THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 703/2011

In the matter between:

ARMGOLD/HARMONY FREEGOLD JOINT VENTURE (PROPRIETARY) LIMITED **Appellant**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **Respondent**

Neutral citation: *Armgold/Harmony Freegold Joint Venture v CSARS* (703/2011) [2012] ZASCA 152 (1October 2012)

Coram: Navsa, Cloete, Heher, Leach and Pillay JJA

Heard: 06 September 2012

Delivered: 01 October 2012

Summary: Income tax – deductions of mining capital expenditure under sub-sections 36(7F) and 36(7E) of the Income Tax Act 58 of 1962 – method of calculation to be adopted where a mine of a taxpayer operates at a loss.

O R D E R

On appeal from: Tax Court, South Gauteng High Court, Johannesburg (Coppin P sitting as court of first instance):

The appeal is dismissed with costs, such costs to include the costs of two counsel.

J U D G M E N T

LEACH JA (NAVSA, CLOETE, HEHER AND PILLAY JJA CONCURRING)

[1] At the heart of the debate in this appeal is the method by which deductions for capital expenditure and assessed losses are to be applied in the calculation of the taxable income of a mining company which owns and operates more than one mine, not all of which operate profitably, and which also receives income from non-mining activities. As its name implies, the appellant, Armgold/Harmony Freegold Joint Venture (Pty) Limited, is a company with limited liability established as a joint venture between the Armgold and Harmony groups of companies. The appellant's mining income is derived from working its three gold mines, respectively known as Freegold, Joel and St Helena. It acquired the Freegold and Joel mines from the Anglo-American group with effect from 1 January 2002 and the St Helena mine the following year.

[2] In September 2008, the respondent, the Commissioner for the South African Revenue Service, (who for convenience I intend to refer to as ‘SARS’), issued revised tax assessments for the appellant, adjusting its income tax liability for the 2002 to 2005 tax years. Although SARS did so on various grounds, only one is relevant to this appeal and it relates solely to the 2003 and 2004 years of assessment. For those tax years SARS set off the losses of the St Helena mine against the taxable income of the Freegold and Joel mines before taking into account the mining capital expenditure incurred in respect of those mines. The effect of this, for reasons more fully explained below, was to reduce the amount of capital

expenditure that could be redeemed in respect of the Freegold and Joel mines.

[3] On 25 March 2009, the appellant objected to the revised assessment but, on 13 July 2009, its objection was disallowed. The appellant appealed to the Tax Court, Johannesburg which, on 1 August 2011, dismissed the appeal. With leave of the Tax Court, the appellant appeals now to this court.

[4] It is useful at the outset to consider the general scheme of assessing liability for tax under the Income Tax Act 58 of 1962 ('the Act'). As a starting point, a taxpayer's 'gross income' is defined as the 'total amount, in cash or otherwise, received by or accrued to or in favour of' the taxpayer during the period of assessment. From such gross income are deducted any amounts that are exempt from normal tax in order to calculate the taxpayer's 'income' (in the present case no such deductions are of any relevance). Further deductions are permitted under both s 11*(a)* of the Act and any further provisions in Part 1 of Chapter II of the Act. In that regard I should mention that s 11*(a)* contains what is commonly referred to as 'the general deduction formula' which allows the deduction of expenditure and losses actually occurred in the production of income 'provided such expenditure and losses are not of a capital nature'. This would include what are generally referred to as a mine's operating expenses. In any event, the taxpayer's gross income, less these deductions, is the amount of the taxpayer's 'taxable income' to which the appropriate tax rate is applied to determine the taxpayer's tax liability for that year of assessment.

[5] Turning to the question of deductions other than those under s 11*(a)*, I should mention at the outset that the relevant part of s 20(1) of the Act, upon which the appellant placed reliance as I shall indicate below, provides as follows:

'For the purpose of determining the taxable income derived by any person from carrying on any trade, 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 ...

(*b*) any *assessed loss* incurred by the taxpayer during the same year of assessment in carrying on any *other trade* ...'.

