.' (my emphasis)

[19] The respondent initially did, but now no longer relies on its first ground for the assessment, namely, that because SISM was registered with the Master of the South African High Court, who then issued authority to the applicant to act as a trustee of SISM, SISM was 'established in the Republic' and therefore was a 'resident' as defined, in South Africa. It is therefore not necessary to consider this first basis upon which the respondent in its assessment concluded SISM to be a resident of South Africa.

[20] The respondent continues to contend, however, that SISM was a resident as defined by virtue of it having its place of effective management (POEM) in South Africa and that consequently, its worldwide receipt or accruals constituted gross income for purposes of the Act, and was taxable in South Africa. In this regard, the respondent stated in the letter of assessment:

'In the end, the question as to where an entity's place of effective management is located is one of fact and of substance over legal form. It will depend upon a conspectus of all the facts regarding the management and operation of the business.'

[21] In this application the applicant relies on the facts set out in the launching and replying affidavits deposed to by Ashraf Ramtoola the director of the applicant, who is the sole trustee of SISM. These papers incorporate the respondent's letter of assessment and the objection by SISM. In its answering papers the respondent disputes the applicant's factual assertions and

conclusions that are in conflict with the facts and conclusions that are set out in the letter of assessment and the answering affidavit.

[22] The relevant facts are set out as follows in the letter of assessment:

2 Reasons for Assessment

The reasons for the assessment are as follows:

2.1. Facts

During SARS's audit and its engagement with third parties, SARS ascertained the following regarding SISM:

- 2.1.1 SISM is registered as an offshore trust in accordance with section 29 of the Mauritius Offshore Business Activities Act, 1992. SISM is licensed in Mauritius to conduct business as a provider of long-term insurance. It holds a Category 1 Global Business License.
- 2.1.2 SISM is registered as a trust under the South African Trust Property Control Act. The Master of the High Court issued a letter of authority dated 21 May 2001 authorising Oceanic Trust Company Limited to act as a trustee thereof. SISM's registration number in South Africa is IT 1184/2000.
- 2.1.3 The main activity of SISM is to carry out captive re-insurance business;
- 2.1.4 SISM derived all its business from MCubed Life Limited, a South African registered company.
- 2.1.5 In 2000, SISM entered into a reinsurance agreement with MCubed Life Limited. SISM was set up to conduct business as a captive re-insurer of mCubed Life Limited.

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Paragraph 3.2 of the re-insurance agreement under the heading 'Application for Reinsurance' provided as follows:

'On a monthly basis, within ten days of the end of each month, the Company (MCubed Life Limited) shall supply the Reinsurer (SISM) with a bordereau reflecting the details of all policies for which the Company requires reinsurance, which details shall include not less than the policy numbers, the premiums paid in respect thereof, the maturity dates of the policies and the types of assets or category of assets required for implementation of each policy.'

Paragraph 4.2.1 of the re-insurance agreement requires SISM to use the reinsurance premiums from MCubed Life to:

'acquire and hold in South Africa or procure that a South African registered custodian or asset manager acquires and holds on its behalf in South Africa ... the assets or categories of assets specified in the applicable policy for the purposes of the applicable policy.'

According to the information in our possession, the instructions on reinsurance premiums, policies and maturities emanated from MCubed Life Limited and sometimes from MCubed Holdings Limited.

2.1.6 MCubed Life Limited made decisions in accordance with the re-insurance agreement on how all the premiums were to be handled (i.e. invested and disinvested) by SISM.

- 2.1.7 SISM appointed Corporate Money Managers (CMM), then a wholly owned subsidiary of MCubed Holdings Limited, to be its asset manager and investment advisor for its South African investments. CMM received instructions regularly from MCubed Holdings Limited and its operating division Asset Management Outsourcing (AMOS) on the SISM investments. SARS has names of individuals from MCubed Holdings who were giving such instructions.
- 2.1.8 Both MCubed Life Limited and CMM were wholly owned subsidiaries of MCubed Holdings Limited, a JSE Limited listed company.
- 2.1.9 All investments of SISM were made in South Africa.
- 2.1.10 During the period under review, SISM generated its entire income from business activities actually conducted in South Africa.
- 2.1.11 SISM held its bank account with Standard Bank in South Africa. A review of SISM bank statements showed that SISM did not transfer money to Mauritius from the bank account in South Africa, and vice versa, throughout the period that SISM was conducting business in South Africa.
- 2.1.12 The reason for formation of SISM was that MCubed Life Limited had a smaller balance sheet than most of its competitors. Many potential policyholders found MCubed Life policies attractive but would not take up the policies for fear of MCubed Life not being able to discharge its obligations on maturity date. Furthermore, section 34 of the

Long Term Insurance Act prohibited MCubed Life from encumbering any of the assets held by it.

In researching a solution to this impediment MCubed Life Limited ascertained that re-insurance companies conducting business outside of South Africa are not subject to any restriction on the encumbrance of their assets equivalent to Section 34 of the Long Term Insurance Act. As a result, a series of actions were taken which resulted in both the formation of SISM as well as the conclusion of a re-insurance agreement with SISM.

- 2.1.13 MCubed Holdings Limited is a beneficiary of International Investment Trust which is itself a beneficiary of SISM.
- 2.1.14 SISM's initial capital (trust property) was US\$1 000 (one thousand dollars).
- 2.1.15 SISM did not provide to SARS, as requested, minutes of trustees meetings of SISM in Mauritius or any documentation to substantiate the claim that SISM's business was run in Mauritius by its trustees, the Oceanic Trust.
- 2.1.16 SISM did not pay taxes in South Africa.'

[23] The letter of assessment concludes as follows after reference to the facts and the applicable Law:

that SISM was effectively managed in South Africa and not in Mauritius where Oceanic Trust (the applicant) was situated. Therefore it is a resident of South Africa. As such SISM is liable to taxes in South Africa in terms of the Income Tax Act.

[24] It is clear that the respondent contends that the determination of the question whether SISM's 'place of effective management' is located in the Republic, is a mixed question of fact and law.

