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.P.-S.51994—1976-77—3 000 (P) J 219

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

(APPELLATE Provincial Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

J. OVENSTONE Appellant,

versus

SEC. FOR INLAND REVENUE Respondent

Appellant's Attorney / *Prokureur vir Appellant* WEBBER & NEWDIGATE

Respondent's Attorney / *Prokureur vir Respondent* DEP STATE ATT

Appellant's Advocate / *Advokaat vir Appellant* MEYEROWITZ

Respondent's Advocate / *Advokaat vir Respondent* KING SC COMRIE

Set down for hearing on / *Op die rol geplaas vir verhoor op* 26 NOV 1979

I.T.S.C. 1

368 912

CORAM: TROLLIP AR, CORBETT AR, DIEMONT AR
MILLER AR GALGUT WAR

MEYEROWITZ : 9h46 - 11h00 11h20 - 12h45 16h05 - 16h15

KING 14h15 - 15h40 15h50 - 16h05

CORBETT 4.3.80 @ 9.45 AM

~~The appeal is ... with costs~~
The appeals are dismissed with costs including those relating to the employment of two Counsel

Writ issued / Lasbrief uitgereik	Date / Datum	Amount / Bedrag	Initials / Paraaf
Date and initials / Datum en paraaf			

Bills taxed—Kosterekenings getakseer

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

J. OVENSTONE .... Appellant

AND

SECRETARY FOR INLAND REVENUE .... Respondent.

Coram: TROLLIP, CORBETT, MILLER, DIEMONT, JJ.A. et GALGUT, A.J.A.

Heard: 26 November 1979.

Delivered: 4 March 1980.

JUDGMENT

TROLLIP, J.A. :

This is a twofold appeal by the appellant tax-payer under the new section 86A of the Income Tax Act, No. 58 of 1962 ("the Act"), against the decisions of the Cape Income Tax

Special Court. The learned President of the Court (SCHOCK, J.) granted leave to appeal direct to this Court under section 86 A(5). In its first decision the Special Court held that the Secretary (respondent) justifiably invoked the anti-tax avoidance section 103 by including certain dividends accruing to a trust in the taxable income of the appellant and assessing him to tax accordingly in the tax years ending in February 1970, 1971, 1972 and 1973. In its second decision the Special Court held that certain dividends received by appellant's two minor sons during the tax years ending on 28 February 1969 and 1970 were also rightly included by respondent in appellant's taxable income by reason of section 7(3).

A. The issue in respect of section 103.

The following relevant facts were common cause or duly proved.

1. Appellant is a member of a family which controls a group

of public companies ("the Group") interested mainly in the fishing industry in South West Africa ("S.W.A."). He was a director of these companies. From them he derived income in the form of salaries, director's fees, interest, rentals, and especially dividends. At all material times he was a wealthy man, his assets exceeding R1 million.

2. Of those companies mentioned in the evidence Ovenstone South West Investments Ltd. ("OSWIL") was a prosperous company operating in S.W.A. Shares in it were held by the Ovenstone family's holding companies, Ovenstone Holdings (Pty.) Ltd., registered in the Republic, and Scotia Investments (Pty.) Ltd. ("Scotia"), registered in S.W.A. Ovenstone Industries Ltd., also registered in the Republic, was dormant until about 1968.

3. Prior to 1969 appellant held 8146 shares in Scotia on

which he received substantial dividends. Since he was ordinarily resident in the Republic, and the source of Scotia's income from which its dividends emanated was in S.W.A., these dividends in his hands were exempt from income tax by reason of section 10(1)(k)(vi) of the Act. He also held 2267 shares in Ovenstone Industries Ltd.

4. In 1966 the administrative and financial director of the Group, one Lombard, suggested to appellant (then aged about 46 years) that he should establish a trust for the benefit of his four children, that he should sell his Scotia shares to the trust at a price equal to their then value, and that the purchase price should be paid to him out of the dividends received by the trust on the shares. Apart from the benefit to the children, the purpose of the scheme was to save estate duty that would otherwise become payable on appellant's death, especially as it was anticipated that

the ..../5

the Scotia shares would appreciate in value in the future. Appellant approved of the scheme. Lombard and another Group official, Laubscher, then discussed it with Attorney Findlay on 23 November 1966. The latter (according to the note on his file - he has since died) stated that he would draw the trust deed on receipt of the necessary instructions and information.

5. The evidence established, and the Special Court correctly found, that at that stage appellant's decision to form the trust was not aimed at avoiding any liability for income tax, for none was then payable or expected to become payable by him in respect of the dividends on his Scotia shares.

6. Despite Mr Findlay's reminder to Laubscher on 28 February 1967, nothing was thereafter done for some time about establishing the trust. On 9 February 1968, however, Laubscher did see

Attorney Tunbridge, who had taken over the matter from Mr Findlay. They had a general discussion about it, Laubscher saying that he would furnish further instructions "in due course". That was not done until August 1968. The trust deed was then drawn up, a special meeting of Scotia was held at which its articles of association were amended to facilitate the transfer of appellant's shares to the trust, and on 11 September 1968 the trust deed was signed.

