5/1988

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE COMMISSIONER FOR INLAND REVENUE.... appellant

and

N C R CORPORATION OF SOUTH AFRICA (PROPRIETARY) LIMITED..... respondent

CORAM: CORBETT, VILJOEN, SMALBERGER, VIVIER JJA, et NICHOLAS AJA.

Date of Appeal: 25 February 1988

Date of Judgment: 10 March 1988

J U D G M E N T

CORBETT JA:

This appeal concerns the proper interpretation of sec 88 of the Income Tax Act 58 of 1962 ("the Act").

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The respondent, the N C R Corporation of South Africa (Pty) Ltd, is a company incorporated with limited liability in accordance with the company laws of the Republic of South Africa and it has its principal place of business in Johannesburg. During the fiscal years 1973, 1974, 1975 and 1976 the respondent suffered certain losses in connection with loans granted to it by foreign corporations. These losses were caused by adverse changes in the exchange value of the rand in relation to the currencies of the loans between the time when the moneys were advanced and when they were repaid. These changes in exchange value resulted in the respondent having to pay substantially more (in rand) when repaying the capital sums borrowed than it had received (in rand) when the loans were initially advanced to it. In toto the losses exceeded R4 million.

In rendering its income tax return for the 1973

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tax year respondent claimed the total amount of the foreign exchange losses incurred in that year as a deduction from income. When assessing respondent to tax in respect of this year appellant, the Commissioner for Inland Revenue, disallowed this deduction. Respondent, in a letter dated 18 November 1975, objected to the disallowance of this deduction generally on the ground that since the losses had been incurred in the production of income and were not of a capital nature they were properly deductible. The appellant responded by disallowing the objection, whereupon respondent lodged a notice of appeal (dated 4 August 1976) to the Income Tax Special Court in terms of sec 83 of the Act.

The set-down of the appeal and the issuing of assessments in respect of respondent's returns of income for the 1974, 1975 and 1976 tax years (in which the foreign exchange losses suffered in each of those years were similarly claimed as deductions) were delayed pending the final

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outcome of another appeal in which, it was thought, the same issue arose. As regards the set-down of the appeal, the appellant delayed the matter initially with the concurrence of the respondent and subsequently at its request. The other appeal in question was decided in favour of the Commissioner by the Transvaal Income Tax Special Court and an appeal to the Transvaal Provincial Division was dismissed on 28 March 1979 (see Plate Glass & Shatterprufe Industries Finance Co (Pty) Ltd v Secretary for Inland Revenue 1979 (3) SA 1124 (T)). Thereafter, on 1 December 1979, the appellant issued assessments for the 1974, 1975 and 1976 tax years in which respondent's claimed deductions in respect of foreign exchange losses were likewise disallowed. In the 1974 and 1976 assessments normal tax was payable; but a trading loss in 1975 resulted in a nil assessment for that tax year. Respondent objected to these assessments on the same grounds as had been advanced in its objection to the

1973 assessment. On 18 March 1980 appellant wrote to the respondent asking whether, in view of the Court's decision in the Plate Glass case (supra), it had decided to withdraw its appeal. Respondent replied (on 2 May 1980) that there was the likelihood of an appeal by the taxpayer in the Plate Glass case and that it wished its appeal to be kept open pending the final outcome of the case. In the end the predicted appeal in the Plate Glass case did not materialize, but in a letter dated 4 June 1980, sent in reply to an enquiry from the appellant, respondent asked that appellant "pend the matter until further notice". Thereafter discussions took place between respondent and an official of the appellant's department; and eventually on 12 May 1981 respondent notified appellant that it had decided to proceed with the appeal. At the same time the objections to the assessments relating to the 1974, 1975 and 1976 tax years were held in abeyance so that they could be

dealt with on the same basis as the appeal concerning the 1973 assessment.

