311/74

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

GLEN ANIL DEVELOPMENT CORPORATION LIMITED — Appellant

and

SECRETARY FOR INLAND REVENUE — Respondent

Coram: BOTHA, WESSELS, TROLLIP et CORBETT, JJ.A. et GALGUT, A.J.A.

Heard: 18 August 1975.

Delivered: 11 September 1975.

J U D G M E N T

BOTHA, J.A.:

This is an appeal direct to this Court on a case stated under section 86 of the Income Tax Act 58 of 1962 against a decision of the Special Court constituted for hearing income tax appeals arising within the

Province.../2

Province of the Transvaal. The question in the appeal is whether, in determining the appellant's liability for normal tax for the year of assessment ended 30 June 1966, the respondent (to whom I shall refer as the Secretary) was entitled, by virtue of the provisions of section 103(2) of the Income Tax Act, to disallow an assessed loss which had been determined for the appellant's previous year of assessment. The Special Court held that the Secretary was so entitled. It is against that decision that the appeal is made direct to this Court with the consent of the parties.

The appellant was incorporated as a private company in 1954 under the name of United Import and Export Company (Pty.) Ltd. On 28 March 1966 its name was changed to Glenvista Development Corporation (Pty.) Ltd., and on 29 July 1968 it became a public company and its name was once more changed to Glen Anil Development Corporation Ltd.

Before.../3

Before it became a public company and at all material times the appellant had an authorised share capital of R30 000, divided into 15 000 shares of R2 each, of which 100 shares had been issued, were fully paid and beneficially owned by Trico Holdings (Pty.) Ltd. (hereinafter referred to as Trico).

Trico had an authorised share capital of R900 000 divided into 800 000 ordinary shares of 50 cents each, 70 000 "A" preference shares of R2 each, 160,000 "B" preference shares of R2 each, and 20 000 cumulative preference shares of R2 each. The issued share capital of Trico amounted to R860 000 and consisted of all the ordinary shares and all the "A" and "B" preference shares fully paid. On 22 March 1964 the whole of the issued share capital of Trico was acquired by United Sewing and Knitting Machine Company (Pty.) Ltd. whose name was subsequently changed to U.S.M. Holdings (Pty.) Ltd. (hereinafter referred to as U.S.M.).

U.S.M. had an authorised share capital of R200, divided into 200 shares of R1 each of which two shares had been issued, were fully paid and were beneficially owned by Charter Shipping Corporation Ltd. (hereinafter referred to as Charter).

By written agreement executed on 10 March 1966 the three major children of Dr. E.A. Rubenstein acquired from Charter the latter's two shares in and all Charter's claims against U.S.M. for the sum of R30 000. Dr. Rubenstein, who was instrumental in bringing about the purchase, bound himself as surety and co-principal debtor for the due fulfilment of the obligations undertaken by his three children in terms of the aforesaid agreement. The children themselves took no part in the negotiations which led to the conclusion of the transaction, and it is doubtful whether they were fully aware of the implications of the agreement. At that time neither U.S.M. nor its wholly-owned subsidiary

Trico.../5

Trico, nor Trico's wholly-owned subsidiary, the appellant company, had any assets.

Upon the acquisition of the two shares in U.S.M. by the three children of Dr. Rubenstein, the issued share capital of U.S.M. was increased from R2 to R3 in order to place the three children on an equal footing, each then holding one share, and Dr. Rubenstein became a director of U.S.M. The agreement of 10 March 1966 also provided for changes in the directorates of both Trico and the appellant.

Clauses 2(1) and 2(2) of the said agreement also provided for an undertaking by the purchasers of the shares in U.S.M. that U.S.M. would deliver to Charter true copies of the income tax assessments of the appellant (a wholly-owned subsidiary of U.S.M.) for the years of assessment ending on 30 June 1965, 30 June 1966 and 30 June 1967, and that if all such assessments were on the basis that the appellant's assessed loss

of.../6

of R622 947, or balance of assessed loss as at 30 June 1964, had not been either extinguished or had not been reduced by more than the appellant's taxable income for the relevant year or years, the purchasers would forthwith pay to Charter a further sum of R50 000 for the shares and claims purchased under the said agreement. The seller as well as the purchasers of the shares were given the right to insist on objection and appeal in the event of the assessed loss being disallowed.

Up to the year of assessment ended 30 June 1965 the appellant carried on a distributing business and for that year of assessment it was issued with an assessment in which its assessed loss for income tax purposes (Section 20) was determined at R622 947, and it had a deficit on profit and loss account for undistributed profits tax purposes of R664 166 (Sections 48, 49).

