

P MINES (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
KUDYA J
HARARE, 15 September 2014 and 13 March 2015

Income Tax Appeal

AP de Bourbon, for the appellant
T Magwaliba, for the respondent

KUDYA J: The issue for determination in the present appeal is whether in the computation of additional profits tax an assessed loss carried forward is an allowable deduction in the calculation of net cash receipts in para 1(2) of the 23rd Schedule of the Income Tax Act.

The Background

The appellant is a company registered in Zimbabwe, wholly owned by a company incorporated in Guernsey, Channel Islands and listed on the Australian Stock Exchange. It mines and processes platinum group metals in Zimbabwe under a special mining lease issued in terms of the Mines and Minerals Act [*Chapter 21:05*].

In terms of the Income Tax Act, holders of a special mining lease were subject to a corporate income tax rate of 15% against a general mining corporate tax rate of 25%. In addition such holders are levied additional profits tax.

The taxable income for a holder of a special mining lease is charged under s 22 of the Income Tax Act which reads:

“22 Special provisions relating to special mining lease operations

- (1) In the case of the holder of a special mining lease, that part of the holder’s taxable income or assessed loss, as the case may be, which is attributable to special mining lease operations for a year of assessment shall be determined in accordance with the Twenty-Second Schedule.
- (2) If the holder of a special mining lease derives income from any trade other than special mining lease operations, that part of his taxable income or assessed loss, as the case may be,

which is attributable to that other trade shall be determined in accordance with the general provisions of this Act”.

It is computed under the provisions of the 22nd Schedule of the Income Tax Act headed: Determination of Gross Income and Taxable Income or Assessed Loss from Special Mining Lease Operations.

Additional Profits Tax is charged in terms of s 33 of the Income Tax Act and is determined in accordance with the provisions of the 23rd Schedule headed: Determination of Additional Profits Tax in respect of Special Mining Lease Area. Notwithstanding some contrary undertakings made by the Government of Zimbabwe in 2001, the appellant conceded that it was liable to additional profits tax.

The facts

The respondent assessed the appellant in July 2009 for additional profits tax for the period 2004 to 2009. The appellant included as an allowable deduction the aggregate of the allowable deductions attributable to the special mining lease area for the purpose of calculating its tax liability for income tax the assessed losses incurred up to June 2005 in the sum of US\$ 26 668 264. It purportedly acted in terms of the 23rd Schedule. It took the position that assessed losses were allowable deductions against both the income tax liability and the additional profits tax of a holder of a special mining lease. The respondent verbally questioned the appellant on the double deduction of the cumulative assessed losses to June 2005 in both the income tax liability and additional profits tax liability. It, however, passed the double deduction and on 27 July 2009 assessed the appellant for additional profits tax in the amount US\$23 485 026.62 for the years 2004 to 2007 [Annexures B1-B4 of appellant’s case]. The appellant accepted liability and settled the amount in full in 2010.

The respondent reassessed the appellant for additional profits tax for the period 2001 to 2007. The computed liability remained unchanged at the figure previously assessed and paid for in full. The respondent, however, revisited the deduction of the assessed tax losses incurred up to June 2005 in the computation of the 2006 additional profits tax. On 13 December 2010, it issued amended assessments [C2-C4 captured in C1 of the appellant’s case and annexure A-C of Commissioner’s case] for the years ending 31 December 2005, 31 December 2006 and 31 December 2007 disallowing the deduction of assessed losses from the additional profits tax that had already been deducted from the gross income of the appellant. The effect was to increase the additional profits tax for the appellant by a further US\$26 895 889.26 from the amount previously accepted and paid for in full.

The appellant objected to the amended assessments on 15 December 2010. The respondent disallowed the objection on 18 February 2011 [annexure E of Commissioner's case and annexure A to appellant's notice of appeal] but suspended in terms of s 69 (1) of the Income Tax Act payment of the additional profits tax pending the determination of the present appeal. The appellant filed the notice of appeal on 11 March 2011 and the commissioner replied to the notice on 3 May 2011. The appellant, however, filed its case on 9 May which prompted the reply from the respondent of 18 July 2011.

The issue

At the pre-trial hearing of 10 July 2014 the issue referred to trial was: whether or not the assessed loss incurred in the previous year is an allowable deduction for purposes of computing net cash receipts in terms of para 2 (3) (a) (i) of the 23rd Schedule of the Income Tax Act.