Prior to the set-down of the appeal and at the request of the respondent it was agreed between the parties that further proceedings in respondent's appeal would be deferred pending the outcome of another appeal to the Full Bench of the Transvaal Provincial Division. Judgment in this matter was delivered on 2 October 1981 (see Commissioner for Inland Revenue v General Motors SA (Pty) Ltd 1982 (1) SA 196 (T). The judgment was considered to favour respondent's case in its own appeal. Further discussions took place between the parties; respondent furnished additional information in regard to the various loans in question, including those relating to the losses sustained in the 1974, 1975 and 1976 tax years; and ultimately, on 24 June 1983, the appellant notified respondent that it had been decided to concede respondent's objections to the assessments for

the years 1973 to 1976 inclusive. On 8 July 1983 there followed revised (and reduced) assessments for these years, as a result of which the respondent became entitled to a refund of taxes overpaid in terms of the original assessments. Subsequently and during July 1983 the appropriate amounts were repaid to respondent; and respondent was also paid a sum representing interest on the amounts repaid, such interest being calculated, so appellant stated, in accordance with the provisions of sec 88 of the Act.

In the meanwhile respondent had been issued with assessments for the 1977 and 1978 tax years. No foreign exchange losses had been incurred in these years and no objections to the assessments had been raised by the respondent. At the time of issue the assessments were correct, but as a result of appellant's concessions in regard to the 1973 - 1976 tax years and the revised assessments issued for those years the assessments for the 1977 and 1978

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tax years had also to be revised to allow for assessed losses carried forward and for certain other adjustments which need not be detailed. Such revised assessments for the 1977 and 1978 tax years were in due course issued and the excess tax paid in terms of the original assessments was refunded to respondent. No interest was, however, paid to respondent in respect of the amounts refunded. The non-payment of such interest gave rise to one of the disputes between the parties.

The other dispute concerned the date from which interest payable upon refunds of tax should be calculated. From time to time, and as it was required to do in terms of para 17 of the fourth schedule to the Act, respondent made payments of provisional tax, which in the relevant tax years were set-off against the normal tax payable by the respondent, as assessed by the appellant. In all the tax years under consideration, apart from 1978, the provisional

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tax standing to the credit of respondent was sufficient to discharge the normal tax liability in full. In 1978 set-off left a balance of normal tax assessed which had to be paid by the respondent. Respondent contended that in so far as the refunds related to excess tax originally paid by way of provisional tax the interest on the amounts refunded should be calculated as from the dates upon which the appellant received the relevant provisional tax payments; whereas the appellant took the view that such interest was to be calculated in each case as from the date when the set-off took place, ie the date of assessment.

These disputes being unresolved, respondent made application on notice of motion to the Witwatersrand Local Division citing appellant as respondent (appellant having consented to the jurisdiction of that Court) and claiming judgment in various sums of money (with alternatives) and, in the alternative, certain declaratory orders. The appli-

cation was opposed by the appellant. When the matter came to court (coram DANIELS J) the relief claimed was simplified and incorporated in a draft order prepared by the respondent (after discussion with the appellant), which was handed in to the Court. DANIELS J appears to have treated the draft order as an amendment of the notice of motion and in the judgment the relief sought by the respondent (apart from costs) was set forth as follows, viz an order —

> (a) Declaring that, in terms of Section 88 of the Income Tax Act No. 58 of 1962 as amended:
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> (i) The Applicant is entitled to interest at the prescribed rate in respect of taxes overpaid for the 1973, 1974 and 1976 tax years from the date of receipt of the said overpayments by the Respondent to the dates on which the said overpayments were refunded less such interest as has already been paid by the Respondent in respect of the periods commencing

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on the dates of settlement of assessment by set-off or payment. For this purpose the phrase 'dates of receipt' means the dates (to be established to the satisfaction of the Respondent) when the relevant monies were actually received by the Respondent, whether or not received as provisional tax; and

(ii) the Applicant is entitled to interest in terms of Section 88 in respect of taxes overpaid for the 1977 and 1978 tax years.

(b) The Applicant is entitled to interest at the prescribed rate (in terms of Section 88) on the amounts of interest referred to in prayer (a) above from the dates (to be established to the satisfaction of the Respondent) on which the relevant overpayments were refunded to date of payment".

The Court a quo, having heard argument, granted an order in terms of para (a)(i) and (ii) of the relief sought and ordered appellant to pay the costs of the appli-

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cation, including the costs of two counsel. The Court refused to make an order in terms of para (b). Appellant appeals to this Court (with leave of the Court a quo) against the whole of the judgment and order of the Court a quo.

