REPORTABLE

IN THE TAX COURT OF PRETORIA

Case number: VAT304

In the matter between:

A (PTY) LTD First Appellant

B (PTY) LTD Second Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

SOUTHWOOD J

[1] In July 2005 the parties agreed that these appeals should be enrolled for hearing on 6 - 7 and 10 – 13 October 2005. On 22 September 2005 the respondent informed the second appellant (B (Pty) Ltd) that the respondent no longer relies on the provisions of section 73 of the Value-Added Tax Act, 89 of 1991 ('VAT Act') in respect of its assessment of October 2003 and that the 'monies seized in terms of the provisions of section 47 of the VAT Act' (i.e. R70 917 268,48)

would be refunded to the second appellant. The respondent considered that the second appellant's appeal would fall away as no assessment had been raised against it. In so advising the second appellant the respondent did not comply with Rule 23(2) of the rules made in terms of section 107A ('the rules') of the Income Tax Act 58 of 1962 ('IT Act'). The respondent did not deliver a notice of concession and did not deal with the costs of the appeal. On 23 September 2005 the appellants' attorney, C, pointed this out to the respondent's representative and on 28 September 2005 the respondent delivered a notice in terms of Rule 23(2)(a)(i) which states simply that the respondent concedes the appeal of the second appellant. The respondent's representative explained that he had no mandate to tender costs. At the pre-trial conference held on 30 September 2005, when questioned about the failure to tender the costs of the appeal, the respondent's representative refused to do so and informed the second appellant's legal representatives that the second appellant would have to make application therefor. No reason was given for the refusal to tender the costs or why it was necessary for the second appellant to formally apply to court for a costs order. On 3 October 2005 it became apparent that the first appellant's appeal could not proceed on the dates agreed. The primary reason was that the respondent's expert witness, Mr D, would not be available to testify during the period for which the appeal had been enrolled. The first appellant agreed to this postponement but insisted that the respondent pay the wasted costs. The respondent refused to tender these wasted costs. The appellants

have brought a substantive application seeking costs orders against the respondent.

[2] Appreciating that counsel had been retained for the hearing of the appeals the appellants and the respondent decided to address the question of costs. They agreed that the first appellant's appeal would be postponed *sine die* and that the question of liability for the wasted costs occasioned by the postponement of the first appellant's appeal as well as the liability for the costs of the second appellant's appeal would be argued. The court agreed to hear this argument. The parties also sought a ruling as to whether this court has the power to make orders concerning the constitutional validity of the VAT and IT Acts. In its grounds of appeal the first appellant contends that section 60(2) of the VAT Act is inconsistent with the Constitution and invalid. There is a dispute as to whether this court has the power to consider this issue and make an appropriate order. The court decided that it would hear argument on the following issues –

(1) whether, in terms of the rules, the VAT Act and the IT Act it has the power to decide a stipulated issue separately from and before deciding any other issue and to make an order on that issue; and if so

(2) whether this court has jurisdiction to decide whether a provision in the VAT Act or the IT Act is inconsistent with

the Constitution and accordingly invalid and to make appropriate orders in that regard.

[3] On 7 October 2005 the respondent sought an opportunity to answer the appellants' application for costs and the court postponed the hearing of the application to 14 October 2005 to enable the parties to exchange affidavits. The court then heard full argument on the two jurisdictional issues and indicated that it would take time to consider its judgment on those issues.

[4] The following issues must be decided:

(1) whether the respondent must be ordered to pay the first appellant's wasted party and party costs occasioned by the postponement of the hearing set down for 6-7 and 10-13 October 2005, including the costs consequent upon the employment of three counsel;

(2) whether the respondent must be ordered to pay the second appellant's costs of the appeal, on the scale as between attorney and client, including the costs consequent upon the employment of three counsel;

(3) whether the respondent must be ordered to pay the costs of the application for costs, on the scale as between

attorney and client, including the costs consequent upon the employment of three counsel;

(4) whether this court has the power to decide a limited issue separately and before deciding any other issue, and to make an order on that issue; and if so

(5) whether this court has jurisdiction to decide whether any provision in the VAT Act or the IT Act is inconsistent with the Constitution and invalid and to make appropriate orders in that regard.

[5] Power of the tax court to make costs orders

Section 83 (17) of the IT Act makes provision for costs orders by the tax court. It reads –

'(17) Where –

(a) the claim of the Commissioner is held to be unreasonable;

(b) the grounds of appeal of the appellant are held to be frivolous;

(c) the decision of the tax board contemplated in section 83A is substantially confirmed;

(d) the hearing of the appeal is postponed at the request of one of the parties;

> (e) the appeal has been withdrawn or conceded by one of the parties after a date of hearing has been allocated by the Registrar,
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> the tax court may, on application by the aggrieved party, grant an order of costs in favour of that aggrieved party, which costs shall be determined in accordance with the fees prescribed by the rules of the High Court.'

[6] There is a dispute about the effect of this subsection. The appellants contend that the subsection is clear and unambiguous. It provides for five discrete situations in which the tax court has a discretion to make an order for costs. In each case, the jurisdictional fact or facts provided for in the relevant paragraph must be present before the court may exercise its discretion. The discretion exercised by the court is similar to that exercised by the High Court when making a costs order. The appellants also contend that the costs orders may include costs on the scale as between attorney and client. The respondent disputes these contentions. The respondent argues that the court may only exercise its discretion in making a costs order against the respondent if it is established that he acted unreasonably. In this regard the respondent refers to a number of cases decided before the present subsection 83(17) came into force. The respondent also argues that the tax court cannot make a costs order on the scale as between attorney and client because the enabling Act (i.e. the IT Act) does not provide for this.

[7] Subsection 83(17) has been significantly amended since it was first enacted. In 1962 the subsection provided –

> 'The court shall not make any order as to costs save when the claim of the Commissioner is held to be unreasonable or the grounds of appeal therefrom to be frivolous'.

The subsection clearly prohibited the making of costs orders by the tax court except in the specified situations. It limited the power of the tax court to make an order against the Commissioner to situations where the court held the Commissioner's claim to be unreasonable.

