REPORTABLE

IN THE DURBAN TAX COURT

CASE NO: 11623

In the matter between:

Appellant

And

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

Judgment Delivered on 06 June 2007

LEVINSOHN DJP:

For ease of reference I shall refer to the appellant as the “taxpayer” and the respondent as the “Commissioner”.

Section 11(e) of the Income Tax Act, No 58 of 1962 ("the Act") provides as follows: -

"For the purposes of determining the taxable income derived by any other person from carrying on any other trade there shall be allowed as deductions from the income of such person so derived

(a) .....

(b) .....

(bA) .....

(bB).....

(bC) .....

(c) .....

(d) .....

(e) save as provided in paragraph 12(2) of the First Schedule, such sum as the Commissioner may think just and reasonable as representing the amount by which the value of any machinery, plant, implements, utensils and articles (other than machinery, plant, implements, utensils and articles in respect of which a deduction may be granted in terms of 12B, 12C or 12E) owned by the taxpayer or acquired by the taxpayer as purchaser in terms of an agreement contemplated in paragraph (a) of the definition of "instalment

credit agreement" in section 1 of the Value-Added Tax Act, 1991 (Act No 89 of 1991), and used by the taxpayer for the purposes of his or her trade has been diminished by reason of wear and tear or depreciation during the year of assessment : Provided that –

.....

(ii) in no case shall any allowances be made for the depreciation of buildings or other structures or works of a permanent nature;"

The taxpayer in its returns for the tax years 1998, 1999 and 2000 respectively claimed that it was entitled to wear and tear or depreciation allowances in respect of certain assets owned by it during the years of assessment. The Commissioner disallowed these claims contending that the assets in question were buildings or other structures or works of a permanent nature within the meaning of section 11(e)(ii) above. Accordingly the Commissioner disallowed the deductions claimed.

The taxpayer objected to these assessments and now comes on appeal before this Court.

The assets in question consist of storage tanks, pipelines, pipe racks and pumps, valves and pressure gauges (hereafter referred to as the "relevant assets"). The storage tanks are situated at Durban as well as at Isando in Gauteng. Pipelines which lead to the tanks have been laid on the premises and on the shipping berth.

In support of the appeal the taxpayer called three witnesses. The Commissioner did not adduce any evidence.

The main business of the taxpayer is the receiving and distributing of bulk liquids for import and export. Where a product is imported this is pumped from vessels berthed at the port into a specific tank designated for the particular type of liquid. Where the product in question is destined for export the system is simply reversed. Insofar as the pipe racks are concerned these are merely a support to hold the pipes above the ground and to ensure their stability. The pipe racks on the quayside are not owned by the taxpayer. It is only those which are situate on the sites occupied by the taxpayer which are owned by it.

The cardinal issue in this case is whether it can be said that the relevant assets are to be categorised as **"buildings or other structures or works of a permanent nature".** The Act does not define the phrase of a **"permanent nature".** This Court is called upon to interpret the subsection. It will be seen that section 11(e) permits the deduction of wear and tear allowances particularly in respect of machinery which is used by the taxpayer for purposes of trade. Subsection (ii) however specifically disqualifies the taxpayer from claiming such an allowance in respect of buildings or other structures or works of a permanent nature. We find a clue to the legislature's intention by its use of the word **"buildings"**. The words that follow are ***eiusdem generic***. In its ordinary meaning **"buildings"** connote a structure which has been constructed on a plot of land. It is regarded as immovable having acceded to the land. It was contemplated that this type of permanent structure would not qualify for depreciation allowances. It seems to us that **"the other structures or works"** in order to be described as being of a permanent nature must we think have acquired the quality of immovable property as that term is understood. In our opinion therefore both the taxpayer and the Commissioner have

correctly referred to decided cases where issues of whether a piece of property could be regarded as movable or immovable have come to the fore. In most of these cases the main focus was on the issue of permanence or otherwise.

