63/75

G.P.-S.59968—1970-71—2 500 J 219

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

(Provincial Division)
(APPELLATE Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

SECRETARY FOR INLAND REVENUE *Appellant,*

versus

EATON HALL (PTY) LTD. *Respondent*

Appellant's Attorney Dep. S.A.(Bmftn) *Respondent's Attorney* Naude & Naude
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate I.L.B. de Villiers *Respondent's Advocate* H Daniels
Advokaat vir Appelland I.L. Grindley-Ferris *Advokaat vir Respondent*

Set down for hearing on 11-9-75
Op die rol geplaas vir verhoor op

26/3/11

Coram: Botha, Wessels, Trollip, Corbett et Katzè JJA

De Villiers - 9.57 - 11.00, 11.20 - 11.35, 12.03 - 12.13

(I.T.S.C.) Daniels - 11.35 - 12.03,

C.A.U.

The Court allows the said appeal with costs, the order of the Special Court is set aside and the following order is substituted: "The appeal is dismissed and the assessment is confirmed."

Judgment

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf
25/6/76		

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE SECRETARY FOR INLAND REVENUE ..... APPELLANT

AND

EATON HALL (PROPRIETARY) LIMITED ..... RESPONDENT

Coram: Botha, Wessels, Trollip and Corbett, JJ.A. and Kotze A.J.A

Heard: 11 September 1975 Delivered: 25 September 1975

J U D G M E N T

Trollip, J.A.:

This appeal under the Income Tax Act, No. 58 of 1962, as amended, concerns the meaning of the words "the cost to the taxpayer of .... portion of any building"

erected .... /2

erected by him for use as an hotel by his lessee. Such cost is the basis for calculating certain allowances deductible under section 13 bis of the Act from the taxpayer's income. The crisp question for decision is whether or not the words cover the interest that is payable by the taxpayer before completion of the building and its use on moneys borrowed by him to pay for the cost of the erection.

The question arises in this way. The respondent owns a building which it lets for the purpose of the lessee carrying on therein the trade of an hotelkeeper. During May 1966 to December 1967 the respondent had a new wing to the building erected. The lessee took occupation of the new wing on 1 December 1967. But as he was unable to use it immediately for letting, it was agreed that the increase in rental for the entire premises should only operate from 1 March 1968. The cost of the new wing was financed by increasing the amount of an

existing .... /3

existing bond over the property. Respondent calculated the total cost of erection as being R377 161. That amount, however, included an item of R16 965 for interest paid up to 1 December 1967 on the additional amount borrowed under the bond. (This is the item with which this appeal is concerned.) For the year of assessment that ended on 28 February 1969 respondent calculated the allowances deductible from its income under section 13 bis (1)(d), section 13 bis (2) read with (3), and section 13 bis (7) read with (8), being allowances respectively of 2%, 2%, and 10% of "the cost", on the aforementioned sum of R377 161. The total deduction so calculated was R67 888. The Secretary, however, in his assessment for that year, excluded the item of R16 965 for interest and, in consequence, allowed such deduction in the sum of R64 835 only. Respondent's objection thereto was rejected, and it appealed to the Special Court, which upheld the appeal and set aside

the .... /4

the assessment. The Secretary has, by consent of the parties, appealed direct to this Court against that decision.

Section 13 bis was introduced in 1965 by Act No. 88 of that year as a concession to hotel-keepers and owners of hotel buildings to encourage them to better their premises by erecting new buildings or improving existing ones. Up till then proviso (ii) to section 11(e) had prohibited the deduction from income of any allowance for the depreciation of buildings or other structures of a permanent nature. Section 13 bis was then enacted. The provisions of sub-section (1), in so far as they are here relevant, read as follows:

> "Notwithstanding anything to the contrary contained in paragraph (ii) of the proviso to paragraph (e) of section eleven, there shall be allowed to be deducted from the income of any taxpayer for any year of assessment ending on or after the first day of January, 1964, an allowance equal to two per cent. of the cost .... to the taxpayer -

(d) .... /5

(d) of such portion -

(i) of any building .... the erection of which was commenced by the taxpayer on or after the first day of January, 1964; ....

as the Secretary is satisfied - (bb) was during such year let by the taxpayer and used by the lessee for the purpose of carrying on therein the lessee's trade of hotel keeper."

