IN THE TAX COURT OF SOUTH AFRICA
[HELD AT CAPE TOWN]

CASE NO: 12244

In the matter between:

XYZ (PTY) LTD **Appellant**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **Respondent**

JUDGMENT DELIVERED ON 21st JANUARY 2008

HJ ERASMUS, J

The background

[1] The appellant is XYZ (Pty) Limited, trading as ABC South Africa, and is a wholly-owned subsidiary of ABC Europe. The appellant conducts business *inter alia* as a holiday timeshare exchange company.

[2] Developers of timeshare resorts who affiliate themselves with the appellant are able to use the appellant's branding and receive advice and support from the appellant. The developers sell timeshare in their resorts

to purchasers who thereby become members of the appellant for a period of three years. The three-year membership fee is built into the price they pay for their timeshare and paid over to the appellant by the developer. After the initial three-year membership period expires, members may renew their membership and pay an annual membership fee to the appellant.

[3] Timeshare resorts are usually structured as share block companies. The purchasers of timeshare become shareholders in a share block company, their shareholding entitling them to occupy a particular unit in a timeshare resort for a particular week of each year. The principal benefit of membership of the appellant's timeshare scheme is that each year members are entitled to "space-bank" (or deposit) their occupation rights with the appellant, in return for which they are credited with "points" on the appellant's internal computer system.[1] The number of points awarded is based on the appellant's rating of the exchange value (based on the desirability of the particular unit in the particular timeshare resort at the particular time of year) of the member's occupation rights which have been space-banked. The use of points provides a basis of comparison for the choice of another unit on a like-for-like basis. Members can accumulate points and then "trade up" for higher grade units at a different resort, or they can use points to take holiday breaks of less than a week (weekends and mid-week). Members have a three-year period within which to utilise the points awarded to them for other rights of occupation space-banked by other members. The appellant pays nothing for the occupation rights that are space-banked with it by its members.

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[1] DEXT is an acronym that stands for Daily Exchange Transactions.

[4] No person can make a timeshare exchange unless he or she has first space-banked a right of occupation with the appellant. Once a right of occupation is space-banked with the appellant in this way, the member ceases to have any interest in the right of occupation, which becomes the property of the appellant. The rights of occupation thus acquired by the appellant are held by it for the purpose of exchange with other members, and the appellant earns its revenue by charging an exchange fee for each exchange made by a member utilising points in order to reserve accommodation held in the appellant's bank of space-banked rights of occupation.

The appellant's employee exchange policy

[5] Holiday timeshare exchanges are usually made telephonically by a member speaking to one of the appellant's call-centre staff (referred to as "guides" by the appellant). Members are often unable to make a booking at their first choice of timeshare resort – the most popular resorts are often already booked – and the role of each guide is to "cross-sell" and if necessary "up-sell" other accommodation which best matches the member's needs and aspirations. The appellant takes the view that a well-educated and experienced telesales person or guide is a key to the success of its business.

[6] The appellant provides members of its permanent staff who have been in its employment for longer than six months with the opportunity to visit the various resorts by allocating each employee 17 000 points annually for the purpose of "resort education". The appellant's stance is that allocation of points to staff enables them to visit several resorts in

any given year, to understand the appellant's exchange system, and to gain first-hand knowledge and experience of affiliated resorts, which assists them in rendering services that will result in successful exchanges. Many employees had not experienced any of the affiliated resorts prior to their employment by the appellant, and the allocation of points and thereby the granting of an opportunity to gain such experience is considered by the appellant to be an integral part of its business, and good for its business.

[7] Essential features of the scheme are:

[7.1] Employees' points are valid for one year only, and points not utilised during the year in respect of which they are allocated, are forfeited.

[7.2] The appellant's policy in relation to the utilisation of points by its employees is permissive: employees may utilise their points at the resorts of their own choosing, nor indeed are the employees obliged to utilise their points at all. The appellant's attitude is that it is in their own interest for employees, who earn a basic salary and thereafter a commission based on their success in selling and cross-selling rights of occupation and in meeting their targets (referred to in the evidence as "budgets"), to acquire product knowledge by experiencing personally the resorts in which they are selling rights of occupation.

[7.3] Because members always take precedence, the rights of occupation that are in practice often exercised by employees are those which are about to "burn" in the sense that they would simply not be exercised at

all.[2] The appellant's attitude is that it would in every case prefer an employee to exercise a right of occupation than for it not to be exercised at all: low occupancy is bad for the resorts, which can only charge for meals and amenities if their units are occupied, and it costs the appellant nothing for units that would otherwise "burn" to be used, even repeatedly, by employees who cannot but acquire better product-knowledge by exercising rights of occupation in their own leisure time.

