IN THE TAX COURT
(HELD AT JOHANNESBURG)

CASE NO: 12167

The Honorable Judge R.S. Mathopo	President
Mr H.V.Hefer	Commercial member
Mr Z Mabhoza	Accountant member

In the appeal of:

AB TRUST Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

MATHOPO J:

INTRODUCTION

[1] This appeal concerns the correctness of the respondent's disallowance of the Appellant's objection to an assessment for donation tax and interest thereon.

[2] The commissioner assessed the appellant in terms of section 54 and 55 of the Income Tax Act 1962(the “Act”) for donations tax of R78 682 849.00 and interest thereon of R93 862 092.95.

[3] This assessment was based on a donation allegedly made by the appellant in 1996.

[4] The appellant objected to the respondent’s assessment on the grounds that no property was disposed off as contemplated in section 54 of the Act, alternatively, that there was no donation as contemplated in terms of Section 56, and further alternatively that any donation was exempt from donations tax in terms of section 56 (1) of the Act.

BACKGROUND FACTS

5.1 The appellant was established by way of a notarial deed of donation executed on 21 September 1973 (“the 1973 Deed”), in terms of which the donor Ms. K, made certain donations to the trustees, in their capacities as such, for the benefit of Mr. DB, Mr. SD, Ms. MB, Ms. TK, Ms. RT and Mr. ASB

("the Children"). The 1973 Deed is not before the Court because the appellant does not have a copy thereof.

5.2 On 29 July 1981, the 1973 Deed was substituted by a new deed ("the 1981 Deed").

5.3 In terms of clause 2.2 of the 1981 Deed, the assets held by the appellant in trust in terms of the 1973 Deed were divided into six equal trusts ("the Sub-trusts"), one for the benefit of each of the Children, but the 1981 Deed authorised the trustees to maintain a single set of books and provided that the Sub-trusts might collectively be referred to by the trustees and third parties as "The Trust" and that property might be purchased by and registered in the names of the trustees in their capacities as trustees of "The A B Trust".

5.4 It is agreed between the parties that the assessment made by the respondent on the appellant can be regarded as an assessment on each of the Sub-Trusts.

5.5 On 10 December 1993, the 1981 deed was amended.

5.6 In 1994, six new trusts were created by Mr. AB *in his personal capacity*. These were The DB 1994 Trust (For the benefit of Mr. DB), The SD 1994 Trust (for the benefit of Mr. SD), The MB 1994 Trust (for the benefit of Mr. MB), The TK 1994 Trust (for the benefit of Ms. TK), The RT 1994 Trust (for the benefit of Ms. RT) and The MKB Trust (For the benefit of Mr. MKB). These six trusts are collectively referred to as "the 1994 Children Trusts".

5.7 Each 1994 Children's Trust was created by a donation by Mr. AB to the trustees of the relevant 1994 Children's Trust, which included both Mr. AB and the appellant's sole witness, Mr. X.

5.8 The trust deed of the RT 1994 Trust is typical of the trust deeds of each of the 1994 Children's Trusts.

5.9 In 1994, the trustees of the appellant entered into a sale agreement ("the 1994 Sale Agreement") with the trustees of each of the 1994 Children's Trusts, in terms of which they

sold assets of the appellant to each of the 1994 Children's Trusts at market value.

5.10 The 1994 Sale Agreement between the trustees of the appellant and the trustees of the RT 1994 Trust is typical of each 1994 Sale Agreement concluded by the trustees of the appellant and the trustees of each of the 1994 Children's Trusts.

5.11 The witness Mr. X testified that the assets sold were capital assets of the appellant.

5.12 A portion of the purchase price of the assets sold to the Children's Trusts was left outstanding to the seller (the appellant) on an interest-free loan account, and this resulted in each 1994 Children's Trust becoming indebted to the appellant in an amount of R52 455 232 (Fifty Two Million Four Hundred and Fifty Five Thousand Two Hundred and Thirty Two Rand) ("the Loan Debts").