In terms of an agreement entered into on 13 May 1966, i.e. just two months after the acquisition

of.../7

of the shares in U.S.M. by the Rubenstein children on 10 March 1966, the appellant acquired certain farm land from one Palliser for R100 000 and established a township thereon. Since then the appellant has carried on the business of a township development company.

Dr. Rubenstein had been a township developer since 1940. The business of property development required large sums of capital and because of a lack of liquid assets Dr. Rubenstein became concerned about his financial position and consulted his auditors. Consideration was given to the formation of a company having a large share capital to which Dr. Rubenstein could sell at their true value his existing investments which consisted of shares in several township-owning companies and two property-owning companies. By reason of the fact that the surplus which would have been realised on the sale of Dr. Rubenstein's investments to a company so formed would normally be subject to income tax, the Secretary was consulted

and.../8

and certain proposals were made to him on behalf of Dr. Rubenstein in an endeavour to avoid the payment of income tax on such surplus. The Secretary rejected the proposals made to him on behalf of Dr. Rubenstein and when the latter was advised that the payment of income tax could not be avoided on any profits realised on the sale of his investments, the formation of the proposed company was abandoned. It was then that, on the advice of Dr. Rubenstein's auditors, the shares in U.S.M. were purchased from Charter for Dr. Rubenstein's three children, and that all future townships were thereafter purchased by the appellant company only. In this way, so it was said, Dr. Rubenstein limited the future growth of his personal estate then valued at approximately R1.5 million with a view to reducing the liability for estate duty which would arise on his death. The reduction so achieved was estimated by his auditors at between R6 and R7 million as at 1970.

Apart.../9

Apart from the saving of estate duty, the result of the scheme, on the assumption that the law would remain unaltered, was that by reason of its deficit of R664 166 on profit and loss account for undistributed profits tax purposes, it was possible for the appellant to earn approximately R1.1 million, before tax, before that deficit would be extinguished. If the whole of those earnings (assuming the assessed loss for income tax purposes of R622 947 were disallowed) were subjected to income tax, the remaining R750 000, after payment of income tax, could, because of its deficit and the exemption provided for by section 50(f) of the Act, have been retained by the appellant for its business without it becoming liable to the payment of undistributed profits tax. After that the appellant could have gone on earning R200 000 per annum indefinitely without having to pay undistributed profits tax. That would have been so because the rate of income tax on companies

at.../10

at that time was 31.5% which on a taxable income of R200 000 amounted to R63 000. Then there was a loan levy of 1.5% which would have amounted to R3 000. A plough-back of 45% was permitted which on a taxable income of R200 000 amounted to R90 000. If the appellant had paid a dividend to its shareholder, Trico, of approximately R43 000, the total of all that would have amounted to approximately R199 000. The dividend of R43 000 would have been exempt from income tax in the hands of Trico as companies do not pay income tax on dividends. Trico would in turn have been entitled to retain those dividends of R43 000 and not distribute them to its shareholder, U.S.M., without having to pay undistributed profits tax because Trico had a paid-up share capital of R860 000, and section 50(g) of the Act exempted Trico from the payment of undistributed profits tax for as long as its total nett profits per annum did not exceed 5% of its paid-up share capital. That meant

an.../11

an annual saving to the group of companies of approximately R10 750 indefinitely. On 29 July 1968 the appellant, however, became a public company to which undistributed profits tax was irrelevant prior to 1969. (Section 48 as amended in 1969).

Finally there was a possible income tax advantage, for the appellant had an assessed loss for income tax purposes of R622 947. The rate of income tax and loan levy on companies at the time was 33% which meant that the value of the assessed loss to the appellant, if allowed, would have been R200 000 over as many years as its taxable income totalled R622 947.

During the year of assessment ended 30 June 1966 the appellant derived an income of R222 895 from its township development business. The Secretary refused to allow the appellant to carry forward its 1965 assessed loss of R622 947 and to set that off against its 1966 income in terms of section 20(1)(a) of the Income Tax Act. The Secretary's decision was based on an application of

section.../12

section 103(2) of the Income Tax Act. That section reads as follows - (My underlining)

> "Whenever the Secretary is satisfied that any agreement or any change in the shareholding in any company, as a direct or indirect result of which income has been received by or has accrued <u>to that company</u> during any year of assessment, has at any time before or after the commencement of the Income Tax Act, 1946, been entered into or effected by any person solely or mainly for the purpose of utilizing any assessed loss or any balance of assessed loss incurred by the company, in order to avoid liability on the part of that company or any other person for the payment of any tax, duty or levy on income, or to reduce the amount thereof, the set-off of any such assessed loss or balance of assessed loss against any such income shall be disallowed."

