THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 92/05

In the matter between :

THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE Appellant

- and -

BP SOUTH AFRICA (PTY) LTD Respondent

Before: **HOWIE P, STREICHER, NUGENT, CLOETE & HEHER JJA**
Heard: **3 MAY 2006**
Delivered: **25 MAY 2006**

Summary: **Income tax – s 11(a) of Income Tax Act 68 of 1962 – interest paid by company in respect of loan granted at time dividend declared – loan obtained not to pay dividend but to produce income – rental paid in advance in respect of long leases – expenditure of capital nature.**

Neutral citation: **This judgment may be referred to as The Commissioner of South African Revenue Services v BP South Africa (Pty) Ltd [2006] SCA 60 (RSA)**

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] This is an appeal by the Commissioner of the South African Revenue Service ('the Commissioner') against a judgment in the Cape Tax Court ('the Tax Court') upholding an appeal by BP Southern Africa (Pty) Ltd ('BPSA') against the Commissioner's income tax assessment for the 1993 year of assessment. In terms of the assessment the Commissioner disallowed the deduction from income of interest in the amount of R81 755 944 payable by BPSA in respect of a loan by its only shareholder British Petroleum Company plc ('BP plc') and rental expenditure incurred by BPSA in respect of filling station sites of R13 483 420 (less R31 008 and R71 464). The Tax Court held that these expenditures constituted expenditures incurred in the production of income and that they were to be treated as expenses deductible from BPSA's income for the 1993 year of assessment.

Deduction of interest

[2] BPSA markets petroleum products in South Africa. Some of the petrol that it markets is refined by South African Petroleum Refineries, a joint venture by BPSA and Shell. BP plc, the holding company of BPSA, is a company incorporated outside the Republic. It required that dividends of profits available for distribution be declared quarterly. As at 25 March 1990 BPSA held distributable profits amounting to R682 499 575 which it would have liked to retain. BP plc on the other hand considered its investment in South Africa risky, wanted to take the money out and insisted that a dividend be declared. Eventually, in terms of an agreement reached with the management of BPSA, a general meeting of the members of BPSA, on 6 August 1990, resolved that the amount of R682 499 575 be declared as a dividend and that a loan of R348 374 594 granted by BP plc be accepted by BPSA. In terms of the loan granted by BPSA, interest at an agreed rate was

payable on the capital amount outstanding from time to time. At the time BPSA had the necessary cash resources to pay the dividend in full but as a result of the loan, only the difference between the amount of the dividend and the loan (after deduction of the non-resident shareholder's tax, being an amount of R300 000 000) was remitted to BP plc on 20 August 1990.

[3] Mr McClelland, the financial director of BPSA, who negotiated the loan with BP plc, was the only witness who testified at the hearing of the appeal in the Tax Court. He conceded that BPSA would have been better off had the dividend not been declared in that the declaration of the dividend brought about a liability to pay interest on the amount of the loan. The payment of the dividend also brought about a lowering of the local borrowing ceiling of BPSA imposed by the South African Reserve Bank. For this reason a dividend would not have been declared had it not been for the insistence of BP plc. The loan together with the partial restoration of the local borrowing ceiling brought about by such loan was required to fund various capital expenditure programmes which were being contemplated by BPSA at the time. These included the expansion of the refining capacity of South African Petroleum Refineries; maintaining other parts of the refinery; the building of new service stations; re-branding them in due course; and replacing delivery vehicles. The major item was the expansion of the refinery. It would have been seriously disadvantageous to BPSA not to have expanded the refining capacity of the refinery. However, at the end of 1990 BPSA, notwithstanding payment of part of the dividend, still had R427m in cash, which was more than was required to pay the balance of the dividend in full. It would therefore have been possible to run the business of BPSA until the end of 1990 but at some stage during 1991 the company would have experienced serious financial difficulties.

[4] In the event essentially all expenditure in respect of the refinery was financed by way of hire purchase contracts and long term leases and at least a substantial part of the loan was used as working capital. According to McClelland the money, while it was in the bank, helped BPSA to overcome shortfalls in working capital.

