IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case No: 337/98

In the case between:

COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICES

Appellant

AND

HULETT ALUMINIUM (PTY) LIMITED Respondent

Coram: Hefer ADCJ, Nienaber, Howie, Olivier JJA and Farlam AJA

Date of hearing: 21 August 2000

Date of delivery: 1 September 2000

Income Tax - Third Proviso to s 79(1) of Act 58 of 1962 - whether general prevailing practice established.

J U D G M E N T

HEFER ADCJ

HEFER ADCJ :

[1] An objection by a taxpayer who has been assessed to income tax strictly in accordance with his own return is an aberration. Yet, as will presently appear, it may be fruitful. The taxpayer is a company ("the company") which manufactures aluminium products. In each return for the 1983 to 1988 years of assessment it deducted expenditure incurred for the purpose of scientific research from its income. The Receiver of Revenue allowed the deductions and assessed the company to tax accordingly. Long after the tax had been paid the company's public officer wrote to the Receiver in the following terms:

> **"We would be pleased if you would note our objection to the assessments raised on Hulett Aluminium Limited for the tax years ended March 1983 to March 1988.**

> **In the tax returns in the years in question, scientific research expenditure has been included in normal operating costs, and was accordingly claimed under section 11(a) of the Act. It has recently come to our attention that scientific research expenditure is specifically deductible in terms of section 11(p)(i) of the Income Tax Act [Act 58 of 1962, as amended]. In the absence of any express exclusion (such as was inserted into section 11(p) in 1988) it follows that the company was entitled to deduct these expenses under both sections 11(a) and section 11(p)(i) of the Act. When compiling the company's income tax returns we were, however, not aware of this double deduction and consequently we have claimed the scientific research expenditure only once, namely under section 11(a) as ordinary expenditure incurred in the production of income ..."**

By letter dated 6 December 1991 the Receiver "conceded" the objection in respect of the years 1984 to 1988. On the same date he issued reduced assessments in respect of these years stating expressly in each assessment that "section 11(p) allowance ... has been allowed". The overpayment was subsequently refunded to the company.

[2] There, however, the matter did not rest. From 1988 to 1993 there

were several amendments to the Act which affected the deduction of scientific research expenditure. In its original form s 11(p)(i) provided simply for the deduction of expenditure of a non-capital nature incurred during the year of assessment by any taxpayer for the purpose of scientific research undertaken by him for the development of his business. An amendment brought about by s 8(1)(g) of Act 90 of 1988 (which excluded expenditure "in respect of which any deduction or allowance has been or will be granted by any other provision of this Act") is not presently relevant because it only came into operation as from the years of assessment ending on or after l January 1989. But s 25(1) of Act 129 of 1991 introduced a new s 23B(1) to the effect that -

"[w]here, but for the provisions of this section, an amount qualifies or has

> **qualified for a deduction or allowance under more than one provision of this Act, a deduction or allowance in respect of such amount, or any portion thereof, shall not be allowed more than once in the determination of the taxable income of any person."**

Sec 57 of Act 113 of 1993 rendered this provision retrospective to all years of assessment commencing on or after 1 July 1962.

[3] After the passing of the 1993 Act (and professedly on account thereof) the Receiver of Revenue issued additional assessments to the company. Each assessment stated that "the section 11(p) allowance has now been disallowed." This led to a fresh but this time unsuccessful objection by the company and eventually to an appeal to the Natal Income Tax Special Court. The appeal succeeded and the Special Court set aside the additional assessments. Its President later granted the

Commissioner leave to appeal directly to this Court.

[4] The ultimate question for decision is whether s 79(1) of the Act could rightly be invoked. This section enjoins the Commissioner to issue an additional assessment whenever he is satisfied that any amount which was subject to tax and should have been assessed to tax has not been assessed, or that any amount of tax which was chargeable and should have been assessed has not been assessed. The Commissioner seeks to justify the present additional assessments by arguing that, on a correct view of the law as it stood both before and after the amendments referred to earlier, double deductions were not permissible when the assessments allowing them were issued, with the result that the company was not

assessed on the full amount of its taxable income. Mr Wallis for the company submits on the other hand that such deductions were indeed permissible before the amendment and that the company's position remained unaffected - despite the retroactivity of s 23B(1) - since its tax liability for the relevant years had been finally considered and assessed on 6 December 1991 (cf *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (AD) at 1148F; *National Iranian Tanker CO v mv "Pericles GC"* 1995 (1) SA 475 (AD) at 483I). On the view that I take of an alternative argument raised by Mr Wallis I find it unnecessary to decide this issue.