(It can be safely inferred that in the present case the Secretary was duly satisfied that the requirement in sub-paragraph (bb), just quoted, was duly fulfilled.)

For the sake of presenting fully the immediate context of sub-paragraph (d) I should also mention that the preceding sub-paragraphs (a), (b), and (c) grant the same allowance on "the cost to the taxpayer of any building the erection of which was commenced by the taxpayer" between certain specified dates and used or let by him for hotel purposes. The same allowance is also granted in

respect .... /6

respect of "the cost to the taxpayer of improvements (other than repairs)" to a building similarly used or let.

Section 13 bis (2) read with (3) grants an additional allowance (fixed by regulation at 2% for a one-star hotel) "in respect of the cost .... of any portion of any building" referred to in section 13 bis (1)(d), quoted above, provided that the requirements of the Hotels Act, 1965, as to registration and grading have been complied with. (In the present case they were duly complied with. The hotel in question was graded one-star.) A further allowance, called "the hotel building investment allowance", is afforded by section 13 bis (7)(d) read with (8), as amended, "in respect of the cost to the taxpayer .... of the portion of any building" that is referred to in section 13 bis (1)(d), quoted above. This allowance is 10% of the relevant cost.

Respondent .... /7

Respondent was entitled to deduct the allowances in section 13 bis (1)(d), (2) and (3), (7)(d) and (8), just mentioned, from its income. It is the calculation of the correct amount thereof that is in issue in this appeal.

The crucial words, common to each of these allowances, is therefore "the cost to the taxpayer of any portion of a building." (I shall henceforth, for brevity's sake, merely refer to "any building" as meaning any portion thereof.) What does that expression mean? Firstly, it is obvious from the context that "the cost of any building" means the cost of erecting that building. Secondly, in the absence of any definition in the Act of such cost one must look at its ordinary meaning. The Oxford English Dictionary defines "cost" as meaning:

> "That which must be given or surrendered in order to acquire, produce, accomplish, or maintain something; the price paid for a thing."

Hence "the cost to the taxpayer of the building" ordinarily means the price or consideration given or paid by him for

the .... /8

the erection of the building. It does not, therefore, include expenses incurred by the taxpayer in connection with the erection of the building unless, of course, they are part of the price or consideration paid for the erection. Thirdly, as counsel for the Secretary rightly pointed out, the use of the preposition "of" instead of a phrase with a wider connotation, like "in respect of", between "cost" and "any building" indicates that the connection between them must be direct and close; in other words, the expression comprehends the cost of erecting the building and nothing more. Fourthly, as counsel for the Secretary again rightly contended, that limited connotation is also manifested by the use of the physical, identifiable, concrete object of "any building" or "any improvements" instead of the abstract, gerundive concept of "building" or "improving" a structure. Thus, "the cost of building or improving" something is not as well delineated as "the cost of any building or improvements".

The .... /9

The former might well cover certain expenses incurred incidentally in building or improving a structure, whereas under the latter the cost is delimited by the very physical nature of the building or improvements.

All those considerations point in one direction, namely, that the ordinary, grammatical meaning of the words "the cost to the taxpayer of any building" in those provisions is that such cost is limited to the price or consideration given or paid by the taxpayer for the erection of the building. Hence there is no need to invoke the aid of any of the other canons of construction or the authorities canvassed in the arguments of counsel for the parties to ascertain its true meaning.

It follows that the interest paid by respondent on moneys borrowed to finance the cost of the new wing of its building is not covered by section 13 bis (1)(d) or the other provisions granting the relevant allowances.

