REPORTABLE

IN THE TAX COURT

HELD AT JOHANNESBURG

ITC CASE NO 11329

Before:

President: The Honourable Ms Justice K Satchwell

Accountant Member: Mr B Adam
Commercial Member: Mr W Gravett

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. This judgment requires the Court to examine, yet again, the vexed question of what constitutes 'trade' for purposes of Sections 11 and 20 of the Income Tax Act.

2. The appellant taxpayer is A which is the holding company for the B. In the determination of its taxable income for the year under assessment ended 31 December 2001, the taxpayer had submitted its return of income together with a supporting set of financial statements.

3. The Commissioner has disallowed an assessed loss in the sum of R1,282,117 which was carried forward by the taxpayer from 2000 on the grounds both that "the company did not trade" and had not derived any income during the year of assessment. The Commissioner has also disallowed claimed expenditure of R84, 262 for the 2001 year on the basis that such expenditure had not been incurred in the course of trade. The total sum disallowed is R1,366,379.

4. The original financial statements showed that the appellant had derived no income during the 2001 year of assessment. However, after the aforesaid disallowance by the Commissioner, the taxpayer revealed that interest earned from loans made by the taxpayer to subsidiary companies had been omitted from these particular financial statements and this income tax return. Revised financial statements and tax return were then prepared disclosing interest income in the amount of R 230 000 for the year of assessment. The taxpayer performed the appropriate arithmetical calculation and requested a revised assessment to reflect the assessed loss to be R1 132 237.

5. The taxpayer has objected to the Commissioner's assessment mainly on the basis that it has indeed traded during the year of assessment under review. On disallowance of the objection, the taxpayer lodged an appeal to the Tax Court.

RELEVANT LEGISLATION AND APPROACH THERETO

6. Section 11 (a) of the Income Tax Act, Act 58 of 1962 ("the Act"), determines that a taxpayer may, in the determination of its taxable income derived from carrying on a trade, deduct any expenditure incurred in the production of income which is not of a capital nature.Section 20 of the Act determines that a taxpayer may, in the determination of his taxable income, set off any income, derived from the carrying on of his trade, against any balance of assessed loss carried forward from the preceding year of assessment.

7. In applying these sections of the Act, it is accepted that a taxpayer must comply with the following requirements before a deduction will be allowed or an assessed loss carried forward from the preceding year of assessment namely –
    (1) The first enquiry is whether or not the taxpayer carried on a "trade" (Sections 11 and 20). Where this question is answered in the affirmative then two further issues must be addressed.
    (2) With regard to the expenditure claimed as a deduction, an enquiry must then be undertaken to determine whether such expenditure was

incurred in the production of income and not of a capital nature (Section 11).

(3) With regard to the carrying forward of the assessed loss, an enquiry must then be undertaken to determine whether the taxpayer had derived income or incurred a loss from the said trade (Section 20).

8. The term "trade" is defined in Section 1 of the Act as "…every profession, trade, business, employment, calling, occupation or venture, including the letting of any property…".

9. The moment a company does not carry on a trade in a subsequent year, the assessed loss is forever lost. The loss is not denied where a taxpayer company has not traded for a number of years - it is denied where an assessed loss is sought to be carried forward from a preceding year and the immediately subsequent year is not one in which trade is conducted [1].

BACKGROUND OF THE APPELLANT TAXPAYER

10. The taxpayer was incorporated in 1985 in C. It converted to a public company on the Johannesburg Stock Exchange in 1992 under the name of "A" Ltd. The Memorandum and Articles of Association of the company claim its main object to be "a holding company". The Director's Reports to the Financial Statements for the taxpayer state that "the company and its subsidiaries manufacture and market luggage and commercial trailers and trailer components".

11. In the years under review the subsidiary companies of the taxpayer were D (Pty) Ltd, E (Proprietary) Ltd, F (Proprietary) Ltd and G (Pty) Ltd. The date of incorporation as also the main objects of these subsidiary companies are unknown since the court has not been provided with any documentation pertaining thereto.