[7.4] Employees have to pay their own transport costs, pay for meals and whatever amenities they use. This is a further reason why the employee's utilisation of the points lies within his or her choice.

[7.5] Employees are required, as a condition of the acceptance of points by them, after their visits to complete a resort evaluation form similar to that which members are requested to complete. An employee who fails to complete the resort evaluation form within the stipulated time becomes liable to pay the exchange fee that would have been payable by members.

[8] The following restrictions apply in respect of the utilisation of points by the appellant's staff:

[8.1] Employees may book only two units per week at a standard resort, and not more than one unit at an RID or gold crown resort (ie a resort with a higher grading)

[2] In argument the situation was likened to that of an aircraft taking off with an empty seat – a space-banked right that goes unused is lost forever.

[8.2] Employees are restricted from making bookings during peak times or high-demand periods; such as, for example school and public holidays, and long weekends.

[8.3] An employee cannot transfer, sell, cede or dispose of his or her points in any way whatsoever; an employee cannot convert points into cash, or rent them out privately to a friend or a relative or a family member.

[8.4] Employees have personal use of the points, and may take family and/or friends to a resort but have to be present themselves.

[8.5] On termination of employment, an employee forfeits any points balance standing to his or her credit; he or she has no expectation of being able to convert the points into cash when taking their final pay-cheque.

[9] The appellant regards the allocation of points to their staff as an integral element in the training of their employees, and not as a form of payment for services rendered.

[10] The appellant's standard letter of employment:

[10.1] makes provision only for pension, medical aid and annual leave as benefits of employment in addition to salary;

[10.2] obliges employees to participate in ongoing learning which may take place outside of normal working hours and over weekends in the interests of performance improvement and development; and

[10.3] states that employees are required to do *whatever it takes* to satisfy the appellant's members, and to use their best efforts to properly conduct, improve, extend, develop, promote, protect and preserve the business interests, reputation and goodwill of the appellant and carry out their duties in a proper, lawful and efficient manner.

[11] Taking all of the above into account, the appellant in terms of paragraph 3(1) of the Seventh Schedule of the Income Tax Act 58 of 1962 ("the Seventh Schedule" and "the Act") determined the cash equivalent of the taxable benefit deemed to have been granted to its employees in the form of exchangeable points to be nil.

The assessment

[12] The respondent became aware of the appellant's employees exchange policy during a routine audit. The appellant was of the opinion that the allocation of free points to employees was a benefit to staff and was subject to tax in terms of the Seventh Schedule. The respondent accordingly assessed the appellant for employees' tax which the respondent contends appellant failed to withhold and pay over to the respondent. The respondent says that such employees' tax was payable by the appellant to the respondent in respect of amounts which the respondent alleges should have formed part of the employees' gross income in terms of paragraph (*i*) of the definition of "gross income" in section 1 of the Act[3] and therefore also part of the employees' "remuneration" as defined in paragraph 1 of the Fourth Schedule to the

[3] "[T]he cash equivalent, as determined under the provisions of the Seventh Schedule, of the value during the year of assessment of any benefit or advantage granted in respect of employment or to the holder of any office, being a taxable benefit as defined in the said Schedule, and any amount required to be included in the taxpayer's income under section 8A."

Act ("the Fourth Schedule"). The respondent has accordingly levied employees' tax in respect of amounts which he contends should have been included in the employees' gross income as being the "cash equivalent" of a taxable benefit calculated in terms of the provisions of the Seventh Schedule to the Act

[13] In view of the fact that (a) every employee was entitled to use the holiday points system irrespective of seniority; (b) employees often used the same resorts more than once, and (c) employees making use of the points scheme would not have been able to utilise the ABC resorts free of charge were they not employed by the appellant, the respondent concluded that the appellant used the privilege (of awarding points to employees) for employees' holiday purposes and that it was therefore subject to tax in terms of paragraph 2(d) of the Seventh Schedule to the Act.

[14] The respondent subsequently, with the concurrence of the appellant, amended the grounds of assessment by relying, in the alternative, on paragraph 2(h) of the Seventh Schedule. In this regard the respondent contends that the appellant had paid indirectly certain amounts owing by its employees, who made use of points to visit resorts, to third persons as a result of those visits without requiring those employees to reimburse the appellant for the amounts so paid.

[15] The respondent established the "current market value" of the resorts in issue, ignoring those cases where the market rate used was considerably higher than other rates and would distort the information. It also ignored cases where the rate quoted was per person. Based on these

figures, the respondent structured a tax liability on the part of the appellant. In the result, the respondent –

(a) assessed the appellant on an additional total of R10 906 242,44 for the 2002 – 2006 years of assessment;

(b) imposed a statutory penalty of R1 096 171,95 on the Appellant in terms of paragraph 6(1) of the Fourth Schedule to the Act;[4]

(c) determined that an amount of R2 759 974,67 in interest was payable by the Appellant in terms of the provisions of section 89*quat* of the Act. The appellant points out that, in fact, *in casu* section 89*bis*(2) of the Act is the appropriate section.[5]

[16] Against these assessments the appellant lodged objection and this being disallowed, noted an appeal to this Court.