In ***Macdonald Ltd, v Radin, NO & The Potchefstroon Dairies & Industries Co Ltd*** 1915 AD 454 at 466 **Innes CJ** set forth the principle very clearly and succinctly: -

"The question of whether an article, originally movable, has become immovable through annexation by human agency to realty is often one of some nicety. As was pointed out in Olivier v Haarhof (T.S., 1906 p. 497) each case must depend on its own facts; but the elements to be considered are the nature of the particular article, the degree and the manner of its annexation, and the intention of the person annexing it. The thing must be in its nature capable of acceding to realty, there must be some effective attachment (whether by mere weight or by physical connection) and there must be an intention that it should remain permanently attached. The importance of the first two factors is self-evidence

from the very nature of the inquiry. **But the importance of intention is for practical purposes greater still; for in many instances it is the determining element.** Yet is sometimes settled by the mere nature of the annexation. The article may be actually incorporated in the realty, or the attached in the realty, or the attachment may be so secure that separation would involve substantial injury either to the immovable or its accessory. In such cases the intention as to permanency would be beyond dispute. But controversy generally arises where the separate identity of the article annexed is preserved, and when detachment can be effected with more or less ease" (My emphasis).

Macdonald's case was referred to by Van Winsen AJA in ***Standard Vacuum Refining Cc v Durban City Council*** 1961 (2) SA 669 at 667 where the learned Judge of Appeal said the following: -

"I think Mr. Shaw is correct in his submission that of these elements, that of intention is the most important.

Indeed as I understand the above quoted authorities it would appear that in each case the object of the

enquiry is to ascertain whether the movable has been attached to the land or other immovable with the intention that **it should remain permanently attached thereto.** In order to ascertain whether such is the intention regard must be had to the nature of the movable, the method and degree of its attachment to the land or other immovable and whether it can be readily removed without any injury to itself or to the land or immovable to which it is attached."

(My emphasis).

Again in **Theatre Investments v Butcher Brothers Ltd** 1978 (3) SA 682 AD 688 the same learned Judge of Appeal re-stated the principles and added the following -

"Evidence as to the annexor's intention can be sought from numerous sources, *inter alia*, the annexor's own evidence as his intention, the nature of the movable and of the immovable, the manner of annexation and the cause for and circumstances giving rise to such annexation. The *ipse dixit* of the annexor as to his intention is not to be treated as conclusive evidence thereof but, should such evidence have been given, it must be weighted together with the inferences derivable from the other sources of

evidence above-mentioned in order to determine what, in the view of the Court, was in fact the annexor's intention."

See also **Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Transvaal)** 1980 (2) SA 214 (w) at pages 222 – 223.

In essence the evidence adduced by the taxpayer went directly to the issue of the taxpayer's intention.

A was called as an expert witness. He is a consulting engineer by profession with a particular expertise in the design and building of tanks. He also had experience in moving and relocation of tanks. The taxpayer retained his services since the early 1970s. He is able to speak to the nature of the taxpayer's business and its activities. He said that over the years the taxpayer consulted him in regard to the development of various tanks sites and he played an integral part in that process. A emphasised that there is a difference between tanks situate on an oil refinery as opposed to the tanks in question. He said that an oil refinery is, what he termed, an integrated system and as he put it **"everything is one big thing"**.

As far as the taxpayer's tanks are concerned he said that each tank is totally separate. It is divorced from any other tank which is alongside it. The pipelines are totally separate and they are not inter-connected in any way whatsoever. The tank farms on the taxpayer's sites are designed to be adapted easily for the next client to use a tank.

A was asked whether the tank positions are fixed and final. He answered that they were definitely not so. He pointed to instances where several tanks have been relocated or moved and he provided examples with respect to (the Durban site). As far as he was concerned the movement of the taxpayer's tanks was not to be regarded as a major engineering feat. He said it was no problem to move tanks weighing in the region of 28, 30, 40 and 50 tons. He said that these tanks were not much heavier than containers which are moved on a daily basis. In the event that the lease of a relevant site were to come to an end the tank situated thereon and the various item of equipment would be relocated to another site.

A was asked to compare tanks which have the so-called floating roofs as far as movability is concerned. He said the following: -

"**ADV SOLOMON SC:** Now how would you compare the movability of those big tanks with those, which (the Appellant) uses?

(A): I think one must be realistic about this. Even the bigger tanks, like we've mentioned the 390, 391 which is nothing like a big floating roof tank, I don't believe they can be moved. So by the time you get to this diameter with loose fitting roof from the inside, they are completely flexible which means if you try to move them.