[6] Two important factors arise from this:

a) First, as I have mentioned, 'income' as defined in the Act is the amount after

the deduction from gross income of any amounts exempt from normal tax but before further allowable deductions under Part I of Schedule II are made to arrive at the taxpayer's taxable income. However, it was held by this court in *Conshu (Pty) Ltd v Commissioner for Inland Revenue* 1994 (4) SA 603 (A) at 613C that the word 'income' is used in the introductory part of s 20(1) not in its defined sense but, rather, as the income of the taxpayer which would be taxable but for the set off; ie the amount of the taxpayer's gross income less the deductions allowable under the Act but before any set off of an assessed loss or balance of assessed loss.

b) Second, s 20(1) clearly distinguishes between a *balance of assessed loss* in sub-section (a) and an *assessed loss* in sub-section (b), the latter being a loss incurred by the taxpayer in the same period of assessment *in the conduct of another trade*. A balance of assessed loss, however, is incurred before a current period under assessment and 'can only be set off when it is carried forward from the preceding year of assessment'.[1] In *New Urban Properties Ltd v Secretary for Inland Revenue* 1966 (1) SA 217 (A) this court held that the section 'envisages a continuity in setting off an assessed loss in every year succeeding the year in which it was originally incurred, so that in each succeeding year a balance can be struck . . . which can then be carried forward from year to year until it is exhausted.'[2]

[7] While s 11*(a)* contains the general deduction formula, further deductions are allowed under the remaining provisions of s 11. As this court observed in *Western Platinum Limited v Commissioner for the South African Revenue Service* 67 (2005) SATC 1 (SCA) para 1, the *fiscus* has historically favoured farmers and miners (presumably due to their national and economic significance) and, despite the limitation in the general formula, in the case of mines the legislature has permitted the deduction of certain mining capital expenditure as a 'class privilege'. This it achieved by way of s 11*(x)* – which authorises the deduction of 'any amounts which . . . are allowed to be deducted from the income of the taxpayer' – as read with s 15*(a)* and s 36, which authorise the deduction of mining capital expenditure as more fully set out below.

1 Per Centlivres CJ in *SA Bazaars (Pty) Ltd v Commissioner for Inland Revenue* 1952 (4) SA 505 (A) at 510F.
2 At 224D-E.

[8] The operation of the scheme of the Act in relation to the deduction of mining capital expenditure lies at the heart of this appeal. Section 15*(a)* authorises a deduction from the income derived by a taxpayer from its mining operations of 'an amount to be ascertained under the provisions of section 36' in lieu of certain other allowances (those allowances are of no relevance in the present case). Section 36(7C) in turn prescribes that subject to sub-sections 36(7E), (7F) and (7G), the amounts to be deducted under s 15*(a)* 'from the working of any producing mine shall be the amount of capital expenditure incurred'. In this somewhat tortuous way the legislature has allowed for the deduction of capital expenditure incurred in respect of any producing mine. As s 36(7G) is of relevance only to an alternative argument advanced by the appellant, I intend for the moment only to deal with the other two sub-sections, the interpretation and application of which are crucial to the outcome of this appeal.

[9] It must be stressed that sub-sections 36(7E) and (7F) allow only a deduction of mining capital expenditure. They do not impinge upon the ambit of s 11*(a)* which allows the deduction of mining operating expenditure as an expense 'not of a capital nature' incurred in the production of income: see *Palabora Mining Company Ltd v Secretary for Inland Revenue* 35 (1973) SATC 159 (A) at 178.

[10] Section 36(7E), which was enacted in 1983 and amended in 1990, provides as follows (as with so many sections in the Act, the reader would be well advised to take a deep breath):

'The aggregate of the amounts of capital expenditure determined under subsection (7C) in respect of any year of assessment in relation to any mine or mines shall not exceed the taxable income (as determined before the deduction of any amount allowable under section 15(*a*), but after the set-off of any balance of assessed loss incurred by the taxpayer in relation to such mine or mines in any previous year which has been carried forward from the preceding year of assessment) derived by the taxpayer from mining, and any amount by which the said aggregate would, but for the provisions of this subsection, have exceeded such taxable income as so determined, shall be carried forward and be deemed to be an amount of capital expenditure incurred during the next succeeding year of assessment in respect of the mine or mines to which such capital expenditure relates.'