After the IT Act was amended by the introduction of section 83A (to make provision for appeals to be heard by a tax board) subsection (17) was substituted by section 36(b) of Act 129 of 1991. It then read as follows –

> 'The court shall not make any order as to costs save when the claim of the Commissioner is held to be unreasonable or the grounds of appeal therefrom to be frivolous or where the decision of the Board referred to in section 83A is substantially confirmed'.

The prohibition on the making of costs orders by the tax court, subject to the specified exceptions, and the limitation of the power of the tax court to make a costs order against the respondent were therefore maintained.

The subsection as it presently reads was substituted by section 54(1)(n) of Act 60 of 2001, with effect from 1 April 2003, which is also the date upon which the rules came into force. Subsection 17 now expressly provides that costs orders may be made in the situations

specified and that costs shall be determined in accordance with the fees prescribed by the rules of the High Court.

[8] Subsection 83(17) is radically different from its predecessors. Such a change indicates a radical change of intention. Instead of a prohibition on making costs orders the court now has a discretion to make costs orders in each of the five situations. The discretion is not limited in any way. There is no justification for reading into the subsection a qualification that a costs order may be made against the respondent only if it is established that he acted unreasonably. There is also no justification for limiting the meaning of the word 'costs' to party and party costs. The legislature is presumed to know that courts may make costs orders on the scale as between attorney and client. By expressly conferring on the tax court the power to make costs orders it is a necessary implication that these costs orders may be on the well-known and recognised scales used by the High Court, the magistrates' courts and other courts.

[9] The first appellant's appeal is to be postponed at the request of the respondent and the respondent conceded the second appellant's appeal after a date of hearing was allocated by the Registrar. Because the appellants seek the costs of three counsel and the second appellant seeks costs on the scale as between attorney and client it is necessary to consider the facts and circumstances of each case in some detail.

[10] The first appellant was registered as a vendor in terms of the VAT Act. During the period September 1998 to March 2000 the first appellant rendered VAT returns (VAT201s) on a monthly basis as provided for in section 27(1) of the VAT Act. During this period the first appellant carried on business under the name E. Its business consisted *inter alia* of the sale of pre-paid cellphone recharge vouchers (supplied by F) and the sale of cellular telephones. In its VAT returns the first appellant declared its VAT transactions – the input tax due to it in respect of expenditure and the output tax charged on sales subject to VAT at 14 % and supplies made by it in the course of its business which were zero rated. During the relevant period the first appellant allegedly sold pre-paid cellphone recharge vouchers and cellular telephones to purchasers in Botswana and Lesotho. On these transactions the first appellant charged and accounted for VAT at the rate of 14 % and later deducted or claimed back such VAT as input VAT from the respondent. This was done in terms of section 11(1)(a) and section 11(3) of the VAT Act read with Practice Notes 1 and 2. In support of its claims for refunds the first appellant furnished the respondent with the relevant export documents and relying on these documents SARS paid an amount of R19 093 113,07 to the first appellant as VAT repayments.

[11] In about 2003 SARS investigated the first appellant's VAT transactions and the investigators concluded that the export documents submitted

by the first appellant to SARS in respect of exports to Botswana and Lesotho were forgeries and that the goods were not exported. The SARS investigators reasoned that if the export documents were forged the goods had not been exported. Further investigation apparently revealed that the vehicle allegedly used for transporting the goods to Lesotho was not capable of doing so; that the owner of this vehicle had never heard of the first appellant and had not made his vehicle available to transport goods to Lesotho; that certain border post officials, whose stamps appear on the export documents, were not on duty when the goods were allegedly exported; that in respect of the goods allegedly exported to Botswana the vehicles used belonged to G but G's vehicles only transport G's goods; and that another vehicle used to transport goods allegedly belonged to H Transport but that no such business could be found.

[12] Having decided that the goods were not exported SARS decided to correct the situation. On 16 October 2003 SARS raised a number of assessments in respect of the period September 1998 to March 2000. The total VAT was R19 093 113,07; the total penalties in terms of section 39 of the VAT Act were R1 909 311,31; the total interest was R12 090 642,23 and the total additional tax in terms of section 60 of the VAT Act was R37 824 201,84. The grand total was R70 917 268,45.

[13] On 20 October 2003, two days before the SARS' letter to the first appellant advising it of these assessments the Registrar of the High Court, Pretoria entered judgment for R70 917 268,45 in favour of SARS against the first appellant. On that date the first appellant did not exist as it had been deregistered on 22 June 2001. On 22 October 2003 SARS served on J Bank a notice in terms of section 47 of the VAT Act declaring J Bank the agent of the second appellant and requiring the bank to make payment to SARS of the sum of R70 917 265,45 from the funds in the second appellant's bank account. The SARS' notice to J Bank alleged that the second appellant was the debtor notwithstanding the fact that the assessments were issued in respect of the first appellant.

[14] On 27 October 2003 a meeting took place between SARS' representatives and the appellants' representatives to attempt to resolve the problem. The appellants' advocate informed the SARS' representatives that the funds had been paid by the wrong person, the second appellant, and that the first appellant had been deregistered and was not carrying on business. The respondent's representatives refused to accept the correctness of this information. They insisted that the first appellant was still in existence and that the funds used to pay the assessment came from the first appellant's bank account. There is a dispute as to whether reference was made to section 73 of the VAT Act to justify using the assessment against the second appellant.

[15] The SARS' representatives requested proof that the first appellant had been deregistered. On 28 October 2003 the relevant documents showing that the first appellant had been deregistered were handed to the attorney representing SARS.

[16] On 4 November 2003 the second appellant instituted proceedings against J Bank and SARS in the Johannesburg High Court to obtain an order that J Bank repay the sum of R70 917 268,45 by crediting the second appellant's account with that amount. The second appellant sought this relief without bringing a review to set aside the actions taken by SARS in terms of sections 47 and 73 of the VAT Act. The application was accordingly dismissed. In his answering affidavit on behalf of SARS the SARS investigator, K, referred to section 73 of the VAT Act as a justification for SARS seeking payment from the second appellant. He stated that SARS decided to ignore the fact that the appellants were different corporate entities - because of fraud - and concluded that they were involved in a scheme in terms of section 73 of the VAT Act. The second appellant hotly disputed this in its replying affidavit. It pointed out that SARS knew that some of the information at its disposal was incorrect and that SARS was relying on section 73 of the VAT Act to cover up the fact that it had acted unlawfully in attaching the second appellant's funds. The second appellant also pointed out that at no stage before serving the notices in terms of section 47 on 22 October 2003 had SARS even alleged that the second appellant was

liable for VAT. The second appellant alleged that SARS' conduct was an opportunistic attempt by SARS to justify its error.