5.13 Such loans were repayable upon the appellant giving at least six months' notice to the relevant 1994 Children's Trust that the loan must be repaid.

5.14 On 18 August 1997, the trustees of the appellant decided, retrospectively, to award to each 1994 Children's Trust an amount of R52 455 232 (Fifty Two Million Four Hundred and Fifty Five Thousand Two Hundred and Thirty Two Rand) in respect of the appellant's 1996 financial year ("the 1996 Awards").

5.15 The 1996 Awards were approved and confirmed by the trustees of the appellant in a written resolution passed by them on 18 August 1997.

5.16 The trustees of the appellant made the 1996 Awards in the *bona fide* belief that they had the power to make such awards in terms of the 1981 Deed and in the *bona fide* belief that such awards were valid in terms of the 1981 Deed.

5.17 The 1996 Awards were accepted by the trustees of each of the1994 Children's Trust in the *bona fide* belief that they had been validly made, and subsequently the trustees were advised that the awards may be *ultra vires*.

5.18 On or about 18 August 1997, i.e. at the same time as or shortly after the 1996 Awards were made, and without the giving of six months' notice as provided in the 1994 Sale Agreements, a decision was made by the trustees of the appellant and by the trustees of each of the 1994 Children's Trusts to set off the liabilities from the 1996 Awards against the Loan Debts. This occurred by agreement and not by operation of law because the debts owing by the 1994 Children's Trusts were only payable upon the giving of six months' notice.

5.19 Mr. AB, one of the trustees of the appellant and who was the donor and a trustee in relation to each of the 1994 Children's Trusts, is still alive, but is physically and mentally incapacitated and was unable to give evidence. As a result

thereof only Mr. X was called to give evidence on behalf of the appellant.

[6] Clause 11.1 provides that the trustees shall have the right if they deem it necessary to apply and utilise the capital of the Sub-Trust towards the purpose set out in clause 11.1 for the benefit of the AB Trust child for whom the relevant trust has been established and for the benefit of any other of the AB children should the circumstances in their opinion so warrant.

ISSUES

[7] An issue that was raised at the commencement of the hearing was whether the respondent was barred from relying on paragraph 11 of its amended statement of the grounds of assessment.

[8] Mr Solomon for the appellant submitted that if the respondent wishes to assess the appellant for donation tax on the basis of events or matters alleged in the amended paragraph 11. The respondent must issue a separate assessment in respect thereof and afford the appellant the opportunity to request reasons for such assessment in accordance with rule 3 of the Tax Court Rules and

thereafter object to such assessment in accordance with Rule 4 of the Tax Court Rules and follow the procedures provided for in the subsequent tax court rules and argued that the 2006 assessment must be withdrawn.

[9] The events or matters alleged in the amended paragraph 11 of the statement of grounds of assessments are alleged to have taken place during the period February 2006 and June 2006, which period was after the time when the 2006 assessment was issued and did not form the basis for such assessment.

[10] Mr Emslie on behalf of the respondent argued that if the commissioner has not raised a particular issue in his statement of the grounds of assessment but such issue is raised by the tax payer in its statements of the grounds of appeal, the issue is an issue before court and either party can address that issue at the hearing of the appeal. He relied on the rationale of the court in **Matla Coal LTD v Commissioner for Inland Revenue 1987 (1) SA 108 (A) at 125** where Corbett JA said the following in relation to the repealed provision in Section 83(7)(b).

"It is naturally important that the provisions of section 83(7)(b) be adhered to, for otherwise the Commissioner may be prejudiced by an appellant shifting the grounds of his objection to the assessment in issue. At the same time I do not think that in interpreting and applying section 83(7)(b) the Court should be unduly technical or rigid in its approach. It should look at the objection and the issue as to whether it covers the point in which the appellant wishes to advance on appeal must be adjudged on the particular facts of the case".

[11] Mr Emslie further submitted that the grounds of assessment and grounds of appeal must be read together because of the Rule 13 of the Tax Court Rules also provides that either party may amend their statements of grounds as the litigation procedure progresses.

