IN THE TAX COURT

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 11486

In the matter between:

XYZ RADIO (PROPRIETARY) LIMITED Appellant

And

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

JUDGMENT:

VAN REENEN, J:

1] This is an appeal in terms of the provisions of section 83(1) of the Income Tax Act 58 of 1962 (the Act) against the disallowance by the Commissioner for the South African Revenue Service (the Commissioner) of allowances claimed by XYZ Radio (Proprietary) Limited (the taxpayer) in terms of section 11 (gA) of the Act in respect of the 1997 to 2001 years of assessment.

Introduction

2] The relevant portions of section 11 (gA), which allows as a deduction from income any expenditure actually incurred in acquiring from any other person, inter alia, a trade mark or other property of a similar nature, provide as follows:

> "For the purpose of determining the taxable income derived by any person from carrying on any trade within the Republic, there shall be allowed as deductions from the income of such person so derived -
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> (gA) an allowance in respect of any expenditure ... actually incurred by the taxpayer-
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> (i) in devising or developing any invention as defined in the Patents Act, 1978 (Act 57 of 1978), or in creating or producing any design as defined in the Designs Act, 1967 (Act 57 of 1967), or any trade mark as defined in the Trade Marks Act, 1963 (Act 62 of 1963), or any copyright as defined in the Copyright Act, 1978 (Act 98 of 1978), or any other property which is of a similar nature; or
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> (ii)
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> (iii) in acquiring by assignment from any other person any such patent, design, trade mark or copyright or in acquiring any other property of a similar nature or any knowledge connected with the use of such patent, design, trade mark, copyright or other property or the right to have such knowledge imparted, if such invention, patent, design, trade mark, copyright, other property or knowledge, as the case may be, is used by the taxpayer in the production of his income or income is derived by him therefrom:
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> Provided that -
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> (aa) where such expenditure exceeds R3 000 the allowance shall not exceed for any one year such portion of the amount of the expenditure as is equal to such amount divided by the number of years which, in the opinion of the Commissioner, represents the probable duration of use of the invention, patent, design, trade mark, copyright, other property or knowledge, or one twenty-fifth of the said amount, whichever is the greater; ..."

3] After the taxpayer had been granted a Private Sound Broadcasting License valid for a period of six years commencing on 10 October 1996 in respect of Radio XYZ it entered into a written agreement in terms whereof it purchased from the South African Broadcasting Corporation (SABC) for an amount of R65,000,094,50 the business conducted by it under the name Radio XYZ which consisted of certain designated assets, contracts, goodwill, specified trademarks, and the name of the business "as an indivisible whole and as a going concern". An amount of R50,000,094,50 of the purchase price was in the agreement allocated to such trademarks and the name. The taxpayer, recognising that R94.50 of the said amount was intended as merely a gimmick -it being the frequency on which Radio XYZ broadcasts in the Cape Town Metropolitan area -claimed an amount of R8,333,333 in respect of each of the four tax years 1997 to 2000 as well as an amount of R10,416,661 in respect of the 2001 tax year as an allowance in terms of section 11 (gA). Applying the legal notion of **de minimis non curat lex,** I shall similarly ignore the amount of R94,05 for the purposes of this judgment. It is the disallowance by the Commissioner of such amounts that forms the subject-matter of this appeal.

4] Although called an appeal, these proceedings amount to a fresh hearing and investigation, in which the court's function is one of revision rather than an appeal in the ordinary sense (See: **Bailey** v **Commissioner for Inland Revenue** 1933 AD 204 at 220; **ITC 163,** 60 SATC 267 at 302) confined to the issues as they have crystallized in the Commissioner's "statement of the grounds of assessment" read with the taxpayer's "statement of the grounds of appeal" but with due regard thereto that in terms of section 82 of the Act the onus of proving that any amount is exempt from or not liable to any tax chargeable under the Act, is upon the Taxpayer.

5] Mr Emslie SC (who with Ms L-A van der Westhuizen) appeared for the taxpayer and Mr Spilg SC (who with Miss Kgoroeadira) appeared for the Commissioner were broadly in agreement that the issues as crystalised in the "Grounds of Assessment" and the "Statement of Grounds of Appeal" that need to be determined by this court are

5.1] whether the assets in respect of which an amount of R50 million was allocated in the agreement of purchase namely, the trademarks and the name that were identified therein, constitute "trademarks" within the meaning thereof in section 11 (gA) of the Act;

5.2] whether as a fact expenditure in that amount was actually incurred in respect of the acquisition of such assets;

5.3] whether such expenditure was incurred in acquiring such assets by "assignment";

5.4] whether the said trademarks were used by the taxpayer, and if so, whether they were used in the production of income and if so, whether income was derived therefrom; and

5.5] whether a period of six years constituted an appropriate write-off period.

The Factual Background

6] As a prelude to dealing with the issues enumerated above it is necessary to briefly set out the factual background against which the taxpayer acquired the business Radio XYZ from the SABC. The Independent Broadcasting Authority (IBA) as part of a national strategy to reduce the SABC's dominance of the radio broadcasting industry in the Republic of South Africa (the RSA) and to open up the airwaves to private enterprise, recommended, inter alia, that a number of the regional commercial radio stations operated by it, be privatised. The board of the SABC during November 1995 accepted the said recommendations and after they had received the imprimatur of Parliament, proceeded to implement them.

With the exclusion of the former TBVC states, the SABC enjoyed a virtual monopoly in radio broadcasting in South Africa, initially under the control of the Post-master General and later the Ministry of Posts and Telecommunications. Accordingly the radio stations the SABC wished to dispose of had not been licenced independently.

7] After a selection process, the SABC engaged the services of Investec Merchant Bank (Investec) to advise and assist it in disposing of six of its regional commercial radio stations, including Radio XYZ. Investec in turn deputed the execution of its mandate to Mr Kevin John Kerr (Kerr) who at the time was a consultant in its Corporate Finance Division and his assistant Mr Bruce MacRoberts (MacRoberts).

8] Due to the fact that, outside of the SABC, little was known about the radio broadcasting industry in the RSA, Kerr and MacRoberts prepared an information document styled "Confidential Sale Memorandum" which comprehended the information they considered necessary to generate interest and elicit offers from potential purchasers in respect of six of the SABC's regional commercial radio stations. The disposal process was to take place in two stages pursuant to potential acquirors having registered their interest by providing prescribed information and, if approved, having been provided with numbered copies of the Confidential Sale Memorandum. During the first phase potential acquirors were required to submit initial offers in a prescribed format based on the information contained in the Confidential Sales Memorandum. Of the 110 potential acquirors who had submitted registrations of interest, only 53 submitted initial offers and of those only 22 were selected to participate in the second phase. During that phase the selected potential acquirors were permitted to carry out due diligence investigations in respect of the radio stations they wished to acquire in accordance with a prescribed protocol that, inter alia, entailed access to management. After completion of the due diligence investigations acquirors were required to submit final irrevocable offers in respect of the radio stations they wished to acquire and were, inter alia, furnished with a draft agreement of purchase which had been prepared by the SABC's attorneys on its instructions and also Investec. In terms of Clause 1.1.2 of the draft agreement of purchase the businesses to be sold included, inter alia, their goodwill (excluding their names) and (as yet) unidentified trademarks. Clause 4.3 thereof made provision of the allocation of the purchase price between designated assets, goodwill and trademarks. Potential acquirors were also provided with written guidelines as regards the format of and the information that had to be included in their irrevocable offers which were required to be submitted at the end of the second phase together with bank guarantees.

9] Of a total of 15 irrevocable offers received in respect of the six radio stations, three were in respect of Radio XYZ. They were Newshelf 63 (Pty) Ltd (Newshelf) for an amount of R110 million; the Crescent Consortium - as the taxpayer was then known - for an amount of R65 million; and the Moribo Consortium for an amount of R35 million. Kerr compiled a summary of the irrevocable final offers and submitted it to the SABC together with Investec's recommendations. The SABC in all instances chose the highest offeror as its preferred bidder and publicly announced the list of such bidders on 21 June 1996. In the case of Radio XYZ the preferred bidder was Newshelf. Details of the irrevocable offers were forwarded to the Cabinet for its approval of the disposal process and any recommendations it wished to make thereanent.

