REPORTABLE

IN THE TAX COURT
(HELD AT JOHANNESBURG)

CASE No: 12262

In the matter between:

ABC (PROPRIETARY) LIMITED Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

Dates of hearing: 8-10, 12 November, 2010.

Date of judgment: 7 December, 2010.

WILLIS J:

[1] This is a tax appeal against assessments of the appellant for the 2000, 2001 and 2002 years of assessment, ending on 30 June in each respective year. The issues in this appeal are the following:

(i) Whether, in respect of five specific transactions for the sale of fluorspar which the appellant had despatched to customers overseas, the amounts thereof had accrued to the taxpayer in the tax year of despatch or the tax year of payment;

(ii) Alternatively, if the amounts in question had not accrued in the year of despatch, how the "add back" in terms of section 23F (2) of the Income Tax Act, No 58 of 1962, as amended ("the Income Tax Act") should be determined;

(iii) The deductibility of marketing fees claimed by the appellant in terms of an agreement between itself and its holding company D Ltd for the 2000, 2001 and 2002 years of assessment;

(iv) The deductibility of management fees claimed by the appellant in terms of an agreement between itself and its holding company D Ltd for 2001 and 2002.

These issues will be dealt with *seriatim*.

The Accrual Issue

[2] The main witness for the appellant was Mr A. He is an engineer by training and profession. He has more degrees than a thermometer and a string of professional qualifications. He has extensive experience, around the world, in mining.

[3] With effect from 1 July 1999 the appellant became a wholly owned subsidiary of D Limited, a public company listed on the Johannesburg Securities Exchange ("the JSE"). Mr A was a director of both the appellant and D Limited from the time of the taker-over of the appellant until October 2000. His evidence was corroborated in a number of material respects by Mr B who, since September 2000, has been responsible for the overall financial administration and control of the appellant. The appellant carried out mining operations in Zeerust, yielding exportable fluorspar. Fluorspar contains high concentrations of calcium fluoride which is used, *inter alia*, in the production of hydrofluoric acid, which has a number of industrial applications. Amongst other things, hydrofluoric acid is used in the manufacture of "CFCs".[1] In more recent years, international concerns about the release of CFCs into the Earth's atmosphere have impacted on the demand for fluorspar. CFC's in the stratosphere are believed to have depleted the ozone layer. The challenged transactions relate to fluorspar exported by the appellant by way of shipment. Mr A's evidence was that:

(i) Purchasers have strict requirements for a high percentage of calcium fluoride (normally 97%) in the fluorspar delivered;

(ii) Fluorspar becomes very easily contaminated during stockpiling and transportation;

(iii) The moisture content of fluorspar needs to be carefully managed: if there too little, it blows away; if there is too much, it increases the weight thereof, resulting in higher transportation costs and a reduction of the purity of the product;

(v) Moisture content fluctuates during transportation;

(vi) The appellant would only be paid for the actual dry metric tonnage of the fluorspar as determined after

[1] Chlorofluorocarbons, compounds derived from the processing of fluorspar, having stable thermodynamic properties making them well-suited as coolants for refrigeration units, aerosol propellants and electronic cleaning solvents

delivery to the purchaser in the country of destination.

(vii) By reason of the above, the delivery of fluorspar is subject to inspection and analysis by independent assayists nominated by the purchaser in the country of destination;

(viii) if the fluorspar does not comply with the specifications of the purchaser, the whole shipment can be rejected by the purchaser;

(ix) in practice they would negotiate a reduced price if the delivered product did not meet the specifications;

(x) minor discrepancies in meeting the standards required by the purchaser could result in large adjustments to the finally agreed price;

(xi) although, sometimes there would be advance payments made by the purchaser, the seller had no right or entitlement to appropriate these receipts until the final price had been determined, consequent upon the inspection in the country of destination.

