G.P.-S.43575—1969-70—2,000 J 219

72

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

230/72

(APPELLATE *~~Provincial~~ Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

PALABORA MINING COMPANY LIMITED, *Appellant,*

versus

SECRETARY FOR INLAND REVENUE, *Respondent*

Appellant's Attorney Webber & Newdigate
Prokureur vir Appellant

Respondent's Attorney D. of S.A. (per mnr. Ehrlich)
Prokureur vir Respondent

Appellant's Advocate H. S. Welsh S.C.
Advokaat vir Appellant R. Peart

Respondent's Advocate W. S. McLennan
Advokaat vir Respondent P. J. van R. Hamm

Set down for hearing on
Op die rol geplaas vir verhoor op 3-5-1973

1.5.8.9.11

Coram: Ogilvie Thompson C.J., Holmes, Jansen, Trollip et Williams JJA

TISC 3.5.1973: 9.45 am ——— 11.00 am
11.15 am ——— 12.45 pm
2.15 pm ——— 3.45 pm
4.00 pm ——— 5.00 pm

C.A.V.

18-5-73. Ogilvie Thompson et Corbett. Appeal allowed with Costs of 2 Counsel. Order as per written Judgment.

Bills Taxed—Kosterekenings Getaks

Date Datum	Amount Bedrag	Initials Paraaf

Issued
Reef uitgereik

and initials
en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the appeal of:

PALABORA MINING COMPANY LIMITED.....Appellant

versus

SECRETARY FOR INLAND REVENUE.....Respondent.

Coram: Ogilvie Thompson, C.J., Holmes, Jansen, Trollip et Muller, JJ.A.

Heard: 3rd May 1973. Judgment delivered: 18-5-1973

J U D G M E N T.

OGILVIE THOMPSON, C.J:

In determining appellant's liability for normal tax for the year of assessment ended 31st December 1966 and assessing appellant to have sustained a very substantial loss in respect of that year, respondent disallowed as a deduction an amount of R1,816,149-00. Appellant's objection to this disallowance was overruled, and its subsequent appeal to the Transvaal Income Tax Special Court

was...../

was dismissed. Against that decision, the appellant now appeals, with the necessary written consents in terms of sec. 86(1)(b) of Act 58 of 1962, direct to this Court.

Regrettably, it is necessary yet again to mention undue delay in bringing appeals against Special Court decisions before this Court. In the present instance, the judgment of the Special Court was delivered as far back as 28th November 1969; but it was not until after 28th November 1972 that the record on appeal was filed with the Registrar of this Court. In response to enquiry from the Court at the hearing of the appeal, counsel were unable to advance any satisfactory explanation for this long delay; indeed, certain dates quoted to us by counsel indicated that correspondence alone - admittedly associated with the preparation of the stated case - took a leisurely course extending over a period of some 12 months. Similar delays in the prosecution of appeals against judgments of a Special Court have been the subject of specific reference in previous decisions

of...../

weight to all such factors - particularly the one last mentioned above - the delay exceeding 3 years ~~and 4 months~~ NOT which has occurred in the present case is an inordinately long delay. In a further endeavour to eliminate undue delays in the preparation and completion of stated cases, the Registrar of this Court will be directed to bring the aforegoing remarks to the personal notice of the Secretary for Inland Revenue (hereinafter referred to as "the Secretary").

For a proper appreciation of the issues to be determined in this appeal, it is necessary first to summarise, as briefly as the circumstances permit, the facts as reflected in the stated case and as found by the Special Court. Appellant's business is the mining and sale of copper. Its mine is situated at Phalaborwa in the Letaba District of the Transvaal. Appellant also produces magnetite, vermiculite and sulphuric acid; but its main product is anode copper, which contains approximately 99.26% copper. In the production of anode copper, certain intermediate products are made, namely, copper concentrates and blister copper,

both...../

both of which are themselves saleable products. Appellant was incorporated in August 1956. The objects clause of its Memorandum of Association embraces a wide range, including power to construct and erect waterworks.

Up to the end of 1962 appellant was mainly engaged in exploratory work and metallurgical tests conducted with the aid of a pilot plant. Early in 1963 appellant exercised certain options which it held, and on 14th June of that year it was granted a mining lease. On 5th July 1963 appellant issued a prospectus offering shares and debentures for public subscription. It was stated in the prospectus that it was estimated that construction of the plant would be completed and initial operations would commence within 36 months.