As stated in *Silke On South African Income Tax*,[3] s 36(7E) limits 'the deduction of the aggregate of capital expenditure determined under s 36(7C) in a particular year of assessment in relation to any mine or mines to what is here referred to as the "gross mining taxable income" derived by the taxpayer from mining [and] thus sets a *general* cap on a taxpayer's deductions of capital expenditure.'

[11] Section 36(7E) was in due course followed by the promulgation in 1985 of s 36(7F). The author of *Mining Tax in South Africa*, Marius van Blerck, explains the rationale behind the introduction of s 36(7F) as follows:

'Until 1984, where a company owned more than one mine, unredeemed capital expenditure on one of the mines could be set off against mining income of another. . . . Although set-offs of this nature had occurred in previous decades, some major mergers and takeovers in the early '80s (along with unexciting dollar gold prices) caused the authorities to express some concern that vast new capital expenditures could substantially erode the mining tax base.'[4]

[12] In order to address this concern, the legislature clearly felt that s 36(7E) did not go far enough and that further protection of the tax base was required in the event of a mining company owning more than one mine. This led to the promulgation of s 36(7F), which was subsequently amended in 1990. It provides as follows (I again advise the reader to take a deep breath):

'The aggregate of the amounts of capital expenditure determined under subsection (7C) in respect of any year of assessment *in relation to any one mine* shall, unless the Minister of Finance, after consultation with the Minister of Mineral and Energy Affairs and having regard to any relevant fiscal, financial or technical implications, otherwise directs, not exceed the taxable income (as determined before the deduction of any amount allowable under section 15(*a*), but after the set-off of any balance of assessed loss incurred by the taxpayer *in relation to that mine* in any previous year which has been carried forward from the preceding year of assessment) derived by the taxpayer *from mining on that mine*, and any amount by which the said aggregate would, but for the provisions of this subsection, have exceeded such taxable income as so determined, shall be carried forward and be deemed to be an amount of capital expenditure incurred during the next succeeding year of assessment in respect of that mine: Provided that where the taxpayer was on 5 December 1984 carrying on mining operations on two or more mines, the said mines shall for the purposes of this

3 Alwyn de Koker and R C Williams *Silke on South African Income Tax* vol 2 at 16-10 to 16-11.
4 Marius Cloete van Blerck *Mining Tax in South Africa* at 12-30.

subsection be deemed to be one mine.' (My emphasis.)

[13] Thus s 36(7F) introduced what is commonly called a 'capex per mine ring-fence' (a description which I intend to use where convenient), a restriction that 'provides that deductible capital expenditure in relation to any one mine cannot exceed the taxable income . . . derived by the taxpayer from mining on that mine.'[5] In the explanatory memorandum issued at the time of the enactment of the section, it is stated that the section '. . will have the effect that where more than one mine is operated by the same person the capital expenses relating to any one mine may be set off only against the income from that mine unless the Minister of Finance, in consultation with the Minister of Mineral and Energy Affairs and having regard to the relevant fiscal, financial and technical implications, otherwise decides.' In *Silke,* the operation of the section is described thus:[6]

'It limits the deduction of the aggregate of capital expenditure determined under s 36(7C) in a particular year of assessment in relation to any particular mine to what is again referred to here as the "gross mining taxable income" derived by the taxpayer from mining *on that mine*. The excess that is as a result not deductible in that year must again be carried forward, and will again be deemed to be an amount of capital expenditure incurred during the next succeeding year of assessment on the mine concerned. Section [36(7F)][7] thus sets a *particular* cap on a taxpayer's deductions of capital expenditure.'

[14] Despite this statutory matrix being somewhat complex, its operation appears to be clear. Take for example a mining company operating two mines, A and B. Mine A has a taxable income after the set-off of any balance of assessed loss, but before the deduction of capex, of R10 million while the taxable income of mine B at that stage is R3 million. During the course of the tax year, while capital expenditure of R15 million was incurred in respect of mine A, no such expenditure was incurred in respect of mine B. The total taxable income before capex of the two mines is thus R13 million, ie R2 million less the total amount of the capital expenditure. Accordingly, under s 36(7E), but prior to the promulgation of s 36(7F), R13 million would have been allowed as a capex deduction with a balance of R 2 million being carried forward to the following year.