10] As part of their irrevocable final offers all selected potential acquirors were required to complete and submit an application to the IBA for a radio broadcasting licence in respect of the radio stations for which they had submitted offers. After the SABC had identified its preferred bidders, it duly forwarded all 15 irrevocable final offers to the IBA so that the licensing process could be initiated. The IBA conducted hearings for the allocation of a broadcasting radio licence in respect of Radio XYZ in Cape Town during August 1996. After the hearings had been completed the IBA resolved to award the licence in respect of Radio XYZ to the taxpayer and publicly announced its decision on 19 September 1996. Despite the fact that the SABC had in clause 2.5 of the Confidential Sale Memorandum reserved an absolute discretion to itself as regards the acceptance of offers, it resolved not to challenge the IBA's decision to award the radio broadcasting licence in respect of Radio XYZ to the taxpayer and thereafter proceeded with the disposal process.

11] The taxpayer was originally known as Electprops 23 (Pty) Ltd (Electprops) a shelf company, hastily acquired, when it during the IBA hearings transpired that a radio broadcasting licence could not be awarded to an unincorporated association comprising of natural persons and a corporate entity. Electprops changed its name to XYZ Radio (Proprietary) Limited on 30 May 1997 and appears to have become vested with all the rights and assumed all the obligations of an unincorporated association known as the Crescent Consortium (the Consortium) which consisted of the following groups/entities: -

11.1] Paul Wilkins (Wilkins), Kevin Savage (Savage) and Antony Mallam (Mallam) who jointly held a 20% interest;

11.2] Western Cape Outreach Broadcasting, Brimstone Investment Corporation Ltd, and the Investments Progress Group who jointly held a 25% interest;

11.3] The management and staff of the radio station who were to hold a 10% interest; and 11.4] Firstcorp Capital Investors (Firstcorp) as the investment vehicle for a group of private equity investors that held a 45% interest. After the taxpayer had been acquired the shares therein were allocated in proportion to the respective parties' interests in the consortium, save that 5% of the shares that were to have been allocated to the staff share trust were allocated to the entities in 11.2 above each whereof thereafter held 10% of the shares. Mallam, Savage and Wilkins as the founding members of the consortium (the founding members) approached Firstcorp to become involved as a financier. Firstcorp was mostly represented by Mr Danie Jordaan (Jordaan) and Mr John van Wyk (Van Wyk). Western Cape Outreach Broadcasting, Brimstone Investment Corporation Ltd and the Investments Progress Group were approached with a view to providing the required empowerment component.

The Provenance and Development of Radio XYZ

12] Radio FM had its origins as a transmitter-split service called Radio Good Hope/Kontrei which had been launched on 2 April 1990 by the SABC in order to target rural audiences. It originally broadcast only on weekdays for a restricted number of hours to both English and Afrikaans speaking listeners. Its area of coverage stretched from Knysna on the Southern Cape coast to Alexander Bay on the West coast. Its launch was successful and resulted in a significant increase in not only its own listener numbers but also those of Good Hope FM. As a consequence its broadcasting hours were extended from seven to thirteen hours per day. As by March 1993 the listeners of Radio Good Hope/Kontrei had grown to 182,000 per day it was allocated a dedicated transmitter situated on the Tygerberg. It changed its name to XYZ as from January 1994 and started transmitting 24 hours per day and by March 1994 its listener numbers had grown to 295,000 per day. Listener numbers continued to increase due to the fact that its mainstream adult contemporary format attracted urban as well as rural listeners in the Cape Metropolitan area as well as other areas in the Western Cape.

13] That the listener numbers of Radio XYZ increased is unsurprising if regard is had to the evidence of Mr. Clive

Ridgway (Ridgway) - whom I found a most impressive witness - and was employed by the SABC as the senior program compiler of Radio Good Hope / Kontrei from its inception. He, as a musician who had often performed in the rural areas and had an understanding of the kind of music that appealed to such audiences, set about putting together a collection of compact discs from which he - guided by feedback received from listeners as well as research in the form of "auditorium music testing" and "focus group studies" - compiled playlists specific and unique to that radio station. His objective was the incremental evolution of the "audio image" of the station so as to extend its appeal to a broad-based adult audience but still sensitive to audience responses. The playlist was restricted to well-known current music items capable of creating an ambience consistent with the positive values and image the station endeavoured to project and changes to the play-list were systematic and gradual. With a view to developing a distinct identity and maintain consistency, no more than one or two new items of music were introduced every week. A rigid policy was introduced in terms whereof each hour of broadcasting was divided into specific time segments in order to maintain a balance between music, advertisements and speech. Presenters were discouraged to speak for longer than 90 seconds at a time and encouraged to smile whilst doing so. The station identification was repeated after every item of music ie. every 3 to 4 minutes. "Pay-off lines", "taglines" and "positioning statements" identifying specific programs were always used in conjunction with "XYZ 94.5" and the station's own advertisements were afforded the first position in advertising slots. Presenters were developed in-house from individuals who were perceived to have an understanding of the "brand and feel" of the station as well as its market and they were required to "drive the format" by playing appropriate music and creating the desired ambience. Presenters were encouraged to sub-ordinate their personalities to the station as a brand. Those measures were directed at attracting more affluent listeners who, in turn, would attract high-end advertisers. In addition, the Radio XYZ brand was promoted by means of advertisements in the print media; other forms of advertising devised by the station's advertising agency Jupiter Drawing Board; and various kinds of promotions. As a consequence, Radio XYZ, as was testified by Kerr, was the fastest growing regional radio station in the RSA and its brand had become firmly established in its transmission area by the time the SABC resolved to dispose of it.

The conclusion of the Agreement of Purchase and the terms thereof

14] The selected potential acquirors were provided with, inter alia, a draft agreement of purchase stamped "Draft for Discussion Purposes Only" which specifically omitted as part of the businesses being offered for sale the names of the respective radio stations (Clause 1.1.2) and specifically provided for the allocation of the purchase price between designated assets, goodwill, and trade marks (Clause 4.3). It is notable that when the consortium submitted its final irrevocable offer on 24 May 1996, it failed to allocate, as provided in the draft agreement of purchase, the amount it offered to pay as purchase price, but dealt with that aspect in the following manner -

> "The broad terms of the Purchase agreement is (sic) acceptable to the consortium. The consortium however suggests that a separate meeting be arranged to discuss the terms and conditions of the agreement and the consortium's comments. For practical reasons, such a meeting should only be scheduled should the consortium progress to the next round. The consortium's initial comments on the purchase agreement are attached as Annexure 2 to this letter."

The taxpayer, in its comments on the draft agreement of purchase furthermore, insisted that the name Radio XYZ be included as part of the business it wished to acquire and proposed that the allocation of the purchase price be finalized at a meeting with the SABC.

15] It also needs to be noted that clause 12 of the draft agreement of purchase provided that its operation would be governed by the fulfilment of two suspensive conditions, one whereof was the granting and the issuing by the IBA to the purchaser of a broadcasting licence by a date to be determined and that in the event of that condition not being complied with, the agreement would be deemed as **pro non scripto** and **void** ab **initio** and incapable of enforcement.

16] The effect of the IBA's announcement on 19 September 1996 that the broadcasting licence in respect of Radio XYZ had been awarded to the tax payer as well as the SABC's decision not to challenge that decision was that it either had to withdraw from the disposal of Radio XYZ or conclude an agreement with the taxpayer. It chose to do the latter. After the awarding of the licence had been announced, Mallam spent most of his time in Cape Town for the purpose of facilitating the take-over. Savage joined him later but Wilkins and Firstcorp remained stationed in Johannesburg.