The grounds of appeal

[17] The grounds of appeal, in summary, are as follows:

[17.1] The appellant submits that the facts may be construed in different ways, but whichever way the facts are construed, the correct conclusion is that a deemed taxable benefit in the form of the acquisition

[4] Nothing turns on the apparent miscalculation of the amount of the ten per cent. Mr Stevens on behalf of the respondent gave the assurance that any mistake would be rectified.

[5] Section 89*quat* of the Act deals with interest on underpayments and overpayments of provisional tax. Section 89*bis* of the Act deals *inter alia* with payment of employees' tax and interest on overdue payments.

of an asset by the employees came into existence, and that the cash equivalent of the deemed taxable benefit is nil.

[17.2] In the event that its employees are in law to be regarded as having been provided with accommodation rather than as having acquired an asset, the appellant raises, as an alternative ground of appeal, the contention that (i) the provisions of paragraphs 9(4), 9(4)(a) and 9(4)(b) are not applicable to the accommodation occupied by employees of the appellant utilising points awarded to them by the appellant; and (ii) in any event, and alternatively, the provisions of paragraph 9(7) of the Seventh Schedule apply in that the accommodation was provided to the employees for the purposes of performing the duties of their employment.

[17.3] The assessment is incorrect in that the respondent has structured a tax liability on the part of the appellant using a tax rate of 33⅓% when in fact the applicable tax rate of the majority of the appellant's employees was considerably less than 33⅓% in the years in question. At a pre-trial conference the respondent acceded to the appellant's request that in the event of the appeal being dismissed, the amount to be levied will be calculated according to the individual tax rates of all the individual employees of the appellant, and not at the blanket rate of 33⅓%. The appellant undertook to co-operate by running the relevant figures through its payroll system in order to arrive at the exact amount of the tax due.

[17.4] The penalty imposed ought to be remitted in full in terms of paragraph 6(2) of the Fourth Schedule because at no time was there any intention on the part of the appellant not to pay tax.

[17.5] The respondent has misdirected itself as far as the imposition of interest and the refusal to waive interest is concerned, and the assessment of interest falls to be set aside on review.

Further issues raised at hearing

[18] At the hearing, the appellant raised two further issues, both of which are disputed by the respondent. These are:

[18.1] The respondent has failed to discharge the burden of proof imposed by section 82 of the Act in relation to the "amount" the respondent seeks to levy employees' tax on the appellant.

[18.2] A further ground of appeal was added with the concurrence of the respondent: The assessment, including the imposition of interest and penalties, falls to be set aside on the ground that, in terms of paragraph 3(2) of the Seventh Schedule, the respondent's remedy – if he is dissatisfied with the determination of the cash equivalent made by the appellant – lies against the appellant's employees upon assessment of their liability for normal tax, not against the appellant by way of an assessment for employees' tax.

[19] It will be convenient to deal these issues at the end of the judgment.

The acquisition of an asset by employees

[20] The appellant's principal ground of appeal is that it does not provide its employees with accommodation: it allocates points to its

employees. The points it allocates to its employees represent the acquisition by the employees of a conditional right to exchange the points for an occupation right acquired by the appellant from its members by being space-banked with it. These conditional rights constitute an "asset" as contemplated in paragraph 2(*a*) of the Seventh Schedule, being "property of any nature (other than money)". The value to be placed on these conditional rights is their market value at the time they were acquired by the employee in terms of paragraph 5(2) of the Seventh Schedule. By virtue of the conditions attached to them, these assets in the form of conditional rights have a market value of nil when they are acquired by the employees.

[20.1] It is further submitted on behalf of the appellant that the conditional rights, which constitute "movable property", were either acquired by the appellant in order to dispose of them to employees or were "trading stock" as defined in section 1 of the Act in the hands of the appellant. In either case, the contingent rights fall to be dealt with under paragraphs 2(a) and 5(1) and (2) of the Seventh Schedule because they constitute assets acquired by the employees from the appellant. The contingent rights have no ascertainable value in the hands of the employees and the cash equivalent of the deemed taxable benefit in the form of the acquisition of an asset consisting of the conditional rights is nil.