It was conceded that the income which the appellant had derived from its township development business during the 1966 year of assessment was received

by.../13

by it or had accrued to it as a direct or indirect result of the agreement of 10 March 1966 within the meaning of that expression in section 103(2). Counsel for the appellant contended, however, that -

(a) the Secretary was not entitled in law to invoke the provisions of section 103(2) inasmuch as "the change in the shareholding" took place in U.S.M. whereas the income resulting from the agreement was received by the appellant company in the shareholding in which no change occurred;

(b) the finding of the Special Court that "the main purpose of the agreement and/or transfer of shares was to utilize the assessed loss of the appellant company to avoid liability for tax as contemplated by section 103(2)" is erroneous in law within the meaning of section 86(1) in that there was no evidence to support it.

Counsel's main submission is based upon the

words.../14

words "that company" where they appear for the first time in section 103(2) in the phrase "as a direct or indirect result of which income has been received by or has accrued to that company". The words "that company" can refer only to the company in which there has been a change in the shareholding. The words "any agreement or" in the opening sentence of section 103(2) are not expressly related to any company, consequently, so counsel argued, if income is received by a company in the shareholding in which there has been no change, the Secretary is not entitled to invoke the provisions of section 103(2) even if the income was a direct or indirect result of an agreement which has been entered into solely or mainly for the purpose contemplated in that section.

The corresponding provision in the 1941 Income Tax Act 31 of 1941 of the present section 103(2) of the 1962 Act was section 90(1)(b) which was introduced for

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the first time by section 20 of Act 55 of 1946, the opening words of which read as follows -

> "Whenever the Commissioner is satisfied... that any agreement or any change in the shareholding in any company, as a direct or indirect result of which income has been received by or has accrued .... to any company ....."

Section 90(1)(b) of the 1941 Act was amended in 1959 by section 17 of Act 78 of 1959 to read precisely as section 103(2) of the 1962 Act now reads. It was then for the first time that the words "any company", where they occurred for the second time in the old section 90(1)(b) in the phrase "income has been received by or has accrued ..... to any company" were replaced by the words "that company". Counsel rightly contended that effect must be given to this deliberate change in the language of section 90(1)(b) of the 1941 Act as re-enacted by section 103(2) of the 1962 Act.

It was contended that, whereas it was sufficient to bring the provisions of the old section 90(1)(b) into

operation.../16

operation if, as a direct or indirect result of any agreement or any change in the shareholding in any company, income had been received by or had accrued to any company, and the agreement had been entered into, or the change in the shareholding in any company had been effected solely or mainly for the purpose contemplated in that section, the provisions of the new section 103(2), on the other hand, can be invoked only if, as a result of any agreement or any change in the shareholding in any company, income has been received by or has accrued to "that company", viz. the company in the shareholding in which there has been a change, irrespective of whether the income was a direct or indirect result of an agreement which was entered into for the purpose contemplated in the section.

Counsel submitted that it was impossible to give any other interpretation to the words of section 103 (2) without, in effect, undoing the substitution in 1959

of.../17

of the words "that company" for the words "any company" where they occurred for the second time in the old section 90(1)(b).

Counsel has, in support of the construction of section 103(2) contended for by him, relied upon the so-called special rules laid down in several cases as being applicable to the interpretation of fiscal legislation. In Cape Brandy Syndicate vs. I.R.C., [1921] I K.B. 64 at p. 71, and referred to in C.I.R. vs. Simpson, 1949 (4) S.A. 678 (A D) at p. 695, the rule was stated as follows by ROWLATT, J., -

> "It simply means that in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

The same principle is stated by Lord CAIRNS in Partington vs. The Attorney-General, 21 L.T. 370

at.../18

at p. 375, and referred to in C.I.R. vs. George Forest Timber Co., Ltd., 1924 A.D. 516 at p. 531/2, as follows-

> "If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute".

In C.I.R. vs. Delfos, 1933 A.D. 242, WESSELS, C.J., however, after referring to the rule stated by Lord CAIRNS in Partington vs. Attorney-General (supra), said at p.254 -

> "I do not understand this to mean that in no case in a taxing Act are we to give to a section a narrower or wider meaning than its apparent meaning, for in all cases of interpretation we must take the whole statute into consideration and so arrive at the true intention of the Legislature".

In.../19

In Dubowitz vs. C.I.R. 1952 (1) S.A. 55 (A D)

CENTLIVRES, C.J., after referring to the rule laid down by ROWLATT, J., in the Cape Brandy Syndicate case (supra) and cited in C.I.R. vs. Simpson (supra), said at page 61 -

> "When that citation was made it was assumed that that rule should be qualified by saying that even in taxing statutes something may have to be implied by necessity".