[17] This dispute about whether SARS had in fact applied section 73 of the VAT Act continued in the papers filed in the second appellant's unsuccessful petition to the Supreme Court of Appeal for leave to appeal against the judgment of the Johannesburg High Court.

[18] On 12 November 2003 a second meeting took place between the SARS' representatives and the appellants' representatives. During this meeting, the appellants' senior counsel pointed out to SARS that not even the provisions of section 73 of the Act would give SARS the power to obtain payment from the second appellant. According to the appellants' deponent the SARS' representatives did not raise the application of section 73 to justify what they had done to obtain payment from the second appellant. However this was clearly not the first time the SARS' representatives had referred to section 73. As already mentioned they referred to the section in their answering affidavits.

[19] At the meeting the SARS' representatives were not prepared to concede that they had made an error by serving the notice in terms of section 47 on J Bank. Subsequent attempts to persuade more senior SARS' officials proved unsuccessful.

[20] The second appellant unsuccessfully attempted to obtain details from SARS as to when, where and who took the decision in terms of section 73. The second appellant also unsuccessfully attempted to obtain from SARS a document evidencing the fact that the decision had been taken. The second appellant also requested the Commissioner of SARS to exercise his discretion in terms of section 36 of the VAT Act and suspend the obligation to pay VAT on the assessments pending the outcome of objection and appeal procedures and to permit a refund of the sum of R70 917 266,45 paid on the ground of the unreasonable delay in the taking of the decision. The second appellant further requested the Commissioner of SARS to withdraw, in terms of section 42(b) of the Act, the statement lodged by the respondent with the Registrar of the High Court on 20 October 2003.

[21] Eventually, to obtain repayment of the R70 917 268,45 paid by J bank from the second appellant's bank account the second appellant launched an application in the Pretoria High Court to review and set aside the decisions (or the failure to take decisions) by the Commissioner to permit a refund. The application was heard on 2 September 2005 and judgment handed down on 6 September 2005. The application was partially successful. The court ordered SARS to repay to the second appellant the additional tax of R37 824 201,84 within 10 days of the order. SARS complied with this order. Subsequently, as already mentioned, SARS informed the second

appellant that it would repay the rest of the amount. SARS' view was that it would not be necessary for the appeal to proceed.

[22] First appellant's costs of postponement

The first appellant requests the court to grant it the costs of the postponement of the appeal including the costs consequent upon the employment of three counsel. It seeks the costs of three counsel because, it says, the amount in issue is large, the matter is complex and the documents involved run to several thousands of pages and it was essential that the first appellant have sufficient manpower to deal with the matter in the limited time available. Accordingly, so it is contended, it was reasonable and necessary for the first appellant to engage two junior counsel to assist senior counsel.

[23] The respondent disputes that the first appellant is entitled to a costs order. The respondent contends that the underlying cause for the postponement is that the parties tried to achieve the impossible by having the matter ripe for hearing in too short a period of time. The respondent also denies that three counsel are necessary. While the documents are voluminous these are documents emanating from the first appellant which the first appellant was required to keep in terms of the general export incentive scheme. The respondent points out that the factual issue arising from the documents is a simple one based on the respondent's contention that, the documents submitted by the first

appellant to show that the goods had been exported, are forgeries. The basis of this contention is that the documents bear stamps of border officials which do not appear to be genuine. The other grounds for the respondent's belief are also straightforward.

[24] It is common cause that in July 2005 the appellants were attempting to expedite the hearing of the appeals when hearing dates became available. At first, four days from 10 October 2005 to 13 October 2005 became available and then an additional two days, from 6 October 2005 to 7 October 2005. The parties agreed that the appeals would be heard during this period and shortened the periods for the filing of documents. From the outset it was clear that the forensic expert, Mr D, would be an essential witness for the respondent. It is also clear that in July 2005 the respondent failed to ascertain that Mr D would be available for the hearing in October and only became aware at a much later stage that he would be available only on 7 October 2005. When the respondent realised that Mr D's evidence would not be concluded on that day the respondent requested that the matter be postponed.

[25] Section 83(17)(d) clearly and unambiguously provides that where the hearing of the appeal is postponed at the request of one of the parties the tax court, may, on application by the aggrieved party, grant an order for costs in favour of that aggrieved party. As already mentioned it is not necessary for the aggrieved party to demonstrate that the other party acted unreasonably in causing the postponement.

[26] In this case the fault lies with the respondent. The respondent should have made sure that all the necessary witnesses were available before agreeing to set the matter down for hearing. The same approach that would apply in the High Court should apply here. The party who caused the postponement must bear the wasted costs occasioned by the postponement.

[27] The next issue is whether these costs should include the costs consequent upon the employment of three counsel. In ***Fisheries Development Corporation of SA Limited v Jorgensen and another: Fisheries Development Corporation of SA Limited v AWJ Investments (Pty) Ltd and others*** **1980 (4) SA 156 (WLD)** at 172C-H the court considered the various formulations of the rule relating to the costs of three counsel and concluded -

> 'It seems to me that these various criteria amount to the same thing, namely that, to justify the fees of a third counsel, the case must be one in which, by reason of exceptional or extraordinary difficulty, complexity, heavy documentation or multiplicity of issues, it would be reasonable to employ a third counsel, and it would be fair for the purpose of doing justice between both or all of the parties to allow third counsel'.

There is no objection to the costs of two. The court agrees with the respondent that the issues are not complex even if the papers are bulky. Two counsel are adequate for such a case and only the costs of two counsel will be allowed.