As I have indicated, the case turns on the proper interpretation of sec 88 of the Act, which at the time when the application in the matter was launched read as follows:

> "88. The obligation to pay and the right to receive and recover any tax chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law under section 86 or 86A, but if any assessment is altered on appeal or in conformity with any such decision a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate (but subject to the provisions of section 89quin), such interest being calculated from the date proved to the

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satisfaction of the Commissioner to be the date on which such excess was received and amounts short-paid being recoverable with interest calculated as provided in section 89".

(This wording, which is also the current wording, differs slightly from the wording of the section in 1973 and there were also amendments in 1974, 1976 and 1982, but none of these differences is material to the issues now before the Court. The provisions of sec 89quin are not relevant for present purposes.)

The first question which falls to be determined is whether in terms of sec 88 the appellant was obliged to pay interest on the amounts refunded to respondent in respect of excess normal tax paid in the tax years 1973, 1974, 1976, 1977 and 1978. As appears from what I have stated above, appellant did in fact pay interest on the amounts refunded in respect of the 1973, 1974 and 1976 tax years. His reasons for doing so are set forth

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in appellant's opposing affidavit, deposed to by Mr G Stoltz, the chief tax advocate employed by the Department of Finance in its Directorate of Inland Revenue:

> "17.5 In response to the Applicant's aforesaid request for the payment of interest and in accordance with the manner in which the Respondent in the past has treated similar matters in which appeals had been extrajudicially conceded, it was decided to pay interest on the refund in respect of the 1973 income tax year as if the appeal had been upheld by a Court.
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> 17.8 As regards the refunds for the 1974 and 1976 years, the Applicant's case was considered and, in the light of a single precedent, it was decided to pay interest on the said refunds, calculated as envisaged by section 88. The reason for the decision was that,

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> by not disallowing the objections and thereby giving the Applicant the right to appeal, the Respondent had effectively prevented interest from accruing in terms of section 88 of the Act by denying the Applicant such right of appeal".

(See further Silke on South African Income Tax, 10th ed, p 1240, where the departmental practice in such cases is referred to.) As regards the 1977 and 1978 refunds, appellant's attitude, as reflected in a letter dated 18 November 1983, was that —

> "(a)s no appeal was lodged against the relevant assessments there can be no question of any interest payable in terms of section 88 of the Income Tax Act".

The fact that these payments of interest were made in respect of the 1973, 1974 and 1976 tax years and the reasons therefor cannot, however, affect the determination of

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the question stated above, which turns solely on the proper interpretation of sec 88.

Sec 88 consists of two portions. The first enacts that the obligation to pay and the right to receive and recover any tax chargeable under the Act is not suspended, unless the Commissioner so directs, by "any appeal" or "pending the decision of a court law under sec 86 or 86A". The second portion provides for the refunding of excess tax paid, together with interest thereon, whenever an assessment is altered "on appeal" or "in conformity with any such decision". Precisely why it was considered necessary to have an enactment such as the first portion of sec 88 is not clear. The section has a long legislative history and may be traced back to sec 85 of the Income Tax (Consolidation) Act 41 of 1917 (see also sec 59 of the Income Tax Act 40 of 1925 and sec 80 of the Income Tax Act 31 of 1941). The common law rule of practice that generally the execution of a judgment is automatically

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suspended upon the noting of an appeal (see South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A), at pp 544 H - 545 A) could hardly apply to an appeal noted to the Special Court against the disallowance of an objection to an assessment by the Commissioner, though it might have been regarded as having relevance to further proceedings in a provincial division or the Appellate Division. On the other hand, in the earlier Union Income Tax Act 28 of 1914 the position was more or less the converse: the obligation to pay and the right to receive and recover tax was, "in the discretion of the Commissioner", suspended by an appeal (see sec 27). When this was changed by sec 85 of Act 41 of 1917 it may well have been thought necessary to state explicitly that there was no such suspension unless the Commissioner so directed. Moreover, the section became the vehicle for empowering the Commissioner thus

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to allow a suspension and this had to be expressed in the context of a general negation of any such suspension.