Thereafter appellant was until early in 1966 engaged in preparatory work which mainly comprised the preparation of a pit for open-cast mining and the erection of the plant required to crush the ore and extract and refine the copper. Appellant itself did the work of preparing the pit, but the erection of the plant was undertaken by a combine of engineering firms known as Bechtel-W.K.E. and subcontractors. By the

end..../

end of December 1964, 947,375 short tons of material had been moved from the pit of which 435,000 tons were ore. During November and December 1964 arrangements were made for the sale of large quantities of magnetite and acid. During the year ended 31st December 1965 preparation of the open pit continued and some 14,365,510 tons of material, which included 5,333,000 tons of ore, were hauled from the pit. During that year 299,970 short tons of ore were crushed. Milling operations commenced in December 1965; 39,549 short tons of ore were treated and 658 short tons of concentrates assaying 33.3% copper were produced. During 1965 appellant also took over the vermiculite operations previously carried on by a subsidiary. In the course of that year, contracts were concluded for the sale of approximately 50,000 short tons of anode copper. Smelting operations commenced in January 1966. On 17th February 1966 the first copper anodes were cast. The copper process plant was completed early in March 1966, and by May of that year full copper production was achieved.

At...../

At the time when its prospectus was issued in July 1963, appellant was obtaining its water requirements from Foskor, an industry in the vicinity, which had a water supply system. It was at that time anticipated by appellant that its future water requirements would be supplied by a statutory board known as the Phalaborwa Water Board, and that the cost of such water would constitute part of appellant's annual operating expenditure. The Phalaborwa Water Board (hereinafter referred to as "P.W.B.") was established in terms of sec. 108 of the Water Act, No. 54 of 1965, on 10th May 1963. Its main purpose was to store water in the Olifants River by constructing a barrage thereon with the object of providing an assured and sufficient supply of water for urban, industrial and agricultural purposes within the Phalaborwa area. The P.W.B. was formed as the result of negotiations which had taken place during 1962 between the Government Departments concerned and the major potential consumers of water in the Phalaborwa area, namely, appellant, Foskor and an industry named Bosveld Kunsmis Edms. Beperk.

Appellant...../

Appellant had hoped that the necessary storage capacity would be provided in the river by the P.W.B. without appellant having to do any of this work itself. By September 1964 however, appellant had become seriously concerned at the delay in commencing construction work on the dam and at the prospect of missing the complete river-flow in the rainy season of 1965-1966. For the original estimate that appellant's plant would be ready to produce anode copper by July 1966 was, as the result of accelerated construction, advanced at the end of 1964 by six months to January 1966. This advancement was achieved through appellant's offering inducements to, and putting pressure upon, the various contractors concerned. The earlier date of estimated anode copper production accentuated the appellant's anxiety regarding the availability of water required for such production. Although it was at all material times clear that the P.W.B. would in due course construct the aforementioned dam on the Olifants River, appellant became increasingly concerned that

the...../

to be recognised as an approved tenderer for various sections of the proposed water supply project. This recognition was granted; and in due course appellant submitted tenders in its own name for various civil, mechanical, and electrical engineering contracts associated with the water project. Although these tenders were submitted in its own name, it was always appellant's intention that the bulk of the work would be carried out on its behalf by Bechtel-W.K.E. and subcontractors. In the event, appellant was awarded a number of contracts, including the contract for the construction of the barrage which appellant considered to be the key contract because appellant believed it to be essential that the barrage should be completed before the start of the next rainy season. All the aforementioned contracts were cost-plus contracts; but, time being in appellant's view of the essence, it offered and paid special incentives and inducements to the subcontractors to finish the work as expeditiously as possible. Work on some of the contracts commenced on 8th December 1964; the work was performed on behalf of appellant

by...../

by Bechtel-W.K.E. (acting as constructing managers) and sub-contractors. The barrage was completed up to sill level on 22nd September 1965. Water was taken out of the dam for the first time for appellant's operations on 23rd January 1966. The main work on all the contracts was completed by the end of March 1966, although certain residual matters still remained to be done thereafter.

The efforts and expenditures made by appellant to complete the barrage resulted in the impounding of all the water required to fill the dam completely during April 1966 - that is to say, some 8 months before the commencement of the next normal rainy season. The completion of the dam in March 1966 thus resulted in the avoidance of a delay of approximately 8 months in appellant's earning of profits. The barrage was built by the appellant for the P.W.B. and is in no way an asset of the appellant. No contract or arrangement has at any stage existed between the P.W.B. and the appellant whereby the latter obtains any kind of preferential

treatment in respect of water from the dam. The members of the P.W.B. comprise persons nominated to and approved by the Minister of Water Affairs. The appellant has only one representative on the P.W.B.