[20.2] An alternative analysis put forward by the appellant is that a taxable benefit as contemplated in paragraph 2(*a*) of the Seventh Schedule arises when an employee exercises his or her right to exchange points for an occupation right held by the appellant by virtue of the fact that it had been space-banked by one of the appellant's members. The

asset acquired by the employee is a right of occupation acquired by the appellant from one or more of its members at no cost and exchanged by the appellant for the points being utilised by the appellant. The right of occupation thus acquired by an employee constitutes trading stock in the hands of the appellant, being "anything … in any … manner acquired by a taxpayer for the purposes of … exchange". This being the case, the right of occupation as trading stock falls to be valued at the lesser of cost or market value in terms of the proviso to paragraph 5(2) of the Seventh Schedule. As the cost of the right of occupation to the appellant was nil, the cash equivalent was correctly determined by the appellant (as employer) at nil.

[21] In its grounds of appeal, the appellant relied on the finding in *Stander v Commissioner for Inland Revenue*[6] for contention that the cash equivalent of the deemed taxable benefit in the form of the acquisition of an asset by the employees, is nil. In that case, the taxpayer received an overseas trip as a prize and the Commissioner sought to include the value of the prize in his taxable income. In response to the question whether a value could be placed on what the taxpayer received by going on the trip, Friedman JP said:[7]

> The answer to this question is, in my view, in the negative. Having gone on the trip he had not received any 'property' on which a monetary value could be placed in his hands. He was no more able to turn it into money or money's worth after accepting the award, than he was at the time when the donation was still at the executory stage.

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[6] 1997 (3) SA 617 (C).

[7] At 622G.

In his judgment, Friedman JP refers[8] to the judgment of Conradie J in *Income Tax Case* 701:[9]

> Conradie J, in delivering the judgment of the Special Court, accepted the principle that in order to fall within the tax net, receipts or accruals other than money had to have a money's worth. However, Conradie J rejected the argument that only benefits which a taxpayer can turn into money can be said to have a money's worth. He stated that there was no warrant for such a restricted form of valuation and held that a service which is available in the market place has a value attached to it by the market. That, he stated, was the value of the benefit which anyone who availed himself of the service enjoys. In other words, one simply looks at what the consumer of the service would have had to pay for it if he had not been given it for nothing.

Friedman JP did not accept this view as correct and concluded:

> Having regard to the conditions applicable to the enjoyment of the award, the overseas trip had no 'value' in Stander's hands which brought it within the terms of para (c) of the definition of 'gross income'.

[22] In *The Commissioner for the South African Revenue Service v Brummeria Renaissance (Pty) Ltd and Others*[10] (hereafter referred to as *Brummeria Renaissance*) the Supreme Court of Appeal held that these views were "contrary to what this court had previously held in the *People's Stores* case[11], restated in C*actus Investments*[12]". After citing the

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[8] At 623F.

[9] (1950) 17 SATC 108.

[10] 2007 (6) SA 601 (SCA); [2007] 4 All SA 1338 (SCA); (2007) 69 SATC 205 (SCA). The judgment of the Supreme Court of Appeal was handed down after the appellant's Statement of Grounds of Appeal had been drawn, and shortly before the hearing of the current matter in this Court.

[11] *Commissioner for Inland Revenue v People's Stores (Walvis Bay (Pty) Ltd* 1990 (2) SA 353 (A).

[12] *Cactus Investments (Pty) Ltd v Commissioner for Inland Revenue* 1999 (1) SA 315 (SCA).

following passage from the judgment of Hefer JA in *Commissioner for Inland Revenue v People's Stores (Walvis Bay (Pty) Ltd* [13] –

> It must be emphasised that income in a form other then money must, in order to qualify for inclusion in the 'gross income', be of such a nature that a value can be attached to it in money. As Wessels CJ said in the *Delfos* case[14] *supra* at 251:
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> > The tax is to be assessed in money on all receipts or accruals having a money value. If it is something which is not money's worth or cannot be turned into money, it is not to be regarded as income.

Cloete JA continued[15] —

> It is clear from the passage quoted from the judgment of Hefer JA, as well as the passage quoted by him from the judgment of the Chief Justice in the *Delfos* case, that the question whether a receipt or accrual in a form other than money has a money value is the primary question and the question whether such receipt or accrual can be turned into money is but one of the ways in which it can be determined whether or not this is the case; in other words, it does not follow that if a receipt or accrual cannot be turned into money, it has no money value. The test is objective, not subjective. It is for that reason that the passages quoted from the *Stander* case incorrectly reflect the law and the reasoning of Conradie J in ITC 701 was correct. The question cannot be whether the individual taxpayer is in a position to turn a receipt or accrual into money. If that were the law, the right to live in a house rent-free, or to drive a motor vehicle without paying for it, for example, could be rendered tax-free by the simple expedient of limiting the right to exercise the benefit to the recipient – which manifestly is not the case.