[28] Second appellant's costs of appeal

The second appellant requests the court to grant it the costs of the whole appeal on the scale as between attorney and client including the costs consequent upon the employment of three counsel. The second appellant seeks the costs of the appeal because the respondent conceded the appeal after the date of hearing had been allocated by the Registrar. This is clearly provided for in section 83(17)(e). In the application the second appellant seeks costs on the scale as between attorney and client because of the conduct of the respondent's representatives who had no legal basis for obtaining payment of the first appellant's assessment from the second appellant. The second appellant contends that when the respondent's representatives realised that they had acted unlawfully they attempted, wrongly, to justify their conduct by relying on the provisions of section 73 of the VAT Act. The second appellant further contends that the respondent's representatives wrongly persisted in this purported justification for a period of about two years, through negotiations with the second appellant's legal representatives, two applications in the High Court and a petition for leave to appeal to the Supreme Court of Appeal and that when they realised that their unlawful conduct would be scrutinised in the appeal they conceded it. Implied in the second appellant's contentions is that the respondent's representatives abused the respondent's powers in terms of the VAT Act. The respondent denies these allegations. His deponent, K, an investigator in the Central

Enforcement Unit, alleges that before the service of the section 47 notice on J Bank on 22 October 2003 the officials concerned in the investigation of the first appellant's VAT affairs decided that there was a scheme covered by section 73 of the VAT Act and that they would use the powers in terms of section 73 to impose liability on the second appellant. At that stage they thought there were two separate companies but K states that after serving the assessment on the first appellant (which did not exist) he approached the second appellant's bankers and attached the funds of the second appellant pursuant to the provisions of section 73 read with section 47 of the VAT Act. At that stage K did not know that the first appellant had been deregistered but he says 'the decision to seize the money was taken as a result of the Commissioner exercising his discretion in terms of section 73 of the Act. This entails that the Commissioner treat the two companies as one and for that reason it was not deemed necessary to serve an assessment on the second appellant'. K also alleges that Ponnan J approved of the respondent's use of section 73 in order to obtain payment from the second appellant. The second appellant seeks the costs consequent upon the employment of three counsel.

[29] In view of the respondent's late concession of the appeal the second appellant is clearly entitled to the costs of the appeal. The question is on what scale and whether the costs should include the costs of three counsel.

[30] As already pointed out there is a dispute as to the basis upon which the respondent sought payment of the first appellant's assessment from the second appellant. The second appellant contends that the respondent's reliance on section 73 was an afterthought and was used to justify what the respondent's representatives knew to be an unlawful action. The respondent contends that section 73 was applicable and that the respondent properly exercised its discretion in terms of the section and knowingly sought payment from the second appellant as it was entitled to do in terms of section 73 read with section 47. It is not possible nor is it necessary to resolve this dispute on the affidavits. For present purposes the respondent's version will be accepted.

[31] The respondent contends that his representatives exercised the discretion in terms of section 73 before the assessment was issued – although his witnesses contradict each other on that point. Nevertheless, it is clear from the respondent's answering affidavit dated 5 November 2003 (in another case) that the respondent relied on section 73 read with section 47. The affidavit negates the appellants' contention that by 12 November 2003 the respondent had not considered relying on that section to justify its use of section 47 to obtain payment of the assessment. The matter is further complicated by the fact, which is not disputed, that on 24 October 2003, the respondent's representatives and the state attorney, consulted with the respondent's counsel on the applicability of section 73. The respondent's counsel informed the court from the bar that he had

advised the respondent's representatives and the state attorney that section 73 had been applied properly to obtain payment from the second appellant. He did not furnish a written opinion. He gave this advice orally and he did not confirm it in writing. In giving this advice he referred to two judgments: ***Contract Support Services (Pty) Ltd and others v Commissioner, South African Revenue Service and others*** **1999 (3) SA 1133 (WLD) (61 SATC 338)** and ***Industrial Manpower Projects (Pty) Ltd v Receiver of Revenue, Vereeniging and others*** **2001 (2) SA 1026 (WLD) (63 SATC 393).** He relied heavily on the latter judgment because he considered the facts to be very similar to those in the present case: the misuse of corporate entities to avoid paying VAT. The respondent's counsel could not refer to any textbook in which it has been stated that section 73 could be utilised to impose liability on a person apart from the vendor concerned.

[32] Appreciating that it could not be found on the affidavits that the respondent's representatives did not exercise a discretion in terms of section 73 before issuing the assessment on 16 October 2003 and that the respondent's counsel's assurance about the advice he gave must be accepted by the court the appellant changed the thrust of its argument regarding attorney and client costs. The appellant contends that the respondent's persistence in relying on section 73 until just before the hearing was vexatious and justified the grant of costs on the scale as between attorney and client.

[33] Section 73 of the VAT Act reads as follows:

> 'Schemes for obtaining undue tax benefits –
>
> (1) Notwithstanding anything in this Act, whenever the Commissioner is satisfied that any scheme (whether entered into or carried out before or after the commencement of this Act, and including a scheme involving the alienation of property) –
>
> (a) has been entered into and carried out which has the effect of granting a tax benefit to any person; and
>
> (b) having regard to the substance of the scheme –
>
> (i) was entered into or carried out by means or in a manner which would not normally be employed for *bona fide* business purposes, other than the obtaining of a tax benefit; or
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> (ii) has created rights or obligations which would not normally be created between persons dealing at arm's length; and
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> (c) was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit,
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> the Commissioner shall determine the liability for any tax imposed by this Act, and the amount thereof, as if the scheme had not been entered into or carried out, or in such manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such tax benefit.
>
> (2) For the purposes of this section –
>
> **"scheme"** includes any transaction, operation, scheme or understanding (whether enforceable or not), including all

steps and transactions by which it is carried into effect;

"tax benefit" includes –

(a) any reduction in the liability of any person to pay tax; or

(b) any increase in the entitlement of any vendor to a refund of tax; or

(c) any reduction in the consideration payable by any person in respect of any supply of goods or services; or

(d) any other avoidance or postponement of liability for the payment of any tax, duty or levy imposed by this Act or by any other law administered by the Commissioner.

(3) Any decision of the Commissioner under this section shall be subject to objection and appeal, and whenever in proceedings relating thereto it is proved that the scheme concerned does or would result in a tax benefit, it shall be presumed, until the contrary is proved that such scheme was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit.'