Appellant's aforementioned contracts with the P.W.B. were not undertaken either as separate projects independent of its copper mining activities or with the object of making a profit on those contracts. Appellant's sole object was to ensure that an adequate supply of water would be available for the start-up of its copper plant early in 1966. Indeed, it was at all material times realised by appellant that these contracts, constituting an accellerated construction programme, would in all probability result in a loss. Early estimates of such loss were in the vicinity of R1,200,000. In the event, however, the ultimate figure by which appellant's expenditure on the contracts exceeded the fees it obtained therefrom was R1,816,149. Appellant was willing to incur this loss in order to obtain the water early in 1966 as it estimated that, at the then level of copper prices, it stood

to...../

to gain a nett revenue of approximately R3,000,000 per month for every month by which anode copper production could be advanced, and that it would lose an equivalent amount of money for every month by which such production was deferred. In the event, these estimates of profits proved correct; for appellant's total loss on the contracts was made up in some three weeks after appellant commenced producing anode copper. The profits made by appellant during the 8 months from April to November 1966 amounted in all to R23,436,000 - that is to say, not so far short of the aforementioned estimated R3,000,000 per month.

The above-mentioned aggregate loss of R1,816,149 on the contracts with the P.W.B. was written off in the appellant's Profit and Loss Account for the year ended 31st December 1966 against its operating profit of R27,945,000 for that year. In its tax computation for the year ended 31st December 1966, the appellant in determining its nett profit claimed as a deduction the aforementioned sum of R1,816,149. The Secretary disallowed this deduction; and

the...../

the admissibility or otherwise of this sum for deduction constitutes the subject matter of this litigation.

Appellant claimed to deduct the aforesaid sum of R1,816,149 under the provisions of sec. 11(a) of Act 58 of 1962 as amended - hereinafter referred to as "the Act" - as being revenue expenditure incurred in carrying on its "trade" (as defined in sec. 1 of the Act) of copper mining.

After sketching the background facts in its judgment, the Special Court, being satisfied - with respect, rightly - that all other requirements of sec. 11(a), read together with sec. 23(g) and the definition of "trade" contained in sec. 1 of the Act, are present, correctly defined the primary issue before it to be whether the sum in question (R1,816,149-00) is, as maintained by appellant, "not of a capital nature" within the meaning of sec. 11(a) of the Act. In upholding the Secretary's submission that the said sum constituted expenditure of a capital nature and is, therefore,

inadmissible...../

inadmissible for deduction, the Special Court, after setting out the conflicting contentions advanced to it and referring to relevant authorities, expressed its ultimate conclusion as follows:

> "Even though (as in all businesses) the object was to make profits, the expenditure was directed toward 'equipping' the structure of the mine in the sense of giving it the necessary water. It was directed towards the cost of making the mine, not of working it (cf. Commissioner for Inland Revenue v. George Forest Timber Co. Ltd., 1924 A.D. at pp. 531 and 526)".

In the course of stating the Special Court's reasons, the learned President (Galgut, J.,) also made some examination of the further submission, advanced on behalf of the Secretary, that the expenditure and loss in question was incurred "with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade" within the meaning of that often-cited expression having its origin in Atherton v. British Insulated and Helsby Cables, Ltd., (1925) 10 T.C. 155; 1926 A.C. 205 at 213. Although some of the learned President's remarks in this context suggest that he tended

to...../

to favour the submission thus advanced, he found it unnecessary, because of the Special Court's conclusion that the expenditure in issue was of a capital nature, to express any final view in regard to the aspect of "enduring benefit". Nor did the Special Court give any decision upon a further submission - based upon secs. 15 and 36 of the Act and with reliance upon New State Areas Ltd. v. C.I.R., 1946 A.D. 610 at p. 621 reaffirming the remarks made in the George Forest case (supra) at 526 - advanced on behalf of the Secretary to the effect that the expenditure now in issue constituted pre-production expenditure and is, for that reason, in the premises not deductible. In this connection, however, the learned President - observing that "the matter may go further" - concluded the Special Court's judgment as follows:

