REPORTABLE

IN THE INCOME TAX SPECIAL COURT

HELD AT JOHANNESBURG

CASE NO: 11423

BEFORE THE HONOURABLE
MR JUSTICE P BORUCHOWITZ PRESIDENT

W B CRONJE ACCOUNTANT MEMBER

G NEGOTA COMMERCIAL MEMBER

In the appeal of:

Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

(HEARD AT JOHANNESBURG 3 JUNE 2005)

JUDGMENT

Date 8 December 2005

BORUCHOWITZ, J

[1] The question which is raised by the special case agreed by the parties is whether section 12C of the Income Tax Act 58 of 1962 (the Act) allows the deductions with regard to the plant in question owned by the appellant.

[2] The agreed facts can be summarised as follows: During the period 1996 to 1997 the appellant's holding company A (Pty) Ltd (A) commenced the construction on its

property of certain plant. In September 1996 B was established with the object of acquiring and leasing out the plant. On 30 September 1996 A sold the plant (then in an advanced stage of construction) to B and with effect from 1 January 1997 B let the plant to A. The plant was brought into use in terms of the lease for the first time by A in January 1997 and was used by A as lessee under the lease for the purposes of A's trade directly in a process of manufacture carried on by A. B was entitled to and was granted the allowances provided for in section 12C(1)(b) for the tax years 1997 to 2001. Before the expiry of the lease by the effluxion of time, which would have taken place in December 2003, B cancelled the lease and sold the plant to the appellant. The appellant in turn leased the plant to A under a new lease. The expiry date of the new lease is 31 August 2006. A then used the plant for the manufacturing process for which it had previously been used; this use was in terms of the new lease. There was no interruption in the use by A between the termination of the old lease and the commencement of the new lease.

[3] The appellant was originally assessed in respect of the 2001 year of assessment on the basis that the appellant was entitled to an allowance of R40 178 720,00 in terms of section 12C(1)(b), being twenty per cent of the original cost of the plant to B. The cost to the appellant was the amount paid to B namely R306 million which was the amount of the valuation which was the market value of the plant at the commencement of the lease to A. The revised assessment and the subsequent assessments for the years 2002 and 2003 proceed on the basis that the appellant is not entitled to the allowance. An objection to those assessments has been disallowed.

[4] The provisions of section 12C(1) which are relevant read as follows:

"In respect of any –

(b) plant which was or is let by any taxpayer and was or is brought into use for the first time by the lessee for the purpose of the lessee's trade and is used by the lessee directly in a process of manufacture carried on by him.

A deduction equal to 20 percent of the cost of such plant shall subject to the provisions of subsection (4) be allowed in the year of assessment during which the asset is so brought into use and in each of the four succeeding years of assessment."

[5] The question involves an interpretation of section 12C and more particularly of the words "*brought into use for the first time by the lessee for the purposes of the lessee's trade …"* which occur in section 12C(1)(b).

[6] The Commissioner's view is that as there was no interruption in the use by A between the termination of the old lease and the commencement of the new lease the plant cannot be regarded as having been brought into use for the first time by the lessee as envisaged in the section.

[7] For the appellant it was argued that the wording of section 12C is not designed to limit or exclude the allowance where a person sells plant and machinery which is subject to a lease to another, subject to the lease remaining in place. The relevant wording suggests that there should be a link between the leasing of the asset and the bringing into use thereof and that the taxpayer (lessor) qualifies for the allowance once the lessee brings the plant into use for the first time under the lease in question.

[8] The appellant sought to derive support for its contention from the wording of section 12C(3)(a), which provides:

(3) No deduction shall be allowed under this section in respect of-

> *(a) any asset which has been let by the taxpayer under a lease other than an operating lease as defined in section 23A(1), unless the lessee under such lease derives in the carrying on of his trade amounts constituting income for the purposes of this Act;"*

[9] It was submitted that the reference therein to an operating lease was significant. By definition an operating lease was a lease for a period of less than one month and a lessee might conceivably enter into successive operating leases with different lessors in respect of the same equipment.[1] It was inconceivable that what was intended was that the first use by such a lessee should disqualify lessors under the further operating leases from obtaining the deduction.

[10] The words "*let by taxpayer under a lease"* which occur in section 12C(3)(a) were also said to be significant. What is comprehended by such wording is the letting under a specific lease and that that is the lease that had to be looked at for the purpose of the deduction. It was submitted that a consideration of this wording alone led to or, at the very lowest, supported the conclusion that the use referred to is a use by the lessee under the lease in question, the lessor being the taxpayer to whom the allowance is made.