It .... /10

It does not constitute part of the price or consideration given or paid by respondent for the erection of the new wing. It was paid to the bondholder who, as such, had nothing to do with the erection of that building. Indeed, the interest paid merely represents part of the cost of financing the cost of the building. As such it is not directly or closely connected with the price or consideration given or paid by respondent for the erection of the building. Any connection therewith is, at most, indirect. If it were to be covered by those provisions, it would mean that the taxpayer who borrows money to finance the cost of erection would get larger allowances than the taxpayer who uses his own money. That could hardly have been the Legislature's intention. And, as counsel for the Secretary pointed out, if the clear boundaries of "the cost to the taxpayer of any building" were breached by allowing the interest paid in the present

case .... /12

case to trespass, it would lead to other trespasses too. For example, the costs paid by the taxpayer to obtain a rezoning under a town-planning scheme to increase the height of his hotel building in order to enable him to add further storeys, would then also qualify to be included as "the cost to the taxpayer" of the further storeys. It would, in other words, open the way to the inclusion of all kinds of expenses incurred by the taxpayer incidentally to the erection of the building. Having regard to the object of the legislation and its language, I am sure that that was not the intention.

The fees paid to the architects and civil engineers in the present case in regard to the erection of the building were treated and allowed as part of the cost of erection. Counsel for respondent used this fact to support his argument. But they were probably directly and closely connected with the erection of the building; if

so .... /12

so, they would then have been correctly treated and allowed as part of the price or consideration paid by respondent for the erection of the building. The reference to these fees, therefore, does not assist the respondent.

The basis on which the Special Court upheld the appeal is epitomized in the following passage in its judgment:

> "Dit is gemene saak dat die algemene praktyk en elementêre begrip is dat die rente gedurende oprigting deel van die koste van die gebou is. Rekeningkundig is dit algemene gebruik. Enige rekenmeester of sakeman sal met die woorde 'koste vir die belastingpligte' net een ding verstaan en dit is wat dit gekos het om die gebou te voltooi en die rente is 'n integrale deel van die koste. Ek sien geen rede om van die gewone betekenis van die woorde af te sien nie."

It is not clear on what the dicta relating to accountancy or commercial practice and the ordinary meaning of the crucial words in such circles are based. No viva voce evidence was adduced at the hearing. Presumably the dicta were based on what was submitted by

the .... /13

the representatives of the parties at the hearing and the views held by the accountant and commercial members of the Special Court. But be that as it may, the point at issue - the correct interpretation of the relevant statutory provisions - was a "matter of law arising for decision before the court" which, according to section 83(15), had to be decided by the President of the Court, and the other members of the Court had no voice therein. Moreover, in deciding on the true meaning of those provisions, the President ought to have regarded the language used in those provisions and not accountancy or commercial practice. On that particular aspect the following statement by Centlivres, J.A. (later C.J.), in Sub-Nigel Ltd. v. C.I.R. 1948 (4) S.A. 580 (A.D.) at p. 588, is apposite and decisive :-

> "At the outset it must be pointed out that the Court is not concerned with deductions which may be considered proper from an accountant's point of view or from the point of view of a prudent trader, but merely with the deductions which are permissible according

to .... /14

to the language of the Act. See Joffe & Co. Ltd. v. Commissioner for Inland Revenue (1946, A.D. 157 at p. 165). In the present case it may be conceded that it would be in accordance with sound business principles for the Company to deduct the amount of the premiums paid by it in order to arrive at its nett profits. This consideration is, however, irrelevant: the only relevant matters in this case are the provisions of the Act which deal with permissible and non-permissible deductions. Cf. Pyott Ltd. v. Commissioner for Inland Revenue (1945, A.D. 128 at p. 135)."

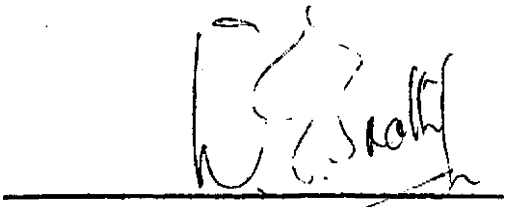
It follows that the determination of the Special Court was erroneous in law and must be set aside.

The Secretary was represented on appeal by senior and junior counsel. Despite the importance to the Secretary of having the question of law involved authoritatively decided, I do not think that the case, in all the circumstances, warrants that respondent should bear the costs of two counsel.

The appeal is upheld with costs. The

order ..... /15

order of the Special Court is set aside and the following order is substituted: "The appeal is dismissed and the assessment is confirmed."



W.G. Trollip, J.A.

Botha, J.A.)
Wessels, J.A.)
Corbett, J.A.) concur
Kotze, A.J.A.)