> "The impression left with the Court on the trading aspect was that the agreements mentioned in the Prospectus did not constitute trading as envisaged by the Act. There is no need to give our reasons save to say that they were preliminary contracts made for delivery some considerable time later, viz. after operations commenced. The impression on the production aspect was that the anode copper was produced in February 1966, but that the removal of material...../

> material in 1965 was part of the production in that the removal of material, although partly done to prepare the pit, was also part of the process of producing copper. This creates certain difficulties in that evidence may well be required to ascertain when (i.e., in what part of 1965) such material was removed. It may be that the bulk of it was removed in the latter half or quarter of 1965 and if so, then much of the barrage expenditure may well be pre-production expenditure. If this appeal had fallen to be decided on this aspect it may have been necessary for this Court to refer the assessment back to the Secretary for further investigation and assessment in terms of section 83(13)(a) of the Act. However, in view of the finding that the expenditure constitutes capital expenditure there was no further need to consider the matter".

In this Court counsel for the Secretary supported the decision of the Special Court on the above-mentioned ground relied upon by it and also upon an alternative ground, founded upon secs. 15 and 36 of the Act, to which I shall make fuller reference later in this judgment.

A submission, made in his written heads of argument, that the first of the above-cited passages from the judgment of the Special Court constitutes a finding of fact unassailable (save on certain well-known but very restricted grounds) in

this

this Court was not persisted in at the hearing by counsel for the Secretary. In that connection it accordingly suffices to make only two observations. First, the passage in question is incomplete in that it omits all mention of the time aspect. As the Special Court had itself remarked shortly before in its judgment, "the purpose of the expenditure was to ensure that the mine could start operating when it was ready to do so and to ensure that it was not held up until the next rains (i.e., in November 1966) or later. In so doing, profits would be made from an earlier date". Secondly and in any event, the passage in question cannot, in my judgment, rightly be regarded as a finding of fact which is (save on very limited grounds) unassailable on appeal (see S.I.R. v. Cadac Engineering Works (Pty.) Ltd., supra).

The essence of the main (as distinct from the alternative) submission in support of the decision of the Special Court is that the R1,816,149-00 in issue fell outside the category of operating expenses but, on the contrary,

was expenditure incurred in bringing appellant's mine to production and, as such, constitutes expenditure of a capital nature. Developing this submission, counsel for the Secretary cited the following passage in the judgment of the Special Court, viz:

> "The picture found by the Court is that this was expenditure made and a loss intentionally incurred in order to ensure that the production of copper would not be held up or delayed, i.e., that such production could start when the construction of the mine was completed".

This picture, submitted counsel for the Secretary citing Income Tax cases Nos. 819, 843 and 924 presently to be considered, is one of capital expenditure in "equipping" appellant's income-earning structure. The expenditure - so the submission continued - was not part of appellant's income-earning operations at all, but is analogous to expenditure incurred, for instance, in erecting a building before it becomes revenue producing and to the type of expenditure considered by this Court in C.I.R. v. Allied Building Society (supra) at pp. 18 F - 20 H. Rightly observing that the

"enduring advantage" test is "not an exhaustive definition, but a useful guide" (Bean v. Doncaster Amalgamated Collieries Ltd., 1944 (2) All E.R., 279 at 281 H), counsel for the Secretary submitted that it is immaterial that the Special Court made no definite finding in that regard. He however further submitted that in any event the established facts reveal sufficient "enduring advantage", more particularly the continued existence of the dam itself - partially constructed with appellant's money, and indispensable to its activities - or, alternatively, the assured supply of water 8 months earlier than would otherwise have been the case.

For the reasons which follow, the aforegoing overall submission that the expenditure in issue is of a capital nature does not, in my opinion, have sufficient regard to the essential features of the present case and is, in my judgment, unacceptable.

The above-mentioned "picture" as found by the Special Court is not, in my view, inconsistent with counsel for appellant's submission that the expenditure in issue

was.../

was a revenue expense. In any event and as will more fully appear below, because that "picture" omits, or fails sufficiently to emphasise, certain important features, it would perhaps be more appropriate to regard it as no more than a preliminary sketch. As to the three Special Court decisions relied upon by counsel for the Secretary in support of his submission that the R1,816,149 in issue in the present case was capital expenditure in "equipping" appellant's income-earning structure, all are, in my opinion, clearly distinguishable. In Income Tax Case No. 819 (21 S.A.T.C. 71) no reasons were given for the conclusion that the amount paid to the tenant in consideration of his prematurely vacating the building, which the taxpayer had purchased and in which he desired to trade, was of a capital nature. It would, however, appear to be correct to say that the taxpayer had purchased an encumbered capital asset, that the sum he paid to the tenant eliminated the encumbrance, and thus formed part of the total cost of the capital asset acquired. Similar considerations apply to Income Tax Case No. 843