[5] Mr Wallis's alternative submission is to the effect that the third proviso to s 79(1) precluded the Commissioner from issuing the

additional assessments. Under this proviso an additional assessment may not be raised

> **"if the amount which should have been assessed to tax ... was, in accordance with the practice generally prevailing at the date of the assessment, not assessed to tax, or the full amount of tax which should have been assessed ... was, in accordance with such practice, not assessed ..."**

According to the judgment of this Court in *Commissioner for Inland Revenue v SA Mutual Unit Trust Management Co Ltd* 1990(4) SA 529 (A) at 536F-538E a practice generally prevailing is one which is applied generally in the different offices of the Department; and the onus to prove the existence of such a practice rests on the taxpayer.

[6] In order to follow Mr Wallis's argument a brief historical survey

is required. It derives from the evidence of Mr Coetzee, a director in the Law Interpretation Section in the Commissioner's office, who testified for the Commissioner in the Special Court.

Coetzee's evidence is to the effect that the Commissioner considers every Special Court judgment in collaboration with a committee consisting of high-ranking officials and then decides upon a course of action. He may decide to appeal; or he may decide to accept the judgment with or without a recommendation to the Minister that the Act be amended to avoid the result of the judgment.

On 23 November 1987 the Cape Income Tax Special Court decided in case No 8412 that scientific research expenditure of a non- capital

nature could be deducted twice from a qualifying taxpayer's income - first under the general provisions of s 11(a) (provided that the expenses were incurred in the production of income) and again under the special provisions of s 11(p) (provided that they were also incurred for the development of the taxpayer's business).

When this judgment came up for consideration the committee was of the view that it was probably correct on the reading of the Act as it stood at the time. But because it was never the intention to allow the deduction of scientific research expenditure more than once it was decided to press for an amendment. This decision led, first to the 1988 amendment, and later to the 1991 and 1993 Acts. In the meantime (on 30

June 1988 to be exact) a circular was despatched to every Receiver of Revenue, all the heads of sections at head office and all inspectors of Inland Revenue informing them *inter alia* that:

> **"3. In view of the fact that it never was the intention that such expenditure should de deductible twice, the Income Tax Act will be appropriately amended. Late objections against assessments with due dates before 23 November 1987, in terms whereof the double deductions were not allowed, must not be condoned as those assessments were issued in accordance with the practice generally prevailing at that date."**

Mr Coetzee's claim that the purpose of the circular was to forestall double deductions in assessments with due date both before and after 23 November 1987 is plainly incorrect or at least not in accordance with the terms of the circular. He was the author of the circular and, if his intention had been what he says it was, he certainly did not express it. He

was at a loss to explain in cross-examination why the circular only speaks of assessments with due date before the date in question; nor could he explain the wording of paragraph 3 even in relation to the assessments to which it expressly refers. Be this as it may, the inevitable result of the acceptance at the highest level of the judgment in case No. 8412 and the terms of the circular must have been that double deductions would, pending the amendment of the Act, be allowed as a matter of general practice in assessments with due date after the date of the judgment. This is plainly what the circular conveyed to its recipients and it is perfectly understandable because it was anticipated that a suitable amendment would be procured with effect from January 1988. Had this happened

the loss to the *fiscus* would have been negligible. What went wrong, as Mr Coetzee conceded, was that "what we had in mind did not really materialize". (Eventually the effective amendment only came in 1993 when Act 113 of 1993 was passed.) Bearing in mind further that double deductions were in fact allowed after the circular had been sent (to which the present case and Mr Coetzee's evidence bear witness), the probabilities favour the conclusion that the circular marked the inception of a generally prevailing practice of allowing double deductionsw pending amendment of the Act.

[7] Accordingly, even if we were to assume by virtue of the retroactivity of s 23B(1) that the double deductions were wrongly

allowed, it was done in accordance with a generally prevailing practice and s 79(1) could not be invoked.

The appeal is dismissed with costs.

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JJF HEFER
Acting Deputy Chief Justice

CONCURRED:
Nienaber JA
Howie JA
Olivier JA
Farlam AJA