17] Although the evidence thereanent is somewhat sketchy, it appears that Jordaan and Van Wyk of Firstcorp, with input from mainly Mallem and Wilkins, were primarily responsible for liaising with the SABC's attorneys as regards the finalization of the terms of the agreement of purchase which was signed by Wilkins on behalf of the taxpayer shortly after the licence had been formally issued on 10 October 1996. As regards the allocation of the purchase price, paragraph 4.3 of the agreement of purchase provided as follows: -

"4.3 The purchase price shall be allocated as follows:

4.3.1] respect of the Designated Assets, the amount of R5 000 000,00 (FIVE MILLION RAND);

4.3.2] in respect of the Goodwill, the amount of R10 000 000,00 (TEN MILLION RAND);

4.3.3] in respect of the trademarks and the Name, the amount of R50 000 094,50 (FIFTY MILLION AND NINETY FOUR RAND AND FIFTY CENTS)."

18] It is apparent from the evidence of Kerr and Mallam that the said allocation was not the product of any direct negotiations between the SABC and the taxpayers representatives, as forshadowed in paragraph 5 of its final irrevocable offer and in clause 3 of Annexure 2 thereto. According to Mallam the consortium at the time did not possess all the required information and lacked sufficient time to have obtained a full valuation of the trademarks and name, and accordingly, the allocation was decided upon in discussions between the founding members and Firstcorp and they were of the view that they possessed sufficient information "... to put a reasonable number" in the agreement of purchase (Record: 450 (24 - 25)). It was the evidence of Mallam that Firstcorp and their attorneys, Webber Wentzel Bowens, attended to the finalization of the terms of the agreement of purchase on the taxpayer's behalf. That

Firstcorp did take the initiative in that regard is consistent with the evidence of Wilkins who testified that he was requested by Firstcorp to obtain, and in fact obtained, a valuation from Mr Russel Yeo (Yeo) after his own valuation of R110 million had been summarily rejected. It is furthermore consistent with Mallam's testimony that he had, prior to November 1996, not seen any of the spreadsheets that had been generated by Firstcorp on 29 and 30 September 1996 (Additional Bundle C) and in turn were based on the projections contained in the spreadsheets that had on 24 May 1996 been included in the "Private and Confidential" portion of the application for a broadcasting licence (Bundle 1, pages 191 - 195). Mallam further testified that the obtaining of a valuation of the trademarks from Mr L. Reyburn (Reyburn) of Webber Wentzel Bowens on 21 October 1996 - to which Mr Yeo's written opinion appears to have been annexed - was an independent exercise carried out by Firstcorp and testified that whilst he knew of Yeo's valuation, he was unaware of Reyburn's.

19] The trademarks and name in respect of which an amount of R50 million was allocated in the agreement of purchase were therein defined as -

19.1]

"1.1.18] "Trademarks" means the trademarks constituting an asset of the Business and being:

1.1.18.1] the trademarks "XYZ" and "XYZ (Special Form) and Device", which is the subject of the following pending trademark applications in South Africa:

1.1.18.1.1] pending trademark application 95/10852 XYZ (Special Form) and Device, in Class 38 for Communication; and

1.1.18.1.2] pending trademark application 95/10853 XYZ (Special Form) and Device, in Class 41 for Education and Entertainment, as more fully detailed in Annexure "F1" hereto;

1.1.18.2] those unregistered trademarks, being "94.5 FM", as well as any derivatives thereof; as more fully detailed in Annexure "F2" hereto;"

19.2]

"1.1.10]

"Name" ... means the name of the business being "RADIO XYZ"

20] It appears from a perusal of the four documents annexed to the agreement of purchase as annexure F1 firstly, that those at pages 310 and 311 of Bundle 1 and had been issued on 31 July 1996 and appear to be certificates in respect of pending trademarks 95/2772 and 95/2273 respectively, the visual representation whereof is as follows:

[Image]

and secondly, that those at pages 312 and 313 of the said bundle, which bear the date stamp 18 August 1995 of the Registrar of Patents, Designs, Trade Marks and Copyrights, are applications numbers 95/10852 and

95/10853 respectively for the registration of a trademark the visual representation whereof is as follows:

[Image]

21] It is apparent from the aforegoing that the trademarks identified in the text of the definition of "trademarks" in the agreement of purchase are limited to "... pending trademark applications 95/10852 XYZ (Special Form) and Device in Class 38 for Communication and pending trademark application 95/10853 XYZ (Special Form) and Device in Class 41 for Education and Entertainment" (the XYZ 94.5 trade mark) and that no reference is therein made to pending trademark application 95/2772 Radio XYZ (Special Form) and Device in Class 38 for Communication and pending trade mark application 95/2773 in Class 41 for Education and Entertainment (the Radio XYZ trademark). However, the fact that the two certificates in respect of the Radio XYZ trademark were included as part of annexure F1 to the agreement of purchase and the fact that both the Radio XYZ and XYZ 94.5 trademarks were formally assigned to the taxpayer by the SABC with retrospective effect from 9 October 1996 (See page 377 of Bundle 1), in my view, is reasonably susceptible of only one inference namely, that the parties thereto intended to dispose of and acquire both.

Those trademarks, self-evidently, possess visual as well as audible aspects. Whilst the visual aspects would constitute the dominant feature of any printed and other graphic forms of advertising the audible aspect of the word and letters "Radio" and "XYZ" respectively and the letters XYZ and figures "94.5" would be the dominant feature in the communications medium in which the taxpayer operates especially as those features are replicated in trade name Radio XYZ.

I interpose to observe that the statement in the Commissioner's Counsels' heads of argument to the effect that the "Radio XYZ" trademark had been withdrawn in March 1996 finds no support in the evidence or any other evidentiary material to which regard may be had.

22] The unregistered trademarks identified in Annexure F2 were -

"94.5 FM"
"ADDICTIVE RADIO"
"VERSLAWENDE KLANKE"
"BIG BREAKFAST"
"BEKKER'S BRUNCH" "MORE MUSIC LESS TALK" "94 TO 97 FM"

Both Mallam and Ridgway testified that those "trademarks" were mostly "pay-off lines", "taglines" or "positioning statements" which had a finite lifespan and accordingly were of limited commercial value. That evidence was not challenged.

23] It appears to be common cause (if not simple common sense) that the financial success of a commercial radio station is largely dependent upon the income from advertising it is capable of generating and in turn is dependent on not only the number of listeners but also their demography as measured in accordance with widely recognised and generally accepted industry criteria. In that context it is not unimportant to note that the animating force of the consortium, and later the taxpayer, was its founding members Mallam, Savage and Wilkins who individually were steeped in different facets of the commercial radio broadcasting industry in the RSA. Mallam, a chartered accountant, was employed by the SABC from 1990 until 1995. He during that period was a member of a team mandated to convert that institution into a commercial entity; served as the acting chief financial officer in charge of the overall financial functions of the SABC; was the financial manager of the commercial radio unit for a period of three years; and thereafter became the financial manager of Radio Active, the sales arm of SABC radio services and sold advertising time to agencies as well as direct to businesses. He during that period became privy to not only Radio XYZ's history but also to its advertising and marketing budget as well as the strategy employed by the SABC in relaunching it as its own brand. Savage had extensive experience over a number of years in broadcasting in the RSA and overseas. He at the time, was a well-known presenter on Radio 5. He had knowledge of programming, had a very good knowledge of popular music, and was particularly strong on presentation. Wilkins has been involved in the advertising industry for almost 40 years. He started his career in the United Kingdom, and after relocating to RSA worked for a number of multi-national companies before starting his own advertising agency during approximately 1980. He joined Grey Advertising in 1985 and started Media Compete in 1986 which was later taken over by a global advertising concern, WWP Agencies. He currently is the Chief Executive Officer in South Africa for Group N which comprises four agencies namely MindShare, Media Compete, Media Edge and Nota Bene and are part of WWP. Those agencies are responsible for handling about 40 percent of all media-spend in South Africa.