[12] He argued that, what the respondent did in the circumstances was to follow the Rules and no prejudice could be suffered by the appellant in the circumstances, particularly since the commissioner's information in relation to the facts is gathered from what is disclosed by the tax payer in the tax returns, as supplemented by the information elicited by the commissioner by requesting information from the taxpayer in terms of the Act.

[13] Although I accept that it is not permissible for the commissioner or taxpayer to raise issues not covered by both sets of statements of grounds. The commissioner is not precluded from advancing any argument in support of issues emerging from both the grounds of assessment and the grounds of appeal read together. The argument advanced by the respondent does not constitute further or separate grounds.

[14] To preclude the respondent from raising new grounds of assessment introduced in the amended statement of the grounds of assessment would, in my view be not only unreasonable but rigidly inflexible and inimical to sound administration of justice and rules.

[15] The essential issues in this appeal are therefore following:

15.1 Was there a **waiver or renunciation** of rights by Appellant (**"the 1996 Awards"**), as contended by Respondent in paragraph 11 of its (amended) Statement of Grounds of Assessment?

15.2 Did Appellant have the power to make the 1996 Awards, if not, what were the consequences of such lack of power?

15.3 Was there a **"disposal"** by Appellant of **"property"**, as contemplated in section 54 and in the definition of **"donation"** in section 55 of the Income Tax Act?

15.4 If there was a disposal of property by Appellant, was the disposal **"Gratuitous"** as contemplated in the definition of donation in section 54 of the Income Tax Act?

15.5 If the Appellant did make a donation, was the donation exempt from donations tax in terms of section 56(1) (I) of the Income Tax Act?

EVIDENCE

[16] The only witness who gave evidence in the proceedings was Mr. X, who was one of the three Trustees of both Appellant and of the Children's Trusts at all material times.

[17] Mr. X was thus a trustee of all the relevant trusts at the time of the 1994 Sale Agreements, at the time of the 1996 Awards, and subsequent up to the present. Mr. X testified that the loans made by the appellant to the 1994 Children's Trusts, by virtue of the major part of the purchase price of the assets sold by the appellant to the Children's Trusts in 1994 being left outstanding as an interest-free loan.

[18] When asked in cross examination why the loans were interest-free, Mr. X was unable to recall or give any explanation. He testified that the trustees of the appellant were advised on or about the 14 February 2006 that counsel had expressed an opinion that the 1996 Awards were *ultra vires* in terms of the AB trust deed and therefore invalid.

[19] According to Mr. X's evidence, the trustees took no action and made no decision with regard to what was to be done in relation to the Loan Debts and their attitude was that they would wait for finality in relation to the tax appeal and if the court decided that the

1996 Awards were *ultra vires* and invalid they would obtain advice as to what steps to take.

[20] Under cross-examination he conceded that it was not entirely correct that the trustees did nothing, after they became aware that the 1996 Awards may be invalid because they prepared and signed subsequent financial statements which did not reflect the Loan Debts.

[21] In hindsight he said maybe they should have reflected the situation as set out in the appellant's first defence that the Loan Debts were owed by the Children's Trusts to the appellant.

[22] According to him the trustees had no intention to waive or renounce the Loan Debts. His evidence was not challenged in cross-examination and the appellant in view thereof elected not to call Mr. ASB another of the three Trustees or the auditor Mr. Y to corroborate his evidence. He also conceded under cross-examination that the Children's Trusts were not trusts as

contemplated in clause 21 of the 1981 Trust Deed but stated that the trustees of the appellant believed that they were entitled to make the 1996 Awards to the Children's Trusts and confirmed that the 1996 Awards were made in the *bona fide* belief that they had the power to make such Awards in terms of the 1981 Deed.

[23] He further gave evidence that there was no intention to repay the loans but was unable to give any explanation why the said loans were interest-free. During cross-examination by Mr Emslie for the respondent, he stated that the reason why the 1994 Children's Trusts were formed given that the beneficiaries of the appellant and the 1994 Children's Trusts were the same persons, was because they wanted to distance the assets of the appellant from within reach of certain American creditors of the other family members particularly Mr AB Senior.