[5] The Commissioner disallowed the deduction of the interest on the loan on the basis that it had not been incurred in the production of BPSA's income as required by s 11(a) of the Income Tax Act 58 of 1962 ('the Act'). The Tax Court overruled the Commissioner's assessment and held that the purpose of BPSA, in so far as the loan was concerned, was to continue its income producing activities; and that the interest paid on the loan was an expense incurred in order to produce income within the meaning of s 11(a).

[6] Section 11(a) provides that there shall be allowed as deductions from income, for the purpose of determining the taxable income derived by a person from the carrying on of any trade, 'expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature'. In order to determine whether expenditure has been incurred in the production of income 'important, sometimes overriding, factors are the purpose of the expenditure and what the expenditure actually effects'. (Per Corbett JA in *Commissioner for Inland Revenue v Nemojim (Pty) Ltd* 1983 (4) SA 935 (A) at 947F-H). In *Commissioner for Inland Revenue v Giuseppe Brollo Properties (Pty) Ltd* 1994 (2) SA 147 (A) at 152I-153D Nicholas AJA said:

'[T]he enquiry relates primarily to the purpose for which the money was borrowed. That is often the "dominant" or "vital" enquiry, although the ultimate user of the borrowed money may sometimes be a relevant factor. Where a taxpayer's purpose in borrowing money upon which it pays interest is to obtain the means of earning income, the interest paid on the money so borrowed is *prima facie* an expenditure incurred in the

production of income. See *Commissioner for Inland Revenue v Allied Building Society* 1963 (4) SA 1 (A) at 13C-G . . .

If, on the other hand, the purpose of the borrowing was for some other purpose than obtaining the means of earning income (for example, to pay a dividend), the interest is not deductible.'

[7] In *Ticktin Timbers CC v Commissioner for Inland Revenue* 1999 (4) SA 939 (SCA) certain trading reserves and income were credited to the loan account of Ticktin Timbers' only member, Dr Ticktin, who had bought the shares in a company which he had then converted into a close corporation, Ticktin Timbers CC. Dr Ticktin contended that 'he was entitled to whatever dividends he wished to declare; and that all the credits were passed in respect of dividends which he had declared but retained in the business as an interest-bearing loan in order to finance its day-to-day operations'.[1] Interest was credited annually on the accumulated balance in the loan account. This court had to decide whether the interest credited to the loan account qualified as expenditure actually incurred in the production of income. The issue was, therefore, the purpose for which the loan was made.[2] It was held that a scheme had been devised with the obvious aim of ensuring that Dr Ticktin would be able to pay the interest on the purchase price in respect of the shares he had bought and possibly the purchase price itself. Hefer JA said: [3]

'I agree with the Court *a quo* that the loan was not needed for the appellant's income-producing activities and that the intention was to increase Dr Ticktin's income, not that of the appellant.'

[8] Counsel for the appellant contend that 'the principle which emerges

[1] 943C-D.
[2] 943A-B.
[3] 944E-F.

from *Ticktin* is that, where the loan giving rise to the relevant liability for interest is incurred pursuant to a scheme devised to benefit the shareholder company and which results, not in additional income for the taxpayer, but in an additional liability, then it cannot be said that the interest is incurred in the production of the taxpayer's income, for the purposes of s 11(a)'. They contend that the evidence and documents clearly established that the scheme upon which BPSA embarked, whereby it paid a dividend and at the same time borrowed an equivalent amount from BP plc, was not conceived in the interest of BPSA but was to serve the purposes of BP plc and in fact created additional expenditure for BPSA in the form of interest on the loan and not additional income.