7. The trust, called "The John Ovenstone Trust" (which I shall refer to simply as "the Trust") was actually constituted by appellant's mother, as "the Donor", donating R100 to it. That was done on the advice of Mr Tunbridge for possible future tax advantages. Nothing, however, turns on that in the present case. The beneficiaries were appellant's four children. The whole of

the income of the Trust was payable to them and they were to get the capital on appellant's death. The trustees were appellant, his brother, and Ovenstone Holdings (Pty.) Ltd. Clause 15 recorded *inter alia* that the appellant intended "that the Trust shall acquire further assets by purchase", and empowered the trustees to borrow monies to pay for them. This, according to Mr Tunbridge, envisaged the imminent acquisition by the Trust of the Scotia shares.

8. During 1968 the Group underwent reorganisation under the guidance of the appellant's son, Andrew Ovenstone, as its investment manager and, later, its managing director. *Inter alia* Ovenstone Industries Ltd. acquired 10% of the shareholding in OSWIL from Ovenstone Holdings (Pty.) Ltd. for which it became indebted to the latter for a substantial amount. That precluded it from paying any dividends until 1973.

9. As will presently appear, nothing further was done about the Trust until March 1969. Thus, about $2\frac{1}{3}$ years had elapsed from the time that the scheme was first mooted and decided on. Various reasons were advanced in evidence for this inordinate delay: the same kind of trust was to be established for appellant's brother and it was given priority; the reorganisation of the Group in 1968; and the dilatoriness of Laubscher, who had since left the Group. They are not convincing reasons in explaining away the tardiness in implementing the scheme. I think that it is far more probable that, as the Special Court said, "appellant simply let the matter drift". Indeed, appellant when testifying admitted that he did not "push Lombard at all to carry out the idea". And Lombard also admitted that "there didn't seem to be any pushing reason" to implement the scheme faster or earlier.

10. However, in March 1969, appellant became aware that Parliament was about to repeal section 10(1)(k)(vi) of the Act. He fully appreciated that in consequence the Scotia dividends to be received by him during the tax year ending in February 1970 and thereafter would now become taxable, thereby increasing his liability for income tax very substantially. The actual increase would have been about R39 000 for the tax year. No wonder (as he admitted) that he then told Lombard, "It's time you got a move on with the scheme", or words to that effect. And indeed things then did begin to happen -

(a) In March 1969 appellant caused Sandwich Harbour Investments (Pty.) Ltd. ("Sandwich Harbour") to be registered in S.W.A. He was its sole director and shareholder, holding its only two issued shares of R1 each.

(b) Thereafter, in September 1969, appellant sold his shares mentioned in paragraph 3 above to Sandwich Harbour:

8146 shares in Scotia for	R631 630,70
2267 shares in Ovenstone Industries Ltd. for	54 762,30
	R686 393,00

These prices represented the fair or market value of the shares. They were credited to his loan account in Sandwich Harbour. The contract of sale was verbal. The loan carried no interest and was unsecured.

(c) Appellant thereupon sold his two shares in and loan account with Sandwich Harbour to the Trust for R686 050, i.e., substantially the same amount as in (b) above. This amount was credited to his loan account with the Trust. In effect it was to be paid off from the dividends received by the Trust from Sandwich Harbour. Again the contract was verbal and the loan was unsecured and interest free.

11. Sandwich Harbour paid the following dividends to the Trust out of the dividends it received on the Scotia shares (and ultimately, I presume, also out of the dividends on the Ovenstone Industries Ltd. shares):

1970	R95 217
1971	76 412
1972	44 727
1973	28 482

This .... /11

This income of the Trust was distributed to appellant's four children (the beneficiaries) who, in turn, lent it back to the Trust to be used for reducing appellant's loan account.

12. In the result, as the Special Court correctly found -

> "appellant received an amount equivalent to the dividends paid in respect of the shares he parted with, not as taxable income (as in the case where he remained owner of the shares) but as part payment for the purchase prices of the shares and therefore as capital completely free of income tax."

Appellant's anticipated liability for tax that would have ensued on the repeal of section 10(1)(k)(vi) and which was avoided by carrying out the aforementioned scheme was substantial, namely:

1970	R38 619
1971	27 314
1972	9 798
1973	4 755

That concludes the summary of the relevant facts.

Subsections (1) and (4) of section 103, before their amendment by section 14(1) of Act No. 101 of 1978, have often been quoted verbatim in previous cases. Despite that I think it is necessary for the purposes of this judgment, at the very least for the sake of easy and ready reference, to quote their relevant parts in full again. Section 103(1) read:

> "Where any transaction, operation or scheme (whether entered into or carried out before or after the commencement of this Act, and including a transaction, operation or scheme involving the alienation of property) has been entered into or carried out which has the effect of avoiding or postponing liability for any tax .... on income .... or of reducing the amount thereof, and which in the opinion of the Secretary, having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out -
>
> (i) was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; or
>
> (ii) has created rights or obligations which would not normally be created between persons dealing at arm's

> length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question,

and the Secretary is of the opinion that the avoidance or the postponement of such liability, or the reduction of the amount of such liability was the sole or one of the main purposes of the transaction, operation or scheme, the Secretary shall determine the liability for any tax .... on income and the amount thereof as if the transaction, operation or scheme had not been entered into or carried out or in such manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such avoidance, postponement or reduction."