None of this evidence was seriously challenged by the respondent. It was credible evidence supported by documentation. It is common cause that, in respect of each of the challenged transactions, the fluorspar was shipped in terms of FOB ("Free on Board") contracts from Durban to the country of destination. In each instance, the appellant arranged and paid for the insurance of the freight, recovering the costs of insurance from the purchaser at a later stage.

[4] The respondent contends that, in each instance, the price of the exported fluorspar accrued upon the delivery thereof to the ship in Durban and the procurement of bill of lading to the purchaser's order. The appellant says: "*No, the accrual only took place after the inspection and analysis by the assayists in the country of destination*".

[5] Fluorspar is a fungible product. Fungibles are goods that are sold by number, weight or measure.[2] The fluorspar in question was sold by number (the number of dry metric tons), weight (the dry metric tons were weighed) and measure (the measurement of the degree of purity of the calcium fluoride).[3] At least two of these determinants of price (weight and measure) were subject to verification and approval in the countries of destination. In *Page N.O. v Blieden & Kaplan*,[4] the following was said:

> *Now according to our law if a person sells a mass and leaves the exact amount of the price to be determined later either by weighing or by measuring or counting, then that price is not ascertained until the weighing or measuring or counting is done. If the price is to be ascertained by weight, it is not sufficient to measure and roughly ascertain the weight from the measurement. In some cases the weight can be accurately ascertained from the measurement but this is not always the case here. A bag of mielies does not always weigh 203lbs. – it depends on the newness of the bag, the manner it is filled, the degree of moisture in the mielies, etc. We cannot therefore say that measuring mielies is equivalent to weighing them and if we cannot do this we cannot say that all was done necessary to ascertain the exact price.*
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> *The sale is therefore a venditio imperfecta; there is no certum pretium and therefore no ownership could pass by the mere bagging of the mielies. But even if I am wrong and if the certum pretium could be ascertained by the bagging of the mielies, I doubt whether the mere placing of the mielies in Blieden & Kaplan's bags can be regarded as delivery.*

Earlier, in the same judgment, the following was said:

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[2] See *Grotius* 3.10.3; *Voet* 12.1.1; *Van der Linden* 12.1.1.
[3] "Measurement" is not confined to a determination of size. See *The Oxford English Dictionary*.
[4] 1916 TPD 606 at 612

> *We have therefore to deal with a venditio imperfecta in which there is no certum pretium even if it can be said to be a corpus certum, until the bagging and weighing is complete.*[5]

Similarly, in the present case, the sale of the fluorspar was, in each instance, a *venditio imperfecta*: there was no *certum pretium* until either (a) the assayist in the country of destination had confirmed that the delivery met the purchaser's specifications or, (b) if not, the parties had negotiated and agreed upon a different but mutually acceptable price in the light of the assayist's findings. The sales in question were, in effect, subject to suspensive conditions.

[6] Ordinarily, where goods have been shipped in terms of FOB contracts, ownership of the goods passes upon the handover of a bill of lading to the purchaser in respect thereof, but even if the contract of shipment is FOB, where the purchaser could refuse to accept the goods upon inspection, this general rule does not apply: there must have been a mutual intention that ownership should pass upon loading on the ship.[6]

[7] As *Johannes Voet* said:

> *Sequatur insuper acceptatio facienda eum, in quem res transitura est, ut ita concurrant affectus ex utraque parte contrahentium, et animus utriusque consentiat in dominii translationem.*[7] (emphasis added).

The Latin may be translated as follows:

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[5] At 611

[6] See *Weeks and Another v Amalgamated Agencies Ltd* 1920 AD 218 at 230-231 and *Anderson & Coltman Limited v Universal Trading Co* 1948 (1) SA 1277 (W) at 1280-1.

[7] *Voet* 41.1.35. Quoted in the *Weeks* case (supra) at 230.