Apart from the rule that in the case of an ambiguity a fiscal provision should be construed contra fiscum, (Estate Reynolds and Others vs. C.I.R. 1937 A D 57 at p. 70) which is but a specific application of the general rule that all legislation imposing a burden upon the subject should, in the case of an ambiguity, be construed in favour of the subject, there seems little reason why the interpretation of fiscal legislation should be subjected to special treatment which is not applicable in the interpretation of other

legislation.../20

legislation. Indeed I do not think that the rule as stated in the Cape Brandy Syndicate case (supra) is any different from that applicable in the interpretation of all legislation. However that may be, it is clear from the remarks of WESSELS, C.J., in the Delfos case (supra) that even in the interpretation of fiscal legislation the true intention of the legislature is of paramount importance, and, I should say, decisive.

In any event I do not understand the rule to be that every provision of a fiscal statute, whether it relates to the tax imposed or not, should be construed with due regard to any rules relating to the interpretation of fiscal legislation. Section 103 of the Act is clearly directed at defeating tax avoidance schemes. It does not impose a tax, nor does it relate to the tax imposed by the Act or to the liability therefor or to the incidence thereof, but rather to schemes designed for the avoidance of liability therefor. It should, in my view,

therefore,.../21

therefore, not be construed as a taxing measure but rather in such a way that it will advance the remedy provided by the section and suppress the mischief against which the section is directed. (Hleka vs. Johannesburg City Council 1949 (1) S.A. 842 (A D) at p. 852, and see generally Maxwell, Interpretation of Statutes, 12th Ed. p. 40 et seq.). The discretionary powers conferred upon the Secretary should, therefore, not be restricted unnecessarily by interpretation.

There can be no doubt that the substitution in 1959 of the words "that company" for the words "any company", where they occurred for the second time in the old section 90 (1) (b), of Act 31 of 1941, did create an obscurity in the new section 90 (1) (b), which obscurity has been carried forward in the re-enactment of that section by section 103 (2) of Act 58 of 1962. That

obscurity.../22

obscurity has created some doubt as to whether the provisions of section 103(2) can be invoked by the Secretary, as the provisions of the old section 90(1)(b) of the 1941 Act could clearly have been invoked, not only in the case where a change in the shareholding in any company has resulted in income being received by that company, but also in the case where an agreement resulted in income being received by some company having an assessed loss. The difficulty arises from the words in section 103(2) that -

> "Whenever the Secretary is satisfied that any agreement or any change in the shareholding in any company, as a direct or indirect result of which income has been received by or has accrued to that company....."

The words "that company" clearly refer to the company in the shareholding in which there was a change, and as the words "any agreement" is not related to any company, the words cited above in relation to "any agreement" do not make any sense.

Those.../23

Those words cannot, however, for those reasons be ignored. The section must, on the contrary, be so construed as to give effect to those words. The effect to be given to those words must depend upon the intention of the legislature as ascertained from a consideration of the context of section 103 as a whole, and of such other circumstances as may be relevant, such as the history of the section.

I have already pointed out that it was clear, from the provisions of the old section 90(1)(b) of the 1941 Act, that the Secretary could have invoked those provisions both in the case where a change in the shareholding in any company ~~has~~ resulted in income being received by any company, and in the case where an agreement had that result. Under the new section 90(1)(b) and section 103(2) the position remains the same except that, in the case of a change in the shareholding in any company, the resulting income must have been received

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by that company, whereas in the case of an agreement the company which is to have received the resulting income is not expressly identified.

It is so unlikely that the legislature could have intended, by the mere substitution in 1959 of the words "that company" for the words "any company", where they appeared for the second time in that section, to have narrowed the field within which the Secretary could have invoked the provisions of the new section 90(1)(b), by excluding from it an attempted tax avoidance by an agreement, that it can be ignored as a possible object of the legislature. On the contrary, it is, I think, clear from the provisions of paragraph (b) of the new section 90(2) and paragraph (b) of section 103(4) of the 1962 Act, that the legislature contemplated the continued existence of the two independent situations in which the Secretary could invoke the provisions of the new section 90(1)(b) or section 103(2), viz. any agreement entered into, or any change in shareholding

effected.../25

effected, for the purpose contemplated.

Tax avoidance by agreement is a wider concept and certainly no less important a method of tax avoidance by means of the utilization of an assessed loss for income tax purposes than tax avoidance by a change in the shareholding in a company. The order in which the two concepts appear in section 103 (2) also indicates that the legislature regarded the former as at least an equally significant method to be defeated. It would be wrong, therefore, to subordinate the former to the latter or allow it to be merged with it with the result that a change in shareholding in a company becomes a prerequisite before the remedy provided by the legislature can be employed.