And section 103(4) -

"Any decision of the Secretary under sub-section (1) ..... shall be subject to objection and appeal, and whenever in proceedings relating thereto it is proved that the transaction, operation, scheme .... in question would result in the avoidance or the postponement of liability for payment of any tax ... on income or in the reduction of the amount thereof, it shall be presumed, until the contrary is proved -

(a) in the case of any transaction, operation or scheme, that its sole or one of its main purposes was the avoidance or the postponement of such liability or the reduction of the amount of such liability; or

(b) ...."

According .... /14

According to <u>S.I.R. v. Geustyn, Forsyth and Joubert</u> 1971 (3) S.A. 567 (A) at pp. 571 E - 572 A the four requirements of section 103(1) that have to be fulfilled before its provisions can be successfully invoked to nullify, wholly or partly, the taxpayer's attempt to avoid his liability for income tax can be summarized (very briefly for the purposes of the present case) as follows:

(a) A transaction, operation or scheme (referred to hereinafter compendiously as a "scheme") must have been entered into or carried out by the taxpayer.

(b) Its effect was to avoid his liability for income tax. (That means an anticipated liability - <u>C.I.R. v. Smith</u> 1964 (1) S.A. 324 (A) at p. 333 E - G, and <u>Hicklin v. S.I.R.</u> 1980 (1) S.A. 481 (A) at p. 492 F - H).

(c) Having regard to the circumstances under which the scheme was entered into or carried out, either of the criteria of normality prescribed in paragraphs (i) and (ii) of section 103(1) was lacking.

(d) The avoidance of such tax liability was the sole purpose or one of the main purposes of the scheme. (The test here is subjective, depending upon the taxpayer's intention or purpose in entering into or carrying out the scheme - see S.I.R. v. Gallagher 1978 (2) S.A. 463 (A) at p. 471 B - E).

In the present case prior to and at the hearing in the Special Court appellant conceded that requirements (a) and (b) had been fulfilled, but he disputed the fulfilment of (c) and (d). The Special Court held that, according to the facts it accepted as proved, both (c) and (d) were also fulfilled. On appeal before us appellant's counsel wisely did not contest the fulfilment of (c); he concentrated his argument on the alleged non-fulfilment of (d). Because appellant's scheme was rightly conceded to have had the effect or result of avoiding his anticipated liability for income tax (see requirement (b)), the onus was cast upon him by section 103(4) of proving that such avoidance was not his sole purpose or one of his main purposes of the scheme (requirement (d)).

Appellant's case on appeal was that he had discharged that onus by proving that, when the scheme was entered into between 1966 and 1968 (see paragraphs 4, 5, and 6 above), his sole purpose was the saving of estate duty, that the avoidance of income tax was not one of his purposes, that however much the implementation of the scheme was delayed, it was never abandoned, and that the transactions or operations set out in paragraph 10(a), (b), and (c) above were carried out in 1969 merely in pursuance of that scheme and as its culmination solely for the purpose of saving estate duty.

There is considerable force in that argument. The Special Court, however, rejected it. Its reasons are epitomized in the following passage from its judgment (my italics for emphasis):

"Appellant rather unconvincingly and without any real confidence, we thought, sought to aver that his purpose in transferring his assets for the benefit of his children had not changed since 1966, namely that - in so far as it was directed to tax saving - it was solely to avoid estate duty. We completely reject this. Whatever may have happened before March 1969, we have no hesitation whatsoever in concluding in the circumstances set out above that a scheme was embarked upon and implemented by appellant in March 1969, one of its main objects being to avoid income tax."

Those dicta, especially the italicized part, would seem to indicate that, in the Special Court's view, appellant's transactions or operations in 1969 constituted a new scheme. There is some merit in such an approach. For what was done in 1969 was somewhat different from what was envisaged under the 1966/1968 scheme. Under the latter scheme appellant's Scotia shares were to be sold direct to the Trust (see paragraphs 4 and 7 above). But in 1969 Sandwich Harbour was interposed, appellant's Scotia and Ovenstone Industries

Ltd. shares were sold to this new company, and his shares in and loan account with it were then sold to the Trust (see paragraph 10 above). The reason for these deviations from the original scheme was explained, albeit not very clearly, in the evidence. I gather from it that they were mainly due to the reorganisation of the Group in 1968. Be that as it may, the evidence as a whole does, I think, establish that the original scheme was never abandoned by appellant. That the control and benefit of the Scotia shares were in fact ultimately vested in the Trust confirms that. It also tends to show that the original scheme was in substance carried out in 1969, the deviations just mentioned being merely "refinements" thereof (as counsel called them). All that negatives any suggestion that the transactions or operations in 1969 constituted a new scheme.