> Furthermore, the making of an acceptance must ensue on the part of him to whom the property is to pass, so that in this way the inclinations of the contracting parties on both sides may come together and the minds of both may agree to the transfer of ownership.[8]

Thus, as between the appellant and the purchasers of fluorspar, this mutual intention between the seller and the purchaser as to the event which triggers the passing of rights and obligations when goods are to be in transit is of critical importance.[9] Even where one is not dealing with finished goods that are be transported from the seller to the purchaser, this principle relating to the critical importance of the event that brings about the coming into being of reciprocal rights and obligations was, in general terms, affirmed in *Cactus Investments (Pty) Ltd v Commissioner for Inland Revenue*.[10]

[8] In *Poort Sugar Planters (Pty) Ltd v Umfolozi Co-operative Sugar Planters Ltd.*[11] Ogilvie Thompson JA, delivering the unanimous judgement of the court, said that:

> *The word "free", of course, denotes that all expenses in getting the cane to the "loading point" must be borne by the grower: cf. the well-known commercial terms f.o.b. and f.o.r. As Sir James Bacon, dealing with a contract to supply clay f.o.b. put it in Ex parte Rosevear China Clay Co., 11 Ch.D 560 at p.565:*
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> > *"Delivery' 'free on board' only means 'The price shall be that which we stipulate for, and you shall not have to pay for the wagons or carts necessary*

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8 Translated by Sir Percival Gane.

9 See also, the article *Passing of Ownership- Delivery to Carrier- Credit Sales* published in 1930 in the SALJ, Volume 47, 50 at p52 by "T.B.H". In that article reference is made to the judgment of Solomon J (as he then was) in *Stephen Fraser & Co. v Clydesdale Transvaal Collieries Ltd* 1903 TH 121 at 124-5 where the court refers to the fact that there may be exceptions to general rule in such contracts of carriage. The learned judge was dealing with an "FOR" (Free on Rail) contract but the same principle would apply to an FOB contract.

10 1999 (1) SA 315 (SCA) at 321A-H

11 1960 (3) SA 585 (A) at 596H-597A

> *to carry the clay from the place where it is dug; we will bear all those charges and put it free on board the ship, the name of which you are to furnish'."*

It does not necessarily follow from the fact that a contract is FOB that, once the cargo is "on board", the seller has acquired the right to claim payment for the purchaser. When the purchaser acquires this right depends on the intention of the parties. That intention need not be express but may also be inferred.

[9] In the case of *Lategan v Commissioner for Inland Revenue*[12] Watermeyer J (as he then was) said of an accrual of income for tax purposes:

> *In my opinion, the words in the Act, "has accrued to or in favour of any person" merely mean "to which he has become entitled".*
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> *So far as a debt is concerned which is payable in the future and not in the year of assessment, it might be difficult to hold that the cash amount of the debt has accrued to the taxpayer in the year of assessment. He has not become entitled to a right to claim payment in the year of assessment, but he has acquired a right to claim payment of the debt in future. This right has vested in him, has accrued to him in the year of assessment, and it is a valuable right which he could turn into money if he wishes to do so.*

In *CIR v People's Stores (Pty) Ltd*[13] Hefer JA, delivering the unanimous judgment of the court, said of this passage in the *Lategan* judgment: "*There is no logical answer to this reasoning."* The critical question is therefore: "When did the right to claim payment vest in the taxpayer?" It did so once the *pretium* became *certum* (the price became certain or had been ascertained). Before that, there was no accrual. In other words, pending the outcome of the assayist's inspection in the country

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[12] 1926 CPD 203 at 209-10
[13] 1990 (2) SA 353 at 365C

of destination, there was no accrual. The appellant's objection on the accrual point was well founded. The respondent has been wrong.