In the light of these considerations it is clear that the legislature in enacting the new section 90(1)(b) in 1959 and section 103(2) in 1962 intended the Secretary to have the necessary authority to invoke the

provisions.../26

provisions of those sections, as he had under the old section 90(1)(b), both in the case of an agreement and in the case of a change in the shareholding in a company, which resulted in income being received by the company affected by the agreement or the company in which the change in the shareholding occurred, where the Secretary is satisfied that the agreement was entered into or the change in the shareholding was effected for the purpose contemplated. In the case of an agreement it seems clear that the company the legislature had in mind was the company, having an assessed loss, which was affected by or concerned with the agreement and which received the income resulting from that agreement.

I have already indicated that the words in section 103(2) that -

> "Whenever the Secretary is satisfied that any agreement ..... as a direct or indirect result of which income has been received by or has accrued to that company....."

does not make sense.

The.../27

The principle to be applied in such a case is set out by WESSELS, A.C.J., in Ex parte The Minister of Justice : In re Rex vs. Jacobson and Levy, 1931 A.D. 466 at p. 477, as follows -

> "if the language of the Statute is not clear and would be nugatory if taken literally, but the object and intention are clear, then the statute must not be reduced to a nullity because the language used is somewhat obscure".

In Minister of Labour vs. Port Elizabeth Municipality, 1952(2) S.A. 522 at p. 534 CENTLIVRES, C.J., referred to this principle and approved of the principle stated in Halsbury Laws of England, Vol. 31 para. 635 (Hailsham Ed.) that -

> "it may in certain circumstances be permissible to supply omitted words or expressions",

and it is clear from what the learned Chief Justice said at p. 534/5 of the report, that it would be necessary to

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do so in order to give effect to the clear intention of the legislature. (See also Trivett & Co. (Pty.) Ltd. vs. Wm. Brandt's Sons & Co. Ltd. and Others, 1975 (3) S.A. 423 (AD) at p. 435/6).

I have already indicated that for the purpose of the opening words of section 103(2) it seems clear that in the case of an agreement it can only be a company having an assessed loss, which is affected by or concerned with the agreement, and which receives any income resulting therefrom, that the legislature could have had in mind. If, therefore the words "any agreement" in the opening words of that section were construed as if the words "affecting any company" were inserted after the words "any agreement", as I think they should be, the opening words of the section would make sense and would give effect to what in my view the legislature intended. The appellant company was clearly affected by the agreement of 10 March 1966, as the Special Court

found.../29

found.

I come to the conclusion, therefore, that the Secretary was in the circumstances in law entitled to invoke the provisions of section 103(2).

I turn now to counsel's second contention, viz. that the finding of the Special Court that "the main purpose of the agreement and/or transfer of shares was to utilize the assessed loss of the appellant company to avoid liability for tax as contemplated by section 103(2)" is erroneous in law within the meaning of section 86(1) in that there was no evidence to support it. The Special Court's finding is a finding of fact and as such not subject to appeal in terms of section 86(1) of the Income Tax Act 1962 unless it was one that could not reasonably have been made, Goodrick vs. Commissioner for Inland Revenue, 1959(3) S.A. 523 (A D), or, as it has also been put, "except on the ground of lack of evidence on which it could reasonably have been made", African Life

Investment.../30

Investment Corporation (Pty.) Ltd. vs. Secretary for Inland Revenue, 1969 (4) S.A. 259 (A D) at p. 268, or that "there was no evidence to support it", Secretary for Inland Revenue vs. Trust Bank of Africa Ltd. 1975(2) S.A. 652 (A D) at p. 669.

In the present case the test requires slight modification in that in terms of section 103(4)(b) -

> "Any decision of the Secretary under sub-section ..... (2) ..... shall be subject to objection and appeal, and whenever in proceedings relating thereto it is proved that the ..... agreement or change in shareholding in question would result in the avoidance ..... of liability for payment of any tax ..... on income ..... it shall be presumed, until the contrary is proved -
>
> (a) .....
>
> (b) in the case of such agreement or change in shareholding, that it has been entered into or effected solely or mainly for the purpose of utilizing the assessed loss or balance of assessed loss in question in order to avoid ..... such liability.....".

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The onus was, therefore, clearly on the appellant to satisfy the Special Court that the agreement in question was not entered into solely or mainly for the purpose of utilizing the assessed loss in question in order to avoid liability for payment of any tax on income. For this purpose Dr. Rubenstein and his auditor, who had advised him in regard to the transaction in question, Mr. B. Torch, gave evidence on behalf of the appellant before the Special Court. No evidence was led on behalf of the Secretary.

In his evidence Dr. Rubenstein said that the advantage of the assessed loss incurred by the appellant was really incidental as he had thought it problematical that the assessed loss would be allowed. He did not say why he thought it problematical. He said that the assessed loss was in any event not a factor which influenced him in deciding to enter into the transaction whereby the shares in U.S.M. were acquired by his children.

It.../32

It is accepted that the test under section 103(2) as to the purpose for which the agreement in question was entered into is a subjective one (Secretary for Inland Revenue vs. Geustyn, Forsyth and Joubert, 1971 (3) S.A. 567 (A D) at p. 576, and cf. Inland Revenue Commissioners vs. Brebner, [1967] 2 A.C. 18 at pp. 27, 30) and that the evidence of Dr. Rubenstein who negotiated the agreement was most important in regard to the question as to the purpose for which the agreement was entered into. It was, however, not decisive.

In view of the Special Court's finding as to the purpose for which the agreement in question was entered into, it must follow that the appellant had failed to discharge the onus which rested upon it and that the presumption created by section 103 (4) (b) accordingly remained standing. That finding of the Special Court cannot therefore be regarded as erroneous in law unless no reasonable

court.../33

court could have come to any other conclusion than that the presumption was rebutted.

Paragraph 13 of the stated case reads as follows -

> "In as much as notice has been given on behalf of the appellant that it is intended to contend in respect of certain findings of this Court that -
>
> (a) in so far as such findings are inferences drawn from primary facts, the primary facts do not justify them; and
>
> (b) in so far as they are findings of fact, there is not evidence to support them, or alternatively, the only true and reasonable conclusions contradict the findings;
>
> a request has been made on behalf of the appellant that the record of evidence before this Court should be annexed to and form part of this Statement of Case.
>
> Accordingly, a copy of such record is annexed hereto, marked 'I'."

In his attack upon the Special Court's finding

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in regard to the purpose for which the agreement in question was entered into, counsel for the appellant accordingly sought to refer us to the evidence adduced before the Special Court in regard to that matter.

The first question to be determined is the relevance of that evidence in the appeal before us. In providing for an appeal against a determination by a special court as being erroneous in law, section 86(1) authorises an appellant or the Secretary to "require the special court to state a case setting forth the facts, the contentions of the parties and the determination of the court for an appeal" to the appropriate appellate tribunal.

The proper form of a stated case under the 1914 Income Tax Act was explained by INNES, C.J. in Commissioner of Taxes vs. Booysens Estates Ltd., 1918 A.D. 576 at p. 599, as follows -

"Sec. ...../35

"Sec. 25 authorises the submission of a question of law for the decision of the Provincial Division. And it follows that the facts, in connection with which the question of law arises, are to be found and stated by the Special Court. A number of facts were so stated, but they were evidently considered insufficient, because by consent of parties the proceedings before the Special Court were annexed and incorporated in the case. That proceeding was irregular, and should be avoided in future. All the facts necessary for the determination of the legal question, whether found by the Court or admitted by the parties, should be set out; but the evidence upon which those facts, or any of them depended should not be detailed".

As was pointed out by SCHREINER, J.A. in Durban North Traders vs. C.I.R. 1956(4) S.A. 594 (AD) at p. 602, -

"though there have been changes in the appeal provisions since 1914 the essential nature of the procedure has remained the same".

At.../36

At page 601 of the report in the Durban North Traders case, (supra) SCHREINER, J.A., said this -

"When one turns to the activities of the company, which disclose the policy which it was pursuing and the intention with which its transactions were carried out, it must be observed that the special case bristles with passages recording that 'It was stated in evidence that .....'. Such passages enabled counsel for the appellant to submit that the Special Court had found what was stated in evidence was a fact. That submission is wholly untenable: there are instances, some of which relate to important issues, in which, though there is a passage in the special case reciting that something was stated in evidence, the judgment annexed to the special case shows that the very opposite was found by the Special Court. The Special Court in terms of section 81(1) (now 86(1)) has to 'state a case setting forth the facts'. The facts to be set forth are those facts, admitted or for other reasons found by the Special Court,

which.../37

which are considered by it to be relevant to the question of liability to tax. That something was stated in evidence may be important in the proof of facts before the Special Court, but it is not itself a fact that has any relevance on appeal. Where the legal error complained of by the dissatisfied party is that there was no evidence to support the findings of the Special Court this in my view means that on the primary facts found by the Special Court the factual inferences or conclusions could not reasonably be supported".

At page 602/3 of the report the following passages occur -

"The primary facts may, and sometimes should be stated fully, but, however closely the statement of facts may follow the evidence, it is as a statement of facts and not as a recital of evidence that it finds a proper place in a stated case.....

It is true that passages can be found in judgments dealing with income tax appeals in which expressions are used such as 'the finding could not reasonably be reached on the evidence'. But, so

far.../38

far as I am aware, where the procedure is by stated case, 'the evidence' means the facts stated to have been admitted or proved".