[1] ITC 664 16 SATC 125; SA Bazaars (Pty) Ltd v CIR 1952 4 SA 505 (A); 18 SATC 240; New Urban Properties Ltd v SIR 1966 (1) SA 217 (A); 27 SATC 175

12. The financial year of the taxpayer runs from 1st January to 31st December.

EVIDENCE – ONUS

13. Section 82 of the Act raises a statutory presumption in favour of the validity of an assessment issued by the Commissioner. It was common cause at the hearing of this matter that the onus is placed on the taxpayer to show that an amount included in the assessment is not taxable[2] .

14. What is required is affirmative evidence that satisfies the court, upon a preponderance of probability, that the amount is not taxable. Mere statements uncorroborated by evidence are insufficient to discharge the onus.

15. By agreement a bundle of documents was handed up to the court and both the taxpayer and the Commissioner have agreed that such documents are what they purport to be. No witness testified and both parties relied on the documents received into evidence.

EVIDENCE ON 'TRADE' – THE TAXPAYER

16. Mr Bregman, who appeared for the taxpayer, advised that the main business of the taxpayer is the manufacturing and selling of trailers for which purposes the subsidiary companies, D and E, are utilised.

1998

17. Mr Bregman took the court through a series of documents pertaining to board meetings of the taxpayer during the 1998 financial year in which there was reference to the supply of steel, obtaining of bank finance, financing business deals, development of software, pending litigation and attention to marketing.

[2] See Commissioner for Inland Revenue v Goodrick 1942 OPD 1, 12 SATC 279

18. Presented into evidence was an agreement dated 10th November 1998, entered into between E (Pty) Ltd and H CC ("the dealer") titled a "network dealership agreement". Our attention was specifically drawn to paragraph 16.1 of the agreement which records that "the dealer … will have access to trade secrets and confidential information of the Company, and of the Company's holding and/or subsidiaries and/or associated companies ("the (A) Group") relating to the business of the (A) Group..".

1999

19. No documentation was adverted relevant to the 1999 financial year.

2000

20. Mr Bregman referred the court to the minutes of the Annual General Meeting held on 23rd March 2000 at which a director retired and was re-elected, the financial statements for the 1998 financial year were adopted and auditor's and director's fees were approved.

21. In the same year there were further minutes of what purported to be another Annual General Meeting on 28th September 2000 at which it appeared that a director retired and was re-elected, the annual financial statements for the 1999 financial year and auditor's report were adopted and approved, director's and auditor's remuneration was approved and it was agreed that un-issued shares of the company be placed under the control of the directors.

22. In the financial year ending December 2000 , there were two Executive and two Non – Executive directors. The statement by the then Chairman with regard to "Directors responsibility for Financial statements" stated that "The directors are responsible for the maintenance of adequate accounting records and the preparation and integrity of the annual financial statements, group annual financial statements and related financial information included in this report….. the directors are also responsible for assistance of internal control which are designed to provide reasonable, but not absolute, assurance as to the reliability of the financial statements…" Clearly, the value of such statement by the Chairman lies in granting absolution to the independent auditors whose

task and responsibility it was to express an opinion on financial statements which are the responsibility of the company's directors.

23. The Corporate Governance Statement for the 2000 financial year stated that the Chairman and the Board meet at least twice a year and that the Board "review [s] the operation and performance of the Group and considers issues such as strategy, business plans and policies and to approve budgets, major contracts and commitments, and other significant matters likely to have a material impact on the Group". As far as financial control is concerned it is stated that "Head office executives meet formally on a regular basis with all major operating subsidiaries to review financial and other presentations". By reason of the nature and size of the group "the Board considers the establishment of an internal audit function to be impractical" and this function is performed "from time to time" by head office personnel.

24. The 'trading results' of the group were set out in the Directors Report for the 2000 financial year and disclosed total revenue in 1999 of R 31million and total revenue in 2000 of R 53 million.

2001

25. For the 2001 financial year, the court was presented with resolutions of directors authorising attendance and voting rights at the "Annual General Meeting" to be held on 28 September 2001. The minutes of that meeting record that one director retired and was re-elected, annual financial statements for the 2000 financial year and auditor's reports were adopted and approved, director's and auditor's remuneration was approved.