As regards the wording of sec 88 it is noteworthy that the first portion of sec 88 speaks of both an "appeal" and "the decision of a court of law under sec 86 or 86A". The word "appeal" clearly has reference to an appeal to the special court and, possibly, to an appeal in terms of sec 86(5) or to an appeal to the Appellate Division against the decision of a provincial division given under sec 86A. Since, however, the proceedings under sec 86A constitute an appeal in the full sense (see Hicklin v Secretary for Inland Revenue 1980 (1) SA 481 (A), at p 485 D - H) and even the procedure under sec 86 (which is now obsolete), though restricted to questions of law upon a stated case, is described in the Act as an appeal (see eg. sec 86(1), (3) and (4)), one wonders why it was necessary to refer at all to

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"the decision of a court of law under sec 86 or 86A". The explanation is possibly historical. Similar wording appeared in sec 85 of Act 41 of 1917, the only difference being that instead of the reference to sec 86 and sec 86A, sec 85 spoke of "the decision of a court of law under the next two succeeding sections". The first of these succeeding sections, sec 86, empowered the special court, whenever a question of law arose before it, to submit such question by way of a stated case to a provincial or local division for a ruling thereon. This procedure, which could be resorted to even during the hearing before the special court (see Ingram, The Law of Income Tax in South Africa, p 249), was clearly not an appeal in the true sense. And the second, sec 87, which empowered the Commissioner to state a case for determination by a provincial or local division whenever a question of law arose in regard to an assessment (ie even before

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the matter had reached the special court) equally did not create an appeal procedure. Hence the reference in sec 85 applied both to the situation where there was an appeal and to the situation where there was pending the consideration of a question of law in terms of sec 86 or 87 of the 1917 Act. In subsequent legislation the same wording has been used despite changes in the procedures which may be followed in order to bring the matter before a provincial or local division or the Appellate Division and perhaps without a full appreciation of the impact of these changes on this wording.

Be all this as it may, the meaning of the first portion of sec 88 is, in my opinion, clear. It enacts in effect that, subject to a contrary direction by the Commissioner, a taxpayer's obligation to pay tax to which he has been assessed (and the Commissioner's correlative right to receive and recover such tax) are not suspended

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by the fact that the taxpayer may have appealed to the special court against the Commissioner's disallowance of an objection to the assessment, or by the fact that, the special court having given its decision concerning the assessment, there is an appeal pending in terms of sec 86 or sec 86A, at the instance of either party, against the decision of the special court.

Turning to the second portion of sec 88, I am of the view that it provides imperatively ("... a due adjustment shall be made....") for a refund to a taxpayer of the tax paid in excess of what was due where his assessment to tax has been altered on appeal, ie by the decision of the special court (and possibly by the Appellate Division — see my remarks above) or has been altered so as to conform to the decision given by the court of appeal in terms of sec 86 or sec 86A in regard to his assessment (such latter alteration being

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made by the court of appeal itself or by the Commissioner, eg in a case where the assessment is set aside by the court of appeal and the matter remitted to the Commissioner for re-assessment in the light of the Court's judgment). It is in these circumstances, and these circumstances only, that, in my opinion, the Commissioner is obliged in terms of sec 88 to refund excess tax paid, together with interest. There is admittedly another section of the Act, sec 102, which also provides for the refunding of tax paid in excess of the amount properly chargeable, but this section does not make provision for the payment of interest on the amounts refunded. Consequently, respondent must perforce rely on sec 88.

Applying the above-stated interpretation of sec 88 to the facts of this case, it is evident that none of the refunds of tax made fell within the purview of sec 88. As I have shown, sec 88 postulates in effect

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that the taxpayer's objection to his assessment should have advanced at least to a favourable judgment of the special court. This did not occur here. At the time when revised assessments which resulted in the refunds of tax were made an appeal had been lodged in regard to the 1973 assessment, but it had not come before the special court; objections had been made in respect of the 1974 and 1976 assessments (there was no refund in respect of the 1975 assessment), but no decision had been taken thereon by the Commissioner; and in the case of the 1977 and 1978 assessments refunds were made without formal objections having been lodged. Moreover, these revised assessments did not result from any alteration "on appeal" or any alteration to bring them into "conformity with a decision of a court of law" given in terms of sec 86 or 86A, as I have interpreted these words in sec 88.