The applicability of section 23F (2) of the Income Tax Act

[10] Since 30 June 2000 the appellant has paid royalties to the owner of the mineral rights reposing in the land where the fluorspar was mined, E (Pty) Ltd (another subsidiary of D Ltd). These royalties have been paid in terms of a notarial mineral lease having a six year term. The appellant's stance has been that, in terms of section 23F (2), these royalties are the only payments that can be included in the income of the taxpayer for the now to be revised year of assessment for the challenged transactions. The appellant contends that royalties are the only item that can be regarded as having been expenditure incurred in respect of the acquisition of the fluorspar exported in terms of the challenged transactions and which was previously allowed as a deduction in terms of section 11 of the Income Tax Act. The dispute hinges on whether mining and processing costs are to be considered as costs in respect of the acquisition of the exported fluorspar. There is no dispute that the mining and processing costs in question were previously allowed as deductions. By the end of the hearing, there was also no dispute that costs of despatch of the fluorspar, including railing, bulk handling and wharfage are not to be considered as costs incurred in respect of the acquisition of the fluorspar.

[11] The relevant portion of section 23F (2) of the Income Tax Act provided at the relevant times in question as follows:

> *Where a taxpayer has during any year of assessment disposed of any trading stock in the ordinary course of his trade for any consideration the full amount of which will not accrue to him during such year of assessment and any expenditure incurred in respect of the acquisition of such*

> *trading stock was allowed as a deduction under the provisions of section 11 (a) or (b) during such year or any previous year of assessment, the amount of such expenditure so allowed as a deduction shall be deemed to have been recovered or recouped by such taxpayer and be included in the income of the taxpayer for the year of assessment during which such trading stock was so disposed of ....*

[12] It seems clear from the cases of *Commissioner for Inland Revenue v George Forest Timber*[14], *Matla Coal Ltd v Commissioner for Inland Revenue*[15] and *Commissioner for SARS v Foskor*[16]that the costs of extracting and separating a mineral like fluorspar from the land (i.e. the costs of mining) must be regarded as costs for the appellant in respect of the acquisition of the fluorspar. The court is referring, in this instance, to the fluorspar which, after extraction from the land, the appellant thereupon sold to its purchasers. A common sense extension of this principle must mean that the costs incurred after mining but before despatch – which the parties have agreed be described as "processing costs" – are also costs of acquisition of "such" fluorspar, to use the term that appears in the section. The appellation "such" makes it clear that the trading stock to which these costs must be attributed in the trading stock actually disposed of, rather than the stock in its raw or partially processed state. Thus, these costs of getting the fluorspar into a state of readiness for sale before despatch to a particular purchaser are costs of acquisition. This processing is necessary for fluorspar to become stock-in-trade, ready for sale. The costs incurred in converting a mineral into stock-in-trade, a saleable product, seem from the *George Forest Timber*, *Matla Coal* and *Commissioner for SARS v Foskor* cases to be determinative. The respondent succeeds in its case to recoup mining and processing costs under section 23F (2) of the Income Tax Act.

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[14] 1924 AD 516 at 523-6
[15] 1987 (1) SA 108 (A) at 128
[16] 72 SATC 174 at paragraphs [7], [39] and [44]-[47]

The Tax-Deductibility of the Marketing Fees

[13] The appellant and D Limited concluded a marketing agreement on 23 September 1999 in terms of which D Limited was appointed the sole marketing agent of the appellant. The agreement provided, *inter alia*, that:

(i) The appellant would pay an "intent fee" of R3 million to D Limited to conduct a study of the world supply and demand priorities of the product and to specifically target Europe and Asia to expand the customer base for the product;

(ii) The appellant was to pay an additional monthly fee of R200,000 to D Limited which was to escalate annually by 10%;

(iii) D Limited would use all reasonable endeavours to increase the customer base of the appellant and sales of the product;

(iv) D Limited would furnish the appellant monthly in arrear with proper and accurate records of all transactions concluded by it pertaining to the product, and further to provide the appellant with copies of the agreements relating to such transactions at the request of the appellant;

(v) D Limited would account and pay over to the appellant monthly in arrear any proceeds received by D Limited from sales of the product;

(vi) D Limited would render all reasonable assistance to the appellant as the appellant may require, in connection with any legal proceedings, in connection with the product and/or the marketing thereof;

(vii) D Limited would be entitled to appoint sub-agents to assist with the marketing of the product and the appellant was liable for the costs of appointment of any sub-agents, as well as other costs incurred in the performance of the services in terms of the marketing agreement.