26. On 9 April 2002, control of the B Group of Companies was taken over by I (Pty) Ltd. A series of court actions culminated in a meeting of shareholders during May 2002 relating to the reconstitution of the Board of Directors. It was then that the controlling shareholder in I (J) gained access to B Group's operations. He subsequently became chairman of the group.

27. In the Chairman's Report for the year ending 31 December 2001, J stated that " it was clear that the business was run down. No investments had been made in plant and machinery, nor in research and development and maintenance was insufficient due to a lack of capital. Stock was absolutely depleted and thus there could not be any production. Creditors had not been paid and the staff were understandably demoralised". During the 2001 financial year the turnover of the Group had reduced from approximately R44 million to R35 Million being a fall of approximately 17% with an increased loss to a total of R11 225 138.

28. The Corporate Governance Statement and Statement of Director's Responsibilities for the year ended December 2001 repeated what had been stated in previous financial years. The Chairman and the Board meet at least twice a year and that the Board "review [s] the operation and performance of the Group and considers issues such as strategy, business plans and policies and to approve budgets, major contracts and commitments, and other significant matters likely to have a material impact on the Group". As far as financial control is concerned it is stated that "Head office executives meet formally on a regular basis with all major operating subsidiaries to review financial and other presentations". By reason of the nature and size of the group "the Board considers the establishment of an internal audit function to be impractical" and this function is performed "from time to time" by head office personnel. In its statement of Principal Accounting Policies under the subheading "Basis of Consolidation" is written "subsidiaries are those entities in which the Group has the power to exercise control over the financial and operating policies".

29. The new Chairman reported that, in 2002, he set about negotiating terms of payment with major creditors of the B Group. A company controlled by himself, K (Pty) Ltd, advanced funding to the B operations during 2002 for the purchase of stock and working capital.

30. This was the only evidence presented to the court pertaining to any activities of the holding company, the taxpayer, during the years of assessment under

review – 2000 and 2001. No documentation in respect of the subsidiaries was tendered in evidence.

2002

30. The court was taken through. the Chairman's Report for the year ended December 2002, dated 4th June 2003. It is reported that turnover during the year reduced and the loss for the year decreased. Current directors took effective control of the company on approximately 1 July 2002. Payment had been negotiated with the major creditors of the B Group and the debts have since been "settled". K (Pty) Ltd, a company controlled by the new Chairman, advanced working capital funding to the B Group in the amount of R 16 million to finance equipment and working capital. Inventory and trade receivables increased mainly due "to increased production and sales towards the end of the year".

Interest Income

31. Insofar as there had been the omission to include the interest of R 293 000.in the financial statements and income tax returns for the 2001 financial year, it appeared that interest had been disclosed in the books of the taxpayer in previous years but had then been omitted in 2001.

32. The Financial Statements of the taxpayer for the 2000 financial year disclose the amounts of R28 million and R29 million owing by the subsidiaries to the taxpayer in the 1999 and 2000 financial years. It is recorded that "The amounts due by and to subsidiaries carry interest at a varying rate with no fixed term for repayment." Interest income from subsidiaries had been credited to the taxpayer in both these years. Note 14 to these Financial Statements disclosed that there had been "Interest from subsidiaries –interest" in the amounts of R 56 000 in the 1999 financial year and R 290 000 in the 2000 financial year. Note 18 to the same Financial Statements disclose adjustments for interest received in the 1999 and 2000 financial years.

33. The Financial Statements of the taxpayer for the 2001 financial year were signed off on 16th August 2002 by J although they related to the period when L was Chairman.

34. It is in the 2001 financial statements that there is no disclosure of any interest from the subsidiaries. The Income statement for the 2001 financial year discloses, for comparative purposes, investment income to the taxpayer of R300 000 for the 2000 financial year but discloses nothing for the 2001 financial year. Investment income for the group of R22 000 in 2000 has now reduced to R 7 000 in 2001. Note 13 to the financial statements discloses no amount against "Income from subsidiaries – interest".

35. The former auditors resigned as auditors of the company with effect from 1 January 2002 and M were appointed as auditors of the company on 8th August (perhaps 2002 or 2003 since the 2000 Annual Financial statements of the taxpayer and the group were approved at that meeting). The resident partner in charge at the former auditors is deceased. The former chairman of the taxpayer is also deceased.