(21 S.A.T.C. 431). There the taxpayer owned two buildings. £750 was paid by the taxpayer to the tenant of portion of one of the buildings in consideration of his prematurely vacating such portion, thus enabling the taxpayer to obtain income from the whole of both buildings. As the learned President at p. 432 correctly remarked: "The money was spent for the purpose of acquiring, if not a new asset, at any rate a portion of the machinery which would enable the profit which was eventually earned to be earned". In Income Tax Case No. 924 (24 S.A.T.C. 250) the so-called bonus payments there in issue had been paid by a building owner to his building contractor as incentives for the expeditious reconstruction of a building intended to be rent-producing. On the facts of that case the bonus payments were, as the learned President (at p. 251) succinctly said, "as clearly expenditure of a capital nature as is the building contract price". I find no persuasive authority in any of these three Special Court decisions to support the submission that the expenditure in issue in the present case was of a capital nature. It

may...../

may here appositely be added that Income Tax case No. 1110 (29 S.A.T.C. 169), upon which counsel for the Secretary also sought to place some reliance, is in my opinion distinguishable from the present case in that, but for the taxpayers agreeing to make financial contributions to the operational loss on the railway line over a ten year period, the line would probably not have been built at all; and, further, that the taxpayer (a gold-mining company) could continue to enjoy the facility of the railway line for the duration of its mining operations estimated at some 47 years.

As to the "enduring benefit" test, the Special Court in the course of its remarks in relation to that aspect, inter alia, said:

> "Had appellant constructed the waterworks for its own benefit and its own account and not for the benefit and account of P.W.B. it could not have been said that this was not an 'enduring advantage'. On this test it clearly would have been capital expenditure. It is difficult to see any difference in principle because the works were built on another's property to become the property of the other. The purpose was the same, i.e., to enable the copper mine to function. The dam was as essential as the rest of the plant and machinery".

It is no doubt correct - as is implicit in that passage and as was submitted by counsel for the Secretary in this Court - that the mere fact that it is in respect of works situated upon the land of another that a taxpayer has incurred expenditure does not preclude that expenditure from being of a capital nature (see C.I.R. v. Meyerson, 1947 (2) S.A. 1243 (A.D.) at 1251-2, approving Ounsworth v. Vickers Ltd., 1915 (3) K.B. 267; and cf. also Coalville Urban District Council v. Boyce, 18 T.C. 655). Nor is the circumstance that expenditure has neither created a new asset nor made any addition to an existing asset necessarily conclusive in favour of such expenditure being on revenue account. (See the Cadac Engineering case, supra, at 522-523). Nevertheless, if no asset has been acquired as a result of the expenditure, that is always a relevant factor (cf. New State Areas Ltd. v. C.I.R., 1946 A.D. 610 at 627 ad fin.). A cardinal feature of the present case, however, is that, not only did the expenditure in issue neither create nor preserve any right or asset in the hands of

the appellant, but also that - as is made clear both in the judgment of the Special Court and in the stated case - the waterworks were, irrespective of appellant's intervention, going to be constructed in any event. The expenditure in issue was therefore not incurred by appellant in order to obtain a long-term supply of water but, as explained earlier in this judgment, solely with the object of accelerating the acquisition of an adequate supply of water in order the sooner to commence earning the estimated profits of three million rand per month. In my opinion, these factors effectively distinguish the Ounsworth and Coalville cases mentioned above and upon which both the Special Court and counsel for the Secretary sought to place some reliance. In this connection, and bearing in mind that the estimated life of appellant's mine as an open pit operation is 26 years, I agree with counsel for appellant's submission that the advantage which the appellant derived from the accelerated construction of the barrage was, and was at all stages intended to be, short-lived and adapted to short term purposes;

and...../

and that, once the eight month period in 1966 had elapsed, the purpose of the expenditure was (to employ an expression used in Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd., 1964 A.C. 947 (P.C.) at 961) "exhausted", and had no residual value to the appellant. As was remarked in that case at p. 959, it must be remembered that phrases such as "enduring benefit", "capital structure" and the like are "essentially descriptive rather than definitive".