[9] The fallacy in the argument is that a comparison is made between the position of BPSA having declared the dividend and borrowed the money and the position in which BPSA would have been, had the dividend not been declared. In the circumstances of this case the position of BPSA having declared a dividend and borrowed the money should be compared with the position that BPSA would have been in had the dividend been declared and had there not been a loan. In terms of the articles of association of BPSA dividends are declared by the company in general meeting. The policy of BPSA, insisted upon by BP plc, was that distributable profits be distributed quarterly. When the dividend in issue was declared there were distributable profits available for distribution and there was cash on hand to pay the dividend. However, the management of BPSA realised that cash would in a few months' time be required to fund capital expenditure programmes.[4] It was because of this expected future

[4] Many years later Mr Featherstone in his capacity as Public Officer: BP Southern Africa (Pty) Ltd wrote to the Commissioner that having declared a dividend it was necessary for BPSA 'to retain cash resources by way of a loan by the Parent in order to carry on its trading operations'. However, counsel for the Commissioner correctly conceded that it made no difference whether it was foreseen that funds would in a few months' time after the declaration and payment of the dividend be required to fund capital expenditure programmes or working capital.

requirement that McClelland negotiated the loan with BP plc. He testified:

'[T]here was a very sound and sensible policy on the part of the shareholders, which I couldn't gainsay as the local Finance Director, that if there was money which could be taken out of South Africa, let's take it out sooner rather than later and then bring it back when needed so the shareholder's interest would have been best served by taking all the money and then bringing it back when needed. I didn't like that because I had no guarantee that when I needed the money I couldn't sign deals to expand or the company couldn't sign deals to expand the refineries without knowing that the finance was going to be there.'

[10] In these circumstances it would be illogical to regard the fact that the loan was linked to the declaration of a dividend as an arrangement or scheme conceived in the interest of BP plc. It was in fact an arrangement conceived and concluded in the interest of BPSA which, insofar as the dividend component is concerned, benefited BP plc and, insofar as the loan component is concerned, benefited BPSA. The loan whether looked at in isolation or in combination with the declaration of a dividend was, therefore, seen from BPSA's vantage point, a transaction concluded in the interest of BPSA.

[11] The fact that the loan agreement was concluded in the interest of BPSA does, however, not answer the critical question whether the money was borrowed in order to pay the dividend or whether it was borrowed in order to produce income. In *Ticktin* Hefer JA said in an alternative approach, upon which the Commissioner also relied:[5]

'A company or corporation is not obliged to pay a dividend or make a distribution respectively irrespective of the financial circumstance in which it finds itself. If after doing so, it will have the resources to enable it to continue its income-earning activities without having to borrow simultaneously an equivalent amount no problem arises. When it will not, but nonetheless pays a dividend or makes a

[5] At 944H-J.

distribution and simultaneously raises a loan in exactly the same amount, it becomes a question whether or not the purpose of the loan was to enable a dividend to be paid or the distribution to be made or to provide the entity with liquid funds required to enable it to pursue its income earning activities.'

Heher JA, in *Commissioner, South African Revenue Service v Scribante Construction (Pty) Ltd* 2002 (4) SA 835 (SCA) at 841H, in respect of the same issue but different facts, regarded surplus cash as the decisive factor.

[12] In the present case the evidence of McClelland was that if the dividend had been paid in full, BPSA would have been able to continue with its normal business activities including its capital expenditures until the end of 1990 but would by the end of 1991 have had to find R440m. BPSA did not therefore have simultaneously to borrow an amount to replace the amount of the dividend or any part thereof. That, according to the above quoted passage from *Ticktin*, should be the end of the enquiry. But it seems to me to be nevertheless conceivable that a company may be borrowing money to fund a dividend notwithstanding the fact that it has resources available to enable it to continue its income-earning activities. I shall therefore proceed on the basis that it nevertheless has to be determined whether the purpose of the loan was to enable the dividend to be paid or whether the purpose was to provide BPSA with the liquid funds required to enable it to pursue its income-earning activities.

[13] After having concluded that, on the facts of *Ticktin*, the two transactions were interdependent and that neither was intended to exist without the other, Hefer JA said:[6]

'It is this linkage which, to my mind, is fatal for appellant's case for it shows that the true reason why appellant had to borrow back at interest from Dr Ticktin money which it had had in it own coffers and was under no obligation to part with was because

[6] At 945C.

it wanted to make a distribution to Dr Ticktin.'