[14] The respondent disallowed the marketing fees paid by the appellant to D Limited because, in essence, they were perceived to be excessive in the circumstances.

[15] The respondent has relied on ITC 621[17] where it was said that:

> *In the case of Ben Richards (11 S.A.T.C. at p.116) it was held that it was open to the Commissioner to challenge the remuneration paid to directors if in his opinion it was unreasonable as not being incurred in the production of the income in terms of sec.11(2)(a). The same rule is applicable in English Law, see Aspro Limited v Commissioner of Taxes (1932, A.C.683).*
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> *This principle has been adopted by this Court in other cases where remuneration paid to employees and directors has been regarded as excessive to such an extent that the Court has arrived at the conclusion that it could not in whole have been expended for the purpose of production of income but was inspired by some other motive.*

[16] Mr C, an expert geologist, employed by a company other than either the appellant or D Limited testified that the marketing fees of the appellant were reasonable by prevailing standards. The respondent's sole witness in the case was Dr F, an economist. She testified on the marketing aspect of the case. She gave an interesting macroeconomic overview of world sales of fluorspar. Dr F conceded that "marketing was not her field" and that she was "not an expert in marketing". She conceded that the appellant's claims with regard to

[17] 14 SATC 498

its marketing strategy "would have to be empirically tested". In the regard, the appellant relied mainly on the evidence of Mr A.

[17] With the possible exception of the proverbial "hot cakes", there is almost no product in the world that sells by itself. Even with hot cakes, it may be a good marketing strategy to position one's bakery in such a place and design the layout so that the delectable aromas waft past the nostrils of passers by, enticing them to buy. Marketing entails a careful strategy on price. In the case of fluorspar, there is what economists call "derived demand".[18] Even in such a market, buyers must know that one is a seller. One has to compete on quality. Buyers need to know that the seller is reliable. All other things being equal, people tend to do business with those whom they like and trust. Money has to be spent on building relationships with purchasers and potential purchasers. Mr A testified that at the time of D Limited making the acquisition in the appellant, the appellant was a "somewhat tired operation". It was overly dependent on only two customers and it seemed wise to try to broaden this base. Although the price of fluorspar fluctuated within a narrow margin, the appellant was selling in the lower range of that band and it was decided to try to move prices into the upper portion of that range. An increase in price of US$10 per 10 000 tons of fluorspar would translate into millions of rands of additional profit. The evidence was that the appellant did ultimately succeed in securing certain large sales at higher prices and that it managed to penetrate the European market. The purpose of the expenditure was to generate additional income and render the appellant's position in the market more secure. These are legitimate purposes for claiming this expense of marketing fees. The fact that the appellant appointed sub-agents in Europe to market on the appellant's behalf does not detract from the fact that D Limited would have had to motivate these sub-agents, keep them

[18] Demand that does not arise from retail consumers buying the product in markets like shops. A world-wide aversion to using aerosol sprays containing CFCs, for example, will, however, affect the demand for fluorspar.

informed and liaise with them regularly. Similar considerations apply in respect of certain expenses paid by the appellant to a certain Mr G, a marketing agent based in Australia: the employment of Mr G did not render the marketing services of D Limited nugatory. D Limited were paid what works out to less than 3% of the appellant's turnover. The sub-agents were paid about 2,5%. Both Mr A and Mr C said that these figures compared well with international norms. It cannot be said that the marketing fees were so devoid of commercial rationality that some motive other than the production of income induced them. The marketing fees were not excessive in the generally accepted sense of such term in such matters.[19] These cases make it clear that it is not for the Court (or the Commissioner) to say, with the benefit of hindsight, that business expenditure should be disallowed on the basis that it was not strictly "necessary", or that it was not as effective as it could have been. If the purpose of the expenditure was to produce income, in the course of trade, and the expenditure was not of a capital nature, then that is sufficient. Accordingly, the respondent was wrong in his assessment of these fees. The appellant succeeds in its objection on this point.