In my judgment, however, application of the "enduring benefit" test to the facts of the present case does not support the Secretary's contention that the expenditure in issue was of a capital nature. Nor, in my opinion, is there any true analogy between the expenditure here in issue and that which was held to be of a capital nature in the Allied Building Society case, supra. There the view of this Court was that the vacant stands upon which the assessment rates in issue had been paid were, during the tax year in question, entirely withdrawn from the society's income-earning activities (see page 20 of 1963 (4) S.A.).

I...../

I turn now to consider the facts in the light of the well-known and often cited statement by Watermeyer, C.J., in the New State Areas Ltd. case (supra, at p. 627). In the Cadac Engineering case (supra, at pp. 521 - 522) I ventured to express the opinion that that statement remains the most useful general guide in determining what is almost invariably a somewhat evenly balanced and difficult problem. I have not since had any reason to alter that opinion; but, for greater clarity, I would here add that in an earlier passage (vide 1946 A.D. at 620-621) Watermeyer, C.J., had said:

> "The problem which arises when deductions are claimed is, therefore, usually whether the expenditure in question should properly be regarded as part of the cost of performing the income earning operations or as part of the cost of establishing or adding to the income earning plant or machinery".

Amplifying that passage, Schreiner, J.A., in C.I.R. v. Genn & Co. (Pty.) Ltd., 1955 (3) S.A. 293 at 299 G, said (as was also mentioned in the Cadac Engineering case, supra, at p. 523 H) that the Court

> "...has to assess the closeness of the connection between the expenditure and the income-earning operations, having regard both to the purpose of the expenditure and to what it actually effects".

In /

In support of his submission that the expenditure in issue was, within the meaning of Watermeyer, C.J., 's above-mentioned statement, part of the cost incidental to the performance of appellant's income-producing operations, counsel for appellant mainly relied upon the following four cases, viz: New State Areas Ltd. (supra); Sub Nigel Ltd. v. C.I.R., 1948 (4) S.A. 580 (A.D.); the Nchanga case (supra) and 1962 (1) S.A. 381 (F.C.); Commissioner of Taxes v. Rhodesia Congo Border Timber Co. Ltd., (1961) 24 S.A.T.C. 602. Counsel for the Secretary submitted that all these decisions are distinguishable, more especially upon the following grounds. The first, because the item (the external sewers) there held to be a revenue expense was, he claimed, in truth but a composite payment for services. The Sub Nigel case, because a direct link existed between the insurance premiums paid and the potential income from the insurance policies; whereas in the present case, said counsel for the Secretary, the expenditure in issue was incurred to bring appellant's mine into production. In the Nchanga case and

Rhodesia Congo case, said counsel for the Secretary, the expenditure in issue was linked with the already existing income-earning operations of the taxpayers concerned and, unlike the present case, was not incurred to bring an income-producing concern to production. Expenditure incurred in order to work appellant's mine "earlier" is, submitted counsel for the Secretary, radically different from expenditure incurred in order to work an already existing mine "harder" - the expression used by Clayden, C.J., in the Nchanga case (supra, at p. 389 A of 1962 (1) S.A.). Although I incline to the view that a reasonably close analogy exists between the present case and the Nchanga case (supra), I do not propose either to expatiate thereon or to express any opinion upon the validity or otherwise of the remaining above-mentioned grounds of distinction advanced by counsel for the Secretary. For, save in so far as they lay down a principle, precedents can seldom be decisive in relation to an inquiry such as the present. Generally speaking, and as was again

pointed...../

pointed out in the African Oxygen case, supra, at p. 691, each case must be decided on its own facts and circumstances.

What then are the dominant facts and circumstances of the present case? As already mentioned, but as must here again be emphasised, the waterworks were not built upon appellant's land; appellant has neither ownership therein nor any preferential treatment in relation to water supplied. The barrage and all works associated with the water scheme were going to be constructed in any event, irrespective of appellant's intervention, by the P.W.B. employing contractors. As was pointed out by Watermeyer, C.J., at p. 627 of the New States Areas Ltd. case (supra), and as has frequently been reiterated in subsequent decisions of this Court, in inquiries of the present kind, the purpose of the expenditure is an important factor. It is, in a limited sense, no doubt correct to say - as was submitted by counsel for the Secretary citing from the George Forest case, supra, at p. 526 - that appellant incurred the expenditure in issue "to enable the