[34] In ***Amor van Zyl Trust v Kommissaris van Binnelandse Inkomste* 1995 (4) SA 1007 (T) (58 SATC 77)** the court considered this section in conjunction with section 103 of the IT Act which is similar but not identical. The court found that section 73 is not a tax-levying provision. This was accepted by the Special Court in **ITC 1686: 62 SATC 433.** The **Deloite & Touche *VAT Handbook*** 6 ed (which was available in June 2003) comments in para 16.5 that section 73 is a general anti-

avoidance provision like section 103 of the IT Act. It enables SARS to ignore certain transactions entered into to avoid or reduce tax. The Commissioner is given the power to assess the vendor 'as if the scheme had not been entered into or carried out, or in such manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such tax benefit'. In short, the Commissioner has the power to ignore the scheme in determining the vendor's liability for tax. The courts in ***Contract Support Services v Commissioner South African Revenue Service supra*** and ***Industrial Manpower Projects (Pty) Ltd v Receiver of Revenue, Vereeniging and others supra*** did not find that section 73 is a tax-levying provision or that it could be used to impose a tax on another party involved in the scheme. The courts were not called upon to consider the issue and neither judgment refers to the ***Amor van Zyl Trust*** judgment. The respondent's counsel could not refer to any case in which it has been held that the judgment in the ***Amor van Zyl Trust v Kommissaris van Binnelandse Inkomste*** case was wrong or any textbook in which this is suggested.

[35] This was the legal position when the respondent's representatives purported to exercise a discretion in terms of section 73. Even if the respondent's representatives considered that the Commissioner was entitled to use the section as a tax-levying provision before 22 October 2003 by 27 October 2003 they knew that the second appellant disputed the lawfulness of this conduct. This was pointed out by the appellants'

attorney immediately after payment was effected by J Bank. It was also canvassed extensively in the application brought in November 2003 and was the subject of discussions with the respondent's representatives thereafter.

[36] The respondent's explanation for conceding the appeal is now alleged to be that the respondent's Tax Appeal Committee is concerned about the procedure followed in obtaining payment from the second appellant. The respondent's principal deponent, K, was not present at the meeting where this was allegedly decided. When the appellants gave notice of their intention to strike out K's evidence on this point as hearsay, the respondent filed a supplementary affidavit by L, the chairperson of the respondent's Tax Appeal Committee. L confirms that on 15 September 2005 the committee decided to concede the appeal after consulting the General Manager: Law Administration. However he does not provide an explanation for the respondent deciding to concede the appeal. He does not even confirm K's evidence that the committee was concerned about the procedure followed in obtaining payment. In these circumstances, where the basis for the second appellant's request for costs on the scale as between attorney and client is the respondent's persistence in relying on the correct application of section 73 as a levying provision in respect of the second appellant, the most plausible inference is that the respondent decided that its reliance on section 73 is misplaced. It is inconceivable that having received payment in terms of a valid exercise

of the Commissioner's discretion in terms of the section, as alleged by the respondent's representatives, that the respondent would concede the appeal. In this regard it must be pointed out that in his judgment (in another case) Ponnan J did not place his judicial seal of approval on the respondent's use of section 73. This was not an issue in the case. Ponnan J simply stated that there was no review to set aside the various decisions taken by SARS preceding the issue of the section 47 notice.

[37] The second appellant relies on the following statement in ***In re Alluvial Creek Limited*** **1929 CPD 532** at 535 –

> 'An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.'

This statement was approved by the Appellate Division in ***Johannesburg City Council v Television and Electrical Distributors (Pty) Ltd and another*** **1997 (1) SA 157 (AD)** at 177D-F subject to the rider -

> 'Naturally one must guard against censuring a party by way of a special costs order when with the benefit of hindsight a course of action taken by a litigant turns out to have been a lost cause.'

Whatever the view of the facts taken by the respondent's representatives when they decided to use the provisions of section 73 to impose liability on the second appellant – they clearly thought that the corporate identities of the first and second appellants were being abused to avoid payment of VAT – by the time the papers had been filed in the application they knew that this was not the case. The respondent was in possession of the written agreement between the first appellant and the second appellant (then called M Investments (Pty) Ltd)) in terms of which the first appellant sold its business as a going concern to the second appellant for a purchase price of R500 million. The respondent knew that the second appellant had been used to acquire the first appellant's business at the insistence of a merchant bank which was representing a number of reputable foreign and local investors that wished to invest in the business. The respondent also knew that the acquisition of the business by a company whose shares were held by a number of different parties is in keeping with the business practice of a private equity investor. There were therefore good commercial reasons for the transfer of the business conducted by the first appellant to the second appellant which had nothing to do with a scheme in terms of section 73. The failure of the respondent's representatives to recognise this fact and repay the R70 million to the second appellant has not been explained. This failure to correct the position was vexatious in the way described in the

cases referred to and justifies an award of costs on the scale as between attorney and client.

[38] As to the costs of three counsel, the second appellant has not satisfied the test in the ***Fisheries Development Corporation*** case. The matter is put beyond doubt by the appellants' attorney's letter of 15 August 2005 in which he informed the respondent that the second appellant had briefed two counsel to conduct its appeal.

[39] Costs of the application for costs

The appellants are entitled to the costs of preparing the substantive application for an order of costs. These costs are recoverable in terms of section 83(17)(d) and (e). They are also entitled to these costs on the scale as between attorney and client. The respondent's refusal to tender the costs was in all the circumstances of the case vexatious. The appellants are not entitled to the costs of counsel other than those included in the other orders.

[40] Power of the Tax Court to decide a limited issue

Section 33(1) of the VAT Act provides that, subject to the provisions of section 33A (which is not relevant for present purposes) an appeal against any decision or assessment of the Commissioner under the VAT Act lies to the Tax Court constituted in terms of section 83 of the

IT Act. Section 33(4) of the VAT Act provides that the provisions of section 83(8), (11), (12), (14), (17), (18) and (19), 84, 85, 107A and 107B of the IT Act and any regulations under that Act relating to any appeal to the Tax Court shall *mutatis mutandis* apply to any appeal under section 33 of the VAT Act. Section 83(1) of the IT Act provides that any person entitled to object to an assessment may appeal against such assessment to the Tax Court established in terms of the provisions of the section in the manner and under the terms and within the period prescribed by the Act and the rules promulgated in terms of section 107A. Section 107A empowers the Minister of Finance to promulgate rules prescribing *inter alia* the procedures to be observed in the conduct and hearing of an appeal before the tax court. The Minister promulgated the rules in Government Notice 467 in Government Gazette 24639 with effect from 1 April 2003.