[25] In the alternative, the respondent contends in the letter of assessment that SISM was taxable:

1. on its income derived from a South African source; and
2. that no portion of this income was exempt from income tax, since SISM 'carried on business through a permanent establishment' in South Africa.

[26] In contending that SISM derived its income from a South African source, the respondent relied upon the financial statements of SISM, drawn in Rands, which disclosed that SISM was deriving investment income from the actual investment of the trust assets in interest bearing instruments in South Africa and fee income from the re-insurance services it provided to mCubed Life in South Africa.

[27] The respondent further contends that no portion of the income should be exempted from tax by reason of the following provisions:

1. Section 10(1)(h) of the Act, which exempted from tax

'interest' ... which is received or accrued during any year of assessment by or to any person who is not a resident, unless that person ... (ii) at any time during that year carried on business through a permanent establishment in the Republic'.

2. the category of 'business profits' referred to in Article 7(1) of the DTA, which provides:

'The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed only in that other State, but only so much of them as is attributable to that permanent establishment.' (my emphasis)

The respondent contended that the fees earned by SISM fell within this category.

[28] The respondent contends that SISM did carry on business through a permanent establishment in South Africa within the meaning of the provisions of the Act and the DTA and that this is clearly a question of mixed fact and Law.

[29] SISM raised a formal objection to the assessment. The objection to the assessment forms part of the papers in this application. The basis of the objection is that SISM was not a resident in South Africa, that its income was not of a South African source and that SISM did not carry on its business through a permanent establishment in South Africa.

[30] In regard to the issue of residence, SISM's objection records its contention that:

The place of effective management is a question of fact and must be evaluated by taking account of the relevant facts and circumstances.

SISM's objection raises several legal but also factual issues on the basis of which it contended that SISM did not have its place of effective management in South Africa and could consequently not be regarded as having been a South African resident at the relevant time.

[31] It is clear that the issues raised in regard to the question whether SISM is a resident in South Africa are, at least in part factual in nature.

[32] As to whether SISM's source of income is in South Africa, SISM relied in its objection on two decisions:

1. CIR v Lever Brothers and Unilever Ltd, 14 SATC 1 and, in particular, where it was held: 'The test to determine actual source of income consist of two legs, first the determination of the originating cause, and what gave rise to income and once this has been established, the next issue is in which country were such activities conducted. The source would therefore be the particular activity of the taxpayer which earns the money.'

2. Rhodesia Metals Ltd (in liquidation) v COT 11 SATC 244, where it was held that:

'Source means not a legal concept but rather something which a practical man would regard as the real source of income'.

[33] It is clear that the issues raised by the assessment and the objection by SISM in regard to the location of the source of SISM's income, is at least in part a factual issue which will eventually have to be determined by the Tax Court.

[34] As regards the issue of whether SISM carried on business through a permanent establishment in the Republic, SISM concludes on the basis of a number of factual and legal contentions that

'... SISM cannot be considered as having a permanent establishment in South Africa as no person had and habitually exercised a general authority to conclude contracts in the name of SISM in South Africa. As a result, a permanent establishment could not have been created in South Africa for SISM on this basis.'

[35] Thus, on this issue also, SISM contends, the question will eventually have to be answered by the Tax Court with reference to the facts found by the Tax Court.

[36] The respondent's first point of opposition to the declaratory relief sought is raised *in limine*. It contends that although the High Court, as opposed to the

Tax Court, does have the power to issue declaratory relief, this court nevertheless does not have jurisdiction to hear this matter. In the alternative, if it be found that the High Court does have jurisdiction, it is contended that the North Gauteng High Court, Pretoria, is the court which has jurisdiction.

[37] If it be found that the Western Cape High Court does have jurisdiction to hear this matter, two further points are raised by the respondent:

1. The relief sought amounts to an impermissible collateral challenge. The respondent contends that in the absence of a judicial review of the respondent's decision to appoint Standard Bank as SISM's agent in terms of section 99 of the Act, the challenge is not competent.
2. Secondly, that there exist *bona fide* disputes of fact regarding the facts relied upon for the relief sought which are of such a nature that they cannot be resolved on affidavit in motion proceedings.

[38] I turn to the in limine point of jurisdiction.

[39] The Tax Court is established by section 83 of the Act, as a specialist court with its own rules to hear appeals against assessments raised by the respondent. In terms of section 169(b) of the Constitution of the Republic of South Africa, 108 of 1996, the High Court may, in addition to certain constitutional matters regulated by section 169(a),

decide . . . any other matter not assigned to another court by an Act of Parliament

[40] It is settled Law that the High Court has jurisdiction to hear and decide income tax cases turning on legal issues only.

[41] In Whitfield v Philips and Another 1957 (3) SA 318 (A) Steyn JA (as he then was) said the following at 345F-346A:

‘In dealing with the question whether the award is for income tax purposes to be regarded as a capital accrual or as income, the very first difficulty which would be encountered would be that by Act of Parliament the determination of the merits of that question, as distinct from a question of law, has been entrusted entirely to the Commissioner for Inland Revenue and, on appeal from his decision, to the Special Court for hearing income tax appeals. Another court cannot usurp that function. No other court can interfere with the decision of the Commissioner, except on appeal from the Special Court, nor will any Court interfere with the decision of the Special Court except where, on the facts, no reasonable person could have arrived at the finding of the Special Court. (Commissioner for Inland Revenue v Paul, 1956 (3) SA 335 (AD) at p. 340; Durban North Traders Ltd v Commissioner for Inland Revenue, 1956 (4) SA 594 (AD) at p. 599.) A court other than the Special Court cannot, therefore, give any definite answer to this question without substituting its own decision for that of the only competent authorities. At the most, it can endeavour to assess, as best it may, the probabilities of what the decision of the Commissioner or the Special Court will be; and in doing so, I may add, it would have to guard against the danger of purporting to prejudge an issue still to be decided by the competent statutory tribunal.” (my emphasis)

[42] In Metcash Trading Limited v Commissioner, SARS 2001 (1) SA 1109 (cc) at 1135B-F, paragraph [44], Kriegler, J held as follows:

‘Indeed, it has for many years been settled law that the Supreme Court has jurisdiction to hear and determine income tax cases turning on legal issues. Thus in Friedman and Others NNO v Commissioner for Inland Revenue: In re Philip Framewell Trust v Commissioner for Inland Revenue McCreath J was asked to resolve the legal question whether a testamentary trust was a person within the meaning of the Income Tax Act. Having referred to half a dozen reported cases, four of them in the Appellate Division, where the existence of such jurisdiction was accepted without discussion, and one Prentice Hall report where the point was specifically considered, McCreath J concluded as follows as to his competence to determine the case: ‘I am in agreement with the finding of the Court in that case that where the dispute involved no question of fact and is simply one of law the Commissioner and the Special Court are not the only competent authorities to decide the issue – at any rate when a declaratory order such as that in the present case is being sought.’ The judgment was confirmed on appeal’.