concern..../

concern to yield profits in the future"; but such a statement takes no account of the fact that the waterworks themselves formed no part of appellant's "concern" and ignores the element of earning profits earlier, which is an important feature of the present case. Appellant's established purpose in incurring the expenditure in issue was to accelerate the availability of a sufficient supply of water. Water in sufficient quantity would in due course have become available but, having regard to the incidence of the rainy seasons, that may well not have eventuated until about November 1966. Appellant's tendering for the contracts, with their anticipated concomitant loss, was dictated solely by its desire to have an adequate water supply early in 1966, when the production of anode copper was expected to commence, and thus to earn profits earlier than otherwise might well have proved possible. The loss anticipated on the contracts (with their accompanying incentives and inducements) was willingly and deliberately assumed because appellant entertained no doubt that such loss would speedily be made up by the earlier

earning...../

earning of profits, estimated at approximately three million rand per month. The expenditure in issue was thus incurred with the sole purpose of accelerating the earning of those profits, and that is precisely what the expenditure achieved. I am accordingly unable to share the view of the Special Court that the expenditure in issue was "directed towards equipping the structure of the mine". Nor am I able to agree with counsel for the Secretary's submission - adapted from the phraseology employed in the African Oxygen case, supra, at 690 E - that what the expenditure in issue effected was the general improvement or better exploitation of appellant's assets or rendering its business machine or profit-yielding structure more effective. On the contrary, appellant has, in my opinion, shown that there existed a direct relationship between the expenditure in issue and its income-earning operations. On the facts of the present case, it is, in my view, irrelevant that the expenditure in question was incurred before profits from anode copper had commenced to be earned. From the facts mentioned

earlier...../

earlier in this judgment - more especially the substantial extraction of ore during 1964 - it is, I think, beyond question (it was indeed not disputed before us) that appellant was already carrying on a "trade" within the meaning of sec. 1 of the Act before it incurred the expenditure in issue. It is immaterial that no anode copper was actually produced until after most of the expenditure in question was incurred. Having regard to all the circumstances, the expenditure in issue was, in my judgment, so closely linked with appellant's income-earning operations during the tax year ending December 1966 as to constitute revenue expenditure in respect of that tax year.

It follows that, subject only to the alternative argument advanced by counsel for the Secretary, the sum of R1,816,149 was, in my judgment, deductible under the provisions of sec. 11(a) of the Act.

The...../

The concluding portion of the judgment of the Special Court (cited earlier) suggests that the Secretary's alternative contention may have been advanced before it in a slightly different form from that in which it was presented in this Court. However that may be, before us counsel for ~~appellant~~ the Secretary advanced his alternative argument as follows. Should this Court, contrary to his submissions as outlined earlier in this judgment, come to the conclusion that the R1,816,149 in issue would otherwise rank as expenditure on revenue account deductible under sec. 11(a), sections 15 and 36 of the Act - submitted counsel for the Secretary - nevertheless require that such portion of the said expenditure as was incurred prior to the production of anode copper must be regarded as expenditure of a capital nature inadmissible for deduction under sec. 11(a).

By a process of reasoning to which I shall make brief reference below, counsel for the Secretary submitted that on the figures before the Court the above-mentioned

pre-production../

pre-production expenditure amounted to R1,307,259. He accordingly conceded that, on his alternative argument, the residual amount of R508,890 (being the difference between R1,816,149 and R1,307,259) would be deductible; and, further, that, if only his alternative argument were to be upheld, the appeal would nevertheless have to be allowed and the sum of R508,890 declared deductible.

To follow this alternative submission advanced on behalf of the Secretary, it is necessary to set out the relevant provisions of the Statute. Sec. 15(a) of the Act (as substituted by sec. 20 of Act 55 of 1966) provides that:

> "There shall be allowed to be deducted from the income derived by the taxpayer from mining operations -
>
> (a) an amount to be ascertained under the provisions of section 36, in lieu of the allowances in section 11(e), (f), (gA) and (o) and section 12(1), including section 12(1) as applied by section 12(3);"

(The wording of section 15(a) prior to its amendment was slightly different, but not in any respect material to this appeal.)

Sections..../

Sections 36(1) and (7) read:

"(1) Subject to the provisions of sub-sections (2) to (7), inclusive, the amount to be deducted each year under paragraph (a) of section fifteen in respect of income from mining operations shall be an amount (hereinafter referred to as the quotient) obtained by - ..... (a formula is then set out).

