CASE NO 47/92

/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

COMMISSIONER FOR INLAND REVENUE — APPELLANT

and

GOLDEN DUMPS (PTY) LIMITED — RESPONDENT

CORAM: CORBETT CJ, VAN HEERDEN, SMALBERGER, KUMLEBEN JJA et NICHOLAS AJA

DATE HEARD: 11 MAY 1993

DATE DELIVERED: 2 JUNE 1993

J U D G M E N T

NICHOLAS, AJA:

This is an appeal by the Commissioner for

Inland Revenue from a decision of the Transvaal Income Tax Special Court, namely, that the appellant in that Court, Golden Dumps (Pty) Ltd ("Golden Dumps"), the present respondent, was entitled inter alia to a deduction of R3 081 750.00 in terms of s 11(a) of the Income Tax Act, 58 of 1962 ("the Act"). This was the nett expenditure incurred in the tax year ending 30 June 1985 in respect of the purchase of 200 000 shares in Consolidated Modderfontein Mines Ltd ("Modderfontein"), which Golden Dumps later transferred to Mr Adrian Nash ("Nash"), a former employee.

In the Special Court the Commissioner's representative contended that the expenditure was not incurred during the 1985 year of assessment; that the expenditure was of a capital nature; and that it was not wholly and exclusively laid out or expended for the

purposes of trade. The Special Court found against the Commissioner in all three respects. Leave to appeal to this Court was granted in terms of s 86A(5) of the Act.

In argument on behalf of the Commissioner in this Court, counsel relied on one ground only, viz, that the Special Court erred in finding that the expenditure was actually incurred during the 1985 year of assessment.

Golden Dumps was formed on 22 March 1977. Until 1978 its members were Mr Loucas Christos Pouroulis and two others. In that year Pouroulis became the sole shareholder, and Golden Dumps began to carry on the business of a management company. On 23 October 1979 it concluded a management contract with Government Gold Mining Areas (Modderfontein) Consolidated Ltd ("GGMA") which subsequently changed its name to Consolidated

Moddeffontein Mines Ltd ("Modderfontein"). Under the contract Golden Dumps was appointed as the technical and administrative adviser, the consultant and the manager of the mine operated by GGMA. Its functions later extended to the raising of some R20 000 000 needed for a project of reorganisation and amalgamation which Modderfontein had in preparation in 1980.

On 19 September 1980 Pouroulis handed to Nash a letter written on a Golden Dumps letterhead and signed "L C Pouroulis Chairman". The body of the letter read as follows:

> "Dear Adrian
>
> I am pleased to be able to offer you a position with our group in the capacity of financial director with effect from 15 October 1980.
>
> Your commencing salary will be R60 000 per annum, and you will have the free use of a Mercedes 230 Automatic motor car.
>
> On conclusion of your negotiations abroad of all matters concerned with the re-organisation and amalgamation of Modderfontein Seventy-Four (Pty) Ltd and Government Gold Mining Areas

> (Modderfontein) Consolidated Ltd you will be entitled to 200 000 shares in the new company broken down as follows: 75 000 at 1c each 75 000 at 50c each, and 50 000 at R1 each."

Nash accepted this offer and on 20 September 1980 left for London to begin the negotiations. He returned to South Africa on 17 October 1980 and took up his position as financial director of Golden Dumps and continued to perform functions in regard to obtaining foreign capital. On 27 December 1980, Pouroulis summarily dismissed him. On 6 January 1981 attorneys acting for Nash wrote a letter to Golden Dumps demanding delivery of the shares referred to in the letter dated 19 September 1980 against payment of R85 750, and stating that failing delivery proceedings to compel such transfer would be instituted. On 9 January the attorneys acting for Golden Dumps replied denying

liability and refusing to accede to Nash's demand. In February 1981 Nash instituted in the Witwatersrand Local Division the proceedings foreshadowed in the letter of 6 January. The action was heard in 1983 by G Coetzee J, who granted an order of absolution from the instance. An appeal by Nash to the Appellate Division was upheld on 27 March 1985 and the substantive order of the Court a quo was altered to read:

> "(1) Defendant is ordered to deliver to plaintiff 200 000 shares in negotiable form in Consolidated Modderfontein Mines Ltd against payment by plaintiff to defendant of the sum of R88 250."

(The judgment, which was written by Corbett JA, was reported s.v Nash v Golden Dumps (Pty) Ltd 1985(3) SA 1(A). In the Special Court the parties accepted as correct the findings of fact contained in the judgment.)

As a purely management company Golden Dumps

did not normally hold shares, but following the judgment and in order to comply with it, Golden Dumps acquired from Pouroulis 200 000 Modderfontein shares at the then listed price of R15,85 per share, thus incurring an expenditure of R3 170 000. It delivered these shares to Nash and received in return R88 250 being the price calculated in terms of the letter of 19 September 1980.