24] Prior to the SABC announcing its intention of disposing of a number of its regional commercial radio stations Mallam and Savage had been in discussions about the launching of a new commercial radio station. Wilkins heard the announcement that the SABC intended disposing of certain of its commercial radio stations when he was on his way to the airport before departing for overseas on a holiday. He subsequently became aware of Mallam and Savage's plans during the early part of 1996 because his mother had sat next to Savage's mother in church and it during a conversation emerged that their sons were both interested in acquiring a radio station. After Wilkins had met Mallam and Savage he succeeded in convincing them that the acquisition of an existing radio station was preferable to starting one from scratch, like they intended to do. They thereafter set about preparing themselves for the submission of offers for the acquisition of Radio XYZ, Radio Algoa and East Coast Radio under the name Crescent Consortium, after the crescent shape of the eastern coast line of the continent of Africa.

25] Meetings and exchanges of correspondence between representatives of the Commissioner and the attorneys of the taxpayer culminated in a letter written by the Commissioner on 14 November 2003 in which the deduction by the taxpayer from its income of an allowance in terms of section 11 (gA) of the Act in respect of the amount expended by it in the acquisition of the Radio XYZ and XYZ 94.5 trademarks was disallowed. The reasons advanced, in a nutshell, were -

25.1] that not all the trademarks acquired in terms of the agreement of purchase can be classified as constituting trademarks;

25.2] that such trademarks were not acquired by assignment, nor was expenditure actually incurred in respect thereof;

25.3] that such trademarks had not been used by the taxpayer in the production of its income, nor has income been derived therefrom;

25.4] that for the mentioned reasons such trademarks had only a nominal value because, as is apparent from a statement in First National Bank's letter of 23 August 1996, the granting of finance for the acquisition of Radio XYZ was subject to the granting by the IBA of a broadcasting licence in respect of XYZ; and

25.5] that the proof submitted by the taxpayer in regard to the probable duration of the use of the trademarks was insufficient to have assisted the Commissioner to arrive at an opinion thereanent.

As a consequence of such disallowance additional assessments were issued.

26] What stands out on even a cursory reading of the correspondence that originated from the officials who represented the Commissioner in this matter, is their almost myopic enchantment with the notion that the market value of a trademark is the decisive criterion for determining whether the amount actually expended in acquiring it is allowable as a deduction in terms of section

11 (gA) of the Act. That observation must be seen against the backdrop of the wording of that subsection which in clear language allows the deduction from income of an allowance in respect of any "expenditure actually incurred" in acquiring a trademark, or any other property of a similar nature from a third party. If the concept "expenditure actually incurred" is contrasted with the use by the legislature of the concepts "costs" or "market value" in proviso (dd) of subsection 11(gA)(iii), the conclusion that the allowance in subsection 11(gA)(iii) was not intended to be based on market value is, in my view, inescapable. I am in full agreement with the submission of Mr Emslie that if the legislature had intended that a section 11 (gA) allowance is to be based on market value, as opposed to "expenditure actually incurred" or that it intended clothing the Commissioner with a discretion thereanent, it would have employed wording similar to that found in section 11(e). That subsection, which applies to tangible assets, provides for a deduction of "such sum as the Commissioner may think just and reasonable as representing the amount by which the <u>value</u> of any machinery etc used by the taxpayer for the purpose of his or her trade has been diminished by reason of wear and tear or depreciation during the year of assessment" (underlining provided) and clothes the Commissioner with a discretion as regards the quantum of the allowable deduction. By contrast Section 11 (gA)

which applies to intangible assets, restricts the Commissioners discretion to the probable duration of the use thereof. If any explanation is needed for the difference in approach between in sections 11(e) and 11 (gA) as regards the mechanism for the determination of permissible deductions in respect of tangible assets on the one hand and allowances in respect of intangible assets on the other hand, I would venture to suggest that it is to be found in the palpable difficulty of valuing intangible assets. The evidence of Mr Gregory Charles Johnson (Johnson) and Mr Harvey Elliot Wainer (Wainer) who were called as expert witnesses by the respective parties and whose evidence occupies approximately 400 pages of the transcribed record, bear more than ample testimony to that fact.

Do the trademarks and name which formed the subject-matter of the agreement of purchase constitute trademarks as envisaged in section 11 (gA)?

27] At the time when the expenditure for the acquisition of the said trademarks was incurred by the taxpayer ie. 10 October 1996 (the date on which the agreement of purchase was concluded) Section 11(gA) referred to "... any trademark" as defined in the Trade Marks Act, 1963 (Act 62 of 1963). That subsection was subsequently amended to refer to the Trade Marks Act, 1993 (Act 194 of 1993). As Section 11 (gA) by reference incorporated the definition of trademark in the 1963 Act, the repeal thereof by the 1993 Act did not render the incorporated definition ineffectual (See: **Solicitor-General v Malgas** 1918 AD 321). I accordingly am in agreement with Mr Emslie's submission that the deductibility of the allowance claimed by the taxpayer must be determined with reference to the criteria extant as at the time when the expenditure was incurred and that the meaning of the concept "trademark" has to be determined in accordance with the definition thereof in the 1963 Act

28] The purpose of the enactment of section 11 (gA) of the Act is manifestly to stimulate investment in intellectual property which is commercially productive and likely to provide enduring economic advantage to the Republic of South Africa (See: **Commissioner for** South **African Revenue Service** v **S.A. Silicon Products (Pty) Ltd** 66 SATC 131 (SCA) at paragraph 18). Although Mr Spilg, in submitting that section 11 (gA) should be narrowly construed, relied on a dictum in that paragraph, no more need be done than to adhere to the approach followed in a number of reported tax cases in the past (See: **Ernest v Commissioner of Inland Revenue** 1964 (1) SA 318 (AD); **Elfert** v **Commissioner for Inland Revenue**

1957(1) SA 483 (AD); and **Bugler's Post v Secretary for Inland Revenue** 1974 (3) SA 28 (AD) at 34 B - F) namely, to require the taxpayer to discharge the onus of showing that the expenditure actually incurred by it in respect of the acquisition of the trademarks and name, when viewed objectively (See: the **SA Silicon Products** case (supra) at paragraph 27), fall within the ambit of the provisions of that subsection. That it bestows a tax benefit on a purchaser of intellectual property without any corresponding benefit to the fiscus as against the seller and furthermore holds the potential for abuse, merely served to provide atmosphere rather than substance to the argument.

29] The concept "trademark" is in the 1963 Act defined as follows: -

> " 'trademark', other than a certification mark, means a mark used or proposed to be used in relation to goods or services for the purposes of-
>
> (a) indicating a connection in the course of trade between the goods or services and some person having the right, either as proprietor or as a registered user, to use the mark, whether with or without any indication of the identity of that person; and
>
> (b) distinguishing the goods or services in relation to which the mark is used or proposed to be used, from the same kind of goods or services, connected in the course of trade with any other person".

and the word "mark", in turn, is therein defined as -

> " 'mark' includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof or a container for goods."

30] It is not insignificant that whereas in the 1963 Act the definition of "mark" includes the concept "brand", the definition of "mark" in 1993 Act does not and that the definition of "mark" in both acts includes the concept "name". As the trademarks that formed the subject-matter of the agreement of purchase encompassed one or more of the elements enumerated in the definition of "mark" which were utilized for the purposes stated in the definition of "trademark" in the 1963 Act, they constitute "trademarks" under that act. To the extent that the evidence of Mallam and Wilkins was that they desired to acquire and develop the "brand" of the station - a term which appears to have been used in its widest connotation as including the trade name, which is a meaning frequently attributed thereto in a business sense (See: **Heinco Enterprises (Pty) Ltd v Netherlands Paint Factories (Pty) Ltd** 1970(4) SA 504 (N) at 506 H) - the name "Radio XYZ" and a variant thereof namely, "XYZ 94.5" which are visual representations and auditory repreproductions of the trademarks from which they were derived, would, at first blush, appear fall within the definition of trademark in the 1963 Act.