[41] Rule 20(1) provides –

> 'Save as is otherwise provided in these rules, the rules issued in terms of section 43 of the Supreme Court Act, 1959 (Act No 59 of 1959) shall apply in respect of the general practice and procedure of the Court insofar as such rules are applicable'.

The Uniform Rules of Court were made in terms of paragraph (a) of subsection (2) of section 43 of the Supreme Court Act 59 of 1959. Although paragraph (a) of subsection (2) of section 43 of Act 59 of 1959 was deleted by section 11(a) of the Rules Board for Courts of Law Act 107 of 1985 the Uniform Rules remain in force.

Rule 33(4) of the Uniform Rules provides –

> 'If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.'

There is no reason why this rule should not apply to proceedings in the tax court. None was suggested in argument.

[42] In terms of section 83(18) of the IT Act a decision by the tax court in terms of this rule is final, although subject to appeal in accordance with section 86A. (Section 86A provides that the appellant or the Commissioner may, in the manner provided, appeal under the section against any decision of the tax court). Furthermore, section 165(5) of the Constitution provides that an order or decision issued by a court binds all persons to whom and organs of state to which it applies. Accordingly a decision of the tax court in terms of Rule 33(4) is final and binding on the parties. It will therefore be convenient to decide the jurisdictional issue raised by the parties.

[43] <u>Jurisdiction of the tax court to decide whether statutory provisions are inconsistent with the Constitution and invalid.</u>

In this context, jurisdiction means the power vested in the court by law to adjudicate, determine and dispose of a matter – see ***Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board*** **1950 (2) SA 420 (A)** at 424; ***Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd*** **1987 (4) SA 883 (A)** at 806D-F; ***Spendiff NO v Kolektor (Pty) Ltd*** **1992 (2) SA 537 (A)** at 551C and ***Ewing McDonald & Co Limited v M & M Products Co*** **1991 (1) SA 252 (A)** at 256G-H. Neither the IT Act nor the VAT Act confers jurisdiction on the tax court to adjudicate or determine the constitutional validity of an Act of Parliament. The parties are in agreement that any such power must be derived from the Constitution.

[44] (1) Section 166 of the Constitution establishes the judicial system. The courts are -

> '(a) the Constitutional Court;
>
> (b) the Supreme Court of Appeal;
>
> (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
>
> (d) the Magistrates' Courts; and
>
> (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.'

(2) Section 169 of the Constitution provides –

‘A High Court may decide –

(a) any constitutional matter except a matter that –

(i) only the Constitutional Court may decide; or

(ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and

(b) any other matter not assigned to another court by an Act of Parliament.’

(3) The relevant part of section 172 of the Constitution provides –

‘(2)(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court’.

[45] The question to be decided is, therefore, whether the tax court constituted by section 83 of the IT Act is a court of similar status to a High Court. If so, the tax court may make an order concerning the constitutional validity of an Act of Parliament.

[46] The first appellant emphasises that the tax court always consists of a judge or an acting judge of the High Court who is President of the court and decides all questions of law and questions as to whether a matter for decision involves a matter of fact or a matter of law and that in certain circumstances the court consists of three judges or acting judges. The first appellant also relies on certain *indicia* which, it

contends, show that the tax court has a status similar to that of the High Court. These *indicia* include the High Court Rules which apply in respect of the general practice and procedure of the court insofar as such rules are applicable; the power of the court to make costs orders which costs shall be determined in accordance with the fees prescribed by the rules of the High Court; the tax court is a court of record; judgments or decisions of the tax court may be published; appeals from the tax court lie to the Full Court of the Provincial Division having jurisdiction and, with the consent of the President, directly to the Supreme Court of Appeal just as appeals from a single judge of the High Court do. On the other hand the respondent emphasises that the tax court is a creature of statute, that its powers are to be found within the four corners of the act and that the limited powers of the tax court are not comparable with those of the High Court. The respondent relies on the judgment in **ITC 1687: 62 SATC 474** where the court said at 477B-D:

> 'It is trite that this court is a "creature of statute" – ***Commissioner for Inland Revenue v GT Taylor*** **1934 AD 387** at 390. It is not a court of appeal in the ordinary sense, but a court of revision with powers to investigate the matter before it and to hear evidence thereon – see ***Bailey v Commissioner for Inland Revenue*** **1933 AD 204** at 220, ***Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue*** **1944 AD 142** at 150 and **ITC 743: 18 SATC 294.** Notwithstanding the Special Court consisting of a judge of the High Court, an accountant and a representative of the commercial community, it has no inherent jurisdiction such as is possessed by the High Court and can claim no authority which is not laid down in the Income Tax Act under which it is constituted. It is what may referred to as an "inferior or lower court" – see ***Meyerowitz on Income Tax*** **(1997-1998)** para 34.17.'

Accordingly, the court found that the Special Court has no power to decide whether an Act of Parliament is inconsistent with the Constitution.

[47] Whereas ***LAWSA*** 2 ed Vol 5 para 122 classifies the tax court (previously the Special Court) as a Superior Court the recognised income tax textbooks conclude that it is an inferior or lower court – see ***Meyerowitz on Income Tax* 2004-2005** para 34.20: ***Silke on South African Income Tax*** Vol 3 para 18-62-6. In ***Commissioner for Inland Revenue v City Deep Limited* 1924 AD 298** at 306 the court said that the Commissioner of Revenue 'is not bound by the reasoning of the Special Court, which, though a competent court to decide the issues between the parties is not a court of law'. And in ***Bailey v Commissioner for Inland Revenue* 1933 AD 204** at 220 **(6 SATC 69** at **76)** the court said that 'a Special Court under the Income Tax Act is not a court of appeal in the ordinary sense: it is a court of revision with power to investigate the matter before it and to hear evidence thereon'. See also ***Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue supra*** at 150 and **ITC 1351: 44 SATC 58** at 62.