[11] For the appellant it was also argued that the interpretation contended for leads to sensible results. By way of illustration the following two examples were advanced: (1) If A leases to B and by virtue of B's use is entitled to a deduction of 20% per year for 5 year and the lease then terminates and a new lease is entered into with C, A will get no deduction because the deductions would then exceed the cost and so be prohibited by section 12C(5). (2) If A lets to B for 3 years and gets 60% of the costs as a deduction and then enters into a new lease with C the sensible conclusion would appear to be that the

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[1] Section 23A defines an operating lease as follows:

"'operating lease' means a lease of movable property concluded by a lessor in the ordinary course of a business (not being a business of a banker or financier) of letting such property, if-

(a) such property may be hired by members of the general public directly from that lessor in terms of such a lease, for a period of less than one month; "

legislature intended that A would be allowed the balance of 40% as a deduction. This could be done only if the plant is regarded as having been *"so brought into use"* by C. Section 12C(5) would still prohibit a deduction of more than the balance of 40%.

[12] In our view exaggerated importance is placed by the appellant on the need to give section 12C(1)(b) a contextual and businesslike interpretation. These considerations must yield to the plain and unambiguous language employed in the section.[2] Where, as in the present case, the language is plain effect must be given thereto even if the result to the taxpayer is harsh, unfair or unbusinesslike. The rules for interpretation are conveniently summarised and restated by Scott JA in *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) at 107B-G:

> *"The starting point in statutory interpretation remains an endeavour to ascertain the intention of the Legislature from the words used in the enactment. Those words must be attributed their ordinary, literal, grammatical meaning. Before a court may do otherwise, whether by cutting down or adding to or varying the actual language of the statute, it must be shown that the case falls within what has been described as the rule in R v Venter 1907 TS 910. That is, that a court may depart from the ordinary literal meaning of the words used only where not to do so*
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> > *'would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account'*.
>
> *(Per Innes CJ at 915.) The rule has been consistently applied over the years. (For two more recent examples, see S v Tieties 1990 (2) SA 461 (A); Bras v Randburg Stadsraad 1992 (3) SA 371 (A).) The Courts have, however, repeatedly stressed the dangers of speculating as to the intention of the Legislature and the need for caution when departing from the literal meaning of the words of a statute. As observed by De Villiers JA in Shenker v The Master and Another 1936 AD 136 at 143, '(t)he absurdity must be utterly glaring and the intention of the Legislature must be clear, and not a mere matter of surmise or probability'. (See also Savage v Commissioner for Inland Revenue 1951 (4) SA 400 (A) at 409A; Summit Industrial Corporation v Claimants against the Fund Comprising the Proceeds of the Sale of the MV Jade Transporter 1987 (2) SA 583 (A) at 596J-597B.) In Bhyat v*

[2] The clearer the language the more it dominates over context. See Jaga v Dönges, NO and Another 1950 (4) SA 653 at 664E-F.

> *Commissioner for Immigration 1932 AD 125 at 129 this Court cited with approval the dictum of Lord Bramwell in Cowper Essex v Local Board for Acton (1889) 14 AC 153 at 169: '(T)he words of a statute never should in interpretation be added to or subtracted from, without almost a necessity.' (See also Land- en Landboubank van Suid-Afrika v Rousseau NO 1993 (1) SA 513 (A) at 518H-J.)"*

[13] In section 12C(1)(b) a distinction is drawn between the letting of the qualifying assets by the taxpayer and the use thereof by the lessee. These are discreet and conceptually different elements. The bringing into use of an asset is an act of a physical nature whereas letting or hiring is a jural or non-physical act. Only the user (in this instance the lessee) can bring the machinery or plant into use for the first time for the purposes of its trade and this is a factual question.[3]

[14] The juxtaposition of the phrase *"for the first time"* between the words *"brought into use"* and *"by the lessee…"* is indicative that the phrase was intended to qualify the lessee's use and not the letting thereof by the taxpayer. If the legislature had meant first brought into use in terms of a particular lease or under the lease in question it would have said so and the phrase would have been differently placed. The section might then have read *"machinery or plant … which was or is let for the first time by any taxpayer and brought into use by the lessee for the purposes of the lessee's trade …".*

[15] The following passage that appears in Silke on *South African Income Tax*, par 8.39 *"Depreciation"* (electronic version) (and with which we are in agreement) aptly summarises the position:

> *"The '20/20/20/20/20' rate applies to both new and used assets, but the allowance is available only if the asset is brought into use for the first time by the taxpayer (or his lessee, where applicable). This requirement prevents a taxpayer form claiming that the allowance is available for a further five, four or three years on an asset that*

[3] Section 12C(4) referred to in section C(1) makes it clear that the phrase *"for the first time"* does not mean that the asset has never been used previously in the manner contemplated by subsection (1).

was previously brought into use by him (or his lessee), is retired from use and is then brought into use again."

[16] For these reasons we are of the view that the interpretation contended for by the Commissioner is correct and that section 12C does not allow the deductions with regard to the plant in question owned by the appellant.

[17] We accordingly make the following order:

The appeal is dismissed and the revised assessments are confirmed.

ON BEHALF OF W B CRONJE (ACCOUNTANT MEMBER)
ON BEHALF OF G NEGOTA (COMMERCIAL MEMBER)

P BORUCHOWITZ - PRESIDENT