[43] It was common cause at the hearing that the High Court has jurisdiction to hear this matter only if the issues to be decided are questions of law and do not require this court to make any finding of fact.

[44] Mr. Emslie submitted that there are no disputes of fact that stand in the way of the relief sought by the applicant. The issue of SISM’s place of effective management (POEM) and whether SISM carried on business wholly or in part,

through a permanent establishment in the Republic can, he submitted, be decided on those facts that are common cause, or where there are disputes, on the respondent's version. What the court is asked to do is to decide two legal questions on the facts alleged by the applicant that are common cause or not disputed and where there is a clash on the facts, to decide the issues on the facts as alleged by the respondent. The applicant therefore does not require the court to decide a dispute of fact.

[45] In this regard, Mr. Emslie referred to a number of decisions which were decided in the context of the provision in earlier tax legislation which allowed an appeal from the tax court to the provincial and appellate divisions of the then Supreme Court only on questions of law and not on questions of fact. He first referred to Platt v Commissioner for Inland Revenue 1922 AD 42 at 49-50, where the court (per Juta, JA) quoted with approval the dictum in Farmer v Cotton's Trustee 1915 AC 922

'Where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of Law' (my emphasis)

and then continued as follows:

'The question here is whether the facts found as to the transaction of the appellant with the company entitled him to the partial exemption provided by sec. 18 of the Act. That depends upon the construction of that section

and of sec. 22 of the Act, and is therefore one of law, which the court has jurisdiction to deal with. (my emphasis)

[46] The other decisions relied upon by Mr. Emslie, Commissioner of Inland Revenue v Stott 1928 AD 252 and Ochberg v Commissioner for Inland Revenue 1931 AD 215, are to the same effect. In Stott the Special Court found on a set of facts that the profit made on sales of Land by the tax payer, was profit upon which income tax was payable. On appeal, the Natal Provincial Division found that the proceeds of the sale were accruals of a capital nature, within the meaning of the relevant section of the Act. On further appeal to the Appellate Division, the taxpayer asked that the matter be sent back to the special court for a finding of fact on whether the taxpayer was or was not carrying on the trade of buying and selling of Land. The court (per Wessels JA) refused to send the matter back, holding at 259

'The facts as stated are sufficiently clear to enable us to decide this appeal. The question we have to determine is whether the facts as set out in the special case show that the proceeds of the sale of the Ifafa and Bluff properties constitute gross income or capital. In order to arrive at this decision it is necessary to know whether the acts of the taxpayer in buying and selling these properties show that he was carrying on the trade or business of a land-jobber. Whether he was or was not carrying on such a business is an inference from facts. This inference is a matter of law. Do or do not such facts as are found lead to the conclusion that the taxpayer is carrying on a business or trade within the meaning of the law? Whatever view other courts have expressed, it is quite clear that this Court has regarded the inference from the acts of the taxpayer that he carries on a trade or business as a question of law. The case of Platt v

Commissioner of Inland Revenue (1922, AD 42) is conclusive. This case decided that whether certain facts do or do not constitute the carrying on of a trade within the meaning of sec. 18 and 22 of Act 41 of 1917 is a question of law.

[47] In Ochberg v Commissioner for Inland Revenue 1931 AD 215 one of the questions on appeal was whether the court below was correct in finding that the issue of what the intention of the taxpayer was when he purchased the properties in question, namely, not to invest his money but for the speculative purpose of purchasing with a view to making a profit on resale, was a finding of fact. At 227 the court per Roos, J.A. held as follows:

'It seems to me that the question whether a person bought a property for a specific purpose is a question of fact and in no sense of the word a question of law. It is quite true that in the cases of Platt v Commissioner for Inland Revenue (1922, A.D. 42) and Commissioner of Inland Revenue v Stott (1928, A.D. 252), it was held that the question whether a person carried on the business of a land-jobber or land speculator was a question of law. But the question whether a series of transactions found to have taken place justifies the conclusion that they amount to proof of the carrying on of a business is an inference which is a question of law. If each of these transactions is itself found to have been entered into with the intention of making a profit and not for investment, this is simply a finding of fact. If it had been necessary to answer the question the facts accepted overwhelmingly justify the Special Court's finding even without the invocation of sec. 57 of the Act. The appeal upon the second question, therefore, fails'

[48] What these cases establish is first that when all the material facts are *'fully found'*, and are *'sufficiently clear'* the question whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, is one of law. Mr. Emslie submitted that in this case, the simple and material common cause fact is that the sole trustee of SISM is the applicant, a Mauritian company with no links to South Africa whatsoever. SISM, being a trust can only act through its sole trustee, the applicant, a corporate entity. The applicant, in turn, can only act through resolutions made by Ramtoola who is the sole director of the applicant. The question whether these facts, in respect of which he submitted there is no dispute, bring the case within the meaning of 'place of effective management' depends on a construction of the section and is therefore purely a question of Law. The dispute is therefore a legal dispute and not factual. He pointed out that there is no suggestion that the applicant, who is the sole trustee of SISM has ever been in South Africa. It is and has always been a Mauritian company. All the management decisions regarding SISM would have been taken by its sole trustee and those decisions he submitted could consequently only have been made in Mauritius. The place where SISM's business activities occurred and where some of its business was carried on (South Africa) must not be confused with SISM's place of effective management. Objectively determined, the place of effective management of SISM cannot, on the facts which must form the basis of the decision in this court, be anywhere else but Mauritius, he submitted.