The advantage (the Appellant) has is that the tanks are extremely small and therefore very rigid and they've got a solid roof on them which gives them rigidity on the top and they've got a solid floor, which means that you can pick them up like a jam tin and you can just move them around, but its totally different from the big floating roof tanks."

The hypothetical situation of the lease coming to an end on the sites occupied by the taxpayer and the taxpayer acquiring a new site was posed to the witness. He was asked what would have happened to the tanks on, for example, (a certain site). He answered that they definitely would not have left them there. He said that the taxpayer is a commercial entity, they are in the business of storage of liquids for other persons and they have competitors in the field. He said they would definitely take the tanks away and not leave them there. A said and I quote: -

"As (B) mentioned to you we are presently looking at two other sites. One of them is a very big site which is owned by, the lease is owned by the (C) group, right up alongside (a certain site). Just off the photograph, if you remember, he discussed it.

ADV SOLOMON SC: Yes.

(A): That is in the same vicinity as what we've been moving all the tanks. There will be difficulties, they won't be tank related difficulties, there would be difficulties with regard to telephone lines perhaps, but nothing that can't be taken away and put

back the next day of kind of thing. And if we had to give up a lease on one of these sites and if (D) has additional sites in the vicinity, they would definitely just move these tanks across the road.

ADV SOLOMON: And is that physically feasible?

(A): We've done it before and there will be no reason why we couldn't. That is they could move anywhere outside the environment, but they could very easily move to (X). As you can see from the photographs, most of these tank farm sites are right up alongside (a certain site) and their (X) terminal and the (Y) terminal are right on the sea, right in the harbour. So one could put them into a ship and unload them on the other end. You wouldn't go down the road".

A said that if necessary tanks could be moved to X. They would be transported by ship or barge.

The taxpayer has occupied and continues to occupy the various sites in terms of agreements of lease concluded between it (or its predecessors in title) and the Z Authority (or its predecessors in title). Mr E, the managing director of the taxpayer,

testified in regard to the various lease agreements. It is unnecessary to refer to all the leases in detail save to highlight salient features thereof. Firstly each lease agreement contained what is termed **“an early termination provision”**. This entitled the lessor in certain circumstances to terminate the lease before the expiring of the 25-year term. The taxpayer submits that there was no certainty that this could not occur. Therefore it is submitted that it is highly improbable that the taxpayer would have incurred the substantial costs of installing tanks if those tanks were to remain permanently on the site, that is to say, after the termination. The leases in question make it clear that upon termination **“permanent fixtures”**, **“improvements”** and **“immovables”** are to revert to the lessor. However the taxpayer is given the option of removing what is referred to as **“movable things”.** These **include** the tanks. The taxpayer submits that the provisions of the respective leases provide very cogent evidence in regard to the taxpayer’s intention with regard to especially the tanks. That tends to support both Mr E’s testimony and A’s that in no circumstances would the tanks be left on the sites but they would be moved.

A in his evidence dealt also with the physical features of the relevant assets. The first point that he made (confirming that which is stated in his expert summary exhibit E) is that these assets have not been attached to the ground or to any base, beam or structure in a permanent manner. Particularly in the case of the tanks some of these rest on the soil itself. There is no difficulty in removing these that have been attached to ring beams. The thin protective layer of bitumen which is applied over the ring beam and the base of the tank are cut away. The bolts attaching the tank to the ring beam are unscrewed and the tank is then either jacked up with an hydraulic jack or lifted by mobile crane. In the case of the pipeline which is attached to a rack the bolts that attach the pipeline to the rack are unscrewed and if necessary the pipeline is cut at its joints. A made the point that the relevant assets are capable of being dismantled and reconstructed with ease.

We turn now to record our findings of fact in this case. Each of the taxpayer’s witnesses was impressive and their evidence falls to be accepted without hesitation. This is particularly so in the

case of A who struck us as being an excellent expert witness who is extremely well qualified in the practical and theoretical spheres of expertise. His evidence has an added dimension to it inasmuch as he has acquired qualifications in the business sphere as well.