However, for reasons that follow that conclusion does not further appellant's case. I proceed to take a closer look at section 103(1). It appears from its provisions that the question whether or not the scheme in question is hit by them must be answered by reference to the effect and purpose of the scheme and the circumstances surrounding it at the time it is implemented or carried out, and not at the time it was formulated, i.e., conceived, decided or agreed upon, or otherwise evolved. For it is only when it is implemented or carried out that it becomes a practical reality concerning the *fiscus*; in particular, it is only then that its purpose and effect in respect of the taxpayer's liability for income tax arises for consideration. True, section 103(1) repeatedly speaks of "any transaction, operation or scheme *entered into or carried out*" (my italics). But "entered into" there does not mean "formulated" in the abovementioned sense. Because of its context it has, I think, a connotation of implementation that is similar to "carried out". Probably both expressions were used because it was considered that "carried out" is more appropriate to connote the implementation of a "scheme", while "entered into" is more apposite to connote the implementation (i.e., the taxpayer's actually engaging in) of a "transaction" or "operation" - cf. The Concise Oxford Dictionary s.v. "enter into", "transaction", and "operation". That approach is supported by the Afrikaans text - "n transaksie, handeling of skema aangegaan, verrig of uitgevoer". It will be observed that there three verbs instead of two are used. And the appositeness of each of them to each of their respective preceding subject-nouns is most striking; "n transaksie aangegaan, handeling verrig, skema uitgevoer."

It follows therefore that, even if the purpose or effect of the scheme when it is formulated is not to avoid liability for tax, it may have that effect or that may become one of the taxpayer's main purposes when he subsequently carries it out, thereby rendering section 103(1) applicable if its other requirements are fulfilled (cf. 35 S.A.T.C. 29 at pp. 36/7 per CORBETT, J. as he then was).

To advert now to the facts of the present case. The effect and purpose of appellant's scheme when it was formulated in 1966/1968 was not to avoid any anticipated liability for income tax, for there was then no such liability, actual or prospective, in respect of the Scotia dividends (see paragraph 5 above). The scheme was, however, allowed to drag on until 1969 without being implemented (paragraph 9 above). The sudden, unexpected announcement in Parliament in March 1969 of its intention to repeal the exemption from income tax on dividends received from S.W.A. companies, hitherto afforded by section 10(1)(k)(vi) of the Act, galvanized appellant into immediate action (paragraph 10 above). The reason was that he now faced substantial taxation in respect of his Scotia dividends. But for that, the past comparative inaction in respect of the implementation of the original scheme might possibly have continued for some time in the future. And because of that, the original scheme with its refinements was then carried out in 1969 before any Scotia dividends accrued to appellant in the tax year ending in February 1970. That resulted in appellant avoiding tax of some R39 000 for that year. Apropos of such tax avoidance appellant was cross-examined at the hearing and gave the following answers -

"I say that you were faced with the situation: you became aware in March 1969 that whereas you paid very little income tax in the past, you were now going to pay considerable income tax .... but the question is: did you then consider ways of reducing your liability for income tax? - Well, obviously I would have considered ways of reducing my income tax.

You were also aware that if this scheme was implemented, your liability for income tax as far as the South West African dividends are concerned, would fall away? - Right.

....

After March 1969, did you try to hurry things up a bit? - I talked to Mr Lombard: What's happening here? It's time you've got to move-on with it.

I ask you: Wasn't the reason for this the fact that you realised if it was going to drag on for another three years you were going to have to pay tax on that South West African (dividend income)? - Well, that certainly would be a reason, yes."

The irresistible inference from all the above facts and evidence is this. Whereas appellant's sole purpose in originally formulating the scheme was the saving of estate duty, that and the additional purpose of now avoiding the anticipated, new liability for income tax on the dividends in question probably became his two main purposes when he hurriedly carried out the scheme in 1969. At any rate, because that resulted in the avoidance of such liability, the onus rested on appellant under section 103(4) to prove that the latter was not then one of his main purposes; and he certainly failed to discharge that onus. I therefore arrive at the same conclusion as the Special Court, although possibly by a somewhat different route, that requirement (d) of section 103(1) was also fulfilled.

It may seem hard on appellant that by not carrying out his scheme before March 1969 he became vulnerable to the application of section 103(1). But that does not assist him, for equitable considerations do not ordinarily operate in determining liability for income tax. Appellant's counsel understandably also posed the question, when appellant heard in March

1969 of the intended repeal of the exemption, what was he supposed to do with his scheme that had already been formulated? It is unreasonable, said counsel, to expect of him that he should then have scrapped it. The question is, however, academic for appellant then hurriedly implemented it with the consequences already mentioned. Possibly, if appellant had proved that, irrespective of the new, anticipated liability for income tax, the scheme would in any event have been implemented in due course by, say, the beginning of the 1970/1971 tax year, the application of section 103(1) might only have been justified for the tax year ending in February 1970 and not for the succeeding tax years (cf. 35 S.A.T.C., supra, at p. 37). I express no firm view on this aspect, for this was not the case presented in either Court for appellant.

The appeal on the issue relating to section 103 therefore fails.