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[13] 1990 (2) SA 353 (A) at 364G.

[14] *Commissioner for Inland Revenue v Delfos* 1933 AD 242.

[15] At para [15].

[23] Cloete JA further approves[16] of the following passage in *Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd*[17] as a correct statement of the law in South Africa:

> The first and basic proposition[18] is that income, although expressed as an *amount* in the definition, need not be an actual amount of money but may be
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> > every form of property earned by the taxpayer, whether corporeal or incorporeal, which has a money value … including debts and rights of action.

Following upon the quotation of this statement, Cloete JA points out:[19]

> It is clear from the *People's Stores* and *Cactus Investments* cases that the word 'amount' in the definition of gross income is to be interpreted widely.

[24] Of relevance within the present context is also the following statement of the Learned Judge of Appeal[20]:

> The Tax Court also held that the benefit included by the Commissioner in the companies' gross incomes had no existence independent from the liability to repay the monies borrowed; that it could not be transferred or ceded; and that it 'clearly has no money value'. This reasoning loses sight of the fact that if a right has a money value – as the right in question did, for the reasons I have

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[16] At para [16].

[17] *Supra* at 363I—364A.

[18] The reference is to a proposition stated by Watermeyer J in *Lategan v Commissioner for Inland Revenue* 1926 CPD 203 at 209.

[19] At para [17].

[20] At para [19].

> given – the fact that it cannot be alienated does not negate such value. The contrary view articulated in *Stander's* case is wrong.

[25] Though the facts of this matter are different from those of *Brummeria Renaissance*, the principles stated in the latter are applicable to the circumstances of this case.[21] The right to accommodation is a benefit for which an employee would have had to pay if he or she had not been given it for nothing. The right has a money value and the fact that it cannot be alienated does not negate the value.[22]

[26] The appellant's appeal on the grounds as set out in paragraphs 35 and 36 of its Statement of Grounds of Appeal cannot therefore be sustained.

Holiday accommodation

[27] The appellant contends that it does not provide its employees with residential accommodation as contemplated in paragraph 2(*d*) of the Seventh Schedule: it allocates points to its employees. If an employee elects to utilise the points allocated to him or her, and if this culminates in accommodation for the employee in one of the timeshare resorts affiliated to the appellant, this is the result of a decision on the part of the employee to utilise the points acquired by him or her. This choice constitutes a *novus actus interveniens* which causally distances the eventual result,

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[21] Chris Cilliers in "*Brummeria Renaissance*. The Interest Free Cat among the Borrower Pigeons" (2007) 56 *The Taxpayer* 184 states at 185 that in his view "the *ratio* of the case appears to lie largely at the level of principle" and that "the *ratio* of the case is not really dependent on the peculiar facts of the case. Rather, the decision turned purely on the abstract meaning of the word 'amount'".

[22] Sight should not be lost of the fact that the entire points system operated by the appellant is value orientated. A member who space banks his time-share receives points on the basis of the quality of the unit and the available amenities, and the time of the year. A high quality unit "earns" more points in the same way as it would, in the open market, command a higher rental.

accommodation, from the allocation of points that was the *sine qua non* thereof.

[27.1] There is no merit in this submission. On the appellant's own case, the purpose of the award of points to employees is to enable them to make use of accommodation at timeshare resorts affiliated to the appellant. The award of points is merely the mechanism, a management tool, by which the appellant's employee exchange policy is regulated and administered. An employee's choice to utilise the points acquired by him or her is no *novus actus* which causally distances the accommodation from the allocation of points.

[28] The appellant submits, in the alternative, that the purpose of the provision of accommodation to employees is not that of a holiday but for the purposes of performing the duties of their employment. In this regard two submissions are made.

[29] The first is that the Seventh Schedule is not entirely clear as to *whose purpose* must be ascertained in order to decide whether accommodation has been "occupied temporarily for the purposes of a holiday" as contemplated in paragraph 9(4) of the Seventh Schedule. It was submitted that it is *the purpose of the employer* that must prevail. Support for this submission is sought in paragraph 3(1) of the Seventh Schedule which provides that the cash equivalent of the value of a taxable benefit must be determined in accordance with the provisions of the Schedule *by the employer*. This is correct as far as it goes. However, it is the employee who enjoys the benefit of the temporary accommodation for the purposes of a *holiday*.

[30] The second submission is that *in casu* the employer, who is in the holiday business, allows accommodation to be occupied in the interests of better sales and better service to its members. The fact that the employees are "on holiday" does not detract from the appellant's business purpose. The provisions of paragraph 9(7) of the Seventh Schedule accordingly apply in that the accommodation is provided to the employees for the purpose of performing the duties of their employment.