The statutory provisions

Additional profits tax in respect of a special mining lease area is charged in terms of s 33 (1) and (2) of the Income Tax Act. The two sub-sections read:

“33 Additional profits tax in respect of special mining lease areas

(1) There shall be charged, levied and collected throughout Zimbabwe for the benefit of the Consolidated Revenue Fund an additional profits tax, determined in accordance with the Twenty-Third Schedule, in respect of the first accumulated net cash position and the second accumulated net cash position, as so determined, in respect of any special mining lease area for any year of assessment.

(2) The additional profits tax referred to in subsection (1) shall be determined, charged and levied in respect of each special mining lease area separately”.

The formula for calculating additional profits tax is set out in para 4 of the 23rd Schedule. The way to the additional profits tax passes through net cash receipts. Net cash receipts in turn determine the calculation of tax for the first and second accumulated net cash position on which the formula for computing additional profits tax rests. Net cash receipts are defined in para 2 of the 23rd Schedule. The relevant part reads:

“2. (1) For the purpose of this Schedule, the net cash receipts from a special mining lease area in a year of assessment shall be the result, which may be a positive or negative figure, of deducting from the income referred to in subparagraph (2) the deductions referred to in subparagraph (3)”.

The computation of income, set out in para 2 (3) of the 23rd Schedule, is not in issue before me. The dispute between the parties is in respect of the deductions that are allowed under para 2 (3) of the 23rd Schedule. It states:

- “(3) The deductions to which subparagraph (1) relates are the aggregate of—
- (a) allowable deductions in respect of expenditure which—
 - (i) has been incurred or is deemed to have been incurred in the year of assessment concerned by the holder of the special mining lease or, in the case of joint holders, by each of the holders; and
 - (ii) the Commissioner determines is attributable to the special mining lease area for the purpose of calculating the holder’s liability for income tax;
 - and
 - (b) income tax paid for the year of assessment concerned in respect of the taxable income of the holder of the special mining lease or, in the case of joint holders, of each of the holders, which the Commissioner determines is attributable to the special mining lease area; and
 - (c) capital expenditure incurred solely in relation to a special mining lease area which is allowable as a deduction under paragraph 5 of the Twenty-Second Schedule:
 - Provided that—
 - (i) any capital expenditure in respect of exploration operations which is so allowable and which is incurred prior to the first year of assessment shall be deemed to have been incurred in the first year of assessment for special mining lease operations;
 - (ii) such capital expenditure shall be deducted in full in the year in which it is incurred or deemed to have been incurred.”

The first two categories of deductions in para 2 (3) are in respect of allowable deductions of expenditure incurred and income tax paid by the holder in the requisite year of assessment, adjudged by the respondent to have been for the special mining lease area. The third and last category is in respect of capital expenditure incurred solely on the special mining lease area that is deductible under par 5 of the 22nd Schedule. The proviso to the third category is a deeming provision that relates to time rather than to exploration expenditure. It was common ground that only the first category calls for determination in the present matter. The decision turns on the meaning and application of “allowable deductions” envisaged in para 2 (3) (a) (i).

The term “allowable deductions” is defined in para 1 (1) of the 23rd Schedule as follows:

“In this Schedule “allowable deductions” means, subject to subparagraph (2), a deduction allowable under the Twenty-Second Schedule in respect of expenditure incurred”

Subparagraph (2) in turn states:

- “(2) For the purposes of this Schedule, a deduction made in respect of—
- (a) expenditure of the kind referred to in subparagraph (b) subparagraph (1) of paragraph 4 of the Twenty-Second Schedule; or
 - (b) a training investment allowance referred to in subparagraph (f) of subparagraph (1) of paragraph 4 of the Twenty-Second Schedule; or
 - (c) any capital redemption allowance referred to in paragraph 5 of the Twenty-Second Schedule;
- shall not be treated as an allowable deduction.

Subpara (2) specifically excludes three deductions. The first is on expenditure of the kind referred to in para 4 (1) (b) of the 22nd Schedule, being “(b) expenditure incurred in that year in respect of interest on, or in borrowing or obtaining, a loan or other form of credit or financial accommodation”. The second concerns a training investment allowance in para 4 (1) (f) of the 22nd Schedule equivalent to fifty *per centum* of the cost to the holder of any training building, any addition or alteration to any training building or any training equipment brought into use in the year of assessment. The third and last exclusion relates to any capital redemption allowance in para 5 of the 22nd Schedule.

The definition of an assessed loss for a holder of a special mining lease as set out in para 2 the 22nd Schedule as an antonym of taxable income. Taxable income under both the 22nd Schedule and 23rd Schedule is defined by reference to para 2 of the 22nd Schedule. Para 2 states:

“2. The taxable income or, as the case may be, the assessed loss accruing to the holder of a special mining lease in a year of assessment shall be the difference, if any, between the income attributable to special mining lease operations accruing to him in that year and the sum of his allowable deductions for that year; and that difference, if any, is a taxable income if the income so attributable is greater than the sum of those allowable deductions, and is otherwise an assessed loss.”