36. In the financial statements for the 2002 financial year a "Fundamental Error – 2001 Company" was reported upon in Note 14. There were two corrections – one of "finance costs on loans payable" and one of "interest received on loans receivable". The latter was recorded in the 2002 years as being the sum of R293 000 income to the company and to the group. No reason for the 'error' was furnished in the financial statements.

37. Correspondence between the taxpayer and the Commissioner concerning this nondisclosure of any interest income from subsidiaries in the 2001 financial statements, has been to the effect that the taxpayer can offer no explanation. On 25 February 2005, the taxpayer advised the Commissioner that interest payments were effected through journal entries. The reason for the failure to reflect the interest income could not be found "by reason of absence of any notation in minutes of previous meetings of directors" of the taxpayer and by reason of the decease of relevant directors and auditors.

EVIDENCE ON 'TRADE' – THE COMMISSIONER

38. Mr Koekemoer, appearing for the Commissioner, prepared schedules which clearly set out the revenue, income by various types, loans of various natures and totals for each of the taxpayer holding company (tax years 1994 to 2002) the subsidiaries D, E and F (tax years 1999 to 2002) the subsidiaries G and F (tax years 1999 to 2002).

39. Our attention was drawn to the absence of any bank account in the name of the taxpayer, the erratic payment of interest by the subsidiaries in past years, the failure by the holding company to declare dividends in any year save 1998, the absence of any loans made by or to the taxpayer to or from any one of the subsidiaries for some years prior to the years of assessment.

40. Further, our attention was drawn by Mr Koekemoer to the evidence which had not been submitted to the court. This included minutes of meetings in the year of assessment, documentation pertaining to the subsidiaries and their relation with the taxpayer, information as to the results (if any) of the discussions recorded in the minutes of the 1998 tax year, attendance registers of director's meetings.

WAS THERE 'TRADE'?

41. Mr Bregman submitted that the taxpayer did carry on 'trade' as defined in the Act and as envisaged in a number of judgments of the Special Tax Courts, the High Courts and the Appellate Division. The taxpayer was not merely a 'passive investor'. In the year under assessment the taxpayer, as holding company, had ensured continuation of the operations of the subsidiary manufacturing and marketing companies in a number of ways.

<u>The interests of the Group were served through and by the taxpayer</u>

42. It was argued that the taxpayer, as holding company, bore the responsibility to ensure the continuation of the operations of the subsidiary manufacturing and

marketing companies. This involved ensuring the listed company remained a listed vehicle on the JSE for the benefit of the entire Group. The directors of the taxpayer took key decisions on behalf of the entire group which ranged from the arrangement of finance for the marketing company through to sourcing of steel.

43. Mr Bregman relied on a number of authorities to submit that both holding company and subsidiaries each conduct an important and interconnected and interdependent phase in the total operations of the Group [3]. Extracting from the discussion on the role of the management company in Sleight supra, he submitted that, although the present subsidiaries may have performed a day-too-day management role, the present taxpayer controlled those subsidiaries. In Ransom supra it was held that it was "legitimate to consider the 'scheme as a whole' where there is evidence, as there is here, that each separate step is dependent on others being carried out" (at 965H) and Mr Bregman argued that this taxpayer was directly concerned with the marketing and manufacturing operations. As was pointed out in Solaglass supra " it is by no means uncommon, in a large group of companies, for the business of the group to be rationalised in such a way that the activities of each subsidiary are strucutured with the interests of the group in mind." [4]. Similarly, this taxpayer had taken responsibility for so structuring the affairs of the B Group. Finally, Tiger Oats supra , in acknowledging the contribution made by the holding company to the activities of the subsidiaries, stressed the importance of the distinction between a 'passive' or an 'active' investor. In casu, it was submitted that this taxpayer was an active investor.

44. It is trite that the proof of the pudding is in the eating. This court must look to the activities of the taxpayer, the functions performed by the taxpayer, the impact which any such activities of the taxpayer had on the activities of it's

[3] Sleight v Federal Commissioner of Taxation [2003] FCA 896; Ransom (Inspector of Taxes) v Higgs and others [1973] 3 All ER 949 HL; Solaglass Finance Co (Pty) Ltd v Commissioner for Inland Revenue 1991(2) SA 257 AD; Commissioner, South African Revenue Service v Tiger Oats Ltd 2003(9) JTLR 243 SCA.