[31] This submission is also, on the facts, untenable. In the Introduction to a document dealing with the appellant's "Staff Educationals and Rentals Policy" it is stated:

> You've worked hard all year. You've been part of an international team that's dedicated to arranging great Holiday experiences for [ABC] members. Now it's your turn to enjoy a Resort Educational through [ABC].

What is termed a Resort Educational is clearly offered to employees as a reward for services rendered.

[32] Counsel for the respondent submitted that the allocation of points to employees for the purpose of "education" is significant. If it the visit of resorts were an important part an employee's education or training, one would have expected a structured plan whereby bookings were made for employees to stay over at resorts in order to "get the experience". It would not have been necessary to award points to these employees. It is therefore submitted that the awarding of points in itself is indicative of the fact that this privilege (of awarding points to employees) is not only a management tool, but also a privilege given to staff (employees) in order to retain their services, to award them for services rendered and

further their morale. The fact that employees have to report back to the appellant on conditions at resorts visited is clearly but a convenient by-product of what is mostly an enjoyable experience for employees.

[33] The allocation of points to employees is not used as a tool in their training process, but as a benefit in the nature of a free holiday which is causally linked to their employment. The appellant thereby provides its employees with a fringe benefit in respect of services rendered by those employees or for services still to be rendered in future or as a reward for these services.

[34] It further appears from documents originating from the appellant's own office that employees would repeatedly visit the same resorts, sometimes within a very short time after their first visit(s). This fact in itself defeats the "educating" value of these visits and is a clear indication that the visits are primarily meant for relaxation or holiday purposes.

[35] Finally, it was submitted on behalf of the appellant that it is not possible to attribute to the accommodation in question – being timeshare accommodation acquired by the appellant at no cost and available only to its members and employees – a rental value as contemplated in paragraph 9(4) of the Seventh Schedule. Paragraph 9(4) sets out methods by which the rental value of accommodation provided free of charge to employees can be determined. Paragraph 9(4)(a) applies where the accommodation is hired by the employer, which is not the case in the present case. Paragraph 9(4)(b) applies "in any other case"; that is, including cases where the accommodation in question is not hired by the employer. In such cases, the rental value is—

> … calculated at the prevailing rate per day at which such accommodation **could normally be let to any person who is not an employee of the employer.** (emphasis supplied)

In terms of the paragraph, in such cases a notional value, based on current market values, is to be placed on the rental value of the accommodation in question. This is precisely what the respondent has done in this case and, as Mr Stevens pointed out, the appellant has not objected to or appealed against "the current market value" of the resorts in question as determined by the respondent.

[36] The appellant's appeal on the alternative grounds as set out in paragraph 37 of its Statement of Grounds of Appeal cannot therefore be sustained.

The penalty and interest

[37] The appellant paid the amount of tax, penalty and interest when these amounts first became due, despite the fact that it did not consider that it was liable for such amounts in terms of the provisions of the Act. The appellant submits that this is an objective indicator of the good faith of the appellant, who has always sought to be fully tax compliant, and that for this and other reasons it is not appropriate to visit the appellant with liability for interest and penalties.

[38] In regard to the penalty, the appellant contends that the respondent ought to have directed in terms of paragraph 6(2) of the Fourth Schedule that, having regard to the circumstances of the case, the penalty should be

remitted in full.[23] It was submitted that there was no intention on the part of the appellant to avoid or postpone liability for tax. The respondent's attitude as articulated at the hearing is that the appellant as a large employer should have been aware of the fact that its points system would be taxable under the provisions of the Seventh Schedule. The appellant says that it considered *bona fide* that the cash equivalent on of the taxable benefit in question was nil. In this regard, sight should not be lost of the fact that the appellant was guided by the finding in *Stander v Commissioner for Inland Revenue*.[24] Having regard to all the circumstances, I am of the view that penalty should be reduced by half.

[39] The appellant further submits that when the terms of section 89*bis*(2) of the Act are taken into account, it is clear that the respondent ought to have directed that no interest be payable having regard to the circumstances of the case, on the same grounds on which the statutory ten per cent penalty should also have been remitted. There is, however, a difference between the levy of a penalty and the levy of interest. A penalty is a form of punishment imposed for breaking, for example, a rule or a law.[25] Interest is money paid for delaying payment of money due. In my view, having regard to the circumstances of the case, there are no grounds on which the levy of interest can be remitted.

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[23] In so far as the imposition of the penalty involves the exercise of a discretion by the respondent, this Court is entitled on appeal to exercise its own, original discretion (*Commissioner of Inland Revenue v Da Costa* 1985 (3) SA 739 (A) at 774I—775A.

[24] 1997 (3) SA 617 (C).

[25] In the *Concise Oxford English Dictionary* 10th ed rev, a "penalty" is defined, *inter alia*, as "a punishment imposed for breaking a law, rule, or contract".