[49] As to the meaning of the POEM of an entity, Mr. Emslie cited the recent decision of the England and Wales Court of Appeal in Commissioner for Her Majesty's Revenue and Customs v Smallwood and Anor [2010] EWCA Civ 778 delivered on 8 July 2010. The case concerned the question whether a trust was liable to capital gains tax in the United Kingdom on the sale of shares it was advised to sell. Because the sale of the shares would in the ordinary course attract capital gains tax in the UK, a scheme devised by KPMG, the tax advisor to Mr Smallwood, the settler of the trust, was implemented as follows. In December 2000, the trustee one Lutea, who was based in the UK, resigned and was replaced as trustee by PMIL, a company which was based in Mauritius and was a tax resident in that country. Mauritius did not itself tax capital gains and had entered into a double tax agreement with the UK under which the chargeable gains on the sale of the shares would only be taxable in the contracting state in which the trust was resident. PMIL then arranged for the trust to be registered as an offshore trust in Mauritius and the shares held by the trust were thereafter sold in January 2001. Soon after the sale of the shares, on 2 March 2001 PMIL resigned as trustee in favour of Mr and Mrs Smallwood and the trust was deregistered as an offshore trust in Mauritius. In effect the scheme therefore involved the trust being 'exported' to Mauritius for only a brief and temporary period at the time the shares were sold, and then being 'returned' to the United Kingdom. The Smallwoods, in their capacity as trustees of the trust were assessed for capital gains tax on the sale of the shares by the UK revenue authorities. The Smallwoods' appeal against the assessment to the Special

Commissioners was unsuccessful, but their further appeal to the High Court was successful and the assessment was set aside.

[50] The further appeal by the UK revenue authorities to the court of appeal was upheld. The court by a majority of two to one held that the POEM of the trust had throughout been in the United Kingdom and not, at the time of the sale, in Mauritius. Lord Justice Patten delivered the minority judgment and found that at the relevant time the POEM of the trust was in Mauritius. At paragraphs 48 and 49 of his judgment, Patten LJ said:

'POEM is not defined in the DTA but was interpreted by the Special Commissioners as meaning the place which is the centre of top-level management: i.e. where the key management and commercial decisions are actually made. This is the test propounded by Professor Dr Klaus Vogel in his Commentary on the OECD Model Convention and has been adopted in German case law. It was also taken to be the correct test by the special commissioner (Mr David Shirley) in *Wensleydale's Settlement Trustees v IRC* [1996] STC 241. The Special Commissioners took as their formulation of the test a passage in the current Commentary on Article 4 (3) of the Model Convention which is in these terms:-

'As a result of these considerations, the "place of effective management" has been adopted as the preference criterion for persons other than individuals. The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made. The place of effective management will ordinarily be the place where the most senior person or group of persons (for

example a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined; however, no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more than one place of management, but it can have only one place of effective management at any one time.'

Mr Prosser (counsel for the taxpayer) accepts that this is the test to be applied and that what has to be identified is the place where the real top-level management of the trustee qua trustee occurred rather than the day-to-day administration of the trust.

[51] In his judgment for the majority, Lord Justice Hughes, who found the POEM of the trust to be in the UK, held in paragraphs 69 and 70 that:

The taxpayer with whom we are concerned . . . are the trustees. Trustees are, by section 69(1) TCGA1992, treated as a continuing body:

In relation to settled property the trustee of the settlement shall for the purpose of this Act be treated as being a single and continuing body of persons (distinct from the person who may from time to time be the trustees) and that body shall be treated as being resident and ordinarily resident in the United Kingdom unless the general administration of the trusts is ordinarily carried on outside the United Kingdom and the trustees or the majority of them for the time being are not resident or not ordinarily resident in the United Kingdom

The POEM with which this case is concerned is, as it seems to me, the POEM of the trust, i.e. of the trustees as a continuing body. That is the

question which the Special Commissioners addressed: see their paragraphs 140 and 145

On the primary facts which the Special Commissioners found at paragraphs 136-145, which are set out in the judgment of Patten LJ, I do not think that it is possible to say that they were not entitled to find that the POEM of the trust was in the United Kingdom in the fiscal year in question. The scheme was devised in the United Kingdom by Mr Smallwood on the advice of KPMG Bristol. The steps taken in the scheme were carefully orchestrated throughout from the United Kingdom, both by KPMG and by Quilter. And it was integral to the scheme that the trust should be exported to Mauritius for a brief temporary period only and then be returned, within the fiscal year, to the United Kingdom, which occurred. Mr Smallwood remained throughout in the UK. There was a scheme of management of this trust which went above and beyond the day to day management exercised by the trustees for the time being, and the control of it was located in the United Kingdom'.

[52] Lord Justice Ward, concurring with Lord Justice Hughes, held at paragraphs 72 and 72:

'I agree with my Lords that, for reasons given by Patten L.J, Article 4 (3) and the ascertainment of the place of effective management of the Trust, not the snapshot approach, provides the solution to the problem.

As for the POEM, I agree with Hughes L.J. for the reasons he gives'.

[53] Mr. Emslie submitted that if the test for POEM adopted and applied in the Smallwood case is applied to the facts of this case, it is clear that the POEM of

SISM had always been in Mauritius. The relevant facts he reiterated, are that SISM had been established and formed in Mauritius, that its sole trustee was resident and situated in Mauritius, and that there was no one in South Africa who can be said to have been orchestrating the management of SISM. The management of the sole trustee of SISM had always been in Mauritius and no decision by the applicant, acting as SISM's trustee was made in South Africa. Therefore the POEM of the sole trustee of SISM, i.e. of the trustee as a continuing body was clearly in Mauritius. There had been no 'exporting' and 'returning' of SISM from South Africa. The fact that SISM carried on its business and conducted certain activities in South Africa pursuant to an agreement between itself and mCubed Life said nothing about the effective management of SISM. This, he submitted had always taken place in Mauritius.