31] The deduction from income of an allowance in respect of expenses actually incurred in acquiring, inter alia, a trademark is restricted to trademarks "acquired by assignment" or in acquiring any other property of a similar nature. The concept "acquired by assignment" has not been statutorily defined in the Act. In the context of trademarks the usual and ordinary meaning of "assign" namely, a transference of both rights and obligations (See: **Talas Properties of Rhodesia (Pvt) Ltd v Abdullah** 1971 (4) SA 369 (R) at 371 A) appears to be inapt. Accordingly, its intended meaning must of necessity be gleaned from the legal nature of the concept trademark namely, a species of incorporeal property conferring a right, in the nature of a monopoly, to restrain others from using it. (See: **Protective Mining & Industrial Equipment Systems (Pty) Ltd (Formerly Hampo Systems (Pty) Ltd) v Audiolens (Pty) Ltd** 1987 (2) SA 961 AD at 979 A -B).

It is trite that a registered trademark is an incorporeal movable (See: **Webster & Page: South African Law of Trade Marks,** 4th Edition, paragraph 11.27; **CJ van der Merwe: Sakereg,** 2nd Edition at 45) which accords to its owner real or proprietary rights enforceable against all (Cf: **Kinekor Films (Pty) Ltd v Movie Time** 1976 (1) SA 649 (D & CLD) at 658 B). In terms of the common law, delivery of ownership in a movable incorporeal passes pursuant to a real or transfer agreement following upon the conclusion of an obligationary ("verbintenisskappende") agreement (See: **Erasmus v Michael James (Pty) Ltd and Others,** 1994 (2) 528 (C) at 589 E - F; 541 F - G; **Silberberg and Schoeman: The Law of Property** (2nd Edition) at 71). To the extent that section 39 of the 1993 Act (which came into operation on 1 May 1995 and therefore applies to the disposal of the trademarks in the instant case) provides for the assignment or transmission of a pending trademark application (subsection (5)) and requires writing as well as the signature of the assignor for the validity of the assignment of a registered trademark or one which is the subject of an application for registration (subsection (7)), the act of assignment encapsulates the real or transfer agreement. Clause 3.2.5 of the Agreement of Purchase in terms whereof the SABC undertook to sign any documentation necessary or required for the substitution of the taxpayer as the applicant for the registration of the trademarks, clearly manifested the obligatory and the deed of assignment executed by the SABC on 12 August 1997 with retrospective effect, the real or transfer part of the transaction in terms whereof the trademarks were transferred. In view of the above, I am of the opinion that the use by the legislature of the concept "assignment" in section 11(gA)(iii) by necessary implication signifies an intention that expenditure incurred in respect of the acquisition of registered trademarks would undoubtedly qualify for deductibility in terms thereof.

32] As the amount of R50 million was allocated to the trademarks Radio XYZ and XYZ 94.5 as well as the name of the business namely Radio XYZ it needs to be considered whether any amounts paid in respect thereof qualify for deduction in terms of section 11 (gA) of the Act. Mr Spilg contended that the name Radio XYZ formed an inseparable part of the goodwill of the business the taxpayer acquired as a going concern and that any amount paid in respect thereof should be allocated to goodwill which, as a matter of law, does not qualify for deduction in terms of that subsection. Although the premise on which that submission is based namely, that the distinctive name of a business constitutes part of the goodwill of a business which is a going concern and cannot be dealt with as a severable item of property, is undoubtedly good law (See: **Federal Commissioner of Taxation v Just Jeans (Pty)** Ltd **(Fed C of A)** (1987) 1880 R 775, lines 38 to 42; and Cf: **Butterworths Publishers (Pty) Ltd** v **Jacobsen's Group (Pty) Ltd & Another** [2005] JOL 14312 (T) at paragraph 12) that is not what happened in the instant case, which concerns the genuineness of the allocation of the purchase price between certain identified asset classes. As is apparent from the graphic representation of the Radio XYZ trademark which has been produced in paragraph 18 above, the name of the business namely Radio XYZ is a replication of the most prominent features of the Radio XYZ trademark, the statutorily permissible use whereof may entail a visual representation and/or an audible reproduction thereof. From that perspective the name Radio XYZ and the Radio XYZ trademark are inseparably intertwined. Just as little as the taxpayer needs any contractual or other warrant for the use of visual representations or audible reproductions of the XYZ 94.5 trademark was it necessary in the case of the Radio XYZ trademark and accordingly, the taxpayer's insistence that the name of the business be included as part of the **merx** acquired by it can be attributed to over-cautiousness. Such over-cautiousness is consistent with the evidence of Wilkins (Record 888 (24 - 889 (4)) that it was done on his insistence because he had a "harrowing experience" in not having been able to "register" the name of Media Compete. It seems to me to follow logically from the conclusion that the name Radio XYZ and the Radio XYZ trademark are inextricably intertwined, that whatever was being paid for the acquisition of the trademark encompassed also the use of visual representation and auditory reproduction thereof in, inter alia, the guise of the name under which the business was operated namely Radio XYZ.

33] Are any amounts paid in respect of the acquisition of any of the unregistered trademarks enumerated in clause 1.1.18.2 of the agreement of purchase and annexure F2 thereto, deductible from the taxpayer's income in terms of Section 11**(gA)** of the Act? In my view not. An unregistered trademark cannot be the subject of proprietary rights (See: **Butterworths Publishers (Pty) Ltd v Jacobson's Group (Pty Ltd & Another** (supra) at paragraph 10). Accordingly such trademarks lack a fundamental characteristic of registered trademarks namely, the conferral of real or proprietary rights and for that reason, constituted part of the goodwill of the business the taxpayer acquired.

34] I accordingly incline to the view that such amounts as may have been shown to constitute expenditure actually incurred by the taxpayer in acquiring the Radio XYZ and the XYZ 94.5 trademarks as well as the name Radio XYZ are deductible from the taxpayer's income in terms of section 11 (gA) of the Act but that any amounts expended on the acquisition of the unregistered trademarks are not.

Was the amount of R50 million which was in the agreement of purchase allocated to the trademarks and the name actually incurred in their acquisition?

35] There cannot be any doubt on the evidence before this court, that the total purchase price of R65 000 094,5 - of which such amount formed part -resulted from negotiations at arms length between the SABC and the taxpayer and that a cheque in that amount was drawn by

First Corp Merchant Bank on the First National Bank in favour of the SABC and met. As the obligation to pay that amount arose on 10 October 1996 when the agreement of purchase was concluded and was discharged on 11 October 1996 or shortly thereafter, there can be little doubt that it constituted an "expenditure actually incurred" in the sense of "in fact" or "really" (See: **Commissioner for Inland Revenue v Golden Damps (Pty) Ltd** 1993(4) SA 110 (AD) at 117 D).

There, in my view, appears to be no warrant for Mr Spilg's submission that the said phrase means "genuinely". It follows logically from the aforegoing that the expenditure of R65 000 094, 50 was incurred during the 1997 tax year.

36] I next turn to the question whether an amount of R50 million or any other portion of the total purchase price was expended by the taxpayer in acquiring any trademark by assignment or any other property of a similar nature. As I have already found above that Radio XYZ and XYZ 94.5 are visual representations and audible reproductions of the Radio XYZ and XYZ 94.5 trademarks and that the said trademarks have been properly assigned from the SABC to the taxpayer, what remains to be determined next is the quantum of the amount the taxpayer in fact paid to the SABC in respect of the said trademarks and name.