[4] Per the minority judgment of Friedman AJA at 277

subsidiaries to determine whether or not the taxpayer can be said to have been carrying on 'trade' of it's own accord.

45. In the majority judgment of Botha JA in Solaglass supra , the learned judge directed attention to the "controlling mind which brought [the wholly owned subsidiary] into operation" and whose "activities were directed… at promoting the interests of the group" (at 283). In the present case, the taxpayer may have ensured the creation of the manufacturing, marketing and other subsidiaries some years earlier. The question is whether or not "the promotion of the group interests" is an integral part of the very activities carried on by the taxpayer . The court must therefore examine the nature of the activities carried on by the taxpayer, the nature of expenditure and income, any benefit derived by the group from the taxpayer's activities and so on.

46. We know of no authority which requires no more than existence as a holding company to constitute the 'carrying on of a trade'.

47. Mr Bregman referred us through the documentation and by inference therefrom, to the activities of the taxpayer during the year of assessment under review.

Listing on the JSE

48. It was submitted that the mere continued listing of the taxpayer on the Johannesburg Stock Exchange was for the benefit of the entire B Group.

49. The listing of the taxpayer was achieved in 1992 . The mere fact of 'keeping itself alive' cannot constitute 'trade'[5] . To hold annual general meetings, ensure that directors are appointed, arrange for financial statements to be prepared, remunerate the directors and auditors constitutes no more than ensuring that the taxpayer did not become statutorily moribund. These activities constitute no more than compliance with the statutory requirements for 'life' as a legal entity.

[5] SA Bazaars (Pty) Ltd v CIR 1952(4) SA 505 A.

Secondment of Directors

50. It was submitted that the taxpayer as holding company, had seconded it's directors to the subsidiary companies whose task and responsibility it was to report back from the subsidiary company to the holding company. This constituted directed supervision over the affairs and activities of the subsidiaries

51. The only information pertaining to directors of both the taxpayer and the subsidiaries appears in the 1992 Prospectus and in the 1996 and 1997 Annual Reports. Clearly there was, at that time, some overlap of the individuals on the respective boards. However, the documentation also disclosed that in litigation was pending against a Mr X in 1998 and there were resignations of directors and appointments of directors in those years for which documentation was provided. Accordingly, the only evidence before this court is that of change and flux in the composition of the various boards.

52. There is no evidence as to the cross-fertilisation (if any) between the taxpayer and the subsidiaries in the year under review. The directors of the subsidiaries in 2001 are unknown to us. Finally, there is no evidence at all as to the purpose for which any directors were ever seconded, if indeed they were. The fiduciary responsibilities of the directors of the subsidiaries, whoever they might have been, were to those companies of which they were directors. This court would, of course, accept that subsidiary and group interests would usually coincide.

53. In Tiger Oats supra , the court had regard to the extent to which the investment holding company "directly or indirectly" utilised its investments to exert a 'significant influence'. Commonality in certain directors between companies might give some indication of such influence but would not be decisive as to the carrying on of 'trade' by a taxpayer company.

Board Decisions taken by the taxpayer in relation to the subsidiaries.

54. It was argued that the taxpayer, as holding company, took decisions which filtered down to the benefit of the subsidiaries. These decisions appear from those minutes handed in as evidence.

55. In 1998, discussions at meetings of the board of directors of the taxpayer concerned litigation against X; the attitude of bankers, the budget; storage of statutory records of the taxpayer and subsidiaries, the advantages of using a steel wholesaler, financing, the share incentive trust scheme. It was thereafter reported that the : litigation with X was settled and an agreement signed and the settlement was authorised. Further discussions concerned upgrading of computer software and hardware, a potential steel supplier, marketing problems; possible acquisition of G, registration of B, issues pertaining to steel suppliers, an audit of computer software, marketing planning, the completed purchase of G and formation of a new company, depreciation of patents and trademarks.