[14] Here it cannot be said that without the loan there would have been no dividend. BP plc insisted on the dividend being declared and there was cash available to pay that dividend. There was, therefore, no need to borrow money to pay that dividend. It was clear that cash would in the future be needed to carry on with the business of BPSA unless the business was to be run down but that cash could have been raised at a later date by increasing the issued share capital of BPSA or by a loan at that stage. In the circumstances there is no reason not to accept the evidence of McClelland that the money was borrowed to ensure that it would be available when the need arose and not to pay the dividend.

[15] It follows that the Tax Court correctly held that the purpose of BPSA insofar as the loan is concerned was to continue its income producing activities and that the interest paid on the loan was an expense incurred in order to produce income within the meaning of s 11(a). Insofar as the interest of R81 755 944 includes interest on interest the Commissioner agreed that, should it be held that the loan was an expense incurred in order to produce income within the meaning of s 11(a), the interest on interest was likewise incurred for that purpose. The appeal in respect of the interest on the loan should therefore be dismissed.

Prepaid rental

[16] BPSA, like other oil companies in South Africa, is not allowed to operate service stations. It sells its products to independent dealers who in turn sell to the public. BPSA, therefore, has an indirect interest in the sale of its petrol to the public and an interest in securing sites from which its petrol can be sold. This is done by either acquiring such sites and leasing them to dealers or by leasing sites from the owners thereof in terms of long

term head leases and subletting them to dealers. The sub-tenants may be the owners themselves. We are concerned with the head leases which, in most cases, were for periods of some 20 years. Each of the head leases provides for the payment of rental by way of a lump sum in advance. These lump sum payments put the owner in a position to build a service station where no service station was in existence on the site, or to improve an existing service station in accordance with the requirements of BPSA. The head leases also provide for the registration of servitudes over the leased properties as security for the repayment of prepaid rental in the event of the termination of the lease by BPSA. In terms of the servitudes the lessor and any other occupiers of the properties are precluded from selling any petrol or petroleum products from the properties other than those supplied by BPSA from time to time. McClelland testified that BPSA was not in the business of hiring or letting property for the purpose of making a profit. He agreed with the proposition that BPSA's 'purpose was to create a set-up which would enable retailers to purchase petrol from BP which they would in turn retail to the public'.

[17] The Commissioner contends that these lump sum rental payments, R13 483 420 (less R31 008 and R71 464) in total, were of a capital nature and therefore not deductible from income in terms of s 11(a). The Tax Court held that the expenditures were deductible. It reasoned that if BPSA had operated its own service stations on the leased properties the rental payable would have been deductible as the premises would have been occupied by BPSA for the purposes of its trade. Due to the prohibition against BPSA owning service stations it had no choice other than to sublet the premises to independent operators. It considered the rentals paid by BPSA to have been expenditures which were 'an essential part of the business of (BPSA); it was the only way in which it could sell its products

and the expenditure incurred thereby was deductible'.

[18] Counsel for BPSA contend that the reasoning of the Tax Court is correct. Their submission is that there is no material difference between a lease in terms of which rental is paid by way of a lump sum 'up front' and a lease in terms of which periodic rental payments are made.

[19] In *Turnbull v Commissioner for Inland Revenue* 1953 (2) SA 573 (A) at 579A-B Centlivres CJ said that rent is an expenditure incurred in the production of income and that it is of a non-capital nature and therefore deductible for the purpose of determining taxable income. In general that is so but it would not always be the case. In this regard Wilcox J said in *Federal Commissioner of Taxation v Creer* 65 ALR 485 (FC) at 493 (25-35):

> 'Ordinarily, of course, rental payments, made to obtain the right to occupy premises used for the purpose of earning assessable income, are deductible. But ordinarily such payments are recurrent; and ordinarily they bear a relationship to the income expected to be earned by virtue of that occupation during the relevant accounting period. Where those features are absent, it is better to set aside nomenclature and to examine the substance of the transaction and – where relevant – the purpose for which it was undertaken.'