[54] In my view, the key features of Smallwood relating to the POEM of an entity relevant to this case, are:

1. The POEM is the place where *key **management and commercial decisions** that are necessary for the conduct of the entities business are in substance made;*
2. The POEM will *ordinarily* be the place where the most senior group of persons (e.g. a board of directors) makes its decision, where *the actions to be taken* by the entity as a whole are determined;
3. However, *no definite rule can be given and all relevant facts and circumstances must be examined to determine the POEM of an entity;*

4. There may be more than one place of management, but only one POEM at any one time;
5. the decision was based not only on the general test for POEM but also on the specific section of the UK legislation which provided that the trustees be treated as a single and continuing body of persons who shall be treated as resident in the UK unless the general administration of the trusts is ordinarily carried on outside the United Kingdom and the trustees or the majority of them for the time being are not resident or not ordinarily resident in the United Kingdom ; and
6. the court undertook a painstaking analysis of the facts and the way the scheme was set up and was implemented in order to come to the conclusion on where the POEM of the trust in that case was.

[55] The statements of fact set out by the respondent in the letter of assessment form part of the facts in this application. The respondent alleges not only that on the facts known to it, SISM generated its entire income from business activities conducted in South Africa, that SISM held its bank account with Standard Bank in South Africa and that its bank statements show that throughout the period that SISM was conducting business in South Africa, SISM did not transfer any money to Mauritius from the bank account in South Africa, and vice versa; but also that the instructions on reinsurance premiums, policies and maturities emanated from mCubed Life and sometimes from mCubed Holdings Limited in South Africa; that mCubed Life made decisions in

accordance with the re-insurance agreement on how all the premiums were to be handled (i.e. invested and disinvested) by SISM; that all investments of SISM were made in South Africa; that while CMM was appointed as SISM's asset manager and investment advisor for its South African investments, CMM regularly received instructions from mCubed Holdings Limited and its operating division Asset Management Outsourcing (AMOS) on SISM's investments and that the respondent has the names of individuals from mCubed Holdings who were giving such instructions; that both mCubed Life and CMM were wholly owned subsidiaries of mCubed Holdings Limited, a JSE Limited listed company and that mCubed Holdings is a beneficiary of International Investment Trust which is itself a beneficiary of SISM; that SISM was formed and the reinsurance agreement was concluded, inter alia, as part of a scheme to enable mCubed Life to escape the provisions of section 34 of the Long Term Insurance Act which prohibited mCubed Life from encumbering any of the assets held by it, by making use of the fact that re-insurance companies conducting business outside of South Africa are not subject to any restriction on the encumbrance of their assets equivalent to Section 34 of the Long Term Insurance Act; that although SISM claimed that its business was in fact being managed by its trustee the applicant, in Mauritius, SISM did not provide the respondent, as requested, with any documentation or with any minutes of trustees meetings of SISM in Mauritius, to substantiate that claim, showing that the applicant did take management decisions regarding SISM in Mauritius.

[56] I do not think that on the Smallwood test, the applicant has made out a case for declaratory relief in this court.

[57] First, in my view, for this court to declare that SISM was not a resident of the Republic, will require this court to enquire into the facts and to make factual findings, inter alia on the question where, in South Africa or in Mauritius, SISM's key management and commercial decisions that are necessary for the conduct of SISM's business were in substance made during the years in question. All the material facts relating to the management of SISM have not, in my view, been 'fully found', and are not 'sufficiently clear' in order to simply pose the question whether the facts are such as to bring this case within the definition of 'resident' properly construed. In my view the question whether SISM was a resident of South Africa is not at this stage, simply a question of law. This court is not entitled even if this court were able to do soon the facts in this case, to enquire into and make the required findings of fact. The legislator has entrusted the making of such decisions to the Tax Court.

[58] Secondly, even if the facts are sufficiently clear to make a decision the place where key management and commercial decisions that were necessary for the conduct of SISM's business, were in substance made, has, in my view not been established to be outside South Africa. It would appear to me that at least some key management decisions and at the very least, key commercial decisions necessary for the conduct of SISM's business were in substance made

in South Africa. Therefore, applying the Smallwood test, the facts to the extent that they have been established, do not, in my view, establish that the POEM of SISM was in Mauritius, and not in South Africa.

[59] I turn to the question whether SISM carried on a business in the Republic through a permanent establishment as is required by section 10 (1)(h) of the Act.

[60] Mr. Emslie submitted that although on the facts the applicant must accept for purposes of this application, SISM did carry on a business in South Africa, this is not conclusive. The question is not whether it carried on a business but whether it did so through a permanent establishment as defined. Mr. Emslie submitted that the facts referred to earlier do not establish that SISM had a 'permanent establishment' as defined in South Africa and emphasised that no place with an address in South Africa has been suggested by the respondent in the papers in this matter.

[61] The relevant part of the definition of the phrase 'permanent establishment' in section 1 of the Act reads:

"permanent establishment" means a permanent establishment as defined from time to time in Article 5 of the Model Tax Convention on Income and on Capital of the Organisation for Economic Co-operation and Development'.

[62] Article 5 of the OECD Model Tax Convention provides as follows:

1. For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term 'permanent establishment' includes especially:

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop, and
- (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. A building site or construction or installation project constitutes a permanent establishment only if it last more than twelve months.

4. Notwithstanding the preceding provisions of this Article, the term 'permanent establishment' shall be deemed not to include:

- (a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
- (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
- (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

- (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
 - (e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
 - (f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.
5. Notwithstanding the provisions of paragraphs 1 and 2, where a person – other than an agent of an independent status to whom paragraphs 6 applies – is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.
6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.'

[63] The categories mentioned in Article 5 which could, in my view, be relevant to SISM's position are those contained in:

1. Article 1, which defines a 'permanent establishment' to mean 'a fixed place of business through which the business of an enterprise is wholly or partly carried on'; and
2. Article 2 , which especially includes under the term 'permanent establishment':
 - (a) a place of management;
 - (b) a branch;
 - (c) an office;

[64] Although the definition of 'permanent establishment' requires some place with an address in South Africa through which the business of an entity is wholly or partly carried on, in my view, the defining provision read as a whole, does not require the establishment to be that of the entity whose business was being carried on through the establishment in question. The establishment may, in my view, be a fixed place of business, a place of management of, a branch or an office of another entity.