5Van Blerck *Mining Law* at 12-30 para 12.11.
6 At § 16.3 page 16-11.
7 Reference is made in *Silke* to s 36(7E) but that is clearly a typographical error.

[15] However, that position changed after the promulgation of s 36(7F). Applying the regime under that sub-section to the same facts, mines A and B are 'ring-fenced' for the purpose of the calculation of capex, the amount of capital expenditure in respect of each mine being capped at no more than the taxable income derived from each mine. In this scenario, as mine A's taxable income is R10 million, its capex deduction is capped at that amount notwithstanding an additional R5 million in fact having been incurred on that mine. The R5 million of mine A's unredeemed capital expenditure would have to be carried forward and deemed to be an amount of capital expenditure incurred in respect of that mine during the following year. As there was no capital expenditure incurred in respect of mine B, ring-fenced as it is from mine A, no capex deduction would be allowed to reduce its taxable income. The effect of this is that by reason of s 36(7F), no more than R10 million (the maximum cap in respect of mine A) would be deductible in respect of capital expenditure whereas, before it was introduced, capex of R 13 million was deductible.

[16] This is all straightforward enough where a taxpayer's mines earn a taxable income. The problem in the present case is that one of the appellant's three mines operated at a loss, as appears from the set of agreed facts placed before the Tax Court. The background facts relevant to the appellant's 2003 and 2004 years of assessment may be briefly stated as follows:

(a) The appellant derived an income from carrying on gold mining operations through its three mines: Freegold, Joel and St Helena.

(b) During both years of assessment, before any deduction for capital mining expenditure was made but after the deduction of operating expenses, both the Freegold and Joel mines produced a taxable income whereas the St Helena mine operated at a loss.

(c) The capital expenditure incurred in respect of both the Freegold and Joel mines, if deducted from the amount of their taxable incomes, was sufficient to reduce their taxable incomes to nil.

(d) Neither the Freegold mine nor the Joel mine had a balance of assessed loss carried forward from the preceding year of assessment.

(e) The appellant derived a taxable income from non-mining operations, the amount of which exceeded the operating loss of the St Helena mine in each year.

[17] To place the arguments of the parties in their factual context, I intend to refer for illustrative purposes Figure 1 below. Reproduced from the appellant's heads of argument, it summarises the income that accrued to the appellant from its mining and non-mining activities, the deductions it claimed and the manner in which it sought to assess its tax liability for the 2003 tax year. The figures reflect the relevant amounts in rand terms, rounded off to the closest million.[8]

Figure 1

	St Helena	Freegold	Joel	Non-min
1 Balance of assessed loss	nil	nil	nil	nil
2 Taxable income (before capex)	(51)	1 177	20	156
3 Capex deductible in 2003	n/a	1 177	20	n/a
4 Taxable income (2-3)	(51)	nil	nil	156
5 Assessed loss (current year)	(51)	n/a	n/a	n/a

Accordingly, the appellant argued that its overall taxable income for the year should be assessed at R105 million, being its taxable income of R156 million from its non-mining operations less the R51 million loss made by the St Helena mine.

[18] On the other hand, the SARS assessment proceeded as follows:

Figure 2

	St Helena	Freegold	Joel	Non-min
1 Balance of assessed loss	nil	nil	nil	nil
2 Gross taxable income before capex	(51)	1 177	20	
3 Set off St Helena loss		(50)	(1)	n/a
4 Nett taxable income before capex	nil	1 127	19	
5 Redemption of capex	nil	1 127	19	nil
6 Taxable income for year	nil	nil	nil	156

8 In the heads of argument the taxable income (before capex) in respect of St Helena is reflected as 'n/a'. In fact, after deductions the mine had incurred a loss of R51 million and I have used that figure reflected in brackets to convey that it is a loss.

[19] As is apparent from this, the main point of departure between the two sides lies in SARS having deducted the St Helena loss for the year in question – such loss being arrived at by deducting its operating expenses from its gross income under s 11*(a)* – from the taxable income before capex of the two remaining mines after apportioning such loss between them, thereby reducing the taxable income before capex of each profitable mine and, at the same time, reducing their capex deductions.