It is apparent from the definition that an assessed loss is the negative balance that accrues to the holder of a special mining lease after making all permissible deductions from the income attributed to the holder for the particular year of assessment. For income tax liability under s 22 of the Income Tax Act, the holder is, by virtue of para 4 (5) of the 22nd Schedule, allowed to deduct any assessed loss incurred by him for the preceding year from the income of the current year. What this entails is that in the current year the assessed loss carried forward would have been deducted to arrive at the final figure constituting taxable income deductible under para 2 (3) (b) of the 23rd Schedule.

The legal submissions

Mr *de Bourbon* for the appellant submitted that all the deductions allowed under the 22nd Schedule except for the three that are expressly excluded under para 1 (2) of the 23rd Schedule are also deductible in the computation of net cash receipts under the 23rd Schedule. Mr *Magwaliba* for the respondent contended that the “allowable deductions” contemplated in para 2(3) and “a deduction allowable” envisaged by para 1 (1) of the 23rd Schedule are both circumscribed by the deliberate use of the phrase “expenditure incurred”. Mr *Magwaliba* submitted on the authority of *Port Elizabeth Electric Tramway v CIR* 8 SATC 13; 1936 CPD 241 at 243-244 cited with approval in *Income Tax Case No. 628* (1946) 15 SATC 90 at p 91 that expenditure incurred is distinct and separate from losses incurred. Watermeyer AJP reasoned that:

“Income is produced by a series of operations and transactions entered into for the purpose of manufacturing or acquiring a saleable product and thereafter selling it or by rendering services for which payment is received. In the course of such operations and transactions expenditure and losses may be incurred, and these are the expenditure and losses referred to in the section. For the purposes of the present case “losses” can be ignored. It was not contended that the expenditure in this case was a loss and rightly so because the word “losses” in this section appears to mean “losses” of floating capital employed in the trade which produces income.”

Again, in *Joffe & Co (Pty) Ltd v CIR* 13 SATC 354 at 359 Watermeyer CJ stated:

“The word “loss” has several meanings and its meaning in s 11 (2) (a) is somewhat obscure. In relation to trading operations the word is sometimes used to signify a deprivation suffered by the loser, usually an involuntary deprivation, whereas expenditure usually means a voluntary payment of money.....The word “loss” is also sometimes used as the antonym of “profit”, but then it denotes the final result of a trading operation after expenditure has been deducted and it seems inappropriate to speak of a loss, in that sense, in conjunction with expenditure, as something which is incurred in the production of income.”

In my view the definition of assessed loss clearly demonstrates that it does not constitute expenditure incurred in the year of assessment concerned by the holder of the special mining lease. Rather, it represents a debit balance in the accounts of the holder of the previous year of assessment. It simply is not expenditure incurred in the year of assessment. This point was conceded by Mr *de Bourbon* in his oral submissions. He confessed that:

“Although we accept that in normal tax parlance an assessed loss is not expenditure, because of the way Parliament has crafted para 2 (3) of the 23rd Schedule, it deems by reference back to the 22nd Schedule assessed losses to be expenditure. It does not have to be expenditure; it has to be an allowable deduction which is deemed in terms of the 22nd Schedule to be treated as expenditure.”

Counsel for the appellant sought to avoid the confession by submitting that reference in the definition of allowable deduction in para 1 (1) of the 23rd Schedule to “a deduction allowable under the Twenty-Second Schedule” imported all the deductions found in the 22nd Schedule. The confession ignores the controlling words “in respect of expenditure incurred” that complete the definition. It seems to me that Mr *Magwaliba* was correct in his submission that the words “in respect of expenditure incurred” limit the deductions in the 22nd Schedule that apply to the 23rd Schedule. The admission that in normal tax parlance an assessed loss is not expenditure demonstrates, in my view, its exclusion from deduction under the 23rd Schedule.

