AS SCHOOL
and
CSS SCHOOL
and
SET COLLEGE
and
GST SCHOOL
and
SC COLLEGE
and
CB SCHOOL
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
KUDYA J
HARARE, 24 February 2015 and 20 May 2016

Income Tax Appeal

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

KUDYA J: These six appeals were filed separately. The parties were all represented by the same firm of legal practitioners', which in turn briefed one counsel. All the appeals raised the same legal issues. At the pre-trial hearing of 1 October 2014, the appeals were for these reasons consolidated for hearing. In the absence of factual disputes, the parties argued the legal issues on the basis of the statement of agreed facts furnished at the pre-trial hearing. The essence of the statement of agreed facts was as follows:

1. All the six appellants were private senior schools operating in Zimbabwe in terms of their respective trust deeds. The second to fourth appellants also operated primary schools, which were jointly administered with the high schools.
2. In the case of each appeal and each school, certain employees of these schools had their children enrolled at the schools where they worked or at other schools which had mutual agreements with the school at which they were members of staff.
3. In terms of those arrangements, the employees of the appellant schools, whose children were enrolled at these schools, did not pay the same amount of school fees as other non-staff parents whose children were enrolled at the school. These children were spread across the schools they were enrolled, in various classes.

4. In either case the employees were charged by the appellants between 20 % and 25% of the full fees and no taxes were paid on the difference between the 20% and 25% of the fees and the full fees payable at the respective schools. The first, second, third and sixth respondents charged 20% while the remaining two charged 25%. The fourth used to charge 3% before it was directed on 30 November 2009 by the respondent to charge 25% which it did from the third term of 2009.
5. The employee parents, like all other non-staff parents, provided all other school items that were not provided by the schools.
6. The appellants asserted that some of their costs were not affected by and did not vary because of the addition of children of staff members. They termed them non-variable costs.
   6.1. These direct costs of education comprised teacher and other employee salaries as well as the capital costs of the buildings, moveable assets such as motor vehicles and buses and sports equipment as well as municipal taxes and the costs for sport and cultural facilities, school transport, school magazines, awards, class outings and annual group camps.
   6.2. The costs related to the repairs and maintenance of buildings and other facilities at each school was not affected by the number of pupils enrolled at the school.
   6.3. In none of the schools was the salary paid to any teacher dependent on the number of pupils actually taught, or in the case of administrators and other staff related to the number of pupils enrolled at the school.
   6.4. No additional staff were employed as a consequence of the pupil sponsoring schemes.
7. The appellants further asserted that there were some costs incurred by the appellant schools which were affected by the addition of children of staff members, which varied depending on the number of pupils enrolled at the school. They termed them variable costs. These comprised stationery and book costs and for boarders food costs.

8. The respondent contended that the difference between the amount of the fees paid by the employee parents to the schools and the full fees payable at the school was an advantage or a benefit in terms of section 8 (1) (f) of the Income Tax Act [*Chapter 23:06]* enjoyed by the employee parents arising from their employment relationship with the appellants that fell to be taxed in the relevant period. The appellants disputed the position.

9. The respondent also asserted that the cost of the benefit to the appellants in respect of each benefiting child was the same as the costs of every other pupil at the school and assessed to tax the appellants on the basis that the advantage or benefit claimed by the respondent was equivalent to the waived amount. The appellants disputed this position.

10. Tax assessments were raised and issued against the appellants in terms of paragraph 10 of the Thirteenth Schedule to the Income Tax Act for taxes that were alleged to be due from the employee parents and which the respondent asserted the appellants were obliged but failed to withhold from the incomes of the concerned employee parents.

11. The appellants disputed both the obligation asserted by the respondent and the application of the legislation in the manner invoked by the respondent. The appellants accordingly objected to the tax assessments in terms of the law and all the objections were dismissed.

12. The appellants appealed to this Honourable Court against the various decisions of the Commissioner-General to disallow their objections.

The determination of the issues referred on appeal will of necessity be decided on the basis of the statement of agreed facts and the information placed before me in the r 11 documents[1] in respect of each appellant.

The rule 11 documents

The r 11 documents comprised 199 pages consisting of the schedules of the grossed up benefits for each employee, certified copies of the assessments raised, the objection to tax assessment on school fees benefit for employees whose children were enrolled at the school, requests for suspension of the payment of the new assessments, the determination of each objection and the notice and grounds of appeal of each of the six appellants. The first five determinations were made on 29 November 2012 while the last determination was made on 4 November 2013. The first five appellants filed their notices of appeal on 21 December 2012 while the sixth appellant did so on 25 November 2013. All the appellants averred amongst other things in their letters of objection that the benefit which staff members received was the placing of their children in a few places at the school.[2] Their collective contention was that the respondent wrongly valued the benefits in kind received by these employees. The commissioner opined that these benefits unravelled during the payroll audit should have been included in the gross income in terms of s 8 (1) (f) of ITA.[3]

On 12 October 2011 the association to which the appellants belonged wrote to the respondent seeking written guidance on the correct tax treatment of the school fees benefit accruing to these employees. The guidance from the Commissioner-General was based on s 8 (1) (f) of the Income Tax Act. He advised that the use of any educational and boarding facilities of any of the association affiliated schools by the children of these employees constituted a s 8 (1) (f) benefit equivalent to the waived amount. It was common cause from the letters seeking suspension of payment of tax of 21 December 2012 that all the schools

[1] The rule 11 documents comprise 199 pages.
[2] Para 5 pp6, 38, 66, 95 and 134 of r 11 documents
[3] Letter of 12 May to third appellant p 78 of the r 11 documents

were non-profit making organisations[4] whose anticipated costs of providing education were derived solely from prospective school fees income[5]. The school fees income was disparately computed between full fee and concessionary paying pupils based on anticipated non-variable and variable costs of providing education to all these pupils. The anticipated cost of providing education to pupils in each category was proportionately shared between them.