[20] The appellant submitted that the loss of the St Helena mine effectively amounted to its 'assessed loss' as envisaged by s 20(1)*(b)*. It therefore argued that in order to assess the appellant's taxable income, each mine should be regarded as being a separate trade and that, doing so, in order to calculate the appellant's final taxable income the 'assessed loss' of the St Helena mine could only be deducted under s 20(1)*(b)* once the taxable incomes of the other mines (trades) had been determined. In addition, the appellant submitted that as s 36(7F) required the taxable incomes of each individual mine to be determined separately, approaching the assessment in the manner SARS had done resulted in the operating expenses of the St Helena mine being used to reduce the Freegold and Joel mines' taxable incomes before capex. This, it submitted, was impermissible, both as it offended s 20(1)*(b)* and as the Act, by ring-fencing those mines, intended their pre-capex taxable incomes to be determined by each individual mine's gross incomes and deductions.

[21] The appellant argued that support for this was to be found both in s 36(10) of the Act and in para 2*(d)* of the Schedule of Rates of Normal Tax and Rebates – as the former stipulates that where 'separate and distinct mining operations are carried on in mines that are not contiguous' (and it is not suggested that any of the appellant's mines are contiguous) then 'the allowance for redemption of capital expenditure *shall be computed separately*' (my emphasis) ─ and the latter refers to the taxable income derived by any company from mining for gold 'on any gold mine' and provides for a rate of tax for gold mines which may vary from mine to mine, such

rate to be applied to a mine's taxable income 'before the set-off of any assessed loss or deduction not attributable to the mining for gold from the said mine'.

[22] The appellant argued that all of this showed that it was impermissible to allow the St Helena loss, incurred by deducting its operating expenses from its gross income, to be deducted from the taxable income of the Joel and Freegold mines as, to do so, would amount to setting off of St Helena's operating expenses against the other two mines' incomes to determine their taxable incomes before making their capex deductions.

[23] Compelling though this argument is in certain respects, I do not see how the mining activities conducted by the appellant at each one of its three mines can be said to be a separate 'trade' – defined in s 1 of the Act as including, inter alia, 'every profession, trade, business, employment, calling, occupation or venture . . .' – from that conducted at the other mines. A company which carries on mining operations certainly carries on the 'trade' of mining,[9] but it would be both fanciful and artificial to regard its mining operations at the St Helena mine as being a different trade from the operations it conducts at its other two mines. Had the legislature intended each mine's operations to be regarded as a separate trade, it could easily have said so. Not only did it not, but the provisions of s 36(7E) in which reference is made to the 'aggregate of the amounts of capital expenditure . . . in relation to any mine or mines,' clearly exclude different mining operations being regarded as different trades. The appellant's argument based upon the necessity to regard its operations at its different mines as different trades must therefore fail.

[24] On the other hand, however, much of the appellant's criticism of SARS's method of assessment has merit. Section 36(7F) envisages the capex deduction of each mine to be determined by having regard to the taxable income derived from that mine, an objective that will be defeated if the operating expenses incurred of one mine are to be taken into account in respect of another. In addition, in ITC 1420 Kriegler J held in regard to the variable tax rate levied against different mines, that the effect of the formula 'is to tax richer mines at a higher rate than poorer mines'[10]. That effect would be nullified if the operating expenses of a poor mine could be used

9 Compare *ITC 1420*, 49 (1987) SATC 69.
10 At 74.

to reduce the tax liability of a rich mine, and it is not surprising that it was stated in the Explanatory Memorandum on the Income Tax Bill, 1990 'that the profitability of each mine must determine the tax rates of the relevant mine and that it should not be influenced by losses and expenditure of other mines or from other sources.'[11] Finally, but most importantly, s 36(7C) provides for the amount to be deducted under s 15*(a)* to be the capital expenditure on a particular mine, determined by the income derived from working that mine. Violence would be done to this if the operating expenses of one mine were set-off against the income of another, and I have therefore concluded that it is impermissible to do so.

[25] That does not mean that the appellant correctly calculated its taxable income. My principal concern with its method is that it effectively excludes the operation of s 36(7E). This is apparent from the summary set out in the appellant's heads of argument, which reads:

'To summarise, the capex deductible by the appellant in respect of any individual mine was in terms of s 36(7C) and (7F) limited only to the taxable income (before capex) derived from that mine, reduced by any "balance of assessed loss" in relation to that mine carried forward from the preceding year. It was not otherwise limited.'