It is not clear to me how reference to “a deduction allowable under the Twenty-Second Schedule in respect of the expenditure incurred” is deemed in para 2 (3) to be expenditure incurred in the year of assessment. I agree with Mr *Magwaliba* by reference to *Pinkey v Race Classification Board and Another* 1966 (2) SA 73 (ECD) at 77 that the two essential features of a deeming section are firstly, “a thing deemed to be something” and secondly “that which it is deemed to be”. The meaning of deemed and its application as restated in the cases cited by the appellant such as *R v Norfolk County Council* (1891) 60 LJQB 379 at 380, *Commissioner of Her Majesty’s Revenue and Customs v DCC (UK) Ltd* [2010] UKSC 58 at para 38 and academic writers such as EA Kellaway in *Principles of Legal Interpretation, Statutes, Contracts and Wills* at p 82 and *Cross Statutory Interpretation* at p 120 is unquestionably correct. In the present case the appellant has simply failed to demonstrate on a balance of probabilities how and where an assessed loss carried forward is in the 23rd Schedule deemed to be “expenditure incurred”.

The appellant’s fall-back position was the *contra fiscum* rule. It entails construing an ambiguous and unclear statute, especially a taxing one, which imposes a burden in a way that is more favourable to a subject. See *Fundstrust (Pty) Ltd (In Liquidation v Van Deventer* 1997 (1) SA 710 (A) at 735G-H, *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & Anor* 1992 (4) SA 202 (A) at 216C, *Coltness Iron Co v Black* 1881 (6) App Cas 315 and *Scottish Widows PLC v Commissioner of Her Majesty’s Revenue and Customs* [2011] UKSC 32 at para 94. The timely warning of Scott JA in *NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue* 567/97 [2000] ZASCA 171 para 17; 2000 (3) SA 1040 (SCA) at 1048D-G applies with equal force in the present case. He said:

“[17] An alternative argument advanced on behalf of the appellant was that subpara (d) (iv) was at least reasonably capable of the construction which the appellant sought to place upon

it. Accordingly, so it was contended, the *contra fiscum* rule required that the subparagraph be so construed. Where there is doubt as to the meaning of a statutory provision which imposes a burden, it is well established that the doubt is to be resolved by construing the provision in a way which is more favourable to the subject, provided of course the provision is reasonably capable of that construction. (See, for example, *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 735G - H; *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 (4) SA 202 (A) at 216C.) But, where any uncertainty in a statutory provision can be resolved by an examination of the language used in its context, there is no rule of interpretation which requires that effect be given to a construction which is found not to be the correct one merely because that construction would be less onerous on the subject. (See, for example, *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* 1975 (4) SA 715 (A) at 726 *in fine* - 727H.) For the reasons already given, I am satisfied that the construction of subpara (d) (iv) advanced on behalf of the appellant is not correct. It follows that the alternative argument must likewise fail”.

In my view, the wording of para 2 (3) of the 23rd Schedule is clear and unambiguous and does not require the application of the *contra fiscum* rule.

Counsel were in disagreement on whether s 15 (4) of the Income Tax Act applied to the computation of additional profits tax against a holder of a special mining lease. It states that:

“(4) Where in respect of any amount, a deduction would but for this subsection be allowable under more than one provision of this Act and whether it would be so allowable in respect of the same or different years of assessment, the taxpayer shall not be entitled to claim that such amount shall be deducted more than once and, where the deduction would but for this subsection be allowable under more than one provision of this Act in respect of the same year of assessment, the taxpayer shall elect under which one of those provisions he wishes to claim such amount as a deduction.”

It prohibits double deduction of an assessed loss in the same year of assessment. It was apparent that in terms of para 4 (5) of the 22nd Schedule, the section applies to such a holder in calculating his income tax liability. The section under consideration in my view is all encompassing and applies to all the provisions of the Income Tax Act whether they specifically incorporate it or not. It prohibits the double deduction of any allowable amount under more than one provision of the Income Tax Act. The taxpayer is given the option to choose the provision under which he wishes to claim the amount of the deduction. The submission by the appellant that the word amount is limited in application to Part III of the Income Tax Act and does not therefore extend to the 23rd Schedule overlooks the effect of the cross references found between para 2 (3) (a) of the 23rd Schedule and para 3 (1) of the 22nd Schedule with s 8 (1) (s) of the Income Tax Act.

The resolution

I am satisfied that the deduction of an assessed loss carried forward from the previous year of assessment is not an allowable deduction sanctioned by the provisions of para 2 (3) (a) (i) of the Twenty-Third Schedule to the Income Tax Act. The issue for determination is answered in favour of the respondent. He correctly disallowed the deductions for the assessed losses carried forward and correctly issued amended assessments dated 13 December 2010 for the year of assessment ending 31 December 2009, 31 December 2010 and 31 December 2011. The amended assessments in question are confirmed.

The parties were agreed that in the event the appeal failed, each party would bear its own costs.

The disposition

Accordingly, it is ordered that:

1. The appeal be and is hereby dismissed.
2. Each party shall bear its own costs.

Dube, Manikai, Hwacha, the appellant's legal practitioners