[24] Furthermore during cross-examination, Mr. X testified that he and his fellow trustees became aware of the advice given by the appellant's counsel that the 1996 Awards were *ultra vires* and

although all the trustees at the time were resident in Johannesburg and discussed the affairs of the trust informally on almost daily basis and held trust meetings monthly. They did not resolve to reinstate the loans or resolve to reflect them in the financial statements.

[25] When he was asked to comment on the advice that the Awards may have been *ultra vires,* he testified that he was pleased that the trustees had an "arguable defence" to the donation tax claimed by the respondent.

[26] His main concern was the fact that certain assets were settled on Mr ASB by the ASB Trust on his emigration to Australia which assets were also sold on an interest free basis to entities controlled by Mr. ASB to protect the latter's tax position in Australia. He sought an indemnity from ASB which at the time of the trial this had not been yet finalised but he was confident that when called upon to sign it Mr. ASB would do so without any difficulty given the fact that he too was aware of counsel's opinion.

[27] He conceded that in the 2006 and 2007 financial statements of both the appellant and the 1994 Children's Trusts, no assets or liabilities were shown in the balance sheets notwithstanding the fact that the trustees had become aware of senior counsel's advice that the 1996 Awards may have been *ultra vires.*

[28] Mr. X testified that what may be termed "the *ultra vires* point" was mentioned and discussed informally, but that no formal decision was ever made in this regard.

[29] He also conceded that in the relevant financial statements no mention was made of the fact that the Loan Debts may still be an assets and liabilities of the appellant and the Children's Trusts, and stated that, with hindsight, this aspect ought to have been disclosed in the accompanying notes with the financial statements.

[30] He also agreed with Mr Emslie that it was surprising why the auditor Mr Y, who was aware of the *ultra vires* point, did not mention this aspect in the 2006 and 2007 financial statements but

proceeded to sign financial statements on the basis that the statements fairly present the financial position of trusts.

[31] Mr. X agreed that in the 2006 and 2007 financial statements of both the appellant and the 1994 Children's Trusts, no assets (in the case of the appellant) or liabilities (in the case of the 1994 Children's Trusts) was shown in the relevant balance sheets, notwithstanding the fact that the trustees had become aware of senior counsel's advice that the 1996 Awards "may be *ultra vires*".

[32] Mr. X denied that the establishment of the 1994 Children's Trusts, the 1994 Sale Agreements and the 1996 Awards amounted to a pre-ordained series of events, and that it was never intended that the Loan Debts would be paid by the 1994 Children's Trusts.

SUBMISSIONS BY THE PARTIES

[33] Mr Solomon on behalf of the appellant submitted that on the evidence of Mr. X which was unchallenged, there was no intention

on the part of the trustees to waive or renounce the loan debts. Any inaction on the part of the trustees with regard to what was to be done in relation to the main debt should not be construed as a waiver because on the advice of senior counsel about *ultra vires point.* They took the attitude that they (trustees) would await the outcome of the court case.

[34] He further submitted that, the fact that, there was no decision or resolution taken by the trustees to waive or renounce the loan debts and argued that it is incorrect that the trustees did nothing after becoming aware of the *ultra vires* point because they prepared and signed subsequent financial statements which did not reflect the loan debts although Mr. X, during cross examination, conceded, that with hindsight they should have reflected that the loan debts were owed by the Children's Trusts to the Appellant.

[35] In essence the submission by counsel on this point is that since the trustees took no decision or pass any resolution to waive or renounce the appellant's rights, there was no conduct on the part of

the trustees which constituted such a waiver or renunciation of any of the rights against any Children's Trusts.

[36] He contended that the fact that the trustees did not reinstate the loan does not constitute an unequivocal conduct consistent only with the intention to waive the loans. He further contended on behalf of the appellant that, if the 1996 awards were invalid and thus no property could have been disposed off pursuant to such awards.