37] The starting point in that enquiry is the amount of R50 million allocated to the trademarks and the name in clause 4.3.3 of the agreement of purchase. Mr Spilg in contending that the trademarks and name had merely a nominal value, submitted that the amount allocated in respect thereof was unduly inflated with a view to maximising the tax benefit that could be claimed under section 11 (gA) of the Act. The circumstances surrounding the finalization of the terms of that agreement as well as the allocation of the purchase price between certain asset classes have already been fully set out in paragraphs 16-18 above and need not be repeated here. What however needs to be reiterated is that such amount reflected the joint view of the consortium's founding members as arrived at in conjunction with Firstcorp's representatives and that Mr Spilg's submission that Firstcorp made the decisions, "called the shots" and was "driving" the bid process is egregiously at variance with the evidence which was to the effect that "probably 80% of the effort in compiling the bid" came from the founding members and that Firstcorp only became actively involved therein during the final stages. That the taxpayer's motive for the allocation was tax- driven is difficult to reconcile with the fact that the necessity to make an allocation in respect of the trademarks was foisted upon bidders by the format of the draft agreement of purchase prepared by the SABC's attorneys Maisel & Smit without any urging whatsoever from any members of the consortium.

38] It is common cause that the allocation of the purchase price between different asset classes was not preceded by negotiations between the taxpayer and the SABC as had been foreshadowed by the consortium at the time it submitted its irrevocable final bid. Mr Spilg, on my understanding of his argument, on the strength of **Collis v FCoT** (1996) 33 ATR 438 at 441 lines 19-25; 443 lines 9 - 33), submitted that the fact that the total purchase price had been allocated in the absence of prior negotiations, not only diminishes the probative value of the agreement of purchase thereanent, but also reflects an indifference on the part of the SABC who had subjected its will to the taxpayer's wishes. That submission too is not supported by the evidence. Mr Kerr - the SABC's advisor - testified that all allocations were scrutinised to determine whether they were appropriate and reasonable, and as a percentage of the purchase price, fell within an acceptable range and that most of the bidders allowed significant values to trademarks. That evidence has a ring of truth as the SABC wanted to dispose of the radio stations in question at the highest possible price and its approach served the interests of Investec also as the level of its remuneration was determined thereby. That submission however, shows an indifference to the fact that the SABC, as the dominant party to the transaction and under no obligation or compulsion to sell, was being advised by Investec and assisted by its attorneys and that the agreement of purchase came into being pursuant to compliance with the established principles of offer and acceptance.

39] It is also common cause that, to the knowledge of the founding members, no formal valuation of the trademarks and name had been obtained prior to the amount allocated in respect thereof being decided upon. It would appear that Wilkins' view thereanent was sought but that his opinion - which appears to have been influenced by the Newshelf's bid of R110 million - was summarily rejected. Although the date on which Wilkins obtained Yeo's opinion of a value of approximately R50 to 55 million cannot be established from the evidence adduced, the probabilities are that at least the oral version thereof would have been conveyed by him to the other members of the consortium and would have informed their views which, in the case of the founding members, are likely to have been predominantly shaped by their exposure to the commercial radio-and advertising industries. In the circumstances it is not surprising that the taxpayer is incapable of producing any working documents showing how the allocated amount of R50 million was arrived at. A window on the view of the consortium's members as regards the value of the trademarks is their projected future cash flow study over the period 1997 to 2002 as reflected in certain spreadsheets generated by Firstcorp on 24 May 1996 (Bundle 1 page 191 et seq) on the basis of information provided by Mallam and formed part of the licence application to the IBA which accompanied the final irrevocable bid and provided for the deduction of R8 333 000 per year and equate to an assumed acquisition price of about R40 million in respect of trademarks. That amount roughly coincides with a formal valuation of plus-minus 41.8 million on 21 November 1996 by Reyburn of Webber Wentzel Bowens for Firstcorp Merchant Bank Limited at the instance of Van Wyk and on the basis of information provided by him. As Reyburn's valuation - which has not been properly proved in evidence - was obtained only after the allocation had been finalized it is highly improbable that it could have played any role in the quantification of the amount allocated to the trademarks and the name.

40] By the time the quantum of the amount allocated to the trademarks and name had to be made, Mallam had already had access to the management and staff of Radio XYZ. He started taking charge shortly after 19 September 1996 and it is likely that he, in addition to the information he had gleaned whilst being employed by the SABC, would by then already have been aware of the coming into being and the further development of Radio XYZ, the positive approach of its management and staff, and the measures that had been and were still being taken (see paragraphs 12 and 13 above) to establish it as a brand in its reception area. Both Mallam and Wilkins knew that Radio XYZ had been under-marketed both in the Western Cape and Gauteng which is the major source of media spend in the Republic of South Africa. Wilkins, as a result of his exposure to and experience of the advertising industry was particularly well equipped to recognise the potential of upgrading Radio XYZ's listener profile and strengthening its brand especially, in the Gauteng area where most of the media managers are stationed and from where 70% of the advertising spend in the RSA originates. It is on the basis of their assessment of the potential of Radio XYZ as a brand that they originally decided on a purchase price and later still the allocation of the purchase price between different asset classes. The potential of the utilization of a **merx** has long been recognised as a factor in the determination of market value (See: **Antonie Geldenhuys: Onteieningsreg,** 2nd Edition, 301 and the cases mentioned in footnote 188; **E. Louis Ellenberger: The Valuer,** at 44).

41] After speaking to Radio XYZ's marketing director Mervin Gerts and their advertising agency Jupiter Drawing Room, Mallam came to the conclusion that its name was the "crux of the station" and testified that he would not have been interested at all to buy Radio XYZ without the name and trademarks. Wilkins was even more adamant that he would not have done so either. That attitude was echoed by Ridgway who testified that "... our radio station is our brand and our brand is our radio station" (Record: 758 (15 - 16)). It therefore is not surprising that Mallam expressed the view that he considered that the bulk of the purchase price should be attributed to the brand. The evidence of both Mallam and Wilkins is replete with references to the "brand" of the station. They appear to have used that concept when referring to the trademarks and name or both and what is clear from a perusal of their evidence is that the consortium would not have been prepared to pay anything remotely resembling the purchase price that had been paid if the trademarks and name had not formed part of the transaction but would instead have preferred to have started a radio station from scratch. Wilkins, who no longer has any interest in the taxpayer, still persists in maintaining that the amount allocated to the trademark and the name was conservative. It in that context is significant that Newshalf, in competition with the taxpayer, offered a purchase price of R110 million of which R88 million was allocated to the trademarks. What is clear from the aforegoing, is that the members of the consortium arrived at the purchase price on the basis of a well-informed and carefully considered assessment of the value of the assets they were acquiring, more in particular, the potential financial benefits that could be achieved by a proper exploitation of the trademarks and the name of the station. Such potential was the, by now well recognised, additional function of trademarks namely the creation and retention of custom (See: **Frank I Schechter: 'The Rational Basis of Trademark Protection"** 1926-27) 40 **Harvard Law Review,** 818 which was referred to with approval by the Constitutional Court in **Laugh It Off Promotions CC v S.A.B. International (Finance) BV** 2006(1) SA 144, at 182, footnote 22) and largely contribute to the commercial value of trademarks. The result of that function namely the establishment of goodwill, is an inseparable part of any trademark as was recognised in **Federal Commissioner of Taxation v Murry** 193 CLR 605 [1988] HCA 42 at paragraph 51 where it was held that if the goodwill of a business largely depends on a trademark, the purchaser of the business will not pay an amount representing the earning power of the trademark and also an amount representing the earning power of the business. I am fully in agreement with Mr Emslie's submission that such goodwill, whether existing or potential, and had its source in the visual representations and auditory reproductions of the Radio XYZ and XYZ

94.5 trademarks was inseparable therefrom and formed an inextricable part thereof.

42] Despite the fact that the Commissioner had not called any witnesses to directly refute Mallam's and Wilkin's evidence to the effect that the allocation of an amount of R50 million to trademarks and the name was genuine, Mr Spilg questioned the reliability thereof on mainly two grounds namely, firstly that the allocation and the determination of such amount was purely tax-driven; and/or secondly, that it was the result of confusion as regards the difference between the value of goodwill and trademarks.