In support of its return of income for the 1985 year of assessment, Golden Dumps attached its annual financial statements in which there was reflected the amount of R3 081 750 as a deduction from income under the heading "EXTRAORDINARY ITEMS". This was explained in note 16 to the annual financial statements:

> "Remuneration paid to ex-employee accrued after Appeal Court decision dated 27 March 1985 and settled by the delivery of 200 000 Consolidated Modderfontein Mines Limited shares as follows:

200 000 Consolidated Modderfontein Mines Limited shares purchased from L C Pouroulis at R15,85 per share	3 170 000
Deduct: Paid by ex-employee in terms of settlement	88 250
	3 081 750"

In determining the liability of Golden Dumps for normal tax the Commissioner disallowed the deduction. Golden Dumps lodged an objection and noted an appeal against the assessment. The Special Court allowed the appeal and referred the matter back to the Commissioner for reassessment.

In the judgment in Nash v Golden Dumps (Pty) Ltd (supra), Corbett JA considered first the question of what constituted the contract between the parties and what was its meaning and effect (see 17 B-C). He expressed the view (at 19 E-F) -

> "...that contrary to the finding of the Court a quo, the share option contained in the letter of 19 September was contingent, as the letter indicates,

> on the successful conclusion by Nash of the negotiations abroad. It was in effect the reward for the carrying out of a mandate...

and at 19J-20A

> "In effect...Nash's main task was to introduce someone overseas who was prepared to provide the additional working capital required to enable the new company, Modderfontein, to carry on its proposed mining activities."

The learned judge of appeal said further (at 20 B-F);

> "To sum up, I am of the view that the last paragraph of the letter of 19 September did constitute a separate mandate in terms whereof it was provided that, if Nash successfully concluded abroad negotiations which were aimed mainly at introducing a source of additional working capital, he would become entitled to purchase 200 000 shares in the new company, if and when the new company was formed and the shares became available. Thus, the mandate having been successfully carried out, Nash's entitlement to the shares was still contingent upon the occurrence of a future uncertain event and could be implemented only after that event had occurred.
>
> The next issue to be considered is whether Nash did what he was required to do in order to earn the right to the 200 000 shares in the new company. The trial Judge found that Pouroulis
>
> '...conceded that whatever Nash could have done

> 'abroad', had been done by 15 October 1980 and he (meaning Pouroulis) was obviously then very satisfied with what Nash had achieved at that stage'.
> A conclusion that Nash had done what was required of him to earn the right to the shares is also implicit in the Court's finding that by 7 January the condition upon which Nash's right to the shares depended had been fulfilled; and generally in the Court's reasons for non-suiting Nash on the ground of the Crest Enterprises principle."

Counsel for the appellant contended that the rights and obligations of the parties existed at the time of the institution of the action in February 1981. The obligation of Golden Dumps to deliver the shares, and any loss which such delivery might occasion, had been "actually incurred" within the meaning of s 11(a) of the Act during the 1981 year of assessment. The judgment did n6t constitute a novation and it did not amount to the fulfilment of a condition which resulted in the liability of Golden Dumps arising, but it served

only to confirm the rights and obligations which already existed in 1981. Relying on the dictum in Sub-Nigel Ltd v Commissioner for Inland Revenue 1948(4) SA 580(A) at 589 -

> "... the whole scheme of the Act shows that, as the taxpayer is assessed for income tax for a period of one year, no expenditure incurred in a year previous to the particular tax year can be deducted"

counsel submitted that the deduction was not claimable in the 1985 tax year.

The validity of the argument depends on the proper interpretation of the words "expenditure and losses actually incurred" in s 11(a) of the Act. This provides -

> "11. For the purpose of determining the taxable income derived by any person from carrying on any trade within the Republic, there shall be allowed as deductions from the income of such person so derived -
> (a) expenditure and losses actually incurred in the Republic in the production of the income,

> provided such expenditure and losses are not of a capital nature."