B. <u>The issue in respect of section 7(3) of the Act.</u>

These are the facts relating to this issue. Appellant was the joint managing director of Buitesee Viskorporasie Bpk. ("Buitesee"), a company registered in the Republic. Some time before the tax year ending on 28 February 1969 250 000 shares of 50c each in Buitesee were offered to appellant at par by way of a private placing. He took up 130 000 of them himself and placed the remainder with his 4 children (25 000 each), two of whom were minors, and the Group engineer (20 000). To enable them to take up the shares he lent each of them the required amount of money R12 500 to each of his children) at the same rate of interest that the bank would charge him for borrowing the money to enable him to make these loans. This rate was initially 8½% p.a. It was envisaged that the loans with interest would be repaid out of the dividends received on the shares. The appellant described the loans as "a family transaction". They were made without security, since the children then had no assets of their own. They all took up and paid for the shares. In addition appellant's mother donated each of his sons 5 000 Buitesee shares. During the tax year ending on 28 February 1969 appellant's two minor children received R6 000 in dividends from Buitesee in respect of their shares. During the following tax year ending on 28 February 1970 one of the children ceased to be a minor and the other received R5 800 in such dividends. (It is not clear from the record whether the above dividends in these two tax years related to the 25 000 or 30 000 shares held by each minor. The respondent seems to have treated them as relating to the former and I shall do the same.) In each of those tax years respondent (the Secretary), relying on section 7(3), added those dividends to appellant's taxable income and assessed him for tax accordingly. Appellant objected thereto but respondent disallowed his objection. Thereafter the Special Court dismissed his appeal and confirmed such assessments.

Section 7(3) reads:

> "Income shall be deemd to have been received by the parent of any minor child, if by reason of any donation, settlement or other disposition made by that parent of that child -
>
> (a) it has been received by or has accrued to or in favour of that child or has been expended for the maintenance, education or benefit of that child; or
>
> (b) it has been accummulated for the benefit of that child."

From the beginning of the dispute respondent maintained that section 7(3) applied because appellant's loan to each of the minor children was a "disposition" by him "by reason of" which the abovementioned dividend income was received by them.

Appellant conceded that such income was received by them "by reason of" the loans, but he has throughout maintained that the loans were not "dispositions" within the meaning of that word in the subsection, which was therefore inapplicable. The Special Court held that each loan was a "disposition". It did not, however, define the word. The learned President inclined to the view that no justification existed for limiting its ordinary, wide connotation. He however assumed without deciding in appellant's favour that that connotation should be limited to a disposition for an inadequate consideration or to one containing an element of bounty, which in either case would therefore exclude a <u>bona fide</u> commercial transaction. On that assumption the Special Court held against appellant on the ground that each loan was for an inadequate consideration, contained an element of bounty, and was not a <u>bona fide</u> commercial transaction.

Since "disposition" is not defined in the Act or section 7 I start the inquiry by looking at its ordinary meaning. That is undoubtedly very wide. The relevant meanings attributed to it in the <u>Oxford English Dictionary</u> are:

> "The action of disposing of; putting away, getting rid of, making over, etc. (see DISPOSE v. 8)".

And the appropriate meaning of the verb "dispose of" in paragraph 8(c) is:

> "To make over or part with by way of sale or bargain, sell."

<u>Webster</u>'s <u>Third New International Dictionary</u> is more explicit in respect of "dispose of". It is thus defined in 2a:

> "to transfer into new hands or to the control of someone else (as by selling or bargaining away)."

And "disposition" -

"placing elesewhere, a giving over to the care or possession of another, or a relinquishing."

Die Afrikaanse Woordeboek says of "beskikking", the Afrikaans equivalent for "disposition" -

"5 (jur.) Enige regshandeling t.o.v. goed."

Hence, "disposition" in its ordinary, wide sense would include a loan of money (mutuum) even though the borrower has to repay an equivalent sum, for the lender parts with, gives or makes over the rights to or dominium of the money to the borrower when it is advanced to him. Voet 12.1.14 (Gane's Translation, vol. 2, p. 768) puts it lucidly:

"The effect of a loan on the side of the lender is that both the ownership in and the risk of consumable things lent passes to the receiver. It is settled that in loan an alienation of the articles lent takes place, and that not the articles themselves which were measured, weighed or counted out, but only others like them ought to go back to the lender."

See .... /32

See also McGain v. F.C. of T. 13 Australian Tax Decisions 556 at p. 560.

For appellant, however, it was contended that in the critical phrase in section 7(3), i.e., "any donation, settlement or other disposition", the word "disposition" has to be construed ejusdem generis with the preceding words. Accordingly, so it was submitted, its meaning should be restricted to a disposal of property made under "a unilateral contract or one with an element of gratuity and not a bilateral or onerous contract" (quotation from the heads of argument).

The same phrase "any donation, settlement or other disposition" also occurs in the succeeding subsections (4), (5), and (6) of section 7. It must have been used in the same sense in those provisions too. (Cf. Steyn, Die Uitleg van Wette, 4th ed., p. 132). They do afford some assistance, I think, in construing "disposition". Hence it is also necessary to quote them. (Subsection (5) is new, having been substituted by section 9 of Act No. 55 of 1966, but the change of wording does not affect my reasoning.) The subsections read:

> "(4) Any income received by or accrued to or in favour of any person, by reason of any donation, settlement or other disposition made by any other person, shall be deemed to be the income of the parent of such minor child, if such parent or his spouse has made a donation, settlement or other disposition or given some other consideration in favour directly or indirectly of the said other person or his family.
>
> (5) If any person has made any donation, settlement or other disposition which is subject to a stipulation or condition, whether made or imposed by such person or anybody else, to the effect that the beneficiaries thereof or some of them shall not receive the income or some portion of the income thereunder until the happening of some event, whether fixed or contingent, so much of any income as would, but for such stipulation or condition, in consequence of the donation, settlement or other disposition be received by or accrue to or in favour of the beneficiaries, shall, until the happening of that event or the death of that person, whichever first takes place, be

deemed to be the income of that person.