[65] In terms of the reinsurance agreement, which is part of the papers in this application, the domicilium of mCubed Life is stated to be Investment Place, 10th Road, Hyde Park in South Africa. The respondent alleges that mCubed Life and mCubed Holdings were making business decisions concerning the handling of the premiums received by SISM. While, as was submitted by Mr. Emslie this probably does not mean that mCubed's address is SISM's place of management, it is at the very least a branch or an office and thus a place of business, through which the business of SISM was partly being carried on. Mr. Emslie, however, submitted that even if this were correct and that SISM adopted a passive role and allowed its business activities to be carried on in South Africa by others, it would still not amount to a permanent establishment as defined in South Africa because article 5.6 of the OECD model tax convention provides that:

'An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business'.

[66] I do not agree that article 5.6. provides a complete answer. It deals with a business being carried on

'through a broker, general commission agent or any other agent of an independent status ... acting in the ordinary course of their business'.

On the facts that must be accepted for purposes of deciding this application, the business, which it is common cause was being carried on by SISM in South Africa, was being conducted, at least partly, through mCubed Life and mCubed Holdings, who were at the very least, making business decisions regarding SISM's business and from whom SISM and its agent regularly received instructions regarding SISM's investments in South Africa. There is no suggestion that mCubed Life or mCubed Holdings, as opposed to CMM, SISM's asset manager and investment advisor, were acting as 'a broker, general commission agent or any other agent of an independent status' on behalf of SISM.

[67] In my view, the applicant has not made out the case for the declarator it seeks namely that the business SISM conducted in South Africa was not wholly or partly carried on through a fixed place of business in South Africa. To the contrary, on the facts upon which this court is asked to determine the application, such business was, in my view, carried on at the very least partly, through a fixed place of business in South Africa.

[68] Alternatively, all the material facts regarding the question whether SISM carried on business through a permanent establishment in South Africa, have in my view, not been 'fully found' and are not 'sufficiently clear'. The answer to that question will require the court after a full ventilation of the facts, to make factual findings. This court is not allowed to do so. The legislator has entrusted the

making of such decision to the Tax Court. It follows that this court also does not have jurisdiction to make the second declaratory order sought by the applicant in Part B of the notice of motion.

[69] There is also a further reason why this court should not make the first two declaratory orders. The issue in this application is whether the applicant has, on the papers in this application, established that SISM was not a 'resident' as defined in South Africa at the time covered by the assessment and that its business was not at that time wholly or partly being carried on through a permanent establishment in South Africa. That SISM is not a 'resident' and that its business was not being carried on through a permanent establishment in South Africa, is the case that SISM will have to make out before the Tax Court in terms of section 82 of the Act. It is not appropriate, in my view, for this court, restricted as it is to dealing with the facts in the manner prescribed for deciding factual disputes in an application before the High Court, to issue a declarator on issues which the Tax Court will be called upon to decide after a full ventilation of the relevant facts before that court. In my view justice and convenience do not demand that the declaratory orders sought by the applicant be issued. I therefore, in any event, decline to exercise the discretion vested in this court, to issue the first two declaratory orders sought by the applicant.

[70] I turn to the question whether SISM is entitled to a declaratory order that the respondent is liable to repay to SISM the amount of R20 656 150 (the R20m)

removed at the behest of the respondent from SISM's Standard Bank account on 23 and/or 24 July 2009.

[71] By the letter of assessment dated 20 July 2009, SISM was assessed for income tax, additional tax and interest for the tax years 2000 to 2007, in the total amount of some R1.5 billion. The outstanding amount of tax was required to be paid by no later than 1 September 2009. Paragraph 6 of the letter of assessment reads:

- 6.1. Please note that the collectability of the assessed amounts is not suspended by objection and appeal and interest continues to be charged from the due dates of the assessments. Full payment of the total outstanding amount of tax mentioned above must be delivered . . . by no later than the 1st September 2009.
- 6.2. You are advised that this notice constitutes the only notification that will be issued in respect of the outstanding amount.
- 6.3. Failure to pay the outstanding amounts by their relevant due dates will result in this office instituting immediate legal proceedings for the recovery of any amount which remains unpaid. You are advised that this may include appointing your bank as an agent to pay over to SARS any funds held by them on your behalf, or due to you by them.

[72] The letter of assessment therefore requires payment of the tax component of the assessment by no later than 1 September 2009. Failing payment by the due dates, the respondent envisages instituting immediate legal proceedings for the recovery of any amount which remains outstanding, which legal steps may

include, so SISM is informed, the appointment of its bank as agent to recover the outstanding tax. Going strictly on the words used in paragraph 6.1., it is only the tax component of the assessment which was to be paid by no later than 1 September 2009. Payment of the interest component, which amounts to more than R470m was, so it appears, not so extended.

[73] Section 99 provides as follows:

99. Power to appoint Agent.

The Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be.

[74] The respondent may make an agency appointment in terms of section 99, if 'he thinks (it) necessary' and the agent may be required by the respondent to make payment of tax, interest or penalty 'due' from any moneys which the agent may hold for the taxpayer. Section 99 envisages two discretionary decisions by the Commissioner, namely:

1. the appointment of the agent; and
2. requiring the agent to make payment of any tax or other monies due.

[75] Three days after the issue of the letter of assessment and more than one month before 1 September 2009, the stipulated day for payment of the tax, on 23 July 2009, the respondent issued the notice to the Standard Bank appointing the bank as SISM's agent in terms of section 99 of the Act. The notice to Standard Bank records that SISM is:

'... indebted to this department for the assessed taxes and/or interest, penalty and costs specified in the schedule below'.

and states that Standard Bank is

'... hereby declared the agent of the taxpayer ... and as such ... you are hereby required to remit to me the amounts detailed in the schedule in the manner indicated below'.

The '*schedule below*' indicates an amount to be deducted of R1, 5 billion and the date upon which the instalment is to be paid is indicated as being 'immediately'. Acting pursuant to the notice, the Standard Bank transferred the R 20m to the respondent 'immediately' that is, on 23 and/or 24 July 2009.