The burden of proof

[40] Section 82 of the Act provides as follows:

> The burden of proof that any amount is –
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> *(a)* exempt from or not liable to any tax chargeable under this Act; or
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> *(b)* subject to any deduction, abatement or set-off in terms of this Act; or
>
> *(c)* to be disregarded or excluded in terms of the Eighth Schedule,
>
> shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off, or that such amount must be disregarded or excluded, and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.

[41] The appellant contends that the effect of the section is that, within the context of "gross income", the burden of proving the existence of an "amount" is on the respondent, and that once the respondent has discharged this burden it is for the appellant to prove that such "amount" is "exempt from or not liable to any tax chargeable under this Act". The appellant relies on the oft-cited finding in *Commissioner for Inland Revenue v Butcher Bros (Pty) Ltd* [26] that –

> … it is essential for the Commissioner, in order to support his assessment, to show that some 'amount' has accrued to or been received by the company by virtue of such rights."

[26] 1945 AD 301 at 322.

[42] The word "amount" in section 82 of the Act has the same meaning as the same word in the definition of the term "gross income" in section 1.[27] As has been indicated above[28] the Supreme Court of Appeal in *Brummeria Renaissance* cited with approval, as a correct statement of our law, the statement in *Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd*[29] that income, although expressed as an amount in the definition, need not be an actual amount of money, but may be every form of property earned by the taxpayer, whether corporeal or incorporeal. The Supreme Court of Appeal further held[30] that it is accordingly clear that the word "amount" in the definition of gross income must be interpreted widely.

[43] In *Commissioner for Inland Revenue v Datakor Engineering (Pty) Ltd*[31] the Supreme Court of Appeal dealt with a finding by the (then) Special Court that the Commissioner bore the *onus* to prove on a balance of probabilities that an ascertainable money value can be ascribed to a benefit. The Special Court relied on the *dictum* cited above from *Commissioner for Inland Revenue v Butcher Bros (Pty) Ltd*[32]. The Supreme Court of Appeal gave the *dictum* a somewhat narrower interpretation[33] as being no more than a conclusion based upon the facts

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[27] See De Koker *Silke on South African Income Tax* vol III §18.27.

[28] At para [23].

[29] 1990 (2) SA 353 (A) at 363I—364A.

[30] At para [17].

[31] 1998 (4) SA 1050 (SCA) at 1058B—1060A.

[32] 1945 AD 301 at 322.

[33] See *Commissioner for the South African Revenue Service v Cape Consumers (Pty) Ltd* 1999 (4) SA 1213 (C) at 1225D.

of that particular case. In his judgment, Harms JA further refers to *Ochberg v Commissioner for Inland Revenue*[34] in which Roos JA was called upon to deal with an argument that in terms of the precursor of section 82, which was to all intents and purposes identical to it, there was an *onus* on the Commissioner to prove that the amount taxed is income liable to taxation. Roos JA held[35], "somewhat tersely",[36] that the contention would make the section –

> … meaningless and useless. The section means that an amount received by the taxpayer, on which an assessment has been made by the Commissioner, is taxable unless the taxpayer shows that it is not income.

Finally, the following statement is cited[37] with apparent approval from De Koker *Silke on South African Income Tax*[38]:

> It would seem that the Commissioner is entitled to tax any receipt or disallow any claim for deduction, set-off or exemption and leave it to the taxpayer to prove that he is wrong.

[44] The respondent has shown that an "amount" in the wide sense has accrued to the appellant on which an assessment has been made. It is up to the appellant to show that it is not liable to any tax chargeable under the Act.

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[34] 1931 AD 215.

[35] At 220-221.

[36] The phrase is used by Harms JA.

[37] At 1059D.

[38] Vol III §18.27.

The respondent's remedy

[45] Paragraph 3(1) of the Seventh Schedule provides in peremptory terms that it is *the employer*, ie the appellant, who must determine the cash equivalent of the value of a taxable benefit:

> The cash equivalent of the value of a taxable benefit *shall*, for the purposes of paragraph (*i*) of the definition of 'gross income' in section 1 of the Act, be determined in accordance with the provisions of this Schedule by the employer by whom the taxable benefit has been granted.

Paragraph 3(2) of the Seventh Schedule sets out the respondent's remedy should he be dissatisfied with an employer's determination of the cash equivalent of the value of a taxable benefit:

> The Commissioner may, if such determination appears to him to be incorrect, re-determine such cash equivalent upon the assessment of the liability for normal tax of the employee to whom such taxable benefit has been granted.