The Tax-Deductibility of the Management Fees

[18] The appellant claims management fees paid to D Limited. The appellant relies, *inter alia*, on a written agreement between itself in terms of which D Limited was appointed to manage the financial and other affairs of the appellant for the period from 1 July 2000 to 30 June 2004. The respondent disallowed the management fees paid by the appellant to D Limited for the following reasons:

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[19] Useful guidance on this point can be found in Case No. 9610 1998 (5) JTLR 132. See also: *Sub-Nigel v Commissioner for Inland Revenue*1984 (4) SA 580 (A) at 592; *De Beers Holdings (Pty) Ltd v Commissioner for Inland Revenue* 1986 (1) SA 8 (A) at 30 and 36-7; and *Port Elizabeth Electric Tramway Co Ltd v Commissioner for Inland Revenue* 1936 CPD 241 at 245.

(i) The copy of the management agreement upon which the appellant relies was not signed on behalf of the appellant and may have, in part, operated retrospectively;

(ii) Even if the management agreement is accepted as having been concluded between the appellant and D Limited, either D Limited did not in fact perform its obligations under that agreement or its management functions were very limited;

(iii) The management fees paid to D Limited were inflated and excessive;

(iv) In substance, the management fees constituted a payment to the appellant's holding company, rather than deductible expenditure, at a time when D Limited did not pay income tax on the receipts as it was in an assessed loss position;

The respondent took into account the fact that prior to 1 July 1999 no management fees were paid to the previous owners, N Corporation, and in the 2000 year of assessment, no management fees were paid to D Limited, that in the 2001 and 2002 years of assessment, almost identical amounts were paid to D Limited for marketing fees and that at no stage has the appellant presented details of the actual costs incurred by D Limited in the provision of management services.

[19] The respondent contends that the aggregate of the marketing and management fees paid during the years in issue were calculated to clear D Limited' accumulated tax loss and that the management fees were not laid out or expended for the purposes of trade and accordingly their deduction is prohibited by section 23 (g) of the Income Tax Act. In the alternative, the respondent contends that the management fees were expended for a dual purpose and should thus be apportioned in an appropriate ratio according to the extent to which the appellant establishes that they were expended for actual

management services as opposed to expended for purposes other than trade.

[20] During the 2001 and 2002 years of assessment the appellant paid management fees to D Limited in the amounts of R2 640 000 and R2 904 000 respectively. The appellant's turnover grew from R88 326 070 for the financial year ended 30 June 2000 to R98 763 262 for 2001 to R113 600 000 for 2002. Before the acquisition by D Limited, for the year ended 31 December 1998, the appellant's turnover had been R55 148 694 and for the six months ended 30 June 1999, R38 136 532. Operating profit before taxation went from R11 774 619 in 1998 to R6 792 723 for the six months ended 30 June 1999 to R25 893 761 for the year ended 30 June 2000. 0Operating profit before taxation for the year ended 2001 was R24 816 000. There was, however, an accounting loss before tax of R 2 243 000 in that year arising from discontinued operations. The board resolved on 10 May 2001 to discontinue the crushing of dolomite for the road building and construction industries in Botswana and the North West Province of South Africa with effect from 1 June 2001. For the year ended June 2002 there was a nett loss before taxation of R272 000. The 2002 audited financial statements of the appellant indicate that this change from a profit in 2001 to a relatively small loss in 2002 was attributable mainly to two factors: (a) the failure to receive any dividend from its subsidiary, H (Pty) Ltd in 2002, whereas it had received R 22 422 000 in 2001 and (b) a plant upgrade write-off of R5 101 000 in 2002 whereas no comparable write off occurred in 2001. Turnover rose 15% from 2001 to 2002 whereas the cost of mining rose by 13% over the same period.