[20] In *Regent Oil Co Ltd v Strick* [1965] 3 All ER 174 (HL) the House of Lords was dealing with four contracts in terms of which garage owners were tied by way of a lease and a sublease to sell an oil company's petrol. The consideration for the lease was an agreed lump sum payment plus a nominal rent of one pound per annum. In two of the four cases the lump sums were expressly stated to be premiums while in the other two they were not. It was held that the lump sum payments were of a capital nature. It is true that some of the law lords drew a distinction between rent and a premium. Their view was that rent is paid for the use of property and is a

revenue expenditure[7] whereas a premium is a capital expenditure as it is a payment for the acquisition of an asset, being the right to use the property for the purpose of carrying on a trade.[8] However, whether a payment is made for the use of property or whether it is made for the right to use property the payment is a rental payment. In this regard I agree with the following statement by Lord Reid in *Regent:*[9]

> 'It was argued that a rent and a premium paid under a lease are paid for different things – that the premium is paid for the right but that the rent is for the use of the subjects during the year. I must confess that I have been unable to understand that argument. Payment of a premium gives just as much right to use the subjects as payment of a rent and an obligation to pay rent gives just as much right to the whole term of years as payment of a premium.'

[21] It is not the legal categorization of a payment which determines whether it is of a revenue or a capital nature.[10] The mere fact that a payment constitutes a payment of rental does, therefore, not qualify it as a revenue expenditure. As in the case of every other expenditure 'the true nature of each transaction must be enquired into in order to determine whether the expenditure attached to it is capital or revenue expenditure'. (Per Watermeyer CJ in *New State Areas Ltd v Commissioner for Inland Revenue* 1946 AD 610 at 627.) Again the purpose of the expenditure is an important factor in determining the true nature of a transaction. If the expenditure is incurred for the purpose of acquiring a capital asset for the business it is capital expenditure.[11]

[7] At 197A-B and 201G.
[8] At 197C-F and 201G; see also Brownlie and Jooste 'The Lease Premium Concept in South African Tax Law' *Acta Juridica* 241.
[9] At 180I to 181A.
[10] See *Hallstroms Proprietary Limited v The Federal Commissioner of Taxation* (1946) 72 CLR 634 at 648.

[11] *New State Areas Ltd supra* at 627.

[22] In the present case the purpose of the lump sum payments 'up front' was to secure sites from which BPSA's petrol could be sold. The registration of the servitudes referred to above ensured that the sites would be used for this purpose, even after termination of the leases by BPSA, for as long as prepaid rental remained in the hands of the lessor. The expenditures were, therefore, intended to secure sites from which BPSA's petrol could be sold even in situations where there was no lease. By paying the lump sums BPSA secured these sites for a period of some 20 years ie it acquired assets which were intended to endure for 20 years and which were going to produce income for 20 years without any further expenditure required in respect of the acquisition of the assets.

[23] A test that has been adopted to assist in the determination whether expenditure is of a capital or revenue nature is to ask whether the expenditure is more akin to the income producing operations of the taxpayer or whether it is more akin to the income-earning structure of the taxpayer, or to ask 'is it expenditure required to carry on a business or is it required to establish a business?'. [12] Money spent in creating an income – producing concern is capital expenditure; it is invested to yield future profit.[13] In this case the purpose of BPSA was to establish a base for its income-producing operations for the next 20 years. In the circumstances the lump sum expenditures are more closely related to the income-earning structure of BPSA than its income-producing operations. They were incurred not to carry on the business of BPSA but to establish it. Through the payment of a lump sum BPSA acquired an asset which, in the words of

[12] *New State Areas Ltd v Commissioner for Inland Revenue* 1946 AD 610 at 620-621; *Secretary for Inland Revenue v Cadac Engineering Works (Pty) Ltd* 1965 (2) SA 511 (A) at 522B; *Hallstroms Proprietary Limited v The Federal Commissioner of Taxation* (1946) CLR 634 at 646-647; and *Regent Oil Co Ltd v Strick (Inspector of Taxes)* [1965] 3 All ER 174 189-190.

[13] *Commissioner for Inland Revenue v George Forest Timber Co Ltd* 1924 AD 516 at 526.

Lord Wilberforce in *Regent*[14], 'was a source or foundation for the earning of profits, through orders for petrol . . .: it can fairly be described as a piece of fixed capital which is to be used in order to dispose of circulating capital'.