In argument before us respondent's counsel,

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Mr Swersky, advanced different interpretations for the key words in sec 88. He submitted, in the first place, that a "broad" or "wide" meaning should be given to the phrase "on appeal"; that, inasmuch as an appeal is initiated by the taxpayer's letter of objection, once an objection has been lodged the matter is "on appeal", and that if the Commissioner alters the relevant assessment while the matter is thus "on appeal", the case falls within the ambit of sec 88.

There is, in my view, no substance in this submission. Firstly, there is a clear distinction drawn in the Act between objection and appeal. A taxpayer objects to an assessment in terms of sec 81 and the Commissioner is required to deal with the objection either by reducing or altering the assessment or disallowing the objection (sec 81(4)). It is only a taxpayer entitled to make an objection and who is dissatisfied with the

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decision of the Commissioner under sec 81(4) who may appeal to the special court "therefrom", ie from such decision. And it is only when the taxpayer, so qualified and so dissatisfied, duly lodges a written notice of appeal in terms of sec 83(7) that the matter could be said in any sense to be "on appeal".

In any event, however, the key words of sec 88 are "is altered on appeal". These words can only mean, in my view, is altered on appeal by the court. That is the ordinary meaning of such words. Moreover their association, in the alternative, with the words "or in conformity with such decision" confirms that this was the meaning intended. "Such decision" clearly refers back to "the decision of a court of law under sec 86 or 86A"in the first portion of sec 88. Thus two alternatives are postulated: (i) alteration on appeal, and (ii) alteration in conformity with the decision of a

court of law under sec 86 or 86A. The fact that (ii) contemplates alteration as a result of a court decision strongly suggests that (i) also involves alteration by a decision of a court, viz the special court, on appeal to it. And, I might add, Mr Swersky was not able to cite any authority or advance any cogent argument in support of his contention that the words "altered on appeal" meant, or could comprehend the meaning, altered by the Commissioner while the matter is on appeal.

Secondly, Mr Swersky argued that the present case was covered by the words "altered in conformity with any such decision". The argument, reduced to its essentials, was the following: (1) the assessments in this case were reduced by the Commissioner as a result of what was decided in the General Motors case (supra); (2) the decision in the General Motors case was a decision of a court of law given, seemingly, under sec 86A of

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the Act; and (3) consequently the assessments were altered in conformity with the decision of a court of law under sec 86A. It was this argument which found favour with the Judge a quo, who stated in the course of his judgment:

> "The 1973 assessment was obviously altered, in conformity with the General Motors decision, "a decision of a Court of Law under Section 86 and 86A" as contemplated by the section. This to my mind falls squarely within the ambit of Section 88, which requires an assessment to be altered in conformity with a decision of a Court of Law. As I understand and interpret the section it is exactly this situation which is also being catered for. The section provides for two eventualities:
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> (a) an assessment being altered on appeal; and
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> (b) an assessment being altered in conformity with a decision by a court of law.
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> The ordinary grammatical meaning of the word "conform" is defined, inter alia, as "to bring into harmony or conformity; to adapt" and "conformity" is defined as "action in accordance with some standard; compliance, acquiescence". I

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> do not understand the section to be limited to the extent contended for by the Respondent. The words "in conformity with" are broad in their meaning and not linked to a single assessment. To limit the ambit of section 88 to only those cases where the assessments themselves are overthrown (either on appeal or in terms of a decision by a Court of Law) appears to me not to be justified on the plain meaning of the words used. As pointed out by Mr. Swersky who appeared for the Applicant, that interpretation would require the interpolation of additional words in Section 88."