43] That the allocation of that amount and the quantum thereof was motivated by a desire to maximise the tax benefit was denied by both Mallam (who knew that such a benefit could be claimed) and Wilkins (who said that he did not have such knowledge). It must be remembered that Wilkins and Mallam were the Managing and Financial Directors respectively of the taxpayer at the time and that Wilkins is the person who signed the agreement of purchase on its behalf. Their unrefuted evidence was that they had not been privy to the spreadsheets prepared by Firstcorp on 29 and 30 September 1996 and on which Mr Spilg based the submission that the taxpayer's guiding minds were involved in wildly varying calculations intent upon supporting a predetermined outcome of a value of R50 million in respect of the shares and the name. As is apparent from the evidence of Wilkins; the contents of Reyburn's valuation; and the said spreadsheets, Firstcorp for reasons known only to itself, appears to have taken a keen interest therein especially after the agreement of purchase had been concluded. Mr Spilg appears to have found support for the contention that the allocation was tax-driven therein that no valuations of the trademarks had been done, or evidence produced that any calculations had been done thereanent. Because (as has already been pointed out in paragraph 26) above, what is required by section 11 (gA) is "actual expenditure" and not market value, the absence of a valuation is of little significance and so is the absence of contemporaneous working papers as the failure of businessmen to keep records to prove the characterization of their transactions is not unknown (See: **Massey-Ferguson Ltd** VR [1977] CTC 6 at paragraph 18). The evidence was that the founding members, on the basis of the facts at their disposal; their extensive knowledge of the commercial broadcasting- and advertising industries; and their projected cash flow studies arrived at an intuitive assessment of their perception of the approximate value of the trademarks and name. The submission that the absence of hard bargaining before the allocation was made tends to show the inflated nature of the allocation in respect of the trademarks and name does not survive scrutiny if seen against the evidence of Kerr that Investec advised the SABC as regards the appropriateness of the allocations to different asset classes and testified that the taxpayer's allocation fell within acceptable parameters. If such evidence is viewed in conjunction with the fact that Newshelf allocated an amount of R88 million to trademarks as well as the evidence of Mr Peter Maw (who at the time was a director of Primedia and involved in the preparation of Newshelf's bid) that the trademarks constituted the bulk of Radio XYZ's value, the size of the allocated amount in paragraph 4.3.3 of the agreement of purchase does not per se engender an impression of extravagance and accordingly does not clamour for an enquiry into the motives of either of the parties to the agreement of purchase (Cf: **ITC 621** 14 SATC 498).

Mr Spilg also attempted to assail the integrity of the allocation in respect of the trademarks and name by contending that objectively, there was no need to have paid any amount for them because firstly the listenership was retained by the obtaining of the broadcasting licence in that it enabled the continuation of the business as a going concern; secondly, that it was considered necessary to change the image of the station; and thirdly that the XYZ brand was unknown in Gauteng and the internal marketing thereof weak.

The evidence is clear. Radio XYZ had to be purchased from the SABC and the licence obtained from an independent body the IBA. They required two totally separate and independent steps essential for the operation of the business known as Radio XYZ. That the listenership was retained by nothing other than the obtaining of the licence was far removed from the evidence of both Mallam and Wilkins who were adamant that the trademarks and name were crucial and that without them the station could be equated to a "greenfield" one ie, one started from scratch. The fact that the agreement was made subject to the granting of a licence by the IBA (no licence had been in existence before) is the clearest possible signification of the importance of Radio XYZ as a business for the proper exploitation of the licence. In addition, the purchase price was payable to the SABC whereas the licence fees to the IBA.

That radio XYZ was sold as going concern was of little significance in the context of the obtaining of a licence, in that it imported no more than that it would be active and operating and be possessed of all plant etc necessary to keep it operating as distinct from an inert aggregation of assets (See: **General Motors of SA (Pty) Ltd v Besta Auto Component Manufacturing (Pty) Ltd and Another** 1982(2) SA 635 (SECLD) at 657 C - F).

Whilst it is correct that the taxpayer intended modifying the image of the station in order to change the listener profile to a more affluent one, it was of little relevance at the time of its acquisition as the evidence was that it was intended to do so only incrementally and with due regard to the responses of listeners.

That the internal marketing and branding of Radio XYZ was weak is also not supported by the documentation provided by it, failed to show a direct link between the revenue generated by Radio XYZ and the trademarks and name. On my understanding of Wainer's evidence the correct method of valuing intangible assets such as trademarks is to compare what the net present value of future cash flows in relation to Radio XYZ would be against the net present value of future cash flows if it were to be deprived thereof. Whilst that undoubtedly, may be the proper approach to follow in order to arrive at a fair value for accounting or valuation purposes, that is not what is required by section 11 (gA) which does not require market value as a prerequisite for deductibility but merely expenditure "actually" incurred, even if not strictly necessary (See: **Port Elizabeth Electric Tramways Co Ltd v Commissioner for Inland** Revenue 1936 CPD 241 at 244). But, in any event, both Mallam and Wilkins testified that they would not have purchased Radio XYZ at all if the transaction had not included the trademarks and name. It is implicit in their testimony that they were of the view that the net present value of the future cash flow of the business would be minimal if Radio XYZ were to be deprived of the said trademarks and name.

Professor Wainer's view that the listenership and therefore the income stream of Radio XYZ would not be affected by the deprival of the trademarks and name was based on his own subjective assessment and not any expertise on his part in either brands or the commercial radio industry and, furthermore, is in direct conflict with the evidence of Mallam and Wilkins. Mr Johnson, an expert called by the taxpayer, disagreed with the view that the trademarks and name had a merely nominal value. He expressed the view, based on experience, that in an open market situation the purchase price, in general, is determined by a sellers and a purchaser's subjective opinions regarding the value of the **merx** and not necessarily formal valuations by accountants. He also expressed the view that on the facts at the disposal of the taxpayer's representatives and the restricted time available to them, they acted reasonably in allocating the purchase price in the manner that they did. His opinion appealed to me because, it in my view, accords more with the realities of the market-place than that of Professor Wainer.

46] Mr Spilg also submitted that, as regards the allocation of the purchase price between different asset classes, the agreement of purchase was a "sham" ie. a simulation. For that submission to be upheld it has to be shown that the SABC and the taxpayer did not really intend that R50 million of the purchase price would constitute payment in respect of the trademarks and the name, but that there as between them existed another unexpressed agreement or tacit understanding, which they deliberately wished to conceal in order to deceive the outside word in order to secure some advantage that would not otherwise be available or to escape some disadvantage imposed by law (See: **Zandberg v Van Zyl** 1910 AD 302 at 309; **Commissioner for Customs and Excise v Randies Bros & Hudson** 1941 AD 369 at 395 - 6; **Erf 3183/1 Ladysmith (Pty) Ltd** v **Commissioner for Inland Revenue** 1996(3) SA 942 (A) at 952 C - 953 A; **Mackay v Fey NO and Another** 2006(3) SA 182 (SCA) at 194 G - I). It needs to be accentuated that it is required that it be shown that the object of such disguise was common to both the contracting parties (See: **Mackay's** case (loc cit)). Irrespective of whether the disguise in the instant case related to the concealment of a lower price paid in respect of the trademarks and name or that the amount paid was in respect of goodwill but was dressed up as representing the price for the acquisition of such trademarks and name, there is a total absence of any evidence of any direct or indirect involvement by either the SABC or the taxpayer in any conduct of that nature. In view of the fact that it was common cause that there were no direct negotiations between the taxpayer and the SABC about the quantum of the allocation of the purchase price between different asset classes, little opportunity, if any, for such underhand dealings existed, which, in any event, hardly had any chance of surviving the scrutiny of their respective legal advisers. Not only is the existence of such underhand dealings in conflict with the evidence of Mr Mallam and Wilkins but it was never put to them during cross-examination that the taxpayer or they personally had been parties to anything of that nature.

I accordingly find myself in agreement with Mr Emslie's submission that the respondent failed to demonstrate the existence of any common intention between the SABC and the taxpayer other than what is reflected in the agreement of purchase and that it has not been shown that the allocation of R50 million to the trademarks and the name was a sham.