After a full discussion of the matter on pp. 601/3 the learned Judge of Appeal comes to the conclusion -

> "that the quotations from the evidence to which I have referred should not have appeared in the special case and must be disregarded".

At page 598 of the report CENTLIVRES, C.J., expressed agreement with the views of SCHREINER, J.A. -

> "that snippets from the evidence given before the Special Court should not have been included in the stated case".

The learned Chief Justice then proceeds as follows -

> "At the end of the stated case it is said that the appellant was dissatisfied with the decision of the Special Court on the ground -
>
> > 'that there was evidence from which it could reasonably be concluded that

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> the profits derived from the realisation of the Northway and Broadway properties did not constitute income subject to income tax but were of a capital nature".

This ground invites this Court to examine the evidence and to come to a conclusion of fact different from the conclusion reached by the Special Court : in other words the appellant is attempting to appeal to this Court on a question of fact in spite of section 81 of the Act which says 'that there shall be no right of appeal against any decision of the Special Court on a question of fact'. Had the appellant's complaint been that there was no evidence from which the primary facts referred to by my Brother SCHREINER could be found, the inclusion of the evidence in the stated case may have been justified. I use the word 'may' deliberately because I do not think that it is necessary for the purposes of this case to give a definite decision on the point".

The concluding remarks of the learned Chief Justice are not applicable to the appeal before us in so

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far as it relates to the finding of the Special Court as to the purpose for which the agreement in question was entered into, as that finding is not a finding of a primary fact, but an inference of fact, or a rebuttable presumption of fact which in terms of section 103(4)(b) arises from the fact that the result of the agreement was the avoidance of liability for payment of tax on income, which fact was not disputed.

No primary fact stated in the stated case was attacked before us on the ground that there was no evidence to support it, except perhaps the statement by the Special Court that "we were not favourably impressed with the evidence of Dr. Rubenstein", if that was indeed a finding of fact. Without entering upon a detailed discussion of this matter it seems to me impossible for this Court in an appeal of this kind to differ in this regard from the Special Court who saw and heard the witness in whose evidence there are several unsatisfactory

features.../41

features to which counsel for the respondent has directed our attention.

I agree, with the greatest respect, with the views expressed by SCHREINER, J.A., as concurred in by the learned Chief Justice, and it follows, therefore, that the evidence adduced before the Special Court is of no relevance in this appeal and must be disregarded.

I have not been able to find any case in this Court where on an appeal under section 86(1) of the Income Tax Act this Court has purely on the evidence adduced before the Special Court, either set aside or confirmed a finding of fact by the Special Court, certainly not since the decision in the Durban North Trader's case (supra). In Commissioner for Inland Revenue vs. Paul, 1956 (3) S.A. 335 (A D) at p. 339 the evidence given by the respondent before the Special Court was referred to and considered in full by this Court. But there the evidence of the respondent was incorporated in the

stated.../42

stated case and the Special Court accepted that evidence as to the respondent's motives in acquiring the land there in question (see at p.340).

The question to be decided in this appeal, therefore, is whether on the facts set out in the stated case no reasonable court could have come to any other conclusion but that the presumption referred to in section 103(4)(b) was rebutted.

The contention of the appellant, both in the Special Court and in this Court, was that the agreement in question was entered into, not for the sole or main purpose of utilizing the assessed loss incurred by the appellant company in order to avoid liability on the part of that company for the payment of any tax on income, but solely or mainly for the purpose of ensuring that all benefits arising from the development of future townships by Dr. Rubenstein would accrue, not in favour of his estate, but for the benefit of his children through their

shareholding.../43

shareholding in U.S.M., and would thus not form part of his estate for estate duty purposes. At the same time, so it was contended, the purpose of the agreement was to take advantage of the benefits of the exemptions from undistributed profits tax enjoyed by the appellant company and Trico.

While it may readily be accepted that Dr. Rubenstein was anxious to arrange his affairs in such a way as to reduce the estate duty which would be payable on his death, that object could have been achieved by diverting his township development business to any company in which his children were the shareholders, such as a company with an issued share capital of only R3 instead of taking over, for his children, Charter's shares in U.S.M. for R30 000. The Special Court was, no doubt, correct in finding that -

> "'The alleged saving on possible death duties could be achieved through any company and is not particular to this company".

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The question is why the agreement in question, rather than any other, was entered into at the particular time. (Cf. Income Tax Case 1178, 35 S.A.T.C. 29). Why, it may be asked, were the purchasers of Charter's shares in U.S.M. prepared to pay R30 000 for the shares and R50 000 for the assessed loss incurred by the appellant company, if allowed, if the main or sole purpose of the agreement in question was the eventual saving of estate duty, particularly having regard to the fact that neither U.S.M. nor any of its subsidiaries were possessed of any assets at that time.