[76] I agree with the formulation by Mr. Emslie of the issue to be decided, to be whether an income tax assessment dated 20 July 2009 which requires SISM to pay the amount of the assessment by no later than 1 September 2009, can lawfully justify the removal of funds from SISM's bank account on 23 July 2009, on the basis that the assessed tax was due as contemplated in section 99 of the Act.

[77] The applicant's case is that that the word 'due', in the context, does not simply mean owing in the sense of being liable, but means payable in the sense that the time for payment has arrived and that, because the date for payment stipulated by the letter of assessment had not arrived, no tax was due at the time the amount was removed from SISM's bank account. Thus, while the liability to pay the amount might arise on or even before the date of assessment, the due date for the discharge of the obligation to pay the amount only arises on the date indicated in the assessment.

[78] The respondent disputes the applicant's contentions on two bases:

1. The word 'due' in section 99 means owing and does not mean payable; and
2. It is not open to the applicant to launch a collateral challenge in the form of the relief sought in regard to the R20m, without seeking the judicial review of the respondent's determination in terms of section 99 of the Act to appoint the Standard Bank as SISM's agent and to require it to pay over the amount in question immediately, in accordance with the requirements of the Promotion of Administrative Justice Act, 3 of 2002, and the case law (and now Rules) pursuant to it.

[79] On behalf of the respondent it was pointed out that there is an important difference between the wording of section 47 of the VAT Act, which provides that

Vat has to be 'due and payable' for an agent to be required to make a payment to the respondent, and section 99 of the Income Tax Act, which merely provides that the taxes have to be 'due'. Although it was reflected in the notice of assessment that the assessed tax was required to be paid not later than 1 September 2009 being the date upon which the assessed amount would become 'due and payable', the fact is that even before 20 July 2009, SISM was indebted to the respondent. In Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste 1994 (2) SA 265 (A) at 289 E-G it was held that the obligation to pay income tax arises no later than the end of the year of assessment to which it relates and consequently, the indebtedness does not only arise when an assessment is raised much later, or when the due date for payment in terms of the assessment arrives. In addition, the respondent contended that given the provisions relating to provisional tax in the fourth schedule to the Act, the tax for each year of assessment was already due and payable, for each respective year, by the end of the financial years in question, namely, 28 February 2000 and each successive year up to 28 February 2007.

[80] The meaning of the word due depends on the context it is used in the Act. In Commissioner of Inland Revenue v People's Stores (Pty) Ltd 1990 (2) SA 353 (AD) at 366 DG, Hefer JA considered the meaning of the word in sections 11(i) and (j) of the Act in the context of an argument that its meant 'due and payable' and stated:

The problem that I have with this submission is that it presupposes that the word 'due' in s 11(i) and (j) means 'due and payable', which is by no

means clear. Admittedly, 'due' often means 'due and payable' when it is said, for example, that a debt is *due* or when one speaks of the *due* date of a debt. But I am not convinced that the word was used in that sense here. 'Due and payable' is actually used at least twice in the Act (in ss 7(1) and 91(3)) and in s 7A (2) mention is even made of a salary or pension which 'has become payable'. Taking account also of the Afrikaans version of s 11(i) and (j) ('skulde aan die belastingpligtige *verskuldig*') it appears to me rather that 'due' was intended to mean 'owing' and no more.

[81] The context of section 99 is that it constitutes a permissible method the respondent may use to recover tax and other amounts owing by the taxpayer. Logically, since a money debt can generally only be enforced once it is payable, the tax owing can only be recovered once it is payable. This is the way the respondent seems to have interpreted its powers when regard is had to paragraph 6.3 of the letter of assessment where it is stated that a failure to pay the outstanding amounts by *their relevant due dates* will result in it instituting legal proceedings, which may include action under section 99 for the recovery of any amount which remains unpaid. Further, the meaning contended for by the applicant is one of the possible meanings of the word 'due'. The word must consequently be applied in the manner least onerous to the taxpayer. In Cactus Investments (Pty) Ltd v Commissioner for Inland Revenue, 1999 (1) SA 315 (SCA) at 323 Hefer, JA said:

Of course, the Act must be interpreted and applied in the least onerous manner which its wording allows.

In addition, to the extent that the word 'due' is ambiguous, it must, in accordance with the *contra fiscum* rule, be construed against the respondent. Further, on a purposive construction of section 99, the legislature cannot be held to have intended that the respondent can fix a date for payment in an assessment but then be entitled in terms of section 99, to proceed to collect some or all of the assessed tax before the arrival of the date for payment set in the assessment.

[82] Subject to what is said in paragraphs [85] and [86] hereunder, it is my view that the fact that the removal of the R20m took place before 1 September 2009, the due date in terms of the letter of assessment for the payment of the assessed amount of tax, means that the respondent had the R20m removed from SISM's bank account before the respondent was entitled to payment of the tax that was owing and thus, in my view, also before the respondent was entitled, in terms of section 99, to require Standard Bank, as SISM's agent, to effect the payment of tax that was owing but not yet payable, on SISM's behalf.

[83] The respondent's second contention is that in the absence of review proceedings, the respondent's exercise of his discretion under section 99 to appoint Standard Bank as an agent in terms of section 99, cannot be interfered with. However, as was pointed out in argument by Mr Emslie, the applicant is not seeking to impugn the respondent's exercise of the discretion to appoint Standard Bank as SISM's agent. The applicant's case is that the jurisdictional fact entitling the respondent to invoke the provisions of section 99 in order to

recover the amount held by the bank (as apposed to the mere appointment of the bank as agent) was absent. Although the tax was owing, payment of the tax was, ex facie the letter of assessment not yet due and the jurisdictional requirement for the recovery of the tax through the appointed agent, was not satisfied. I agree with the contention that in these circumstances, it is not necessary in this case for the applicant to first institute review proceedings.

[84] The question remains, however, whether the applicant is entitled to the declaratory order it seeks which is that the respondent is liable to repay to SISM the amount of R 20 656 150, 00 removed at the behest of the respondent from SISM's bank account held at the Standard Bank of South Africa Limited, on 23 July 2009 and/or 24 July 2009.