[37] It was submitted that it cannot be successfully contended by the respondent that the appellant waived its rights in respect of the loan debts because if the 1996 awards were invalid, no property could have been disposed of pursuant to such awards.

[38] He furthermore argued that it is incorrect to infer that inaction by the appellant's trustees to recover what had been purportedly set off by reinstating the loans owing by the Children Trusts and that

the appellant had decided to waive the rights which it had to recover the loans debts.

[39] Mr Solomon again submitted that the making of the 1996 awards did not result in the appellant transferring any property to the Children's Trusts because the appellant did not transfer any right in or to the property as contemplated in the definition of property in Section 55. As there was no disposition of the property, consequently, no donation took place in terms of Section 54 read with Section 55 of the Act.

[40] He further argued that if the trustees were not entitled or obliged to make the 1996 awards, for as a long as they acted in the *bona fide* belief that they were entitled or have the power, the awards would consequently not have been inspired by pure liberality or disinterested benevolence, in other words the Trustees were discharging the obligation imposed upon them by the AB Trust deed.

[41] He submitted further that the 1996 awards were not gratuitously made and there was thus no donation as contemplated in section 54 read with section 55 of the Act.

[42] It was further contended on behalf of the appellant that since the 1996 (and 2006) awards did not exist there could not be any disposal of property pursuant to such awards.

[43] Counsel submitted that the making of the 1996 awards did not result in the appellant transferring any property to the Children's Trust but simply agreed to pay the Children's Trust the relevant amount, thus no disposition of property or donation took place in terms of the Act. In the alternative Mr Solomon argued that since the 1996 awards were a nullity, the set off of the amounts against the loan debts ought never to have taken place.

[44] Mr Emslie for the respondent, submitted that from the evidence of Mr. X, the 1996 awards were *ultra vires* because the 1994 Children's Trust were not in fact beneficiaries of the appellant

whose Trustees could only make awards to beneficiaries of the appellant and the appellant trustees were not empowered to make awards of capital until after the death of Mr. AB.

[45] He argued that the concession by Mr. X that the awards were of a capital nature clearly shows that the appellant acted contrary to the trust and ignored counsel's advice about the *ultra vires* point.

[46] He submitted that it is cold comfort for the appellant to state that because they had an "arguable case" they would await the outcome of the tax appeal before they regularise the position in the financial statements of 2006 and 2007.

[47] As regards the issue of waiver or renunciation, he argued that the inaction of the appellant against senior counsel advice and the fact that nothing was done by their auditor Mr Y, who was aware of the *ultra vires* point is conclusive proof that by their conduct they waived or renounced their rights.

[48] Regarding the appellant's submission that the 1996 awards were exempt from donations tax. He submitted that they were not made under and in pursuance of any trust because they were in fact expressly prohibited under the appellant's trust deed since they were awards of capital during the lifetime of Mr. AB and thus the exemption in Section 56 (1) (i) of the Act cannot apply.

[49] Mr Emslie submitted, that failure on the part of the trustees of both the appellant and the 1994 Children's Trusts to take steps to reinstate the 1994 loan debts as a liability owing by the 1994 Children's Trusts, to the appellant and to reflect it in the 1994 Children's Trusts financial statement for the year ending 2006 and 2007, is clear evidence of conduct amounting to waiver or renunciation of the rights and resulting in this amount being a donation giving rise to liability for donations tax.

<u>CONCLUSION</u>

[50] It follows, from the evidence of Mr. X regarding the formation of the 1994 trusts, given the fact that the beneficiaries of the appellant

and the trusts were identical, that the appellant was clearly aware of the distinction between the 1994 Children's Trusts which were created by Mr, AJ in his personal capacity and the AB Trust.

[51] In my view this was a deliberate decision to create a new trust with different trust deed by Mr. AB in his personal capacity. I agree with Mr Emslie that following the evidence of Mr. X the trustees have sought to "hedge their bets" because they adopted an attitude that they would await the findings of the court and did nothing pursuant to senior counsel advice that the awards may be *ultra vires*.