I cannot agree with this submission by counsel or, with respect, with the reasoning of the Court a quo. It seems to me that the crucial point overlooked is that the second portion of sec 88 speaks of "in conformity with any such decision" (my emphasis). "Such decision" clearly refers, as I have stated, to "the decision of a court of law under section 86 or 86A" alluded to in the first portion of sec 88. And this latter decision, as I have held, is a decision relating to the very assessment

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in question. Inevitably, Mr Swersky was compelled to argue that the decision of a court of law under sec 86 or 86A pending which the obligation to pay an assessment was not to be suspended (unless the Commissioner so directed) could be a decision in a matter totally unrelated to the taxpayer concerned or his affairs: in other words, for example, an appeal under sec 86A by some third party. I find this suggested interpretation unacceptable. I cannot think of any reason why the Legislature should have wished, or found it necessary, to negate the suspension of an obligation to pay tax by reason of the fact that, not the taxpayer, but some unrelated third party had appealed against his own assessment in terms of sec 86 or 86A. Nor was Mr Swersky able to suggest any such reason. Although Mr Swersky initially conceded that "appeal" in the first portion of section 88 meant an appeal by the taxpayer whose obligation to pay tax is

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not normally suspended, he later withdrew this concession and contended that here too it could be an appeal by a third party. I find this too a very unlikely interpretation of the Legislature's intention, for the reasons already given.

Furthermore, it is difficult to see how an assessment issued to taxpayer A can be said to be altered in conformity with a decision given by a court of law under, say, sec 86A in proceedings taken by taxpayer B in regard to his own assessment. In an appropriate case the Commissioner may consider that the principle laid down by the court in B's case is applicable to A's assessment and alter it accordingly, but I doubt whether such an alteration is made "in conformity with" the decision of the court in B's case, which may, as in the General Motors case, merely consist of a decision to dismiss the appeal.

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Mr Swersky sought to derive some support for his submissions from the anomalies which, it is said, flow from the interpretation which I have adopted. He pointed out that in terms of this interpretation no interest would be payable on a refund of tax where the Commissioner conceded the appellant's appeal at the doors of the court or even after evidence had been led, but prior to judgment. Similarly a taxpayer would have to note an appeal and prosecute the appeal to judgment notwithstanding the delivery of an authoritative judgment on the point in issue, if he wished to acquire the right to interest on the tax refunded. And even if the parties wished to settle the dispute extra-judicially, the taxpayer would have to persist with his appeal to judgment in order to become entitled to interest. In practice these anomalies could be avoided by the taxpayer insisting upon an order of court where the Commissioner concedes

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the appeal at the last minute or by stipulating for the payment of interest in any extra-judicial settlement reached with the Commissioner. Nevertheless anomalies they are, for I can see no reason in equity why, for example, a taxpayer whose appeal is successful should receive interest on his tax refund, whereas a taxpayer whose appeal is conceded at the doors of the court must be content to receive a refund without interest. Moreover the ordinary taxpayer might well not be astute to the need for obtaining an order of court or for stipulating for interest when settling the matter with the Commissioner. I do not think that these anomalies can affect in any degree the plain meaning of sec 88, but they are matters which suggest that in the interests of fairness the wording of sec 88 should be reconsidered by the Legislature. In fact the appellant's practice in paying interest in cases not strictly covered by sec 88 indicates that the

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wording of the section is not satisfactory. It is desirable that practice and the law be brought into conformity with one another.

It follows from the aforegoing that the respondent was not entitled under sec 88 to be paid interest on any of the refunds of tax received by him. Accordingly, the second question as to whether the interest should be calculated as from the dates of the receipt of the tax, irrespective of the fact that it was received as provisional tax, falls away. The Court a quo ought, therefore, not to have made the declaratory order set forth in para (a)(i) and (ii) of the draft and ought to have awarded appellant the costs of the application. Appellant's counsel, Mr Du Toit, asked that, in the event of the appeal being successful, this Court should issue a declaratory order to the effect that respondent was not entitled to any further interest on the amounts refunded

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in respect of the 1973, 1974, 1976, 1977 and 1978 tax years. There was, however, no counter-application in the Court a quo and there is, therefore, no basis upon which such an order can be made. The proper order to be substituted for that of the Court a quo is that the application be dismissed with costs; and since it would appear that the appellant was represented by two counsel in the Court a quo, such costs should include the costs of two counsel.

The appeal is allowed with costs, including the costs of two counsel, and the order of the Court a quo is altered to one dismissing the application with costs, such costs to include the costs of two counsel.

M M CORBETT

VILJOEN JA)
SMALBERGER JA)
VIVIER JA) CONCUR.
NICHOLAS AJA)