In terms of s 36(7C), however, the amount of capital expenditure which may be deducted under s 15*(a)* is made subject to both sub-sections 36(7E) and 36(7F), and the appellant's argument essentially ignores the former. But as pointed out by Silke:[12]

'Section 36(7E) sets a general cap on a taxpayer's deductions of capital expenditure under s 36(7C) for all mines by limiting them to his taxable income from mining; while s 36(7F) sets a particular cap on a taxpayer's deductions of capital expenditure under s 36(7C) for any one mine by limiting them to his adjusted taxable income from mining on that mine . . . . In other words, capital expenditure incurred is deductible in the year in which it is incurred *but only to the extent permitted by these various caps'* (My emphasis.)

[26] It must be remembered that s 36(7E) sets the maximum amount of capital expenditure that may be deducted in respect of the aggregate of the appellant's taxable income before capex derived from its various mines (the so-called 'general cap'). This does not mean that its full cap must necessarily be allowed. As not all of the appellant's mines have produced a taxable income at that stage, it must of

11 *Silke* § 16.11 page 16-21.
12 At § 16.3 page 16-9.

necessity mean that the aggregate mining taxable income will be less than the combined taxable incomes of just those that have been profitable. Consequently, the general cap under s 36(7E) must of necessity be less than the aggregate of the taxable incomes of the profitable mines ─ and the taxpayer will not be entitled to deduct the full amount of each particular cap calculated in respect of those profitable mines as would have been the case had the St Helena mine not operated at a loss. To hold otherwise would be to permit the deduction of an amount exceeding the general cap prescribed by s 36(7E).

[27] This may be demonstrated in the present case by reference to Figure 1 above. As set out therein, the appellant seek to deduct a total of R1 197 million in respect of its 2003 capital expenditure in respect of the Freegold and Joel mines, that sum being assessed with reference to the taxable incomes of R1 177 million derived from the Freegold mine and R20 million derived from the Joel mine. However, a total of R1 197 million cannot be allowed as a capital deduction as the appellant's aggregate capex deductions for the year is limited to R1 146 million under s 36(7E), being its taxable income from mining before any capex deduction (the total of the taxable incomes of the Freegold and Joel mines less the loss of R51 million incurred by the St Helena mine). Accordingly, although the combined taxable income, before capex, of the Freegold and Joel mines exceeds R1 146 million, no more than that sum may be allowed as a total capex deduction under s 36(7E).

[28] The appellant sought to meet this by arguing that its aggregate taxable income from mining before capex was in fact R1 197 million. This was based on the submission that as the St Helena mine had incurred a loss, it had earned no taxable interest and that, rather than taking its loss that year of R51 million into account in calculating the appellant's taxable income before capex, it should merely be treated as having a taxable income of nil. The effect of this, if accepted, would be that the loss actually incurred by the St Helena mine would not be deducted from the combined incomes of the Freegold and Joel mines.

[29] This cannot be accepted. The amount to be determined under s 36(7E) is the taxable income to the appellant's mining operations from all its mines, and in determining that amount the gross incomes and the operating expenses of all three

mines have to be taken into account. The taxable income of a taxpayer is, after all, determined by deducting operating expenses from gross income, and the St Helena loss therefore cannot just be left out of reckoning. Accordingly, the appellant's taxable income before capex derived from its mining activities must be assessed at the sum of R1 146 million, ie R51 million less than the aggregate of the capex the appellant wishes to have deducted in regard to its Freegold and Joel mines.

[30] The end result of this is that, by reason of the operation of s 36(7E), the appellant is not entitled to deduct the full caps of the capex it calculated in respect of the Freegold and Joel mines but, rather, lesser amounts. The issue then becomes, how should the individual amounts of capex in respect of the Freegold and Joel mines be reduced?

[31] SARS purported to do so by setting off the St Helena loss from the taxable incomes of the Freegold and Joel mines. But in principle that is impermissible, doing violence to the scheme already described which requires the taxable incomes of mines to be assessed separately and without the operating expenses of one mine being used to reduce the taxable income of another.