(6) If any deed of donation, settlement or other disposition contains any stipulation that the right to receive any income thereby conferred may, under powers retained by the person by whom the right is conferred, be revoked or conferred upon another, so much of any income as in consequence of the donation, settlement or other disposition is received by or accrues to or in favour of the person on whom that right is conferred, shall be deemed to be the income of the person by whom it is conferred, so long as he retains those powers."

From all those provisions and subsection (3), it is manifestly clear that "disposition" was not intended to bear its wide, unrestricted meaning of any making over, parting with, or transferring of property to another. For that would then include a disposition of property made under a bona fide commercial, business, or at arm's length contract for full or fair consideration in money or money's worth (hereinafter referred to as "due consideration") to not only a minor child (subsections (3) and (4)) but also to any other person (subsections (4), (5), and (6)). It is inconceivable that the legislature could have intended by those subsections to hamper persons who wish to enter into contracts of that kind. (Cf. Joss v. S.I.R. at pp. 16/17 of the as yet unreported judgment of the Full Bench of the Transvaal Provincial Division delivered on 2 November 1979.) The transactions the legislature seems to have had in mind in enacting subsections (3) - (6) are those in which a taxpayer seeks to achieve tax avoidance by donating, or disposing of income-producing property to or in favour of another under the therein specified conditions or circumstances, thereby diverting its income from himself without his replacing or being able to replace it (cf. Estate Dempers v. S.I.R. 1977 (3) S.A. 410 (A) at pp. 421 B - F). But if he receives due consideration for the disposition, theoretically he is able to replace such income, and in practice he often does, by using or investing the consideration. In those circumstances no reason exists at all why the legislature should have wished to deem that income derived from the property disposed of should continue to be that of the disposer. Moreover, in a disposition of property for due consideration any income derived by the recipient therefrom would usually not be "by reason of" (see subsections (3) and (4)) or "in consequence of" (see subsections (5) and (6)) such disposition, but rather by reason of, in consequence of, the consideration given therefor. Lastly, that the disposees of the disposition under subsection (5) are called "beneficiaries" indicates that a disposition for due consideration was not intended to be covered by the critical phrase, for the term is most inappropriate in such a case. And the reference to the stipulations in subsections (5) and (6) relating to the deferment, revocation, or transference of income derived from the property disposed of also points in the same direction: stipulations of that kind would hardly feature in dispositions for due consideration. For all those reasons it is quite safe to conclude that "disposition" in the critical phrase in those subsections was not intended to have its wide, unrestricted connotation.

That being so, what is the limitation that must be imposed upon its meaning? In view of that uncertainty, the associated words in the critical phrase, i.e. "donation" and "settlement", can legitimately be looked to for assistance. _Noscitur a sociis_.

In a donation the donor disposes of the property gratuitously out of liberality or generosity, the donee being thereby enriched and the donor correspondingly impoverished, so much so that if the donee gives any consideration at all therefor, it is

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not a donation (see The Master v. Thompson's Estate 1961 (2) S.A. 20 (F.C.) at pp. 24F - 26C, 48F - 49C, where all the authorities are collected). It can therefore be regarded as a unilateral contract in the sense that the donor is the only party upon whom any obligation lies. In a "settlement" the property is usually disposed of upon specific terms and conditions, set out in a deed of settlement, to or through the medium of a trustee or trustees for the benefit of some person, or for the benefit of persons in succession as in a *fideicommissum* (see Webster's Dictionary, *supra*, and Sisson's S.A. Judicial Dictionary, s.v. "settlement"). As far as the beneficiaries are concerned a settlement is also generally made gratuitously out of liberality or generosity in the sense that no consideration usually passes from them to the settlor for the benefits conferred on them. "Settlement" is thus usually of the same genus as "donation". It is probably separately mentioned in the critical phrase because in form, substance, or effect it may sometimes not be regarded as a true donation. For example, where the recipients of the property are trustees who are not themselves enriched by the settlement. That the trustees are, in terms of the settlement, to be remunerated for their services as such, does not detract from the settlement being gratuitous. But because they obligate themselves to perform those services, the settlement is not a unilateral contract. True, consideration may sometimes pass for a settlement, but the kind of "settlement" envisaged by the critical phrase, especially by reason of its being closely associated with "donation", is a gratuitous one or one that is gratuitous to an appreciable extent. For if a settlement is made for due consideration, it would, in reality be a purely

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commercial or business transaction, which, for reasons already given, would fall outside the scope of section 7(3) - (6).