In Caltex Oil (SA) Ltd v Secretary for Inland Revenue 1975(1) SA 665(A) Botha JA referred at pp 673H to 674B to certain provisions of the Act (to which I shall return), and said at 674 B-E:

> "It is clear from these provisions that income tax is assessed on an annual basis in respect of the taxable income received by or accrued to any person during the period of assessment, and determined in accordance with the provisions of the Act. In determining the taxable income of a person carrying on any trade in any year of assessment there is, in terms of sec. 11(a), deductible from such person's income the expenditure actually incurred by him in the production of the income during that year of assessment. (Sub-Nigel Ltd., v. Commissioner for Inland Revenue, 1948(4) S.A. 580(A.D.) at p. 589). It is only at the end of the year of assessment that it is possible, and then it is imperative, to determine the amounts received or accrued on the one hand and the expenditure actually incurred on the other during the year of assessment. (Cf. Port Elizabeth Electric Tramway Co. Ltd. v. Commissioner for Inland Revenue, 1936 C.P.D. 241 at p. 244, and Commissioner for Inland Revenue v. Delfos, 1933 A.D. 242 at p. 257). The expression 'expenditure actually incurred' in

> sec. 11(a) does not mean expenditure actually paid during the year of assessment, but means all expenditure for which a liability has been incurred during the year, whether the liability has been discharged during that year or not. (Port Elizabeth Electric Tramway Co. v. Commissioner for Inland Revenue, supra at p. 244, and I.T. Case 542 (13 S.A.T.C. 116 at p. 118)). It is in the tax year in which the liability for the expenditure is incurred, and not in the tax year in which it is actually paid (if paid in a subsequent year), that the expenditure is actually incurred for the purposes of sec. 11(a)."

In case ITC 1117 decided in the Rhodesia Special Court ((1968) 30 SATC 130) Mr J B Macaulay Q.C., President, said at 131 that he did not regard the presence of the qualifying word "actually" in s 11(a) of the South African Income Tax Act as adding anything to the plain and ordinary meaning of "incurred", observing that "expenditure is either incurred or it is not incurred and if no legal liability for it arises it is not 'incurred'". The dictum was adopted in the

judgment of the full court of the Transvaal Provincial Division in CIR v Edgars Stores (1986) 48 SATC 89 at 94.

If the implication is that the word actually is mere surplusage and can be ignored, that would be contrary to the firmly established rule of statutory construction that a meaning must be given to every word. See Steyn, Die Uitleg van Wette, 5e uitgawe, pp 17-19. In Attorney-General, Transvaal v Additional Magistrate for Johannesburg 1924 AD 421 KOTZE JA said at 436 that to regard words occurring in a section as having been inserted per incuriam is contrary to the well approved canon of construction:

> "'A statute', says COCKBURN, C.J., 'Should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.' The Queen v Bishop of Oxford (4 Q.B.D. at 261). To hold certain words occurring in a section of an Act of Parliament as insensible, and as having been inserted through inadvertence or error, is only permissible as a last resort. It is, in the language of ERLE, CJ: 'the ultima ratio,

> when an absurdity would follow from giving effect to the words as they stand.' Reg. v St John (2 B and S 706), in the Exchequer Chamber affirming the judgment of the Queen's Bench."

See also Craies on Statute Law, 7th ed at pp 103-4:

> "'It is a good general rule in jurisprudence,' said the Judicial Committee in Ditcher v Denison, 'that one who reads a legal document whether public or private, should not be prompt to ascribe - should not, without necessity or some sound reason, impute - to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use.' And this is as justly and even more tersely put by Lord Bramwell, who said in Cowper-Essex v Acton L.B.: 'The words of a statute never should in interpretation be added to or subtracted from, without almost a necessity.'"

The learned author acknowledges that surplusage, or even tautology, is not wholly unknown in the language of the legislature, but continues -

> "Nevertheless, as Lord Brougham said in Auchterarder Presbytery v Lord Kinnoull, 'a statute is never supposed to use words without a meaning.'"

It cannot be suggested that in s 11(a) the legislature used the word actually through inadvertence or error. The phrase actually incurred is used repeatedly in successive Income Tax Acts since Union, and occurs in several other paragraphs of s 11 (see for example paras (b), (bA), (d), (gB), and (gC). The phrase is used frequently in Australian tax statutes, including s 28(1) of the New South Wales Act of 1895, 59 Victoria C.15, which was used as the model by the officials responsible for the drafting of the first Union Income Tax Act, 1914. (See Ingram, The Law of Income Tax in South Africa, p 2, and p 278 ad s 11(2) (a) of the Income Tax Act, 1925.)

According to the Shorter Oxford English Dictionary, the adverb actually means "in act or fact; really". Ingram referred at 102 to a passage in an

unreported judgment of Watermeyer, when President of Special Court for Income Tax Appeals (Cape), in Jacobsohn's case (circa 1923):

> "The phrase 'actually incurred' here in our opinion means no more than that the loss must be an ascertained loss in the year of assessment: the word 'actually' does not push the meaning of 'incurred' further so as to give it the sense 'realised in cash' as contended by the Commissioner."

(My emphasis).