[21] Management fees charged to subsidiaries by holding companies are not infrequently the subject of mutterings from different quarters. It is inherent in the relationship between a holding company and a subsidiary that the subsidiary is amenable to manipulation and

exploitation by the holding company. This is especially the case where the holding company is located in a rich, first world country with a strong currency and the subsidiary is in a developing country with a weak currency. As between the appellant and D Limited, the relationship was, of course, one between two local companies. There is no simplistic paradigm through which the relationship between holding companies and subsidiaries can be viewed. Many a subsidiary is utterly dependent on its holding company for its effective functioning. Each case must be determined on its own merits. Furthermore, taking advantage of an accumulated assessed tax loss is not an inherent wrong. On the contrary, the advantages presented by such losses can influence strategic decisions which can save companies and turn them around to the obvious benefit of employees and the Revenue Service, among others. Each case must be decided on its own merits.

[22] Mr A confirmed that there was indeed a management agreement in place between the appellant and D Limited at the relevant time. Mr B confirmed that directors of D Limited had regular management meetings with the management of the appellant. In addition to Mr A, Mr I, a geologist based in Australia, Ms J a geologist based in South Africa and Mrs K, an attorney in Pretoria, all of whom were directors of D Limited and also served over the relevant period as directors of the appellant. Mr A resigned on 12 October 2000, Mr I on 23 August 2001 and Mrs K on 19 January 2001. Mr L, an Australian, was appointed to the board of the appellant on 23 August 2001. A certain Mr M, who was also the appellant's public officer, was appointed as a director on 18 October 2000. The directors of D Limited who were appointed as directors of the appellant did not receive any remuneration from the appellant. They were to be remunerated by share options in D Limited. The support which D Limited gave to the appellant was hardly nominal. It was active and direct. That support extended to measures taken to ensure that the railway trucks upon

which the fluorspar was to be loaded were cleaned by the appellant's staff from debris such as coal dust to prevent contamination and a deterioration of the quality of the fluorspar. D Limited used its "muscle", as a long established public company, to raise capital for the appellant. It is clear from the evidence that the appellant, as a lack-lustre, under-performing company at the time of its acquisition by D Limited, needed the management inputs of D Limited and received it. With its business located in a remote rural area of the country, it needed the global vision and strategic advice of the cosmopolitan, internationally experienced team of directors from D Limited. The collective services of such highly qualified persons such as Mr A, Mr I, Ms J, Mrs K and Mr L do not come cheaply. Mr C confirmed that the management fees charged by D Limited to the appellant were in line with the norm in the mining industry. In all the circumstances, the respondent wrongly disallowed the appellant's claim for management fees. *Mutatis mutandis*, the same considerations apply as in the case of the marketing fees. The appellant also succeeds in its objection on this point.

De Finibus

[23] Counsel for the parties agreed that, in this case, it would not be appropriate for the court to make any order as to costs.

[24] This judgment reflects the unanimous opinion of the members of the court.

[25] The following is the order of the court:

(a) Save in respect of the respondent's alternative claim in terms of section 23F (2) of the Income Tax Act, the appeal is allowed;

(b) The appellant's 2000, 2001 and 2002 assessments are referred back to the respondent to be reassessed on the basis that:

(i) there was no accrual of income in respect of the five challenged transactions in the years of assessment in which the respective deliveries of fluorspar had been despatched from Durban shortly before the appellant's year-end;

(ii) the respondent may add back to the appellant's income, the amount of the royalties, mining and processing costs in respect of the appellant's trading stock despatched from Durban, referred to in (i) immediately above (the "challenged transactions"), by reference to the dry metric tonnage as finally determined by the assayists nominated by the purchaser in the respective countries of destination;

(iii) the appellant's claims for marketing and management fees are deductible in terms of the provisions of sections 11 (a) and 23 (g) of the Income Tax Act.

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N.P.WILLIS