The first appellant: AS

The first appellant, AS's maximum enrolment capacity was for 540 pupils. In 2009 and 2010 it enrolled 515 and 521 pupils respectively of which 174 and 162 were boarders. In each year 11 children benefitted from the payment of concessionary school fees. The cumulative waived amounts for these children were in the sum of US$28 314 in 2009 and US$40 524 in 2010. The respondent raised assessments[6] against the appellant on the waived amounts provided to these employees to which objection was raised on 21 June 2012 and disallowed on 29 November 2012.

The audited 2009 and 2010 financial statements indicated the values of non-current assets[7] and current assets[8] and the revenue inflows and outflows. A deficit of US$43 241 was incurred in 2009 while a surplus of US$120 306 was earned in 2010. The actual expenditure in these two tax years in respect of non-variable expenditure[9] consisted of six categories that were further divided into different line items. The main categories were administration, staff, educational, boarding, motor vehicles and maintenance. The line items under administration were audit/accountancy; bank charges, insurance, legal expenses, sundry, telephone and postage and security. Staff costs comprised of salaries and wages, pensions, NSSA pensions, medical aid, staff training, staff welfare and uniforms. Educational costs covered bursaries and bad debts while maintenances costs covered cleaning, electricity and water, depreciation, repairs and maintenance. The lion's share of costs were absorbed by staff costs in the sum of US$ 1 262 234 constituting 58.62% of the total expenditure in 2009 and US$1 695 232 constituting 58.08% in 2010. The expenditure for non-variable costs was US$ 2 026 901 constituting 94.14% in 2009 and US$2 691 254 constituting 92.12% in 2010.

[4] Para 4 pp 18, 57, 82, 106,145 and p175 dated 25 November 2013.
[5] Para 58 p13 of first appellant's plea of waiver against 100% penalty, para3.7 pp 22, 40, 57 and 76 of third appellant's bundle of documents
[6] 12 samples for each 2010 calendar month of US$1 404.55 on p 21-32 of r 11 documents
[7] Consisting of land and buildings US$8 397 600, estate plant and equipment US$61 910, household and office equipment US$527 169 electronic equipment US$190 827 motor vehicles US$118 700
[8] Consisting of inventory US$21 582, debtors and prepayments US$56 067 and cash at bank US$536 259
[9] P6 of first appellant's bundle of documents

Variables costs consisted of a different category of "educational" incorporating printing and stationery, textbooks, library, magazine, science, sport, travel and accommodation, medical and subscriptions line items. The total expenditure under this head was in the sum of US$126 215 constituting 5.86% in 2009 and US$ 227 555 constituting 7.80% in 2010.

The second appellant: CSS

The maximum enrolment capacity of the second appellant was 840. It enrolled a total of 694 with 54 in boarding in 2009 and 715 with 55 boarders in 2010. The number of pupils who benefited from the concessionary scheme were 25 in 2009 and 30 in 2010. The assessed benefits were in the cumulative sum of US$ 74 600 and US$ 115 337 in each respective year. In addition, there were 28 children in 2009 and 29 in 2010 whose parents were employees of the second appellant who attended other association affiliated schools at concessionary rates applicable to those schools. The assessed benefit was in the sum of US$ 73 508 and US$ 95 584 in each year respectively. The second appellant objected to the schedule on 6 July 2012. It only received the official assessments[10] on 29 October 2012 and proceeded to incorporate them in the earlier objection on that date.

The expenditure heads and line items were similar to those in the first appellant's pleadings. The total non-variables costs in 2009 were US$2 988 953 constituting 96.33% and in 2010 were US$3 523 448 constituting 96.16% of the total costs. The variable costs amounted to US$ 113 750 constituting 3.67% in 2009 and US$140 645 constituting 3.84% in 2010. The financial statements as at 31 December 2009 and 2010 indicated that the school costs were all met from school fees income and showed the amounts charged against depreciation on all categories of property, plant and equipment.

The third appellant: SET

The maximum capacity for both the primary and secondary schools operated by the third appellant was 1 120[11]. In 2009 both had 523 and 628 pupils respectively. The number of children on the concessionary scheme in both schools was 32 in 2009. In 2010 the schools enrolled 524 and 661 pupils of whom 33 were on the concessionary scheme. The waived amounts in respect of each tax year were indicated in the schedules raised by the respondent. In addition, there were 10 children of staff who enjoyed concessionary fees at another

[10] P59 and 60 of US$79 750.77 and US$113 660.62 for 2009 and 2010 respectively.

[11] P 66 para 6 contrary to enrolment figures of 520 for primary and 670 for secondary on p77 of r 11 documents.

kindred school in both 2009 and 2010. The benefit that accrued to their parents was in the sum of US$28 368 in 2009 and US$37 008 in 2010. Six assessments were raised on 17 October 2012[12] in respect of each year to which the appellant unsuccessfully objected.

The appellant prepared its financial statements in the same format as the other appellants[13]. The non-variable expenditure in 2009 was US$1 411 915 constituting 95.91% of total expenditure for the primary school and US$2 847 300 being 93.96% for the secondary schools. The variable expenditure and percentage of total expenditure for each school in 2010 was US$60 146 constituting 4.09% and US$ 183 092 being 6.04%, respectively. The respective figures and percentages for each respective school in 2009 for non-variable costs was US$1 723 371 constituting 95.44% and US$ 3 221 243 being 91.69% of total expenditure. The variable expenditure for 2010 was US$ 82 423 (4.56%) and US$ 291 757 (8.31%). The line items covering variable expenditure were more detailed than in the other schools. They covered art and pottery materials, bond paper, computer expenses and maintenance, exercise books, stationery, trips and camps, magazine, library, music drama play, photocopier maintenance consumables, science materials, departmental hand-outs, clubs travel, equipment, IB curriculum, Cambridge courier, staff training and sports.

The actual audited reports for the two schools encompass some 70 pages. While minimal income was earned from voluntary donations and fund raising activities, the bulk of the revenue was derived from tuition and general purposes fees. Surpluses of US$ 131 734 and US$173 700 accrued to the primary school in 2009 and 2010, respectively[14]. During the same periods the secondary school sustained deficits of US$507 673 and US$265 295[15]. The property and equipment listed comprised of land and buildings, furniture and fittings, books and equipment, musical instruments, office equipment, plant and equipment, school books and equipment, science equipment, sports equipment, computer equipment, and motor vehicles and work-in-progress[16].

The fourth appellant: GST

In 2009 the primary school enrolled 640 pupils against 625 pupils at the secondary school. In 2010 each had 647 and 620 students, respectively. In 2009, 82 children were on the concessionary scheme while in 2010 the number stood at 96. The variable costs for both

[12] Certified copies on p p84-89
[13] P 10 of bundle of third appellant's bundle of documents
[14] P 17 and 34 of third appellant's bundle of documents
[15] P 52 and 70
[16] P 61 and 78-79

schools constituted 3.31% in 2009 and 2.94% in 2010 of the total costs of educating them. In the first two terms of 2009 the concessionary fees constituted 3% of the fees paid by other pupils and 25% thereafter following a directive from the respondent. In 2009 the aggregate benefit of US$202 256.50 accrued to the 57 staff members while the figure was US$ 312 126.56 in 2010 in respect of 66 members.

The audited financial statements listed thirteen cost centres and their respective detailed line items[17]. In 2009 the non-variable cost centres utilised US$ 3 942 558 constituting 96.69% of total expenditure for the primary school and US$6 517 352 constituting 97.06% for the secondary school. The variable costs were US$ 134 962 (3.31%) and US$197 472 (2.94%), respectively.

The audited financial statements showed that the appellant incurred a net deficit of US$ 281 721 in 2009 and US$ 301 281 in 2010. In addition in 2010 liabilities exceeded assets by US$645 767. These were against aggregate school fees payments of US$3 794 625 in 2009 and US$6 413 543 in 2010 and an asset base less depreciation of US$10 897 111 and US$ 11 163 319 in each respective year. The appellant took an overdraft of US$ 353 346 to fund building operations in 2010.

The fifth appellant: SC

The maximum enrolment capacity was 383 for the primary school and 780[18] for the secondary school.

The fifth appellant objected to both the schedules to tax of 26 May 2012 and the subsequent assessments of 12 September 2012. The Rule 11 documents incorporate 2012 term 3 concessionary rates which were irrelevant to the 2009 and 2010 assessments. The relevant documents are found in the appellant's bundle of documents. In 2009 the primary school enrolled 369 pupils of whom 10 were on the concessionary scheme. In 2010 the figures were 368 and 9. The primary school had 13 classes. For the secondary school the 2009 enrolment was 769 and concessionary scheme children were 27 while in 2010 the figures stood at 768 and 24. The secondary school had 30 classes. The combined total benefit was US$103 558 in 2009 and US$110 196 in 2010[19]. The concessionary scheme was contractually sanctioned. The appellant apportioned costs between non-variables and variables. The non-variables for the primary school were in the sum of US$ 1 179 353

[17] P 34-37 and 53-56 of the fourth appellant's bundle
[18] P 11 of bundle of this appellant
[19] P 8 and 10 of bundle

(96.87%) in 2009 and US$ 1 394 155(96.9%) in 2010. The figures and percentages to total expenditure for the secondary school were US$ 3 133 850 (92.66%) in 2009 and US$ 4 070 650 (92.61%) in 2010. The variable costs for the primary school were US$38 050 (3.13%) in 2009 and US$ 44 557 (3.10%) in 2010. Those for the secondary school were US$ 248 323 (7.34%) and US$325 399 (7.39%) in each respective year.

The income raised from tuition fees was in the sum of US$4 379 183 in 2009 and US$ 5 323 110 in 2010[20]. The financial statements reveal amongst other information that depreciation charged on buildings, plant and equipment furniture and fittings, computers, motor vehicles, bicycles library and text books was in the sum of US$ 423 753 in 2009 and US$ 434 871 in 2010. The cash flow statement indicated that fixed assets valued at US$226 338 and US$ 294 442 were added to the inventory of the secondary school in each year, respectively. The cost of refurbishments in each respective year were in the sum of US$ 210 400 and US$ 383 704.

The sixth appellant: CB

In 2009, the school had a total enrolment of 560 children of whom 8 were on the concessionary scheme. The figures in 2010 were 601 and 15. The benefit that accrued to these children amounted to US$ 17 680 in 2009 and US$39 240 in 2010. The concessionary amount paid was deemed by the appellant to be the cost of education to the employer[21]. The present appeal is limited to the assessments in respect of 2009 and 2010 notwithstanding the figures and amounts availed in the pleadings for the 2011 and 2012 tax years. On 23 May 2013[22] the respondent waived the penalties in full resulting in the withdrawal of the penalty objection. The appellant apportioned costs under the broad headings of non-variable and variable costs for both years. The non-variables were in the sum of US$1 528 991 (94.37%) in 2009 and US$1 883 392 (91.43%) in 2010.[23] The variables were US$ 91 287 (5.63%) in 2009 and US$ 176 576 (8.57%) in 2010. In addition a review as opposed to an audit of the accounts revealed a deficit of US$44 778 in 2009 and a surplus of US$14 909 in 2010.[24]The fixed assets of the school were valued at US$ 2 934 700 after depreciation of US$133 967

[20] P18 and 39 of bundle of this appellant
[21] P 3 of bundle of documents for this appellant
[22] P 177-178, 181 and 182 of r11 documents
[23] p, 6, 7 and 20 of appellant's bundle of documents
[24] P11 and 19 of bundle of documents

and US$2 961 831 after depreciation of US$280 489 while the current assets were US$78 946 and US$196 39 in each tax year, respectively.[25]

The appellant objected to the four assessments on 15 March[26] and 15 May 2013. All the seven objections were disallowed on 4 November 2013. On appeal, the sixth appellant collaborated with the other appellants in attacking the correctness of the interpretation and application of s 8 (1) (f) rendered by the respondent.

A summary of r11 documents

The rule 11 documents delineated the interaction between the appellants and the respondent that gave rise to the present appeal. They revealed that the appellants categorised their running expenses into non-variable and variable costs on the basis of their respective accounting policies which *inter alia* placed the burden of funding non-variable costs on full fee paying students as long as the maximum enrolment threshold of each school was not breached. They also revealed that the appellants modelled their applicable accounting policy, objection to the Commissioner and appeal to this court on an English statute that was discussed and applied in the interesting case of *Pepper (Inspector of Taxes)* v *Hart* [1993] AC 593. Unfortunately for the appellants, Mr *de Bourbon*, wisely abandoned that case on the ground that it was irrelevant to the present appeal.

The issues for determination

The following three issues were referred on appeal.

a. Whether each employee parent whose children are educated at any of these schools at either a lesser cost than charged to other parents or at a notional cost received an advantage or benefit as defined in s 8 (1) (f) of the Income Tax Act subject to the deduction of pay as you earn by each appellant;
b. If so, the computation of the value of such an advantage or benefit, that is whether or not it is equivalent to the waived amount;
c. Whether Zimra was correct to add back the waived amount into gross income and assess pay as you earn on the aggregate amount.

My task is essentially to determine whether or not the waived amounts were an advantage or benefit and if so how the advantage or benefit is to be computed. It was common cause that in terms of sub-para (1) of para (3) of the 13 Schedule to the Income Tax

[25] P13 and 21 of bundle of documents
[26] P185-191 of r11 documents

Act, each of the appellants were employers obligated by law to deduct pay as you earn in respect of benefits forming part of the gross income of their employees. They did not deduct and remit the full extent of the tax due on the benefit and rendered themselves liable to make payment in terms of para 10 of the 13th Schedule of the Income Tax Act. The benefiting employees paid concessionary school fees ranging between 20% and 25% of the normal fees paid by other students. The rationale for paying less fees being that their salaries were inadequate to meet the education provided by their employers.

The starting point is to set out the relevant portions of s 8 (1) (f) of the Income Tax Act that were applicable in both 2009 and 2010. The section read:

8 Interpretation of terms relating to income tax

(1) For the purposes of this Part—

"gross income" means the total amount received by or accrued to or in favour of a person or deemed to have been received by or to have accrued to or in favour of a person in any year of assessment from a source within or deemed to be within Zimbabwe excluding any amount (not being an amount included in "gross income" by virtue of any of the following paragraphs of this definition) so received or accrued which is proved by the taxpayer to be of a capital nature and, without derogation from the generality of the foregoing, includes—

(*f*) an amount equal to the value of an advantage or benefit in respect of employment, service, office or other gainful occupation or in connection with the taking up or termination of employment, service, office or other gainful occupation:

Provided that—

(i) …….

(ii) …….

For the purposes of this paragraph—

I. "advantage or benefit"—

(*a*) means—

(i) board; or

(ii) the occupation of quarters or of a residence; or

(iii) the use of furniture or of a motor vehicle; or

(iv) the use or enjoyment of any other property whatsoever, corporeal or incorporeal, including a loan, whether of the same kind as that referred to in subparagraph (i), (ii) or (iii) or not, which is not an amount referred to in paragraph (*a*), (*b*) or (*c*) of the definition of "gross income" in this subsection; or

(v) an allowance;

[granted to an employee, his spouse or child by or on behalf of his employer in so far as it is not consumed, occupied, used or enjoyed, as the case may be, for the purpose of the business transactions of the employer and in so far as an amount is not paid by the employee, his spouse or child in respect of its grant; words qualify all 5 now 6) of the defined forms of advantage or benefit] and

(*b*) …….

(*c*) ……..

"employee" includes a person who is a director of a company, agent or servant or is otherwise gainfully occupied and "employer", in relation to such person shall be construed accordingly;

II. the value of the grant of an advantage or benefit, other than a payment by way of an allowance shall be determined—
(*a*) in the case of the occupation or use of quarters, residence or furniture, by reference to its value to the employee; and
(*b*) in the case of any other advantage or benefit, by reference to the cost to the employer:

The definition of gross income denotes a positive aspect on the one hand and a notional aspect on the other. The positive aspect involves the actual receipt or accrual while the notional aspect deems such receipt or accrual of income. In my view, the waived amount was not physically received but was deemed to have been received by each affected employee. I am however satisfied that the amounts positively accrued to each employee on enrolment of each child at each of the participating schools. It was common cause that the waived amount was regarded by all the appellants as a benefit or advantage. Para 5 of each appellant's case denoted the waived amount as a supplement to the low earnings of each qualifying employee. In addition, except for the second appellant all the other appellants juxtaposed the right to participate in the concessionary scheme with the other benefits of employment.

The legislature in its wisdom deliberately broke down the definition of gross income into two parts demarcated by the word "includes". The opening words preceding "includes" generalise while those subsequent to it particularise and stretch the meaning of gross income by way of inexhaustive examples of the term without limiting its broadness. It seemed to me that both Mr *de Bourbon,* for the appellant and Mr *Magwaliba,* for the respondent were agreed that the particularised provisions were intrinsically subsumed in the opening words of the definition. The correctness of this submission was underscored firstly by the deliberate resort by the legislature to the phrase "without derogation from the generality of the foregoing" that immediately precedes "includes". And secondly, by the sentiments in Thornton's *Legislative Drafting* 2nd ed at p 60 cited with approval by Gwaunza JA in *Sagittarian (Pvt) Ltd v Workers Committee, Sagittarian (Pvt)* Ltd 2006 (1) ZLR 115 (SC) at 118F that "a section of whatever length must have unity of purpose……separate subsections must all have some relevance to the central theme which characterises the section".

All the appellants admit in para 5 of their respective cases that the payment of the concessionary fees was a benefit enjoyed by the affected staff members. They received the

benefit by virtue of their status as employees at these schools. An amount referred to in s 8 (1) of the Income Tax Act for the determination of the gross income, income or taxable income, is defined in s 2 as:

> "(*a*) money; or
>
> (*b*) any other property, corporeal or incorporeal, having an ascertainable money value,"

A reading of *Lategan* v *CIR* 1926 CPD 203 reveals that this was not how it was defined in the Income Tax Act in force at that time. Watermeyer J stated at p 208-209 that:

> "But the word income in its ordinary sense does not always consist of money, as was pointed out in *Booysen'*s case (1918 AD 576). "Income", unless it is in some form such as a pension or annuity, is what a man earns by his work or wits or by the employment of his capital. The rewards which he gets may come to him in the form of cash or some other kind of corporeal property or in the form of rights." Ordinarily speaking, the value of these rewards is the man's income. Unless the word "amount" means something more than amount of money, the definition given in the Act would not seem to be wide enough to include the "value" of property or rights earned by the taxpayers, unless they were benefits granted in respect of employment. The legislature could hardly have intended such as a result, because then it would be open to any taxpayer [who did not earn his income by employment] to receive payment in some form other than money, and thus escape taxation. In my opinion, the word "amount" must be given a wider meaning, and must include not only money, but the value of every form of property earned by the taxpayer, whether corporeal or incorporeal, which has a money value……if this view be correct then the taxpayer's income for taxation purposes includes not only the cash which he has received or which has accrued to him, but the value of every other form of property which he has received or which has accrued to him, including debts and rights of action.....which he could turn into money if he wished."

It appears that at the time the *Lategan* case was decided "amount" was limited to money and was extended by dint of judicial interpretation to include the value of every form of property earned by the taxpayer, whether corporeal or incorporeal, which had a money value. The rewards earned by his work or wits or the employment of his capital accrued to him in the form of cash or some kind of property or in the form of rights.

The meaning of the word amount proffered by Watermeyer J was cited and approved by Sandura JA in *Standard Chartered Bank (Zimbabwe) Ltd* v *Zimbabwe Revenue Authority* 2009 (1) ZLR 251 (S) at 255A and 257B. In the present matter, the right to have children educated at the concessionary rate derived from employment. It vested in each employee parent and accrued to him in the year of assessment and was capable of being turned into money. The right had an ascertainable money value equivalent to the waived amount. In my

view, it constituted income. I accordingly agree with the sentiments expressed by Mr *Magwaliba* in para 13 of his heads of argument that:

> "The employees in this case get the benefit of paying less fees than other parents only because they render service to the appellants. There is therefore a causal nexus between the contract of employment and the benefit. If it had not been for the employment of their labour, service or wits, they would not be entitled to this benefit. The ordinary and grammatical meaning of the word income therefore includes the right which these employees get to educate their children at these and other schools at a concessionary fee."

The children paid between 20 and 25% of the fees paid by other children whose parents were not employed at these schools. The waived amount was between 75% and 80% of the normal school fees and had an ascertainable monetary value. At the very least it was money notionally received by or at best money that actually accrued to or was in favour of each employee parent by virtue of employment. It clearly fits into the opening words of s 8 (1). The appeal would fail on this ground.

While conceding that s 8 (1) of the Income Tax Act had to be considered as a whole and not in fragments, Mr *de Bourbon* sought to persuade me to resolve the first issue by excising para (f) and its consequential provisions from the opening words of the subsection under consideration. In so doing he suggested that gross income "means" rather than "includes" para (f) and its constituent definitions of advantage or benefit. It was common cause that the liability of an employer arises from its failure to deduct, as prescribed by para (3) (1) of the 13 Schedule of the Income Tax Act the correct pay as you earn from the gross income of the subsidised employee parents. It was also common cause that Act no 6 of 2012 which came into force on 1 January 2013 amended para (f) of s 8 (1) of the Income Tax Act to specifically incorporate the school fees benefit. A new subpara (vi) states that:

> "in the case of an employee *whom* is a member of the teaching or non-teaching staff of a "school" as defined in the Education Act *[Chapter 25:04]*, the waiver of the whole or any portion of the amount of tuition fees, levies and boarding fees (hereinafter called a "school benefit") that would otherwise be payable by employee for any child of his or hers who is a student at that or another school".

The contention by Mr *de Bourbon* that the benefit was not previously incorporated in s 8 (1) (f) before the 2012 amendment does not prove the benefit was beyond the tax reach prior to the amendment. In my view the benefit was at that time also caught in the tax net by the provisions of s 8 (1) (b) of the Income Tax Act, which reads:

> "(*b*) any amount so received or accrued in respect of services rendered or to be rendered, whether due and payable under any contract of employment or service or not, and any amount so received or accrued by reason of the cessation of the employment or service of a person other than a benefit (not being a pension or gratuity) received or accrued by reason of

> contributions made to the Consolidated Revenue Fund, and any amount so received or accrued in commutation of amounts due under a contract of employment or service provided that [all the provisos are inapplicable to the present case]"

In my view, the waived amount accrued to each of the affected employees on enrolment of their children at each of the participating schools. It was on that basis correctly added back to each employee's gross income and assessed for pay as you earn.

Mr *de Bourbon* concentrated his firepower on the meaning of s 8 (1) (f) and its consequential paragraphs. In that paragraph the key words are an amount equal to the value of an advantage or benefit in respect of employment. He contended that the definition of advantage or benefit in para (f) is restricted to the five meanings postulated in subpara I. In my view, he correctly contended that the waived amount did not constitute board, nor occupation of quarters or residence. He forcefully argued that the waived amount could not be equated to the use of furniture or motor vehicle. He further argued that the waived amount did not constitute the use or enjoyment of any other property whatsoever, corporeal or incorporeal, including a loan, whether of the same kind as board, occupation of quarters or of residence or use of furniture or a motor vehicle or not which was not an amount referred to in para (a) (b) (c) of the definition of gross income in this subsection. He however recognised that all the six schools own furniture in the form of chairs and desks used in class rooms and vehicles such as buses and other smaller motor cars available for use by these day scholars in various school driven extra-curricular activities.

In my view furniture and motor vehicles constitute property. In fact all the items listed in (f) I (i) (ii) and (iii) constituted property in the mind of the legislature otherwise the word "other" in the phrase "any other property whatsoever" in subpara (f) (iv) would be tautologous. The financial statements and the various cost centres of each school defined the specific activities that constituted education. Each school was identified by the building and classrooms, grounds, desks and chairs, equipment, books and stationery and vehicles. These constitute corporeal property availed for the use and enjoyment of each student at each specific school. These are covered in the definition of an advantage or benefit. The only cost centre that may pose difficulties concerns staff costs. The staff corps do not work in a vacuum. They utilize school premises and property and provide both formal and informal education to the students. The students have the right to receive, use and enjoy that education. The triad of premises, property and the right to education constitute in my view an admixture aptly incorporated in the phrase "use or enjoyment of any other property whatsoever,

corporeal or incorporeal". Fortunately, for the school staff, we no longer live in the era of slavery where providers of labour where regarded as chattels to capital.

In *27 LAWSA 'Things'* cited by Mr *de Bourbon* in his written heads of argument Professor van der Merwe states, *inter alia,* in para 5 the following enlightening description of and distinction between corporeal and incorporeal property in these terms:

> "When signifying a legal object, the word "property" refers to everything which is susceptible of pecuniary evaluation that is everything which has a monetary value or can constitute an asset in an estate. The notion "property" thus not only includes corporeal or material objects like land, houses and motor vehicles but also incorporeal or immaterial objects like personal rights, shares in a company and patent rights."

Again, *Stander* v *CIR* 59 SATC 213 at 218 cited *CIR* v *Estate CP Crewe & Anor* 1943 AD 656 at 667 where Watermeyer CJ said:

> "One would expect that when an estate of a person is described as consisting of property what is meant by property is all rights vested in him which have a pecuniary or economic value. Such rights can conveniently be referred to as proprietary rights and the include *jure in rem*, real rights, such as rights of ownership in both immovable property and also *jure in personam* such as debts and rights of action."

In my view, the right to education at concessionary rates constituted incorporeal property that was used or enjoyed by these children at these schools. It had a monetary value. It was a personal right possessed by the employee. It was capable of enforcement. That the right was intrinsically transferable was underscored by the determined efforts of the schools to prohibit such transfer to other parents. The waived amount would be disqualified for inclusion in gross income had it been utilised in the business operations of the schools or had the employee made any contributions in respect of its grant. In *casu*, the appellants were actually denied use of the monetary value of the waived amounts nor did any employee pay any amount in respect of its grant. It was therefore not utilised in the business transactions of each school. Viewed from a functional perspective, the waived amounts met the requirements of subpara (f) I (iv) of section 8 (1) of the Income Tax Act and constituted an advantage or benefit. The observation made by the respondent in dismissing the objections that "the benefit granted to the employee was for the use of school property whatsoever, corporeal or incorporeal, (which property) included educational and other facilities that were offered by the school"[27] was on point. The word "whatsoever" in the provision is wide enough to embrace all the school property used or enjoyed by the targeted student notwithstanding that

[27] P16 rule 11 documents letter dated 29 November 2012

other staff members without children at the school used the same facilities. The waived amounts were not consumed in the business of the employer.

Mr *de Bourbon* further contended that the waived amount was not a loan contemplated in (iv) nor an amount regarded in (a) (b) (c) of the definition of gross income nor in the same class with them. I agree with Mr *Magwaliba* that the waived amount is an amount equal to the value of an advantage or benefit in respect of employment. It falls into the definition of amount as defined in s 2 of the Act. Again, it seems to me that the use of "other" in the phrase "any other property" suggests that the legislature regarded money as property. The advantage or benefit advanced to the parent employee of paying concessionary fees constituted an amount which accrued to the employee parent and warrants inclusion in his or her gross income.

Accordingly, the answer to the first issue is that each employee whose children were educated at either a lesser cost than charged to other parents or at a notional cost received an advantage or benefit as defined in s 8 (1) (f) of the Income Tax Act which is subject to the deduction of pay as you earn by each appellant. I would answer the first issue referred on appeal in favour of the respondent.

It seems to me that even if the argument advanced by Mr *de Bourbon* was valid the benefit would form part of the gross income in terms of s 8 (1) (b) of the Income Tax Act. It was money or property, corporeal or incorporeal, having an ascertainable money value that at the very least accrued to the parent employee in each respective tax year of assessment. The appellant's argument would also fail on the basis of the main provisions of s 8 (1) and also the specific provisions of s 8 (1) (b).

The second issue referred to trial was whether the computation of the value of such an advantage or benefit was equivalent to the waived amount. The determination of this issue only arises in respect of a tax liability founded on the provisions of s 8 (1) (f) of the Income Tax Act. In other words, the issue would not arise in respect of liability based on the main charging portion of s 8 (1) or 8 (1) (b).

The key to the determination of this issue is found in s 8 (1) (f) II (b) of the Income Tax Act which provides that:

> II. the value of the grant of an advantage or benefit, other than a payment by way of an allowance, shall be determined----
>
> a. In the case of the occupation or the use of quarters, residence or furniture, by reference to its value to the employee; and

b. In the case of any other advantage or benefit, by reference to the cost to the employer

The parties disagree on what the cost to the employer in respect of the advantage or benefit of paying the concessionary school fees was. The six appellants produced financial statements for each tax year in which they apportioned costs under two major headings styled non-variable and variable costs. The non-variable or basic costs were divided into six sub-heads of administration, staff, educational, motor vehicles and maintenance while the variable or additional costs were lumped together under a separate sub-heading of educational. Under each sub-head were listed detailed lines of expenditure. I have drawn up a table summarising the apportionment of the costs by each appellant.

NUMBER	SCHOOL	YEAR	NON-VARIABLE US$	PERCENTAGE OF TOTAL	VARIABLE US$	PERCENTAGE OF TOTAL
1.	AS	2009 2010	2 026 901 2 691 254	94.14 % 92.2 %	126 215 227 555	5.86 % 7.80 %
2.	CSS	2009 2010	2 988 953 3 523 448	96.33 % 96.16 %	113 750 140 645	3.67% 3.84%
3	SET	2009 2010	1 723 371 3 221 243	95.44 % 91.69%	82 423 291 757	4.56 % 8.31%
4	GST	2009 2010	3 942 558 6 517 352	96.69 % 97.06 %	134 962 197 472	3.31 % 2.94%
5	SC-PRIM PRIM HIGH HIGH	2009 2010 2009 2010	1 179 353 1 394 155 3 133 850 4 070 650	96.87 % 96.9 % 92.66 % 92.61%	38 050 44 587 248 323 325 399	3.13 % 3.10 % 7.34 % 7.39%
6	CB	2009 2010	1 528 991 1 883 392	94.37% 91.43 %	91 287 176 576	5.63 % 8.57 %

The accuracy of the computations were not put in issue by the respondent. The calculations demonstrated that the variable costs for each school were below the 20 to 25% of the concessionary school fees paid by each employee parent at each school. Each appellant contended that the actual cost to each school of running that school ranged in the two year tax period between 2.94% for the lowest and 8.57% for the highest. The net result was that each school actually benefitted on the 20% to 25% of the concessionary fees paid by the employee parents who benefited from the scheme. The respondent did not dispute the accuracy of the computations. Rather, it consistently attacked the legal basis for the apportionment of the

expenditure into non-variable and variable costs throughout the audit, in the determination of the objection, in the appeal pleadings and in both its written and oral heads of argument.

The basis for the apportionment advanced by all the appellants was simply that they crafted their budgets against the backdrop of the full fee paying pupils. The schools were all non-profit making organisations. The school fees were fixed based on the anticipated costs of each school divided by the anticipated enrolment. The anticipated costs were all met by the pupils. These pupils paid for all the fixed costs and expenses budgeted under the so called non-variable costs. The fixed costs covered the budget lines under the broad headings adverted to earlier on in this judgment. The very fact that these non-variable costs were budgeted to cover the anticipated yearly costs of the appellants underscored their absolute necessity. This method of budgeting was not derived from nor sanctioned by any known legal instrument. The contention by Mr *Magwaliba* that the budgeting process was based on each school's accounting preferences was not refuted by Mr *de Bourbon*. It is trite law that all accounting practices, procedures, policies and preferences play second fiddle to the tax legislation in force in any given year of assessment. I made the same point in *Standard Chartered Bank of Zimbabwe* v *Zimbabwe Revenue Authority* 2007 (1) ZLR 228 (H) at 249G.

That the distinction sought by the appellants has no force of law in this country was laid out some 35 years ago by Squires J in the local *Income Tax Case No. 1336* (1981) 43 SATC 114. In that case the appellant was allocated a motor vehicle as a perquisite of employment. The taxman estimated all the costs incurred by the employer in running the vehicle and incorporated them into the gross income of the employee as an advantage or benefit received from his employment in terms of s 8 (1) (f) II (b) of the Income Tax Act. In objecting to the assessment the taxpayer apportioned the costs to his employer of running the motor vehicle into two categories of variable costs for fuel and garage repairs and service and non-variable costs for constant expenses such as licensing, insurance, depreciation and the like. He averred that only the variable or additional costs constituted a benefit since these were directly the result of the use of the motor vehicle and that the constant basic or non-variable costs were incurred by his employer and remained the same whether the employee used the vehicle or not. In jettisoning the narrower interpretation advocated by the taxpayer, based as it was on strikingly similar contentions raised in the present matter, Squires J stated at p 117 that:

> "The clear intention of the legislature is manifestly to tax in a taxpayer's hands all the benefits or advantages afforded to him as an employee from his employment, as well as the income he earns. The advantage or benefit of using a car belonging to the employer is to

> relieve the employee taxpayer of the financial burden of owning the car himself. It can be a very substantial benefit compared to the person who receives no such advantage, and not the least relief is the costs of licencing and insuring such asset, quite apart from the diminution in value that is inherent in the aspect of depreciating whether actual or notional. Since the relief thus afforded is unquestionably a benefit to the employee, I can see no basis on which the spirit of the Act would save to exclude these from what falls into the gross income, particularly as they are equally clearly a cost to the employer. Not only, therefore, is there no reason for implying additional words, but, as it seems to me, a strong reason for giving the words used their ordinary meaning."

The reasoning of the learned judge is unassailable and applies, *mutatis mutandis*, with equal force to each of these six appeals. The necessity for these constant basic costs to each school cannot be gainsaid. They were all costs required to run the school, otherwise they would not have been budgeted for and levied against the full paying students. A simple survey of the line costs demonstrates the fiction advanced by each school that these costs would not and were not directly related to the benefiting pupils. Again, the provision under consideration does not differentiate the costs incurred by the employer on the basis of variable and non-variable costs. The underlying reason behind the dismissal of the objections was simply that all these schools were non-profit making organisations mainly run on the school fees paid in an equal amount by each enrolled student. The intrinsic nature of such schools demand that their running costs should be equitably met by every enrolled student. And this is apparent from the application of this principle to all full fee paying pupils.

I however find the formula applied in computing the cost to the employer flawed in one respect. The cost of the benefit is not equivalent to the difference between what other pupils paid and what the benefiting pupils paid. The correct cost to the employer under this provision for all these schools would be equivalent to the total cost incurred in running each school divided by the total enrolment of each school inclusive of the favoured pupils less the concessionary fees paid. As all the beneficiaries were day scholars the calculation would of necessity exclude all costs that all other day scholars are exempted from paying such as those associated with boarding facilities.

However, as I dismiss this appeal on the basis of both the opening words in s 8 (1) and s 8 (1) (b) the method of computation applied by the respondent in arriving at the value of the amount that accrued to the employee parents that was susceptible to inclusion in the gross income of each employee for payment of pay as you earn was the difference between what was paid by full fee paying students and what each of these students paid. The respondent therefore correctly added back the waived amount to the gross income before assessing pay as you earn on the aggregate amount.

The last issue raised by Mr *de Bourbon* pertains to the second and third appellants only. Some of the employees of these two appellants had children enrolled at the other school at the concessionary rates offered by the other school. The respondent taxed the two appellants based on the waived amounts availed by the two appellants to those employees whose children were enrolled by the appellants rather than on the waived amount of the enrolling school. A total of 77 children were involved. The respondent took the view that the arrangement of allowing children to attend another school was an amount equal to the value of an advantage or benefit in respect of the employment consequent upon such employment.

Mr *de Bourbon* contended that the contract between the parent and school where the child was educated was not based on an employer-employee relationship between the appellant and the parent. It was simply a discount offered by the enrolling school to some of the employees of the appellants that could not invoke any tax liability for the appellants.

It seems to me that the contention ignores the averments made in para(s) 2 and 3 of the statement of agreed facts and 16 and 17 of each appellant's case. The statement of agreed facts indicated that this was by mutual agreement between the schools. The employees of the other school were treated in the same way as employees of the enrolling school whose children were enrolled thereat. The effect of para 16 and 17 of each appellant's case was that the children of staff members enrolled at the other appellant paid concessionary school fees offered by the other school. And further, that each appellant did not incur any costs in respect of those children of staff members enrolled at the other school.

The employees under consideration were not employees of the enrolling schools. They received the benefit from the enrolling school by virtue of the agreement between their employer and the enrolling school. It seems to me that s 8 (1) (f) applies to these employees in that they received the value of the advantage or benefit by virtue of their employment not with the enrolling school whose property their children enjoyed but with the appellants who executed these mutual agreements for these employees' benefit. In my view, the appellants were caught in the respondent's tax net by the closing words "granted to an employee, his spouse or child by or on behalf of his employer" perched at the tail end of s 8 (1) (f) I (a). It seems to me that these benefits were granted to these employees by each of the appellants on behalf of the other appellant, respectively. Consequently, as the value of the advantage or benefit that accrued to each employee was made on behalf of his or her employer, it must be taxed in the hands of that employer. The respondent wrongly assessed the value of the benefit in respect of these children as equivalent to the amount waived by each employee parent's

employer. He should have assessed the benefit on the amount waived by the school at which these children attended.

In line with my earlier findings on the computation of the value of the benefit, it would be equivalent to the *pro rata* share paid by each student at the enrolling school in each tax year calculated by dividing the total costs incurred by the school by all the children enrolled at the school, inclusive of all concessionary fee beneficiaries, less the concessionary fees paid.

However, I do not base liability against the two appellants on the basis of s 8(1 (f) of the Income Tax Act. Liability for the inclusion of the amounts that accrued to each of the 77 children into their parents' gross income is derived from the main charging provision of s 8 (1) of the Act. The amount that accrued to or was received by or was in favour of each employee of the appellants was equivalent to the difference between the amounts paid by the full paying students and those paid by each of the 77 children at the school each was enrolled. In my view, by virtue of the agreement executed between the two appellants, which initiated the benefit, the benefit is known and is payable by the employee and each employee's pay as you earn is administered by his own employer, the outstanding pay as you earn in question should for convenience and ease of administration be assessed in the hands of his or her employer. In my view, while the respondent correctly found the employee parents of these 77 children liable for pay as you earn, he erroneously assessed it on the amount waived by each parent's own employer.

I do not find the claims made by the respondent unreasonable nor the grounds of appeal frivolous. The appeal has neither been allowed in full or to a substantial degree as would warrant an imposition of costs in favour of the second and third appellants on the issue raised in argument on the correct computation of the waived amount to be included in the gross income of the parent employees of the 77 children. The imposition of costs as against either the appellants or the respondent is not warranted.

Accordingly, it is ordered that:

1. The appeal of the 1st, 2nd, 3rd, 4th, 5th and 6th appellants against the inclusion of the waived amounts brought into the gross income of each employee parent who participated in the concessionary scheme offered by each appellant and the subsequent assessment of pay as you earn against each appellant in respect of such employee parent whose child was enrolled by such parent's employer in respect of the 2009 and 2010 tax years be and is hereby dismissed.

2. In respect of the second and third respondents:
    a. The assessments raised by the respondent in respect of the employee parents of the 77 children enrolled at the other school are hereby set aside.
    b. The respondent shall include in the gross income of each such employee parent the amount waived by the school at which the child of such an employee parent was enrolled before re-assessing the appropriate pay as you earn liability of the second and third appellants.
3. Each party shall bear its own costs.

Dube, Manikai and Hwacha, appellant's legal practitioners