56. No evidence was presented to suggest similar involvement in any trading interests in any other year prior to 2001.

57. The court knows of no meetings of directors in 2001 save for the annual general meeting which was concerned solely with statutory responsibilities as opposed to trading activities. No minutes of any other meetings were made available for the 2001 year of assessment under review. No attendance register has been presented. No director or employee of either the taxpayer or any subsidiary company gave evidence. One would have expected that any 'trade' by the taxpayer would have been within the knowledge of some person or recorded in some documentation which could have been made available to this court.

58. This court cannot infer that what was done in 1998 must in all likelihood have been performed in 2001. This cannot be inferred where there is no evidence at all to suggest that this was so. It particularly cannot be inferred where the 2001 Annual Report commented so critically on the inactivity of the B group and, by implication, on the inactivity of the board of directors of this taxpayer.

59. We accept Mr Koekemoer's submission that there is no evidence that that which was discussed at the 1998 meetings was ever translated into activity on

the part of either the taxpayer or the subsidiaries. However, it may well be, though we do not need to decide this point, that these 1998 discussions did proceed beyond the mere formulation of intentions and did fall within the ambit of carrying on a 'trade' in the 1998 financial year.

60. Similarly, the documentation pertaining to the 2002 financial year is not of assistance. The report of the new Chairman as to what had been done and achieved in that year does not retrospectively confer trading activity upon the taxpayer in the preceding tax year. Especially not so, when one has regard to the comments of the Chairman with regard to the inactivity of the previous tax year.

61. Financial arrangements on behalf of the subsidiaries may indeed have been negotiated and concluded during earlier tax years. The schedules prepared by Mr Koekemoer are extremely enlightening in this regard and confirm what a trawl through the financial statements presented in evidence reveal. The taxpayer had made loans to two of it's subsidiaries – D and G. The bulk of the loans (approximately 99 per cent) had been made to prior to 1998 and apparently the last such loan to D was probably made in the 1994 tax year. Thereafter, the loans were an ongoing indebtedness of this subsidiary to the taxpayer. The loan to G was apparently made in 1999 and thereafter remained an ongoing indebtedness to the taxpayer. There are no loans to D or F.

62. Mr Koekemoer relied on Cactus Investments (Pty) Ltd v Commissioner for Inland Revenue 1999(1) SA 315 SCA for the proposition that loans cannot be regarded as continuing actions on the part of the lender. My reading of that judgment is that his lordship, Mr Justice Hefer, did no more than to uphold the majority of the Court a quo that the right to claim interest accrued to the lender on the days on which the investments were made and had an unconditional right to receive the interest on due date[6]. However, Mr Koekemoer submitted that the Supreme Court of Appeal did find that , having paid over money to a

[6] See page 322 of the judgment.

borrower, the lender has then fully performed all obligations under the loan agreement and has no continuing obligation to the borrower. Of course, that may be the case on particular facts.

63. The minority judgement of Nicholas AJA in Burman v CIR 1991(1) SA 533 AD is of assistance when considering the true nature of an inter company loan by a holding company to its subsidiary. After discussing the position of a shareholder with a loan account vis-à-vis the company, it was stated: "Even though it is not permanent capital, a member's loan is therefore a contribution to the capital of the company, and in a real, economic sense such loan is a component, together with his shareholding, of the member's interest in the company".[7] That may well be the situation in the present case, but it does not mean that the holding company , qua shareholder, may not have engaged in real and active endeavour pertaining to such loan. It just means that this taxpayer should not attempt to rely on it's continuing loan and therefore investment in the subsidiaries to constitute activity in a non-loan financial year.

64. There is absolutely nothing to suggest further funding was obtained elsewhere through the placement of shares on the open market or by raising loans from external sources during the 2001 financial year. There is no evidence that loans were contemplated, negotiated, arranged or concluded for or on behalf of the subsidiaries during the 2001 tax year.

65. There is also nothing to suggest that the terms and conditions of such loans occupied the mind of or resulted in any action on the part of the taxpayer during this year. Indeed, this is the year that the non payment of interest on these loans went completely unnoticed by the board of directors and the auditors. Even if there had been such monitoring, merely watching over existing investments that are not or expected to be income-producing during the year in question is not a sufficiently active step to constitute 'trade'[8].