[32] Although s 36(7F) provides for a maximum (or particular cap) that may be deducted for capital expenditure in respect of each of the Freegold and Joel mines, it does not necessarily entitle the appellant to deduct the full amount of each such cap. Thus, the answer seems to me to be for the individual capex caps of the Freegold and Joel mines to be reduced so that their total does not exceed the general cap imposed by s 36(7E). In this way the two sub-sections will work in tandem, setting a maximum total deduction and reducing the Freegold and Joel mines maximum caps proportionally (an exercise similar to that adopted by the respondent in prorating the St Helena loss of R51 million between the Freegold and Joel mines). This is similar to what is done when it becomes necessary to apportion between trades a balance of assessed loss brought into reckoning from a previous year, the process of which is described by *Silke* as follows:[13]

'It is submitted that the assessed loss must be apportioned among the different trades in proportion to the income derived from each. For example, if in one year a company had an

13 § 8.127C.

assessed loss of R100 000 and in the next year it derived an income from mining of R200 000 and an income from manufacturing of R300 000, the assessed loss must be apportioned between the two trades, R40 000 being apportioned to mining and R60 000 to manufacturing. In practice SARS accepts this view.'

[33] Adopting that approach, the simplest method of calculating the amount of the allowable capex deduction is to deduct the amount of the appellant's taxable income from its mining operations (R1 146 million) from the total of the taxable incomes of the Freegold and Joel mines (R1 197 million) and to apportion the difference (R51 million) between the two mines in the manner just described. Doing so, using the same ratio of approximately fifty to one used by the respondent (that is the approximate ratio between the incomes derived from the two mines: and the appellant did not quarrel with such a ratio – merely that it was impermissible to set the amounts off against the taxable incomes of those mines) reduces the Freegold mine's capex deduction by R50 million to R1 127 million and that of the Joel mine by R1 million to R19 million, with the balance of capital expenditure in respect of those two mines standing over to the succeeding year under s 36(7F) being increased accordingly.

[34] In the light of these conclusions and the reduction of capex mentioned above, the correct treatment of the appellant's taxable liability for the 2003 year is set out in Figure 3 below.

Figure 3

	St Helena	Freegold	Joel	Non-min
1 Balance of assessed loss	nil	nil	nil	nil
2 Taxable income before capex	(51)	1 177	20	156
3 Capex deductible	nil	1 127	19	n/a
4 Taxable income after capex	(51)	50	1	156

[35] This exercise shows that the appellant had no taxable income from mining (the loss of the St Helena mine being offset by the aggregate of the taxable incomes after capex of the Freegold and Joel mines), resulting in the appellant's taxable income

being limited to R156 million, being its income from its non-mining activities. I appreciate it that this is the same result arrived at by SARS, but that is a matter of arithmetic, not of principle. The underlying principles giving rise to the calculations differ. In Figure 3, the general cap capex deduction is reduced by reason of the St Helena mine having operated at a loss, and the particular caps of the appellant's two profitable mines being reduced as a result. In Figure 2, SARS made its calculations, in my view impermissibly, by setting off the St Helena loss against the respective taxable incomes before calculating the capex deduction of the two profitable mines. The result may be the same, but the route followed to reach it is different.

[36] It is clear from this that the appellant's principal argument cannot succeed. That makes it necessary to deal, albeit briefly, with the appellant's alternative argument based upon s 36(7G).

[37] That section relates to the deduction of capital expenditure in respect of mining operations commenced by a taxpayer after 14 March 1990. However, it was correctly common cause that the section is only of application in the event of a taxpayer having a taxable income from mining after deduction of whatever capex may be allowable for each of its mines. In the present case that does not arise as after applying the provisions of sections 36(7E) and (7F) the appellant was left with no taxable income from mining. Section 36(7G) therefore does not apply.

[38] Be that as it may, the appellant's appeal cannot succeed. There is no reason for costs not to follow the event.

[39] The appeal is dismissed with costs, such costs to include the costs of two counsel.

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L E Leach

Judge of Appeal

APPEARANCES:

For Appellant:	T S Emslie SC Instructed by: Cliffe Dekker Hofmeyr Inc, Sandton Naudes, Bloemfontein
For Respondent:	A R Bhana SC (with him G D Goldman) Instructed by: State Attorney, Pretoria State Attorney, Bloemfontein

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