On a conspectus of all the evidence adduced we find on a balance of probability that the relevant assets and in particular the tanks were never intended to be installed as permanent structures. We find that the tanks *in casu* are substantially different to the tanks which featured in the **Vacuum Oil** case, supra. The taxpayer's tanks can be moved with ease and without causing substantial damage either to the site where they have stood or to the tank itself. Indeed the evidence shows that over the years several tanks have been moved and there are plans afoot to move tanks in the future. It seems to us that the taxpayer has succeeded in establishing its intention in regard to the installation of these tanks, and that is, that they were never intended to remain permanently on the sites. We accept the taxpayer's submission in regard to the probabilities which arise from the terms of the leases which permit the removal of the tanks upon

expiration of the respective leases. That in contrast with provisions in the leases which state that buildings and other improvements are to remain upon expiration. That to our minds signifies a state of mind on the part of the taxpayer (or its predecessors in title as the case may be).

We are satisfied that the physical features of the tanks and the other relevant assets do not militate against the inference we seek to draw in regard to the taxpayer's intention. We accept A's evidence that the tanks can be moved with ease without causing substantial damage to them. The same applies to the pipes and gauges.

The Commissioner has argued, however, that the evidence established that the taxpayer's tank farms **"compromise a network of storage tanks linked by way of yet another of pipelines and a pipeline infrastructure".** The Commissioner submits that the tanks and the pipelines infrastructure was erected with the intention that it remain permanently for as long as the taxpayer remained in business. The Commissioner submits that the tanks and pipeline infrastructure taken individually qualify as **"building**

structures or works of a permanent nature” within the remaining of the subsection. It submits that these were erected with the intention that they remain permanently within **“the bigger structural works for as long as the appellant remained in business”.** The Commissioner further submits that the tanks and pipes have no useful purpose with respect to the taxpayer’s trade when viewed individually. Its trade according to the Commissioner is **“the whole tank farm together with its infrastructure consisting of pipelines, pumps, valves, etc”.** The Commissioner concedes that any of these articles when viewed individually can perhaps be regarded as a temporary attachment or appendage in that it can be dismantled from its location and can be reattached to another location within the farm or can be taken off completely and replaced by a new one. These articles however cannot be used on their own by the taxpayer for purposes of trade; **“it can only be used as part of a composite infrastructure”.**

We suspect that in making these submissions the Commissioner has by implication conceded that the taxpayer’s evidence in regard to the degree of performance of the various assets is correct. However

it seems to us that the Commissioner has introduced a new dimension in this case. It argues that these assets are part of a composite permanent infrastructure including a network of pipelines. Individually they have no existence and cannot be said to be used in the course of the taxpayer's trade. Therefore they do not qualify for the section 11 (e) allowance.

10 We agree with the taxpayer's submission that it is not open to the Commissioner at this stage to raise the issue of whether the assets in question are used for the purposes of trade. The issues defined in terms of the tax rules were whether the taxpayer's storage tanks as well as the related pipelines and pipelines infrastructure are to be regarded as machinery, plant, implements, articles within the meaning of section 11(e) or whether these are structures or works of a permanent nature.

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In regard to the Commissioner's submission pertaining to the composite nature of the infrastructure we point out that this submission goes contrary to what was said by A in his evidence. Earlier in this judgment we alluded to this evidence.

It will be recalled that the witness said that an oil refinery is an integrated system whereas the taxpayer's tanks are totally separate and divorced from any other tank which is alongside it.

In our view there is no merit in the Commissioner's submissions. We hold that each individual item qualifies for the allowance. That is contemplated by the section itself. We accept that the items in question can be regarded as machinery or plant within the meaning of the subsection. We are persuaded by the taxpayer's submission that it is of significance that subsection 11 (e) (iiA) envisages that a piece of machinery may be affixed to a concrete structure (of a permanent nature). That piece of machinery will nonetheless be deemed to be of a non-permanent nature and qualify for the depreciation allowance. The legislature clearly intended that these items retain their movable or non-permanent characteristic.

It follows from the foregoing that we are of the opinion that the appeal should be upheld. The respective assessments are set aside and the matter

remitted to the Commissioner for the purpose of issuing revised assessments.