[48] It is clear that the first enquiry must be whether the tax court was established or recognised by an Act of Parliament as a court of a status similar to the High Court as contemplated by section 166(e) of the Constitution. In the unreported judgment of ***Khomisenore Petrus Tsoaeli and others v The Minister of Defence and others*** (TPD

Case number 27513/2000 delivered June 2005) the Full Court held that it is not the composition of a court or the identity of the presiding officer that determines the status of a court. The status is determined by the Constitution which, in section 166(e), provides for Acts of Parliament to establish or recognise courts of a status similar to the High Courts. The Full Court held that the Court of Military Appeals established in terms of the Military Discipline Supplementary Measures Act 16 of 1999 does not have a status similar to the High Court because neither the Act nor any other Act of Parliament provides that it has such status. The same approach was followed in ***Fredericks and others v MEC for Education and Training, Eastern Cape*** **2003 (2) SA 693 (CC)** where the Constitutional Court held that the Labour Court constituted under the Labour Relations Act 66 of 1995 is a court of a status similar to a High Court. In reaching this (apparently self-evident) conclusion the Constitutional Court relied simply on section 151 of the Labour Relations Act which provides –

> '(1) The Labour Court is hereby established as a Court of law and equity;
>
> (2) The Labour Court is a Superior Court that has authority, inherent powers and standing in relation to matters under its jurisdiction, equal to that which a Court of the Provincial Division of the High Court has in relation to matters under its jurisdiction;
>
> (3) The Labour Court is a Court of Record.'

This is obviously a clear case where the Labour Court was established in terms of an Act of Parliament as a court of a status similar to the High Courts.

[49] The provisions of the enabling Act may provide the answer to the question raised in the present case. It may be that, in every case, the status of a court is determined by the provisions of the Act in terms of which it is established. Difficulties arise only when the enabling Act (or some other Act) does not determine the status of the court created in clear and unambiguous terms. The parties clearly accepted that the effect of section 166(e) of the Constitution (which seems to be ambiguous) is that a court may have a status similar to a High Court even if the Act is silent as to its status. Apart from providing that the tax court shall always consist of at least one judge or an acting judge of the High Court, who shall be President, that in some cases the court may consist of three judges or acting judges and that in certain respects the tax court is governed by the High Court rules, the IT Act contains no provisions which clearly and unambiguously indicate the status of the court. The first appellant argued that a court presided over by a judge and consisting of three judges would of necessity have the status of a High Court. To complicate matters the provisions of the Acts which constituted the tax court (previously the Special Court) have undergone changes over the years.

[50] A meaning must be given to each of the key words 'status' and 'similar'. It seems clear that in the context of section 172(2) of the Constitution 'status' connotes the legal standing of the court. That will be determined by a number of factors: who sits in the court; the powers or jurisdiction of the court and the legal effect of the court's orders. The next question is what is meant by the word 'similar'. It has been held that a thing is similar to another, if, without being identical to it, there is a resemblance in some relevant respect – see ***South African Railways and Harbours v Springs Town Council*** **1949 (2) SA 34 (T)** at 47-48: **Claassen** ***Dictionary of Legal Words and Phrases*** Vol 4 p91. In my view the ordinary meaning of 'having a marked resemblance or likeness' is more appropriate. It accords with the object of the section: ie that only courts at the level of at least the High Court may make orders concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President.

[51] When the judgments in ***CIR v Taylor; Bailey v CIR; Rand Ropes (Pty) Ltd v CIR*** and **ITC 743** were handed down the Special Court was constituted in terms of section 58 of the Income Tax Act, 40 of 1925 and section 79 of the Income Tax Act, 31 of 1941 which provided that the Special Court shall consist of an advocate of one of the provincial divisions of the Supreme Court, of not less than 10 years standing, who shall be the president of the court, and an accountant of not less than 10 years standing, and a representative of the commercial community and that in all cases relating to the business of mining, such third

member shall, if the appellant so desires, be a qualified mining engineer. This was substantially the same as the constitution of the Special Court under section 84 of the Income Tax Act, 41 of 1917, the difference being that under Act 41 of 1917 the appellant did not have the choice of having a mining engineer sit as a member of the court. Act 45 of 1949 amended the composition of the Special Court by deleting the reference to the advocate and substituting therefor, a judge of the Supreme Court. At all times the regulations promulgated in terms of the Income Tax Acts provided that save as otherwise provided in the regulations, the general practice and procedure of the Special Court shall be that of a magistrates' court insofar as such practice and procedure are applicable. That was also the position under the IT Act until 2003 when new rules were promulgated under section 107A of the IT Act with effect from 1 April 2003. It will be remembered that Rule 20 provides that, save as is otherwise provided in the rules, the rules issued in terms of section 43 of the Supreme Court Act, 59 of 1959, shall apply in respect of the general practice and procedure of the court insofar as such rules are applicable. The practice and procedure in the magistrates' court no longer applies in the Tax Court.

[52] Section 83(4) of the IT Act provides that subject to subsection (4B) every Tax Court established in terms of the Act shall consist of a judge or an acting judge of the High Court, who shall be the President of the court, an accountant and a representative of the commercial

community who shall be of good standing and who have appropriate experience: provided that –

(a) in all cases relating to the business of mining such third member shall, if the President of the court, the Commissioner or the appellant so desires, be a qualified mining engineer;

(b) where any appeal relates to the valuation of immovable property, or of both movable and immovable property, such third member shall, if the President of the court, the Commissioner or the appellant so desires, be a person appointed by the Commissioner from amongst persons approved by the President of the Republic, and who shall be a person appointed and carrying on business as a sworn appraiser who shall have skills or knowledge relating to the purpose for which the property is utilised.

[53] Section 83(4B) of the Act provides that the Judge President of the Provincial Division of the High Court having jurisdiction in the area where the Tax Court to hear the appeal is situated, may, where –

(a) the amount which is the subject of the dispute exceeds R50 million; or

(b) the Commissioner and the appellant agree thereto and have jointly applied to that Judge President,

direct that the Tax Court hearing that appeal shall consist of three judges or acting judges of the High Court, one of whom shall be the President of the Tax Court, and the others the members of the court, as contemplated in subsection (4). Section 83(4)(c) provides that when an appeal before the court involves a matter of law only or constitutes an application for condonation the court shall consist of the President of the court sitting alone and section 83(4A) provides that any question as to whether a matter for decision involves a matter of fact or a matter of law, as contemplated in subsection (4)(c), shall be decided by the President of the court sitting alone.