Hence, the words "donation, settlement or other disposition" all have this feature in common: they each connote the disposal of property to another otherwise than for due consideration, i.e., otherwise than commercially or in the course of business. "Donation" and "settlement" have this further feature in common: the disposal of property is made gratuitously or (occasionally in the case of a "settlement") gratuitously to an appreciable extent. Since "disposition", the general word that rounds off the critical phrase, was not intended to have its wide, unrestricted meaning, I think that this is an appropriate situation in which to circumscribe its scope by extending that common element of gratuitousness to it too by the _ejusdem generis_ or _noscitur a_ sociis rule. The critical phrase should, in other words, be read as "any donation, settlement or other similar disposition." So construed, "disposition" means any disposal of property made wholly or to an appreciable extent gratuitously out of the liberality or generosity of the disposer. It need not flow from a unilateral contract for that is not necessarily a common element of a "donnation" and "settlement". That a "disposition" need not be wholly gratuitous and is not restricted to any particular form of disposal of property differentiates it to some extent from a "donation" and "settlement". To the extent, however, that it does overlap either of the latter that is quite understandable and acceptable as having been done ex abundanti cautela in these anti-tax avoidance subsections of section 7. For "donation" and "settlement" are technical terms of the law; whether a particular disposal of property constitutes a true "donation" or "settlement" may give rise to difficulty and contention; and the legislature probably used the more general, comprehensive word "disposition" for the sake of achieving clarity and certainty and in order to eliminate any such problems (cf. Caseley, N.O. v. Minister of Defence 1973 (1) S.A. 630 (A) at p. 639 B - D).

The aforegoing construction of the critical phrase accords, I think, with the intention of the legislature as manifested in section 7(3) - (6). This aspect has already been mentioned earlier in this judgment. That intention was to hit at certain gratuitous disposals of property whereby the taxpayer diverts from himself the income derived therefrom without replacing or being able to replace it fully or at all. Subsections (3) and (4) refer specifically to a minor child because a taxpaying parent, out of natural affection, would be prone to effect such a disposal in the child's favour. The use of the words "the beneficiaries" of "any donation, settlement or other disposition" in subsection (5) also tends to support that construction. "Beneficiaries" is a most apt term to use in relation to a disposition that is wholly or to an appreciable extent gratuitous. And it would also not be surprising to find in such dispositions the kind of stipulations in subsections (5) and (6), previously referred to, relating to the deferment, revocation, or transference of income derived from the property disposed of.

Turning now to the authorities I should mention that the decisions in 13 S.A.T.C. 204 and 15 S.A.T.C. 238, dealing with the provision in question, accord with the above construction to this extent: in effect the ejusdem generis rule was applied

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in each and "disposition" was held to mean a gratuitous one. In Joss v. S.I.R., supra, the T.P.D. also applied the rule to the extent that "disposition" does not cover a disposal of property for "full value in money or money's worth" - see pages 22/23.

Some cogent support for my above approach is also to be found in Bulmer v. I.R.C. 1967 Ch. 145. The decision concerned the meaning and application of the definition of "settlement" in section 411(2) of the English Income Tax 1952, in a context somewhat similar to, albeit more elaborate than, the context of our section 7. "Settlement" was there defined as including "any disposition, trust, covenant, agreement, or arrangement". PENNYCUICK, J., said (p. 165) that some restriction had to be implied on the otherwise wide scope of that definition. He consequently held that it did not cover a bona fide commercial transaction without any element of bounty. That view was accepted by the Court of Appeal in I.R.C. v. Plummer (1978) 3 All E.R. 513. It was there pointed out (p. 523 b-d) that "commercial transaction" is not used in any restricted sense as one effected only in the course of commerce or trading; it means simply any transaction in which there is no element of bounty; hence, a transaction effected for full consideration in money or money's worth was held not to be a "settlement".

On the other hand, Barnett v. C. of T. 1959 (2) S.A. 713 (F.C.) contains dicta that are against my above conclusion. It therefore behoves me to deal with them in some detail. That decision turned on the meaning of section 9(3) of the Federal Income Act, No. 16 of 1954, cast in substantially the same mould as our section 7(3). The critical phrase there was "any gift, donation, settlement or other disposition". The three learned Judges expressed divergent views for dismissing the appeal. They were agreed, however, that the ejusdem generis rule could not be invoked to construe "disposition", mainly because a "settlement" is not necessarily gratuitous - it can be made for consideration (pp. 715H, 719A, 724 A-F). In their view "disposition" should not, therefore, be restricted to a gratuitous one (ibid.). True, as I have already said, a "settlement" can be made for some consideration, but that is not usual. And in any event, for reasons already given, that does not preclude the application of the ejusdem generis rule to the extent I have mentioned above. Moreover two of the learned Judges of the Federal Court were undoubtedly influenced (see pp. 719 A-E, 727H) by the Privy Council decision on the meaning of "disposition" in Ward v. C.I.R. 1956 A.C. 391.

With great respect I do not think that that decision is a safe guide to the proper construction of "disposition" in the critical phrase. Section 5(1) of the New Zealand Death Duties Act, 1921, deemed that the estate of a deceased person should include, *inter alia*,

> "(j) Any property comprised in any settlement, trust, or other disposition of property made by the deceased .....
>
> (ii) Which is accompanied by .... a contract for any benefit to the deceased for the term of his life or the life of any other person."