[85] In my view a declarator should, for two reasons not be issued. The first is that while payment of the tax component of the assessment was extended to 1 September 2009, there was no extension of the date for payment of the interest component of some R470m, which was therefore payable at the latest once the assessment was issued. The R20m recovered through section 99 was therefore in respect of the R470m which was then already due and payable.

[86] Secondly, I would in any event and even if payment of the whole of all the assessed amounts, that is, tax and interest, was extended to 1 September 2009,

exercise the discretion afforded this court by section 19(1)(a)(iii) of the Supreme Court Act, 59 of 1959, against making a declarator.

[87] In Durban City Council v Association of Building Societies 1942 AD 27, at 32 it was held with reference to the earlier legislative provision similar to section 19(1) (a) (iii) of the Supreme Court Act:

The question whether or not an order should be made, under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an "existing future of contingent right or obligation," and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.

[88] Since SISM is clearly a 'person interested', it is the second stage of the enquiry which is relevant to this case namely, whether or not the case is a proper one for the exercise of the court's discretionary power. At the time the application was launched in October 2009, the assessed tax had already become due and payable. Therefore, assuming that payment of the full amount of R1,5 billion had been extended to 1 September 2009, the recovery during July 2009 of the R20m through the mechanism of section 99 of the Act was premature and therefore not lawful. However, by the time the application for declaratory relief was launched, the full assessed amount had fallen due for payment. In Naptosa and Others v Minister of Education, Western Cape, and Others 2001 (2) SA 112 (C), Conradie, J as he then was, held at 125 B –E:

What the discretion entails is explained by Williamson J (as he then was) in *Adbro Investment Co Ltd v Minister of the Interior and Others* 1961 (3) SA 283 (T) at 285B - C:

' . . . (T) he Court in each case must . . . carefully determine whether or not the particular case in question is a proper case for the exercise of its discretion. For a case to be a proper case, in my view, generally speaking it should require to be shown that despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet justice or convenience demands that a declaration be made. . . . '

A declaratory order is an order by which a dispute over the existence of some legal right or entitlement is resolved. The right can be existing, prospective or contingent (*Suid-Afrikaanse Onderlinge Brand- en Algemene Versekeringsmaatskappy Bpk v Van den Berg en 'n Ander* 1976 (1) SA 602 (A)). A declaratory order need have no claim for specific relief attached to it, but it would not ordinarily be appropriate where one is dealing with events which occurred in the past. Such events, if they gave rise to a cause of action, would entitle the litigant to an appropriate remedy.

[89] In this case it would, in my view, serve no purpose to issue the declaratory order sought by the applicant. Even if it be ordered that SISM is entitled to the repayment of the R20m, the respondent will it seems to me, be entitled to raise set off or, if the order is given effect to, to immediately require the Standard Bank, as SISM'S agent, to return the R20m to the respondent under the provisions of section 99 of the Act. SISM appears to me to have an alternative remedy namely to recover from the respondent such damages in the form of interest as it may

have suffered because of the precipitous payment of the R20m, but even this may be to no avail because of the operation of set off that may be raised by the respondent as soon as the damages are liquidated. In the circumstances, it seems to me, neither justice nor convenience demands that the declaratory order sought be made. I consequently decline for this reason also, to make the order sought.

[90] The costs relating to Part A of the notice motion stood over by agreement. The applicant's contention is that it was entitled to seek the interim urgent relief and is therefore entitled to the costs associated with it seeking such relief. The respondent's contention is that the application for urgent interim relief was unreasonable and wasteful.

[91] On 5 October 2009 the State Attorney wrote to the applicant that although the respondent was of the view that it was entitled to take any of the steps referred to in its letter of 16 September 2009, in order to recover the amounts currently payable by SISM, the respondent

'is prepared to consider suspending the operation of its said letter until further notice, against a satisfactory undertaking by SISM that, pending the determination of its objection, it will not deal with its assets in any manner that will prejudice our client's claims on such assets.

Please advise whether SISM is prepared to make such an undertaking. In that regard and to enable our client to make a final decision on the

suspension of further collection steps, we reiterate our request that you furnish us with a full inventory of the assets of SISM. Such information should be furnished by no later than 9 October 2009. In the absence of any material change in circumstances, our client undertakes not to take any further steps under the said letter in the period prior to that date. Should in its view circumstances change, it will give such prior notice as may be appropriate in this regard'.

[92] The respondent's undertaking in the State Attorney's letter of 5 October 2009 was:

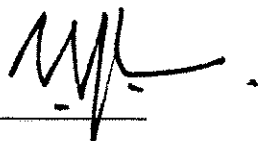
1. was in fact no more than a statement of its preparedness to consider the suspension of its intended step, 'until further notice' and could be withdrawn at any time, upon the giving of further notice 'as may be appropriate'; and
2. subject to a 'satisfactory undertaking' given by SISM.

[93] The applicant had, however, in an earlier letter of its attorney, already given an undertaking 'not to deal with its assets (other than paying legal expenses and repaying the amount due to the policy holder) in a manner that will disadvantage the South African fiscus pending the finalisation of its objection and tax appeal'. On 5 October 2009, the respondent again sought a 'satisfactory undertaking'. In addition, the preparedness to consider the suspension of its intended steps, was until further notice.

[94] The position therefore remained unresolved. The applicant's contention that it remained under a reasonable and genuine apprehension that steps may nevertheless be taken by the respondent was, in my view, reasonable. In the circumstances, and although it delayed bringing the application until 29 October 2009, some three weeks after the final correspondence, the applicant was, on balance, in my view, entitled to bring the application as a matter of urgency and should therefore be awarded the costs that stood over.

[95] The applicant has not been successful with the relief sought by it in Part B of the notice of motion, and the respondent is entitled to the cost of the main application. It is common cause that the employment of two counsel on both sides was justified in this case. The following order is made:

1. The application for the orders sought in Part B of the Notice of Motion is dismissed with costs, such costs to include the costs of two counsel.
2. The respondent is ordered to pay the applicant's cost relating to the relief sought in Part A of the notice of motion which stood over, such costs to include costs of two counsel.



W.J. LOUW

Judge of the Western Cape High Court