[52] Again the fact that nothing was done by them or their auditor Mr Mr. Y who was aware about the *ultra vires* point save to append their signature to the financial statements which did not show the loan debts as either an asset of the appellant or a liability of the 1994 Children's Trust in the 2006 and 2007 financial year statements serves as support for that proposition.

[53] The 1996 awards were *ultra vires* because the 1994 Children Trust were not beneficiaries of the appellant whose Trustees could only make awards to the beneficiaries of the appellant. The appellant trustees were, in my view not empowered to make awards of a capital until after the death of Mr. AB.

[54] Quite clearly the trustees including Mr. X, an experienced attorney, were not empowered to make any capital awards until after the death of Mr AB since the 1994 trusts were not beneficiaries of the appellant.

[55] Having proceeded to do so, without the requisite power or authority either by way of resolution or Trust Deed, is clear evidence that the 1996 awards were motivated by pure liberality or disinterested benevolence because the trustees intended to benefit the 1994 Children's Trusts which they wrongly regarded as beneficiaries. See in this regard the remarks of Marais JA

*In **Welch's Estate v Commissioner, South Africa Revenue Services 2005 (4) SA 173 (SCA) at para [30]**, Marais JA said the following concerning the definition of "donation" in section 55(1) of the Act:*

"In my opinion the Legislature has not eliminated from the statutory definition the element which the common law regards as essential to a donation, namely that the disposition be motivated by pure liberality or disinterested benevolence and not by self-interest or the expectation of a quid pro quo of some kind from whatever source it may come."

[56] Even if the 1996 awards were made in the bona fide but mistaken belief that 1994 Children's Trusts were beneficiaries of the appellant without regard to the prohibition against awards of a capital nature during lifetime of Mr AB, these were donations as contemplated by the legislature.

[57] There can be no question of such a donation being exempt from payment of donations tax because the property was not disposed of under or in pursuant of the trust.

Section 54 of the Act provides that:

"there shall be paid for the benefit of the National Revenue Fund a tax (in this Act referred to as donations tax) on the value

of any property disposed of (whether directly or indirectly and whether in trust or not) under any donation by any resident."

Section 55(1) of the Act defines the word "donation" to mean:

"any gratuitous disposal of property including any gratuitous waiver or renunciation of a right".

Section 55(1) defines the word "donee" to mean:

"any beneficiary under a donation and includes, where property has been disposed of under a donation to any trustee to be administered by him for the benefit of any beneficiary, such trustee: Provided that nay donations tax paid or payable by any trustee in his capacity as such may, notwithstanding anything to the contrary contained in the trust deed concerned, be recovered by him form the assets of the trust".

Section 55(1) defines the word "property" to mean

"any right in or to property movable or immovable, corporeal or incorporeal, wheresoever situated".

[58] I accept that where the trustees of a trust make an award of an amount of money, and such award is accepted by the beneficiary of such award, the trust has awarded the property as defined in Section 55 (1) of the Act. What is disposed of in terms of such a

donation is a right in or to movable, corporal property in the form of money and this constitutes a donation as defined.

[59] In the light of the aforegoing, it follows that the 1996 awards were motivated by pure liberality or disinterested benevolence because the trustees intended to benefit the 1994 Children's Trusts which they regarded wrongly as beneficiaries of the appellant.

[60] I agree with the respondent that in making the 1996 Awards there was no self-interest or expectation of a *quid pro quo* of any kind on the part of the appellant, and the whole rationale of the appellant – as is typically the case with most family trusts – was to benefit the beneficiaries in accordance with the appellant's founder, Ms. K purpose of pure liberality or disinterested benevolence in the interests of the beneficiaries.