[7] The majority judgment did not express disagreement with this statement.
[8] ITC 1476, 52 SATC 141 (T)

66. There is also no evidence of any interest policy with regard to these loans. No interest was actually charged over the years 1994 to 1997. There is no indication that interest was ever actually received. The loans were, according to the 1996 and 1997 financial statements, "interest free" and according to the 1998 financials onwards " carry interest at varying rates". There is no evidence to indicate what caused the taxpayer to change its modus operandi with regard to interest – save perhaps the subordination. Furthermore, the loans had 'no fixed terms for repayment' and there is no evidence of any concern on the part of the taxpayer with regard thereto.

'Trade' conducted through subsidiaries

67. Relying on the well known proposition that a taxpayer can trade through other entities [9], Mr Bregman argued that the taxpayer had so done through it's subsidiaries. It had not been passive in it's relationship with the subsidiaries and referred to the information concerning overlapping directors, financing activities, involvement in manufacturing and administration. The taxpayer had ultimate responsbility for the activities of the subsidiaries.

68. We do not doubt that it is both possible and permissible for this taxpayer to have carried out 'trade' through the medium of it's subsidiaries. The question is whether or not it actually so did. Whether and to what extent the carrying on of 'trade' could be attributed to the taxpayer would depend upon the link between it and it's subsidiaries and the nature of the arrangements made

69. The citation of the subsidiaries in the taxpayer's earlier financial reports indicate that each one is a separate legal entity with it's own Memorandum and Articles of Association and registered as a taxpayer in it's own right. In this regard one should be mindful, as were their Lordships in Ransom v Higgs supra, of the dangers of confusing the activities of one taxpayer with those of another taxpayer for purposes of determining liability for taxation.[10]

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[9] See Smith v Anderson 1879 S 120 ; Sleight supra: Timberfellers (Pty) Ltd v CIR 59 SATC 153

[10] See 966f and 972d of the different speeches. See also Lord Wilberforce " the same trade cannot be located in two different places."

70. Mr Koekemoer referred us to English authority of Turnstall v Steigmann [1962] 2 All ER 417 for the proposition that "Even the holder of one hundred per cent of the shares in a company does not by such holding become so identified with the company that he or she can be said to carry on the business of the company" and that "control of a company by a corporator is wholly different in fact and in law from carrying on the business himself". We would be reluctant to simply transpose statements which are cited with reference to specific provisions of the English Landlord and Tenant Act, 1954. However, the proposition is certainly not without commonsense appeal. As was said in Commercial Union Assurance Co plc v Shaw (Inspector of Taxes) [1998] STC 386 , which case was concerned with whether or not payments by the taxpayer were made for the purposes of 'trade', " It is necessary to concentrate on the separate trade of each company, even though the holding company may correctly be said to carry on business itself and through its subsidiaries. The trade of each subsidiary is (apart from concession) separate from the trade of CU and also from the business, in its wider aspect, of CU" (at paragraph 175). Mr Koekemoer also referred us to the obiter comment of Milne J (as he then was) in S v Nixon 1971(4) SA 495 N to the effect that "I am inclined to doubt however, whether the control which a holding company exercises over the composition of the board of directors of a subsidiary company constitutes participation in the management of the company…" (at 498).

71. It is our view that, at the end of the day, the most helpful guidance on the issue before us is to be found in Tiger Oats supra. In that case the Supreme Court of Appeal found that the taxpayer was "no mere passive investor" and "in a very real commercial sense was actively involved in the business of its operating subsidiaries and associated companies". One need only look at the facts of that case for the distinction between the taxpayer in that case and the taxpayer before us to be startlingly obvious. That holding company had equity investments in both subsidiaries and associated companies; it drew some of its non-executive directors from the boards of the subsidiary and associated companies; it held other investments in both listed and unlisted shares; in the period under consideration the taxpayer had substantially increased it's loans to its subsidiaries; income was received on the loans to subsidiaries and associate

companies and by way of cash balances with banks; it operated bank accounts in it's own name; it had no employees but paid management fees in respect of management services provided to it's operating subsidiaries and associated companies; deployment of the taxpayer's capital and reserves to it's subsidiaries were managed in accordance with annual budgets and strategic plans and so on and so on.