47] I in view of the aforegoing find that the taxpayer has succeeded in discharging the onus of showing that the amount of R50 million allocated to the trademarks and name in clause 4.3.3 of the agreement of purchase constituted an expense actually incurred in acquiring them.

Was such expenditure incurred in acquiring the trademarks and name by assignment?

48] Having come to the conclusion set out in the immediately preceding paragraph as well the conclusion in paragraph 27 above that both an obligatory as well as a transfer agreement had been concluded in terms whereof ownership in the trademarks that had been acquired from the SABC and were transferred to the taxpayer, I conclude that the taxpayer has succeeded in discharging the onus of showing that it acquired the Radio XYZ and the XYZ 94.5 trademarks by means of assignment.

Were the said trademarks used by the taxpayer in the production of income and was income derived therefrom?

49] Mr Spilg, in his argument was constrained to concede - in my view correctly - that the taxpayer in fact used the dominant feature of both the Radio XYZ and XYZ 94.5 trademarks namely, the letters XYZ but placed in issue whether it was used in the production of income or that income was derived therefrom.

Both Mallam and Wilkins testified that by acquiring the trademarks and name specified in the agreement of purchase the taxpayer specifically intended to acquire

"XYZ" both as a name and a trademark and that it constituted the bulk of the purchase price paid. Whilst it is apparent from the evidence that the trademarks were used in printed and other physical advertisements and that substantial amounts had been spent thereon during the period 1997 - 2001, Ridgway testified that the auditory reproduction of the XYZ 94.5 trademark, which was used to identify the station every three or four minutes, was the most significant element in its branding. That evidence was not challenged. It is apparent from the evidence of Ridgway that the measures enumerated in paragraph 13 above were designed to achieve a recognisable "sonic branding" of the station which would attract listeners possessing certain desirable demographic attributes and would associate the XYZ brand with the station's sound and programming. In that sense the purpose of the constant and repetitive use of the XYZ 94.5 trademark was to create and retain custom or goodwill. Other than their loyalty to the station, the SABC had no hold over its listeners and no means existed whereby their support could be transferred to the taxpayer. Accordingly the taxpayer had little choice but to continue utilising and incrementally enhancing the broadcasting and marketing techniques which had been implemented by the management of Radio XYZ in the past. Advertisers and advertising agencies in turn, came to associate the station with a specific number of listeners possessing certain desirable attributes and would place advertisement if those features coincided with the target market their clients wished to reach. Approached from that perspective the trademarks generate income through the goodwill that attaches to and is inseparable from them. I accordingly conclude that the trademarks were not only used in the production of income but that income was in fact derived therefrom.

Does a period of six years constitute an appropriate write-off period?

50] The period over which an allowance in excess of R5 000 claimable in terms of the provisions of section 11(gA) of the Act may be claimed is regulated by the proviso thereto which provides as follows: -

> "Provided that -
>
> "(aa) where such expenditure exceeds R5 000, and was incurred -
>
> (A) before 29 October 1999, the allowance shall not exceed for any one year such portion of the amount of the expenditure as is equal to such amount divided by the number of years which, in the opinion of the Commissioner, represents the probable duration of use of the invention, patent, design, trade mark, copyright, other property or knowledge, or four per cent of the said amount, whichever is the greater."

On the basis that the broadcasting licence had been issued to the taxpayer for only a period of six years; the uncertainties surrounding the licensing process; doubts about the taxpayer's ability to meet the demanding obligations that had been imposed by the IBA; and uncertainties about whether the licence would be renewed in the future, Mr Emslie contended that six years was a reasonable and rational "probable duration of use" within the meaning thereof in section 11 (gA).

Mr Spilg in turn submitted that the taxpayer failed to justify a six year write-off period on any rational basis and contended that the default position of a 25 year write-off period should apply.

The Commissioner, despite having in a letter of 14 November 2003 disallowed the deductions claimed by the taxpayer on a number of different grounds, and for that reason need not have applied his mind to the probable duration of the use of the trademarks by the taxpayer, impliedly affirmed that he had not done so by complaining that the taxpayer failed to place him in possession of sufficient information so as to have enabled him to exercise the discretion which has been statutorily bestowed on him, and which, if it had been exercised, would undoubtedly have been subject to revision by this court on appeal (See: **Kommisaris van Binnelandse Inkomste v Transvaal Suiker-Korporasie Bpk** 1985 (2) SA 654 (T)). As the proceedings before this court are not in the nature of a judicial review of the Commissioner's handling of write-off period in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 his failure to have exercised such discretion

cannot in my view be assailed in these proceedings. As the Commissioner has not taken any decision with regard to what would constitute an appropriate write-off period there, in my view, is no decision which is susceptible of revision on appeal.

Costs

51] Mr Emslie requested that in the event of the appeal being upheld, wholly or in part only, the Commissioner, apart from the costs of 4 February 2008, should be ordered to pay the taxpayer's costs of suit in accordance with the fees prescribed by the Rules of the High Court. He did so on the basis that the Commissioner's claim was unreasonable within the meaning thereof in section 83(17**)(a)** of the Act. The allegation of unreasonableness was predicated thereon that the Commissioner –

Firstly, failed to comply with the provisions of Rule 10 and accordingly left the taxpayer "groping inferentially" for the "true essence" of the Commissioner's case right up to the end;

Secondly, made no genuine effort to narrow the issues with a view to expediting the conclusion of the appeal by, for instance, having indulged in crossexamination on whether the purchase price had been paid or not, when a request for further particulars would have elicited the production of the cheque;

Thirdly, based his case on the market value of the trademarks when that is not the criterion for deductibility;

Fourthly, by having indulged in fruitless and misdirected attempts to draw a distinction between expenditure subjectively and objectively incurred; Fifthly, by having imputed dishonesty to the taxpayer and the SABC by alleging that the allocation of the purchase price to different asset classes was a sham without that proposition having been put to the taxpayer's witnesses; and

Finally, by having approached the taxpayer's claim in terms of section 11 (gA) of the Act on the basis of an unjustified preconception namely, that all taxpayers artificially inflate the price attributable to the acquisition of intellectual property in order to enjoy an unjustifiable deduction.

Whilst the view that the issues could have been more clearly delineated and the pursuit thereof during cross-examination curtailed, may appear to be justified, the Commissioner, in my view, because of the statutory duties imposed upon him, was fully justified to have put the taxpayer to the proof of the deductions claimed by it, especially, in circumstances where such substantiation as was provided was sketchy, inadequate and at times conflicting. Although the Commissioner's conduct in the handling of the matter may not have been beyond reproach it did not deviate from the norm to such an extent that I would characterise it as unreasonable. In the circumstances I am not prepared to accede to Mr Emslie's request and accordingly decline to exercise my discretion as regards awarding costs against the Commissioner.

Order

52] In view of the aforegoing the following orders are made:-

52.1] The assessments for the 1997, 1998, 1999, 2000 and 2001 tax years and issued on 26 November 2003 are set aside.

52.2] The said assessments are referred back to the Commissioner for -

52.2.1 reassessment on the basis that the taxpayer is entitled to claim allowances amounting to R50 million in terms of the provisions of section 11 (gA) of the Act; and

52.2.2 the proper exercise by him of his discretion as regards what in his opinion represents the probable duration of use of the trademarks which have been found to have been acquired by the taxpayer in terms of the agreement of purchase. 52.3] Each of the parties shall be liable to bear their own costs in respect of the postponement of the appeal to 4 February 2008.

End Note

53] The esteemed commercial member of this court Mr T.I. Potgieter sadly passed away after argument had been completed but before this judgment could be finalized. In terms of the provisions of subsection 83(4C) as read with subsection 83(4D) of the Act the judgment of the remaining members of the court as originally constituted shall be the judgment of the court.

D. VAN REENEN

Date: 11 May 2009