(7) In the case of income derived from the working of any copper mine in the district of Namaqualand in the province of the Cape of Good Hope or the district of Letaba in the province of the Transvaal, there shall, in lieu of the quotient referred to in sub-section (1), be deducted in respect of the year of assessment during which the production of copper commences, the amount of capital expenditure incurred up to the close of that year of assessment, and thereafter in respect of each succeeding year of assessment the actual capital expenditure incurred during that year of assessment."

So far as is material to the present case, subsection (11) of sec. 36 reads:

"(11) For the purposes of this section -

'capital expenditure' means -

(a) expenditure on shaft sinking and mine equipment.....;

(b) expenditure on development, general administration and management (including any interest and other charges payable

after..../

after the thirty-first day of December, 1950, on loans utilized for mining purposes) prior to the commencement of production or during any period of non-production; and

(c) ..... ".

As mentioned earlier, copper anodes were first produced on 17th February 1966; but, relying upon a letter written, in response to the Secretary's inquiry, by the appellant; upon the form of appellant's tax returns in respect of the 1966 year; and upon the onus of proof, counsel for the Secretary submitted that 31st March 1966 should be taken as "the commencement of production" for the purposes of sec. 36(11)(b) of the Act. The above-mentioned figure of R1,307,259 thus represents that portion of the expenditure in issue which was incurred prior to 31st March 1966. This sum, as already indicated, was submitted by counsel for the Secretary to be rendered non-deductible as a consequence of the operation of the sections set out above.

In my opinion counsel for the Secretary's alternative submission is unacceptable. In the first place,

it...../

it is to be observed that the mere fact that a particular item of expenditure falls within the special definition of "capital expenditure" in sec. 36(11) of the Act does not necessarily mean that it must also be regarded as "expenditure of a capital nature " within the meaning of sec. 11(a) of the Act (cf. the Sub-Nigel case, supra, at pp. 601-602). Secondly, it remains unclear to me how the particular expenditure in issue in the present case can - having regard to the nature of that expenditure as determined by this Court and as postulated in counsel's alternative submission - rightly be said to fall within the ambit of the definition of capital expenditure contained in sec. 36(11) of the Act. Thirdly, for the reasons which follow, the interpretation which counsel for the Secretary seeks to place upon the relevant sections appears to me to be unsound.

Sec. 36(7) undoubtedly applies to appellant; and it is clear that it was during 1966 that the production of copper commenced. In respect of the tax year ending 31st

December..../

December 1966, appellant was thus by virtue of the provisions of sec. 36(7) entitled to deduct "the amount of capital expenditure incurred up to the close of that year of assessment". Such deduction was, however, "in lieu of the quotient referred to in subsection (1)". This last-mentioned subsection in turn refers back to sec. 15(a) of the Act. The deduction allowed by the provisions of sec. 15(a), in respect of income derived by a taxpayer from mining operations, is an amount "to be ascertained under the provisions of sec. 36" and which is expressly stated to be "in lieu of the allowances" referred to in the various sections of the Act listed in section 15(a). That list does not include sec. 11(a). It follows that the aforegoing provisions do not impinge upon the ambit of sec. 11(a) of the Act. It would, in my opinion, indeed be remarkable if they did; and it is difficult to think that the Legislature could have intended such a result. The deduction permitted by the provisions of sec. 36(7) "in respect of the year of assessment during which the production of copper commences"

is manifestly of great value to a copper mine which has attained the production stage. It is however a deduction of capital expenditure (as defined in sec. 36(11)) in lieu of the quotient referred to in section 36(1), which latter in turn relates to "the amount to be deducted each year under paragraph (a) of section 15". This last-mentioned section makes provision in lieu of certain stated allowances. Section 11(a) relates, not to allowances, but to "expenditure and losses actually incurred in the Republic in the production of the income". In my judgment, if expenditure incurred by a copper mine to which sec. 36(7) of the Act applies qualifies for deduction under sec. 11(a) of the Act, that qualification is not, in consequence of the provisions of sections 15 and 36 of the Act, impaired by reason of the expenditure in question having been incurred prior to the commencement of the production of copper.

For the foregoing reasons, the Court's order is as follows:

(1) The...../

(1) The appeal is allowed with costs, such costs to include the fees of two counsel.

(2) The judgment of the Special Court is altered to read:

(a) Appeal allowed.

(b) The sum of R1,816,149 is declared to be deductible under sec. 11(a) of the Act;

(c) It is directed that the assessment be altered accordingly.

NOGENIE THOMPSON

HOLMES, J.A.)
JANSEN, J.A.)
TROLLIP, J.A.) CONCUR.
MULLER, J.A.)