72. In the present case, none of the Tiger Oats activities were shown to have been performed for or on behalf of the taxpayer during the 2001 financial year.

73. This apparent inactivity of the taxpayer is compounded by the fact that it had no banking accounts with commercial institutions in it's own name. No monies passed through it's hands for funding it's subsidiaries, financing it's own activities, meeting administration costs or remunerating its directors.

'Trade' conceded by Commissioner in previous years

74. Mr Bregman has further argued that there has been no difference in the operations conducted in the period from 1995 to 2003. The appellant has been a listed company and its reports have always indicated the nature of the operations which have been undertaken. There has been no period of cessation. There has been no winding-up nor has there been any realisation. The only dislocation in the affairs of the appellant company was the suspension for a period during the 2002 financial year which had no impact upon the 2001 financial year and which related to the subsequent change of ownership during 2002. Accordingly, there has been no substantial change in the structure of operations during 2001.

75. Accordingly, Mr Bregman has argued that , absent a concession from SARS that it was wrong to allow losses to be assessed in previous years, SARS should have continued to allow a loss on exactly the same basis to this taxpayer in the year under review.

76. We are not asked to adjudge upon the correctness or otherwise of assessments made by the Commissioner other than that for the 2001 financial year.

Whether or not the taxpayer carried on 'trade' in previous years is not for us to decide.

CONCLUSION

77. We are required to determine, as the first step, if the taxpayer has engaged in 'trade' during the 2001 financial year. The onus is on the taxpayer to show that trade has been conducted.[11]

78. The word 'trade' itself has not been defined and it rests on the courts to provide content thereto. As an ordinary word in the English language 'trade' has or has had a variety of meanings or shades of meaning and is capable of embracing a great diversity of circumstance and activities[12]. It has attracted a variety of definitions in the courts[13]. However, it is perhaps most useful to pose the question "What did the taxpayer actually do?".[14] In attempting to answer this question we have had to "examine closely the nature of the activities carried on" by the taxpayer .[15]

79. The taxpayer presented minimal evidence and that which was relevant to the issue before us was little more than circumstantial in nature. We are unable to find that any probabilities have been established which would assist the court in evaluating such evidence as has been adduced.

80. This full court can only conclude that the taxpayer has not evidenced, during the 2001 year of assessment under review, any indication of the 'controlling mind' to which reference was made in Solaglass supra. We have nothing before us, not even passivity. There is no evidence of any activity of a continuing nature pertaining to the loans made some years previously by way of monitoring those investments and there were certainly no further investments or disinvestments. There is no evidence of involvement in the affairs of the

[11] CSARS v Contour Engineering (Pty) Ltd 61 SATC 447at 452
[12] See all the speeches in Ransom v Higgs supra
[13] See for example those given in Ransom v Higgs supra
[14] As did each of their Lordships in Ransom v Higgs supra
[15] Per Botha JA in Solaglass supra

subsidiaries during 2001. We have no knowledge of the appointment of the directors of those subsidiaries or of any appointment from those companies to the taxpayer during the year under review. We cannot find any control or dominance exercised over the subsidiaries. There is no evidence of strategic management or direction of policy formulated by the taxpayer which was implemented by the subsidiaries. We have no knowledge of any facilitation by the taxpayer of any of the activities of the subsidiaries in any of the spheres of human resources, production, management, financing, administration or elsewhere. Nor do we have knowledge of any activity of the taxpayer conducted on it's own account.

81. We find that the taxpayer/appellant did not carry on 'trade' during the year of assessment under review, namely the 2001 financial year.

82. Accordingly, it is not necessary for us to proceed to consider whether or not the taxpayer derived income or incurred any loss therefrom.

ORDER

83. The appeal is dismissed. The assessment of the Commissioner for the 2001 financial year is confirmed in respect of both the assessed loss of R1 282 117.00 and the expenditure of R 84 262.00.

Dated at Johannesburg 10th August 2005.

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Satchwell J

On behalf of Mr W. H. Gravett (commercial members) Mr B Adam (accounting member) and myself..

Dates of Hearing: 1st and 5th August 2005

For the Taxpayer: Adv D Bregman SC

Instructed by Robin Beal Attorneys.

For the Commissioner: P J Koekemoer