Prior to his death the deceased had transferred property to his four sons in consideration for which they undertook to pay him an annuity for life, and after his death, an annuity to his wife. It was contended that the transfer, being for full consideration, was a commercial transaction of bargain and sale, and was therefore not a "disposition of property" within the meaning of those words in section 5(1)(j). The Privy Council rejected that contention.

Lord MORTON said at p. 400:

"In their Lordships' opinion, the transfer exactly answers the description of a 'disposition of property .... Which is accompanied by .... a contract for any benefit to the deceased for the term of his life' .... in their view the words ('disposition of property') in their ordinary meaning are wide enough to include this transfer .... the word 'disposition' is not a technical word, but an ordinary English word of very wide meaning, and their Lordships see no good reason for giving to it a restricted meaning in para. (j). In their opinion, any transfer of property which possesses the characteristics described in .... sub-para. (ii) .... is a disposition to which para. (j) applies."

The context of "disposition" in the New Zealand statute is quite different from that in our and the Federal sections. Apart from the fact that it deals with a different subject matter, in the critical phrase in the N.Z. statute "donation" or "gift" is not mentioned; and in our and the Federal sections there is no equivalent to subparagraph (ii) which obviously influenced

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the view of the Privy Council. Besides, in our section 7(3) at any rate, there are very good reasons - already mentioned - for restricting the ordinary wide meaning of "disposition" so as to exclude a commercial transaction, i.e., one for due consideration. In my view, therefore, Ward's case is clearly distinguishable and the abovementioned dicta in Barnett's case should not be followed in the present case.

To sum up: the critical phrase in section 7(3)- "any donation, settlement or other disposition" - excludes any disposal of property that is a wholly commercial or business one, i.e., made for due consideration; it covers any disposal of property made wholly gratuitously out of liberality or generosity; it also covers any disposal of property made under a settlement or other disposition for some consideration but in which there is an appreciable element of gratuitousness and liberality or generosity.

I wish to add this observation about the last kind of composite disposal - one that is partly gratuitous and partly for consideration. If the consideration is merely illusory, simulated, or minimal, the disposal will, of course, be regarded as wholly gratuitous. On the other hand, merely because the settlement or disposition contains some element of bounty or gratuitousness that is insufficient to render section 7(3) applicable; such element must be appreciable for that to happen. To this extent the approach is somewhat less strict or rigid than may be suggested by the words "no element of bounty" used in the English cases referred to above. Now where the consideration, while not being due consideration, is nevertheless appreciable, it will mean that the income in question under section 7(3) will usually have accrued or been received "by reason of" both elements of gratuitousness and consideration. I see no reason why in those circumstances the income should not then be apportioned between the two elements. The words, "by reason of", themselves suggest some apportionment in order to give proper effect to the real cause of the accrual or receipt of the income. (Cf. Joss v. S.I.R., supra, at pp. 29/30.) If such apportionment is not possible, or if insufficient evidence is adduced to enable the Court to effect it (the burden of proof being on the taxpayer under section 82), the composite disposal will usually, because of its appreciable element of bounty, be then simply treated as a gratuitous settlement or disposition, as the case may be, that falls within the scope of the critical phrase.

At long last I turn to apply that construction of the critical phrase to the facts in the present case. As already mentioned the loan appellant made to each of his minor sons constituted a disposition. The fact that it had to be repaid did not render it any the less a disposition. It was not made wholly gratuitously. Each son had to pay him interest at the rate the bank charged him. On the other hand, it was not a wholly business, commercial, or at arm's length transaction without any element of bounty. Indeed, a strong element of bounty was present. That appellant was actuated by liberality, generosity, and filial affection in making the loans is indicated by his making available to his sons gratuitously the privilege (which he conceded had "some value") of taking up some of the Buitesee shares that had been privately placed with him. He asked for no security for the loans. The terms of repayment of the loans and interest were also vague: that was to be done out of the dividends received, but nothing was apparently stipulated about by when they had to be repaid or what was to happen if the dividends were insufficient or ceased. The reason for the vagueness about the terms of the loans was probably because the appellant, as he indeed admitted, regarded them as "a family transaction". That all indicates that the rate of interest appellant charged his children for loans of that kind was probably, or at least possibly, unduly favourable. No evidence was adduced for appellant to prove that it was the ordinary, full or fair rate for loans of that kind prevailing at that time. That it was the same rate that the bank charged appellant does not go far enough to discharge that onus. For, having regard to appellant's business standing, wealth, and relationship with his bank, that rate might well have been a special, low rate of interest. In the absence of evidence on these important aspects

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the only conclusion is that appellant did not prove that these loans to his minor children were wholly commercial or business transactions without an appreciable element of bounty. They must therefore be regarded as being dispositions that were partly gratuitous and partly for consideration. As such they fall within the critical phrase in section 7(3) of the Act. Moreover, appellant made no attempt to apportion the dividend income received by the minor sons between those two elements of gratuitousness and consideration of the dispositions. On the contrary, he conceded that that income had all been received by the minor children "by reason of" the loans.

The appeal on this issue therefore also fails.

In the result the appeals on both issues fail

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and are dismissed with costs, including those relating to the employment of two counsel.

W.G. TROLLIP, J.A.

CORBETT, J.A.)		
MILLER, J.A.)		
DIEMONT, J.A.)	concur	
GALGUT, A.J.A.)		