It was submitted on behalf of the appellant that the respondent's remedy, if he is dissatisfied with the employer's determination, is to tax the employee on the assessment of normal tax, and that this paragraph precludes the raising of an assessment for employees' tax on the employer in respect of the employer's determination of the cash equivalent.

[46] It was further submitted that while the respondent can make an assessment for employees' tax in respect of "remuneration" as defined in paragraph 1 of the Fourth Schedule, he may not do so merely because he

disagrees with an employer's determination of the cash equivalent in terms of the Seventh Schedule. To do so would be to violate the provisions of paragraph 3(2) of the Seventh Schedule, which prescribe that the respondent's remedy is to tax the employee on assessment for normal tax. In other words, the respondent is obliged to collect any additional normal tax from the employee him- or herself where he considers that tax has been under-collected owing to an incorrect determination of the cash equivalent by the employer. If the respondent were to disregard the provisions of paragraph 3(2) of the Seventh Schedule and assess the employer in respect of employees' tax, as the respondent has done in this case, the result is a dispute which ultimately affects the employees' rights without them being a party to a dispute that fundamentally affects their individual rights,[39] as the employer has a right of recovery of employees' tax from each individual employee in terms of paragraph 5(3) of the Fourth Schedule. The appellant accordingly contends that the respondent ought not to have assessed the appellant in respect of the disputed amount of the cash equivalent, and that the assessment falls to be set aside for this reason.

[47] The appellant relies on *Commissioner for Inland Revenue v King*[40] for the proposition that considerations of justice and expediency require that the use of the word "may" in fiscal legislation imports a duty on the part of the respondent. The judgment deals with the appearance of the word in section 90 of Act 31 of 1941 and is not authority for the general proposition that "in fiscal legislation" it imports a statutory a duty on the

[39] In terms of paragraph 3(3) of the Seventh Schedule to the Act, a re-determination on assessment of an employee gives the employee the right to object to his or her assessment and become a party to an appeal.

[40] 1947 (2) SA 196 (A) at 209—210.

respondent. In the absence of cogent internal indications to the contrary, the word "may" in a statute is to be given its ordinary meaning; that is, that it empowers but does not direct.[41]

[48] The Act provides[42] that employees' tax must be paid by the employer. It is further provided in the Fourth Schedule[43] that any employer who fails to deduct or withhold the full amount of employees' tax *shall* be personally liable for the payment to the Commissioner of the amount he fails to deduct or withhold. The employer has a right of recovery of employees' tax from each individual employee in terms of paragraph 5(3) of the Fourth Schedule.

[49] The fact that the respondent may, if he disagrees with an employer's determination of the cash equivalent in terms of the Seventh Schedule, employ the remedy provided for in paragraph 3(2) of the Seventh Schedule, does not derogate from the peremptory provision that an employer *shall* be personally liable for the payment to the Commissioner of the amount he fails to deduct or withhold. It would appear that paragraph 3(2) of the Seventh Schedule provides an alternative, but not an exclusive remedy, when the Commissioner disagrees with an employer's determination of the cash equivalent in terms of the Seventh Schedule.

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[41] See *Commissioner for Inland Revenue v King* 1947 (2) SA 196 (A) at 209; *SAR&H v Transvaal Consolidated Land and Exploration Co Ltd* 1961 (2) SA 467 (A) at 478G—480B; *Northwest Townships (Pty) (Ltd) v The Administrator, Transvaal* 1975 (4) SA 1 (T) at 12F—13A.

[42] In section 89.

[43] Para 5(1) of the Fourth Schedule.

[50] The appellant was accordingly entitled to have assessed the appellant in respect of the disputed amount of the cash equivalent.

Costs

[60] In terms of section 83(17) of the Act, the Court may award costs in favour of the appellant where the claim of the respondent is held to be unreasonable. The appellant submits that the respondent's claim is unreasonable for a number of reasons. Those reasons pertain to issues which have been considered above (for example, the submission that the respondent has wilfully failed to adopt the course of action spelled out in paragraph 3(2) of the Seventh Schedule), or are of little consequence (for example, that the respondent purported to levy interest under the wrong section of the Act, and that the respondent has incorrectly calculated the penalty of ten per cent). In my view, there are no grounds for an order of costs in terms of the section.

Conclusion

[61] The respondent at the hearing requested that this Court to decide which of the approaches of the parties is the correct one. It was made clear that the Court is not requested to determine the amount of tax to be payable by the appellant should the appeal be dismissed, and that the matter should be referred back to the respondent.

[62] The following orders are made:

(a) the appeal is dismissed save that the penalty imposed is reduced by half; and

(b) the matter is referred back to the Commissioner in order to determine, with the co-operation of the appellant as has been agreed between the parties, the cash equivalent of the taxable benefit of allowing employees free accommodation within its employee exchange policy.

HJ ERASMUS, J