[24] To allow these lump sum payments as a debit against income would distort the profit for the particular year in that the profit for that year would be unduly diminished and it is only after 20 years that a fair result would be reached. This is a consideration that weighed with Lord Reid in *Regent*. He said[15] 'recurrence as against a payment once and for all has (ever since *Vallambrosa Rubber Co Ltd v Farmer (Surveyor of Taxes)* (1910) 5 Tax Cas. 529) been accepted as one of the criteria in a question of capital or income' and added that he 'would have great difficulty in regarding a payment to cover twenty years as anything other than a capital outlay'.[16] Lord Wilberforce said:[17]

> 'No rule can be laid down as to a minimum period of endurance for a capital asset or a maximum permissible period for an item of stock or circulating capital, though obviously the more closely the period of endurance is related to an accounting period the easier it is to argue for a revenue character, but no doubt there is a penumbra the width of which may vary according to the nature of the trade.'

[25] In the light of the nature of the payments, being lump sums, the nature of the advantage obtained, being security that BPSA's products would be sold from the leased premises, and the substantial periods involved, I am of the view that the expenditures were of a capital nature. My reasons are essentially the same as the reasons advanced by Lord Wilberforce in *Regent*[18] for concluding that the lump sum payments dealt with in *Regent* were capital and not revenue payments. In one of the other

[14] At 202G.
[15] See also *Commissioner for Inland Revenue v George Forest Timber Co Ltd supra*.
[16] At 181B-F; see also 200A (per Lord Pierce).
[17] At 204H-I.
[18] At 205A.

speeches in *Regent* Lord Morris of Borth-y-Gest expressed agreement with the conclusion of Lord Denning MR in the Court of Appeal, which conclusion is particularly apposite to this case and reads:[19]

'The company make a payment once and for all. In return they get an advantage which is of enduring benefit to the company. It brings in revenue to the company week after week, and month after month, from the petrol they supply to the retailer. I have no doubt this advantage is a capital asset and the payment for it is capital expenditure.'

[26] The parties were agreed that should it be held that the lump sum payments constituted expenditure of a capital nature, s 11(f) would be applicable.[20] It follows that the appeal should be dismissed in respect of the deduction of interest on the loan by BPSA plc but that it should succeed in respect of the prepaid rental to the extent that BPSA is not entitled to a deduction in terms of s 11(a) but is entitled to a deduction in terms of s 11(f). Counsel for the Commissioner suggested that should this be our conclusion it would be fair to apportion the costs of the appeal 80:20 in favour of BPSA. Counsel for BPSA on the other hand submitted that BPSA should be awarded all its costs. In the light of the fact that the appeal is successful to the extent mentioned above it would be fair to award the Commissioner 20% of the costs of the appeal as requested by his counsel.

[27] The following order is made:

1 The appeal in respect of the interest in an amount of

[19] *Regent* at 188B-C.

[20] Section 11(f) provides as follows:

'11For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived –

...

(f) an allowance in respect of any premium or consideration in the nature of a premium paid by a taxpayer for –

(i) the right of use or occupation of land or buildings used or occupied for the production of income or from which income is derived; or

...

(aa) the allowance under subparagraph (i), (ii), (ii)*bis* or (iii) shall not exceed for any one year such portion of the amount of the premium or consideration so paid as is equal to the said amount divided by the number of years for which the taxpayer is entitled to use or occupation, or one twenty-fifth of the said amount, whichever is the greater.'

R81 755 944 on the loan by British Petroleum Company plc to the respondent is dismissed.

2 The appeal in respect of rental payments in an amount of R13 483 420 (less R31 008 and R71 464) is upheld.

3 Paragraph 2 of the order by the Cape Tax Court is replaced with the following order: ‘The respondent is directed to apply the provisions of s 11(f) of the Income Tax Act 58 of 1962 in respect of the rental expenditure of R13 483 420 (less R31 008 and R71 464).’

4 The appellant is to pay 80% of the respondent’s costs and the respondent is to pay 20% of the appellant’s costs.

P E STREICHER
JUDGE OF APPEAL

HOWIE P)
NUGENT JA)
CLOETE JA)
HEHER JA)