In a judgment in New Zealand Flax Investments Ltd v Federal Commissioner of Taxation (1938) 61 CLR 179 (High Court of Australia), Dixon J said at 207:

> "To come within that provision [sc. s23(l)(a) of the Income Tax Assessment Act 1922-1934] there must be a loss or outgoing actually incurred. 'Incurred' does not mean only defrayed, discharged, or borne, but rather it includes encountered, run into, or fallen upon. It is unsafe to attempt exhaustive definitions of a conception intended to have such a various or multifarious application. But it does not include a loss or expenditure which is no more than impending, threatened, or expected."

(My emphasis)

In support of the dictum in Caltex Oil (SA) Ltd v Secretary for Inland Revenue which is quoted above, Botha JA relied on the following at pp 673H-674B:

> "In terms of sec 5(1) of the Income Tax Act em income tax is levied annually in respect of the taxable income received by or accrued to or in favour of a person during the year of assessment... In terms of secs 66(13) and 66(13) quat the return of income to be made by any person in respect of any year of assessment shall be a full and true return for the whole period ending upon the last day of the year of assessment under charge. An assessment of tax made under the Act shall, in terms of sec 81(5), be final and conclusive, subject to the right of appeal provided for in the Act, and subject to the provisions of sec 79."

The learned judge of appeal emphasized that it "is only at the end of the year of assessment that it is possible, and then it is imperative, to determine the expenditure actually incurred during the year of assessment."

In the case of a liability which is contingent in the legal sense, the expenditure is incurred during the year of assessment only if the condition on which it depends is fulfilled during that year. See Nasionale Pers Bpk v Kommissaris van Binnelandse Inkomste 1986(3) SA 549(A) where Hoexter JA said at 564 C-D:

> "Die vereiste dat die onkoste 'werklik aangegaan' moet word, het egter tot gevolg dat moontlike toekomstige uitgawes wat bloot as waarskynlik geag word nie ingevolge art 11(a) aftrekbaar is nie. Alleen onkoste ten opsigte waarvan die belastingbetaler 'n volstrekte en onvoorwaardelike aanspreeklikheid op die hals gehaal het, mag in die betrokke belastingjaar afgetrek word."

After quoting this passage in Edgars Stores Ltd v Commissioner for Inland Revenue 1988(3) SA 876(A), Corbett JA said at 889 A-C:

> "Thus it is clear that only expenditure (otherwise qualifying for deduction) in respect of which the taxpayer has incurred an unconditional legal obligation during the year of assessment in question may be deducted in terms of s 11(a) from income returned for that year. The obligation may

> be unconditional ab initio or, though initially conditional, may become unconditional by fulfilment of the condition during the year of assessment; in either case the relative expenditure is deductible in that year. But if the obligation is initially incurred as a conditional one during a particular year of assessment and the condition is fulfilled only in the following year of assessment, it is deductible only in the latter year of assessment (the other requirements of deductibility being satisfied.)"

There is no difference in principle between a case where liability is contingent in the legal sense and one where it is contingent in the popular sense. In the field of accounting a contingency is understood as

> "...a condition or situation, the ultimate outcome of which, gain or loss, will be confirmed only on the occurrence, or non-occurrence, of one or more uncertain future events."

(See Faul et al, Financial Accounting, p 475.)

A liability is contingent in that sense in a case where there is a claim which is disputed, at any

rate genuinely disputed and not vexatiously or frivolously for the purposes of delay. In such a case the ultimate outcome of the situation will be confirmed only if the claim is admitted or if it is finally upheld by the decision of a court or arbitrator. Where at the end of the tax year in which a deduction is claimed, the outcome of the dispute is undetermined, it cannot be said that a liability has been actually incurred. The taxpayer could not properly claim the deduction in that tax year, and the receiver of revenue could not, in the light of the onus provision of s 82 of the Act, properly allow it.

A prudent accountant would no doubt require that provision' be made in the taxpayer's financial statements for the expenditure that might be incurred (see Financial Accounting ubi cit) but any reserve

thereby created would not be a permissible deduction. Sec 23(e) of the Act provides that no deduction shall in any case be made in respect inter alia of income carried to any reserve fund.

What then was the situation regarding the liability of Golden Dumps to deliver Modderfontein shares to Nash as at the crucial date, namely the last day of the 1981 year of assessment?

Nash had claimed delivery in January 1981, and his claim had been rejected, because, according to Pouroulis in his evidence in the Special Court, he had formed the view acting on legal advice that Nash was not entitled to the shares. Nash had instituted an action claiming delivery and this was being defended. On the crucial date the outcome was undetermined. Liability was then, to use the words of Sir Owen Dixon, no more

than impending or threatened. The ultimate outcome would be known only upon the delivery of the Appellate Division's judgment, which lay four years in the future.

In my view therefore the decision of the Special Court was clearly right.

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

NICHOLAS, AJA

CORBETT, CJ)
VAN HEERDEN JA) CONCUR
SMALBERGER, JA)
KUMLEBEN, JA)