[54] Despite these provisions a tax court remains a court of first instance whose function is to review the decision of the Commissioner of SARS appealed against. It does not hear appeals from the Board constituted in terms of section 83A of the IT Act. (Where the appellant or the Commissioner is not satisfied with the decision of the Board the matter may be referred to the tax court for hearing (section 83A(13)(a) and (b)). In either case the appeal is heard *de novo* by the tax court (section 83A(14)). The rules provide comprehensively for an appeal before the tax court. Firstly, it is required that the issues in the appeal be defined. The Commissioner is obliged to deliver to the taxpayer a statement of the grounds of assessment. In this statement the

Commissioner must set out a clear and concise statement of the grounds upon which the taxpayer's objection is disallowed and the material facts and legal grounds upon which the Commissioner relies for such disallowance (Rule 10(1) and (3)). In answer, the taxpayer must deliver to the Commissioner a statement of the grounds of appeal. This statement must contain a clear and concise statement of the grounds upon which the taxpayer appeals; the material facts and legal grounds upon which the taxpayer relies for such appeal and a statement of the facts and legal grounds in the grounds of assessment which are admitted and which are denied (Rule 11(1) and (2)). The issues in the appeal are those defined in the statement of the grounds of assessment read with the statement of the grounds of appeal (Rules 12 and 13). The Rules provide for discovery (Rule 14), the calling of expert witnesses (Rule 15) and the holding of a pre-trial conference (Rule 16). They also provide for a dossier of relevant documents to be prepared and furnished by the Commissioner to the taxpayer and the Registrar (Rule 18). Any procedural matter not dealt with in the rules must be dealt with in accordance with the Uniform Rules of the High Court insofar as such rules are applicable (Rule 20). At the hearing of the appeal the appellant commences the proceedings – unless the Commissioner takes a point *in limine* – and tenders the evidence of his witnesses and relevant documents (Rule 22(1) and (2)). Thereafter the Commissioner tenders the evidence of his witnesses and any relevant documents (Rule 22(3)). At the conclusion of the evidence the parties or their representatives are entitled to address the court (Rule 22(4)).

While the rules require greater precision in the formulation of the issues and disclosure by the respondent of his factual and legal contentions this is substantially the same procedure which has been in force since the tax court was instituted – see **ITC 743: 18 SATC 294** at 296: ***Arepee Industries Limited v Commissioner for Inland Revenue*** **1993 (2) SA 216 (N)** at 222F-H (**55 SATC 139** at 146).

[55] The powers of the tax court are closely related to its function. Section 83(13) provides that subject to the provisions of the Act the court may –

> ‘(a) In the case of any assessment under appeal –
>
> (i) confirm the assessment; or
>
> (ii) order that assessment to be altered; or
>
> (iii) if it thinks fit refer the assessment back to the Commissioner for further investigation and assessment;
>
> (b) in the case of any appeal against the amount of any additional tax imposed by the Commissioner, reduce, confirm or increase the amount of the additional tax so imposed, subject to the maximum amount chargeable in terms of this Act;
>
> (c) in the case of any other decision of the Commissioner which is subject to appeal, confirm or amend such decision; and
>
> (d) hear any interlocutory application and decide on procedural matters as provided for in the rules of the tax court contemplated in section 107A.’

As already mentioned the tax court may also make costs orders in certain circumstances. In addition the court has certain powers relating

to the summoning of witnesses and penalties for non-attendance (section 84) and contempt of court (section 85).

[56] These powers and jurisdiction must be contrasted with those of the High Court which in very brief summary are the following. The High Court sits as a court of first instance and as a court of appeal in both civil and criminal matters. When sitting as a court of first instance the High Court is usually constituted by a single judge, although in civil matters the Judge President or senior judge available may direct that a matter be heard by a full bench consisting of as many judges as he or she may determine. The High Court exercises jurisdiction over all persons within its area and in relation to all causes arising or all offences triable within its area. It hears appeals from single judges and inferior courts and it reviews the proceedings of lower courts and administrative tribunals. It may also, in its discretion, enquire into any existing, future or contingent rights or obligations at the instance of interested persons and issue declaratory orders in respect of such rights or obligations. The High Court has jurisdiction to decide constitutional issues except where jurisdiction is reserved to the Constitutional Court or another court. The High Court has inherent jurisdiction to entertain any claim or give any order it would have been empowered to entertain or give at common law. The High Court is always presided over by a judge or an acting judge.

[57] Finally, unlike a High Court the rules of *stare decisis* do not apply to the decisions of a tax court. Its decisions are not binding on itself or other tax courts. See ***LAWSA*** 2 ed Vol 5 para 163-172.

[58] It is therefore found that there is not a sufficient resemblance or likeness between the tax court and the High Court for the tax court to be a court of similar status to the High Court. The tax court therefore does not have jurisdiction to decide on the constitutionality of an Act of Parliament.

[59] It is recorded that argument on the jurisdictional issues was heard on 7 October 2005 and took up most of the day. Neither party is entitled to the costs of that day.

[60] The following orders are made:

(1) The hearing of the first appellant's appeal is postponed *sine* die.

(2) The respondent is ordered to pay the costs occasioned by the postponement of the first appellant's appeal including the costs consequent upon the employment of two counsel.

(3) The respondent is ordered to pay the costs of the second appellant's appeal on the scale as between attorney and client

including the costs consequent upon the employment of two counsel.

(4) The respondent is ordered to pay the costs of the application for costs on the scale as between attorney and client. No costs of counsel are allowed.

(5) It is found that –

(i) the tax court constituted in terms of section 83 of the Income Tax Act, 58 of 1962, has the power to consider a stipulated issue first and separately from any of the other issues in the appeal;

(ii) the tax court constituted in terms of section 83 of the Income Tax Act, 58 of 1962, is not a court of similar status to the High Court and accordingly may not make an order concerning the constitutional validity of an Act of Parliament including an order that an Act of Parliament or any part thereof is invalid.

_____

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT