REPORTABLE
Case No: 468/99

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Appellant

and

DUNBLANE (TRANSKEI) (PTY) LTD Respondent

Coram: Hefer, ACJ, Harms, Scott, Streicher and Mthiyane, JJ A

Heard: 23 August 2001

Delivered: 17 September 2001

Section 20(2) of Act 58 of 1962 (Transkei) – "amount, as established to the satisfaction of the Secretary" did not confer a discretionary power on the Secretary.

J U D G M E N T

STREICHER JA:

[1] The issue to be decided in this appeal is whether the officer concerned with the determination of the income tax payable by the respondent ("the officer concerned"), exercised a "discretionary power" within the meaning of those words in s 3(2) of the now repealed[1] Income Tax Act 58 of 1962 as amended and adopted by the Republic of Transkei ("the Act"), when he, in respect of the 1992 year of assessment, determined that the respondent ("Dunblane") had suffered an assessed loss of R127 823 628.

[2] Dunblane is a company, which was registered in the Republic of Transkei ("the Transkei") and which, during the 1992 year of assessment, carried on business there. Its business consisted of the purchase and sale of shares. It purchased shares in companies with distributable reserves, distributed the reserves to itself as dividends and then sold the shares. The

[1] Section 58 of the Income Tax Act 21 of 1995.

financial and accounting effect of the transactions entered into during the 1992 year of assessment was as follows:

Expenditure incurred	
Cost of shares purchased	127 705 000
General expenses	34 781
Total expenditure	R127 739 781
Income received	
Selling price of shares and interest received	6 156
Dividends received	128 299 000
Total income	R128 305 156
Profit	**R565 375**

[3] In its return of income for the 1992 year of assessment Dunblane contended that, for income tax purposes, it had suffered a loss of R127 823 628 since the dividends received by it were exempt from tax and, together

with an assessed loss of R90 003 brought forward from the preceding tax years, had to be deducted from the profit of R565 375. The Secretary as defined in the Act ("the Secretary"), through the officer concerned, accepted these contentions as is apparent from the assessment issued on 1 November 1992 ("the original assessment"), which reflected an assessed loss for the 1992 year of assessment of R127 823 628, made up as follows:

Loss brought forward from the 1989 year	1 249
Loss brought forward from the 1990 year	1 271
Loss brought forward from the 1991 year	87 483
1992 Sharedealing loss (profit minus dividends)	127 733 625
	R127 823 628

[4] Subsequently, a revised assessment dated 1 July 1994 and reflecting an assessed loss of R127 821 108, was issued. In terms of this assessment the losses of 1989 and 1990 were disallowed. The validity of the revised

assessment is not in issue. Thereafter, on 1 March 1995, an additional assessment was issued reflecting an assessed loss of R34 598. This amount was arrived at by disallowing the 1991 loss of R87 483 and by allowing R5 973, instead of R127 705 000, as expenditure incurred in the production of income during the 1992 year of assessment, i.e. by disallowing R127 699 027 of the cost of the shares previously allowed. The sum of R5 973 was calculated by applying the formula which should, in terms of the decision in *Commissioner for Inland Revenue v Nemojim (Pty) Ltd*[2], be applied, in a "dividend stripping" operation such as the one that had been undertaken by Dunblane, in order to determine what portion of the cost of the shares was incurred in the production of income as defined in the Act (being the proceeds of the sale of the shares) and what portion was incurred in the

[2] 1983 (4) SA 935 (A) at 957H-958E.

production of income exempt from income tax in terms of the Act (being the dividends received).

[5] The additional assessment therefore reflected a reversal of two decisions namely the decision to allow the loss of 1991 to be carried forward and the decision to allow the full amount of the cost of the shares to be deducted as expenditure incurred in the production of income.

[6] Dunblane objected to the additional assessment and when the objection was disallowed appealed to the Natal Income Tax Special Court on the ground that when the officer concerned determined the assessed loss reflected in the original assessment i.e. when he made the two decisions just referred to, he exercised a discretion which could in terms of s 3(2) of the Act not be withdrawn or amended after the expiration of two years from the date of the notice of the original assessment. The Income Tax Special Court dismissed the appeal and confirmed the additional assessment but a further

appeal to the Natal Provincial Division was upheld with costs and the additional assessment was set aside.[3] For the reasons that follow the court *a quo* erred in upholding the appeal.

[7] In terms of s 2(1) of the Act, which Act has been repealed, the Secretary was responsible for carrying out the provisions of the Act. Section 3(2) provided that the powers and duties imposed upon the Secretary by or under the provisions of the Act could be exercised or performed by the Secretary personally, or by any officer engaged in carrying out those provisions under the control, direction or supervision of the Secretary.

[8] Section 3(2) provided as follows:

> "3(2) Any decision made and any notice or communication issued or signed by any such officer may be withdrawn or amended by the Secretary or by the officer concerned, and shall for the purposes of the said provisions, until it has been so

[3] The judgment is reported as *Dunblane (Transkei)(Pty)Ltd v Commissioner, South African Revenue Service* 1999 (4) SA 395 (N).

withdrawn, be deemed to have been made, issued or signed by the Secretary: Provided that a decision made by any such officer in the exercise of any discretionary power under the provisions of this Act or of any previous Income Tax Act shall not be withdrawn or amended after the expiration of two years from the date of the written notification of such decision or of the notice of assessment giving effect thereto, if all the material facts were known to the said officer when he made his decision."

[9] "Assessment" was defined in s 1 of the Act as-

"the determination by the Secretary, by way of a notice of assessment . . .-

(a) of an amount upon which any tax leviable under this Act is chargeable; or

(b) of the amount of any such tax; or

(c) of any loss ranking for set-off,

. . ."

[10] Section 20 of the Act is the section which provided for the set-off of assessed losses. The "loss ranking for set-off" referred to in the definition of assessment therefore had to be assessed for purposes of s 20. Subsections (1) and (2) thereof provided as follows:

> "20 (1) For the purpose of determining the taxable income derived by any person from carrying on any trade within the Republic, there shall be set off against the income so derived by such person-
>
> (a) any balance of assessed loss incurred by the taxpayer in any previous year which has been carried forward from the preceding year of assessment: Provided that-
>
> (i) . . .
>
> (ii) . . .
>
> (b) any assessed loss incurred by the taxpayer during the same year of assessment in carrying on in the Republic any other trade either alone or in partnership with others, otherwise than as a member of a company the capital whereof is divided into shares.

> (2) For the purposes of this section 'assessed loss' means any amount, as established to the satisfaction of the Secretary, by which the deductions admissible under sections *eleven* to *nineteen*, inclusive, or the corresponding provisions of any previous Income Tax Act exceeded the income in respect of which they are so admissible, or, if the context so requires, means an assessed loss as determined under the provisions of section *thirty* or the corresponding provisions of any previous Income Tax Act."

[11] The Natal Income Tax Special Court, per Galgut J, held that it was clear that the words "as established to the satisfaction of the Secretary" in s 20(2) could not have been intended to confer any discretion on the Secretary and stated that it was "inconceivable, and as such absurd, to think that by including the words concerned the legislature intended that for purposes of the set-offs provided for in section 20(1) the deductions which would otherwise have been available as a matter of right would no longer be available unless the Commissioner in his discretion (allowed) them". In this

regard the court relied, *inter alia*, on an unreported decision in the Cape Income Tax Special Court[4] in which Conradie J dealt with the then corresponding wording of s 20 in the South African Income Tax Act. Conradie J concluded that the relevant words should be regarded as *pro non scripto* in that it seemed to him absurd "to give the Commissioner a discretion to determine the amount of an assessed loss where a taxpayer carries on more than one trade, but not where he (carries) on only one trade."[5]

[12] The court *a quo* found that the language of s 20(2) of the Act, more particularly the words "established to the satisfaction of the Secretary", were unambiguous and clear.[6] According to the court *a quo* it gave the Secretary an administrative discretion to determine the amount of any assessed loss for the purposes of set-off in terms of s 20(1). It arrived at this finding on the

[4] Case no 10067.
[5] See ITC 1665 61 SATC 413 at 433 where Wunsh J adopted the reasoning of Conradie J.
[6] At 402C.

strength, *inter alia*, of a statement by Schreiner JA in *Irvin & Johnson (SA) Ltd v Commissioner for Inland Revenue*[7] to the effect that expressions such as "in the opinion of the Commissioner" or "if the Commissioner is satisfied" were generally regarded as typical of those that grant an administrative discretion since in the absence of contrary indications they convey the meaning that the Legislature intended the opinion of, or satisfaction of one person only and of no other, to be decisive.[8] Further, that it could be assumed that the legislature was aware of the judicial interpretation of these expressions and, in the absence of any contrary indication, that it intended the words used in s 20(2) of the Act to bear that meaning.[9] The court *a quo* then proceeded to consider whether the meaning ascribed to the words would lead to an absurdity so glaring that it could not have been contemplated by the legislature or if it would lead to a result

[7] 1946 AD 483 at 492.
[8] At 401H-J.
[9] At 402A-B.

contrary to the intention of the legislature as shown by the context or any other considerations that could be taken into account.[10] It concluded that it was not inconceivable, and as such absurd, to think that the legislature intended to confer upon the Secretary a discretion to determine the amount of any loss ranking for set off as distinct from the determination of taxable income,[11] and that no departure from what it considered to be the plain meaning of s 20(2) was justified.[12]

[13] In my judgment the court *a quo* adopted a wrong approach by first attributing a meaning to the relevant words looked at in isolation and then, when, in its opinion, such meaning did not give rise to an inconceivable and absurd result, interpreting the words accordingly. The phrase "any amount, as established to the satisfaction of the Secretary" may refer to an amount to be established or it may refer to an amount, which has already been

[10] at 402D-E.
[11] At 403I.
[12] At 404A.

established. To ascribe to the words a meaning "well settled and recognized" in instances where they refer to an amount to be established, before it has been determined whether they were being used in that sense, would clearly be wrong. In the present case the approach outlined by Lord Greene MR in *In re Bidie,*[13] quoted with approval by Schreiner JA in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another,*[14] was indicated. He said:

> "The first thing to be done, I think, in construing particular words in a section of an Act of Parliament is not to take those words *in vacuo*, so to speak, and attribute to them what is sometime called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that their meaning is entirely independent of their context. The method of construing statutes that I myself prefer is not to take out particular words and attribute to them a sort of *prima facie* meaning which may have to be displaced or modified, it is to read the statute as a whole and ask myself the question: 'In this statute, in this context, relating to this subject matter,

[13] [1949] Ch 121 at 129.
[14] 1950 (4) SA 653 (A) at 663 to 664.

> what is the true meaning of that word? . . . The real question that we have to decide is, what does the word mean in the context in which we here find it, both in the immediate context of the sub-section in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy."

To this Schreiner JA added[15]:

> "[T]he legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene."

[14] In terms of s 20 the amounts which could in a particular year of assessment qualify for set-off against income derived from carrying on a trade in the Transkei were: (a) the balance of an assessed loss incurred in any previous year, which had been carried forward from the preceding year and (b) the assessed loss incurred by the taxpayer during the same year of

[15] At 664H.

assessment in carrying on in the Transkei any other trade. For purposes of the section "assessed loss" was defined to mean "any amount, as established to the satisfaction of the Secretary, by which the deductions admissible under sections *11* to *19* . . . exceeded the income in respect of which they (were) so admissible."

[15] The Act did not provide for the re-determination of the assessed loss brought forward from the preceding year and it did not grant a discretionary power to the Secretary in respect of the carrying forward thereof from one year to another. In terms of s 20 an assessed loss "incurred by the taxpayer in any previous year which has been carried forward from the preceding year of assessment" "shall" for purposes of determining his taxable income, be set off against income derived by him. Therefore, in so far as the amount of R87 483, being the loss brought forward from the 1991 year, is concerned, no discretionary power could have been exercised when it was added to the

loss incurred during the 1992 year, in order to arrive at the assessed loss of R127 823 628 reflected in the original assessment.

[16] It remains to determine whether, when the loss incurred in the 1992 year was assessed, the officer concerned exercised a discretionary power. As stated above, the assessment had to be done for purposes of set-off in terms of s 20 i.e. the amount assessed had to be the "amount, as established to the satisfaction of the Secretary", within the meaning of those words in the section.

[17] Section 20 forms part of the procedure prescribed for the determination of a taxpayer's taxable income. It is therefore necessary to have regard to that procedure in order to be able to interpret the relevant words in their context.

[18] "Gross income", "income", and "taxable income" were defined in s 1 of the Act. "Income" was defined as the amount remaining of the gross

income after having deducted therefrom any amounts exempt from normal tax under Part I of Chapter II ("Part I"). "Taxable income" was defined as the amount remaining after having deducted from income all the amounts allowed under Part I to be deducted from, or set-off against such income. Sections 11 to 19 fell within Part I. Section 11 provided that, for the purpose of determining the taxable income derived by any person from carrying on any trade within the Transkei, there should be allowed as deductions from the income of such person so derived, various amounts, including, in terms of s 11(x), any amounts which in terms of any other provision in Part I were allowed to be deducted from his income. Therefore, in order to determine the taxable income of a person, his gross income had to be established first, thereafter the amounts which were exempt from normal tax under Part I had to be deducted from his gross income in order to determine his income, and then the amount "to be deducted from or set off against such income" had to

be established and deducted or set off.[16] If the deductions admissible in terms of sections11 to 19 exceeded the income there would have been a loss and only then would the question have arisen whether that loss was a loss which could be set off against income derived from another trade or which could be carried forward for set off against income in the following year. It follows that it was only when the amount of the deductions admissible in terms of sections 11 to 19 had been determined that s 20 would have become relevant. That determination would only have been made if the amount determined had been established to the satisfaction of the Secretary. It is highly unlikely that the legislature, in terms of s 20, intended the Secretary to re-determine the amount by which the deductions in terms of sections 11 to 19 exceeded the income in respect of which they were admissible, this time endowed with a discretion also in those instances where he had no

[16] See *Conshu (Pty) Ltd v Commissioner for Inland Revenue* 1994 (3) SA 603 (A) at 612F-613E.

discretion in terms of sections 11 to 19. Such a re-determination would have yielded the exact same result in that, as stated above, the Secretary would in the first place only have allowed a deduction from income if it had been established to his satisfaction. In these circumstances the reference in s 20(2) to an amount established to the satisfaction of the Secretary was intended to be a reference to the amount, which had already been determined by the Secretary in terms of sections 11 to 19 and not to an amount, which still had to be determined.

[19] In establishing the amount, the Secretary might or might not have exercised a discretionary power. Whether he did exercise a discretionary power would depend on the nature of the deduction and the terms of the statutory provision in terms of which the deduction was allowed. For example, in terms of s 11(a) a taxpayer was entitled to a deduction from his income of expenditure actually incurred in the Transkei in the production of

that income, provided such expenditure had not been of a capital nature, whereas in terms of s 11(e) a taxpayer was, subject to qualifications, entitled to a deduction in respect of wear and tear of machinery of "such sum as the Secretary may think just and reasonable". In the case of s 11(a) no discretionary power was conferred on the Secretary while in the case of s 11(e) such discretionary power was conferred on him.

[20] The deduction in the present case was allowed in terms of s 11(a). In terms of the section Dunblane was entitled to a deduction of its actual expenditure. The Secretary had no discretion to disallow expenditure actually incurred and no discretionary power was therefore exercised when the full purchase price of the shares was allowed as a deduction.

[21] It follows that the determination that Dunblane incurred an assessed loss of R127 823 628, which determination was given effect to in the original assessment, did not involve the exercise of a discretionary power by

the officer concerned. The withdrawal or amendment of that determination, after the expiration of two years from the date of the original assessment, was therefore not prohibited by s 3(2). In the circumstances the appeal should be upheld.

[22] The appellant's notice of appeal was delivered after the time prescribed for the delivery had expired. He applied for condonation of the late filing of the notice and the respondent conceded that he would be entitled to such condonation if his prospects of success in the appeal were good. In the circumstances condonation should be granted to the appellant. The respondent's opposition was nevertheless reasonable and he is entitled to costs in respect of the condonation application.

[23] The following order is made:

1 The appellant's application for condonation of the late filing of his notice of appeal is granted. The appellant shall pay the costs of the application.

2 The appeal is upheld with costs including the costs of two counsel.

3 The following order is substituted for the order made by the court *a quo*:

"The appeal is dismissed with costs including the costs of two counsel."

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P E Streicher JA

Hefer, ACJ)
Harms, JA)
Scott, JA)
Mthiyane, JA) concur