Undistributed profits tax is payable only on the amount by which the distributable income of a company exceeds the amount of the dividends distributed by it during any year of assessment. If the distributable income is distributed in full no undistributed profits tax is payable. No explanation appears from the stated case as to the apparent reluctance on

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the part of the group of companies to distribute its distributable income. Indeed, the ultimate shareholders, the children of Dr. Rubenstein, who held all the shares in U.S.M. for which they paid R30 000 (not taking into account the R50 000 they undertook to pay for the assessed loss if allowed) did not give any evidence at all as to what object, if any, they had in mind in entering into the agreement in question, and the Special Court was not favourably impressed with the evidence of Dr. Rubenstein. It is true that Dr. Rubenstein's children themselves took no part in the negotiations which led to the conclusion of the transaction and that they probably were not fully aware of the implications of the agreement, but they had to foot the bill and it would have been of some importance to know what they had in mind. If it is true that the companies were in need of cash money for the carrying on of their business, there is no explanation as to why distributed dividends

could.../46

could not have been re-invested in the companies by way of loans, and it would have been of some importance to know what Dr. Rubenstein's children thought about the matter.

On an annual income of R200 000 the appellant would, if the assessed loss were allowed, have saved approximately R200 000 in income tax over a period of three years. The saving in undistributed profits tax would have amounted to approximately R10 750 per annum. To have saved the sum of R200 000 in undistributed profits tax would have taken approximately 18 years. If the companies were in need of cash money a saving of R200 000 in income tax over a shorter period would have been an important consideration. Even if the saving in undistributed profits tax arising from the appellant's deficit of R664 166 on profit and loss account is taken into consideration, the saving in income tax over a short period still far exceeds the saving in undistributed

profits.../47

profits tax. In any event the position must have changed materially when the appellant became a public company, and the Special Court had "the impression that ab initio it was intended to make it a public company as was done on 29th July 1968".

The facts set out in the stated case show no more than that the contemplated saving in estate duty in the estate of Dr. Rubenstein, the avoidance of liability for the payment of undistributed profits tax by the group of companies, or the reduction of the amount thereof, and the saving of income tax by the utilization of the assessed loss incurred by the appellant, were all important considerations underlying the agreement of 10 March 1966. But that was insufficient to rebut the presumption under section 103(4) (b). It cannot therefore be said that no reasonable court could, on the facts set out in the stated case, have come to any other conclusion than that the sole or main purpose of the agreement was

not.../48

not the utilization of the assessed loss incurred by the appellant to avoid liability for the payment of income tax or to reduce the amount thereof. The appeal accordingly cannot succeed.

It is unfortunately yet again necessary to mention the inordinate delays in bringing appeals against determinations of a Special Court before this Court. The remarks of OGILVIE THOMPSON, C.J., in Palabora Mining Co. vs. Secretary for Inland Revenue 1973(3) S.A. 819 at p. 825, and the remarks made in other cases there referred to, have apparently not evoked any reaction from those mainly responsible for such delays. In the present case the hearing before the Special Court took place on 13 and 14 October 1970. The judgment of the Special Court was handed down on 28 January 1971. The stated case was only filed with the Registrar of the Special Court on 3 December 1974. It was only thereafter that the record on appeal was filed with the Registrar of

this.../49

this Court. The consent to appeal direct to this Court was signed by the parties in June 1971.

It seems clear that the delay in bringing this appeal before this Court was due to the inordinate delay in preparing the stated case which, apart from its annexures which required typing only, consisted of but 24 pages. The annexures, including the judgment of the Special Court, comprise 164 pages. Taking everything into consideration, such as the ordinary delays that occur in matters of this kind and staff shortages, it would seem difficult to justify a delay of four years in the preparation of the stated case in this matter.

Appeals of this kind usually raise issues of great importance to the Secretary and to the taxpayers concerned. Inordinate delays in obtaining a final decision on such issues not only cause embarrassment and inconvenience to the taxpayers concerned, but cast an unfavourable reflection upon the administration of justice in the Republic.

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In the circumstances it seems to us, and to the other members of this Division who have been consulted, that the time has arrived that serious consideration be given to affording a full right of appeal to the Secretary and to taxpayers concerned against all decisions of a Special Court. This would avoid the preparation of a stated case in every appeal, and thus the main cause for the delays in bringing such appeals before this Court. It will also avoid the difficult questions which sometimes arise as to whether the matter appealed against is a question of fact or a question of law.

The Registrar of this Court is directed to bring the above remarks to the notice of the Secretary for Inland Revenue and the Secretary for Justice.

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

D.H. BOTHA, J.A.

WESSELS, J.A.
TROLLIP, J.A.
CORBETT, J.A.
GALGUT, A.J.A. } Concur.