[61] This is supported by the fact that the loan debts were interest-free, interest free loan amounts to a continuing donation to the borrower

which confers a benefit upon such borrower **See Commissioner for Inland Revenue v Berold 1962(3) SA 748(a) at 753 F-G**

[62] On the facts of this appeal, it is clear that the 1996 awards were not validly made. This is so, on the contention of the appellant, because the 1994 Children's Trusts, to which the appellant's trustees purported to make the 1996 awards, were not trusts created in terms of clause 21 of the 1981 Deed and the appellant's trustees were not entitled in terms of clause 21 to make the 1996 awards.

[63] The gratuitous disposal of the right to the money were made by the appellant and accepted by the 1994 Children's Trusts and payment thereof took place by way of a set off, by agreement between the parties. In my view this gave rise to a donation for which donations tax is payable.

[64] Whether or not the transaction was void *inter partes* is irrelevant. Consequently if a void transaction can give rise to liability for income tax, there is no reason why a transaction can also not give

rise to liability for donations tax. **See: MP Finance Group CC(In liquidation) v Commissioner South African Revenue Services 2007 (5) SA 521 (SCA) at 523 B-C**

[65] Even if the 1996 awards were void as between the appellant and the 1994 Children's Trusts, they attracted fiscal consequences because *an illegal contract is not without all legal consequences and it can, indeed, have fiscal consequences".*

[66] On the evidence the 1996 awards were gratuitous disposals of property as defined and were donations as defined in terms of section 55(1) of the Act but were not exempt from donation tax because they were not made under or in pursuant of the trust as contemplated in section 56(1) of the Act.

[67] The fact that the appellant in the present matter, after discovering the *ultra vires* point did nothing or adopted a supine attitude to the whole transaction other than awaiting the outcome of the tax appeal, cannot assist it because the trustees signed the financial

statement in 2006 and 2007 and behaved as if the loan debts and 1996 awards were valid.

[68] I conclude that the appellant by its conduct either waived or renounced its right to reinstate the 1994 loan debts and its inaction amounted to a donation giving rise to liability for donations tax because on its own version the *ultra vires point* came to the attention of the Trustees on or after 14 February 2006 and not later than 21 June 2006, the date of the appellant’s objection in which it relied on the fact that the 1996 awards were a nullity.

[69] In my view once the error had been brought to the attention of the Trustees, it was incumbent upon them to reinstate the loan debts in the financial statements. Inaction on their part amounted to waiver or renunciation of their right to reinstate the loans.

[70] It should have been clear to the trustees in particular Mr. X that the trustees had no power to award capital during the lifetime of Mr. AB, to do nothing against senior counsel advice, and proceed to

sign the financial statements of 2006 and 2007 and not reinstate the loan debt is again unacceptable and contrary to the appellants trust and constitute a waiver or renunciation of rights.

[71] I therefore conclude that the appellant is liable for donations tax in respect of the 1996 awards notwithstanding the fact that they might have been void as between the parties to (illegal) agreement. It does not mean that if the award is not valid there is no donation. Validity is not a requirement for donation in terms of the Act. I am fortified in my view by the ratio in **MP Finance Supra**.

[72] The other issues raised in this appeal relates to estoppel and the possible extension of the turquand rule to the trusts. The issue of estoppel was not raised in the pleadings and I agree with Mr Solomon that it merits no further consideration in this matter. Regarding the turquand rule, although I agree with Mr Emslie that it may be extended to the trust, this issue was also not raised in the pleadings and thus requires no further consideration.

ORDER

1. The appeal is dismissed;

2. The matter is referred back to the Commissioner to assess appellant on the basis that the donation was on 21 June 2006.

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R.S. MATHOPO - PRESIDENT

ON BEHALF OF
MR H.V.HEFER (Commercial Member)
MR Z. MABHOZA (Accountant Member)

Appearances

For the Appellant	:	ADV PA SOLOMON SC
		ADV J BOTTAR
Instructed by	:	WERKMANS INC
For the Respondent	:	ADV EMSLIE SC
		ADV T MANYOSI
Instructed by	:	SARS
Date of hearing	:	
Date of Judgement	:	2009-08-27