THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case number: 672/06

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE — **APPELLANT**

and

AIRWORLD CC — **FIRST RESPONDENT**
J H RETIEF (COM) INTER CC — **SECOND RESPONDENT**

CORAM: **HOWIE P, FARLAM, LEWIS, COMBRINCK JJA *et* HURT AJA**

HEARD: **11 SEPTEMBER 2007**
DELIVERED: **26 NOVEMBER 2007**

Summary: Revenue – Secondary Tax on Companies – when payable where loans made to a discretionary trust – interpretation of the word 'beneficiary' in definition of 'recipients' in s 64C as it read prior to amendment in 2000

Neutral citation: This judgment may be referred to as *CSARS v Airworld CC* [2007] SCA 147 (RSA)

JUDGMENT

COMBRINCK JA/

COMBRINCK JA:

[1] This is an appeal against the judgment of the Cape Tax Court, upholding the respondents' objection to assessments made by the appellant ('the Commissioner') that the respondents were liable for the payment of Secondary Tax on Companies ('STC') for certain tax years. The assessments were raised in terms of s 64B read with s 64C of the Income Tax Act 58 of 1962. The president of the special court (Cleaver J), it being a question of law, held on an interpretation of these provisions as they read in the relevant years, that the Commissioner was not entitled to assess the respondents to STC. The relevant section, 64C(1), the interpretation of which was the subject of the dispute between the parties, was amended in 2000 effectively removing all doubt about the meaning of the words. The issue is therefore to a large extent academic, the more so in the light of the announcement by the Minister of Finance in his 2007 budget speech that STC is to be phased out and replaced by a withholding tax on dividends at shareholder level.

[2] In 1990 the second respondent successfully tendered for a contract to convey postal items by road for the South African Postal Services. In 1995 the first respondent won the contract with the Postal Services to convey postal items by air. These contracts constituted the main business of the respondents and proved to be very lucrative. Marius Smit Retief ('Retief') was a shareholder in both companies (as they then were) and later acquired the entire shareholding of both. The way he did this was by his family trust, the Marius Smit Retief Familietrust ('the Trust'), purchasing the shares of the other shareholders and then in turn selling them to Retief. He did not have the means to pay for the shares and the only source of payment was the two companies. Realising that a transaction would fall foul of s 38 of the Companies Act 61 of 1973 were the purchase to be funded from this source, it was decided to convert both companies to close corporations. This was done in the

case of the first respondent on 29 December 1997 and in the case of the second respondent on 9 January 1998. At all material times thereafter Retief was the sole member of both close corporations. The purchase price of the shares was paid out of the coffers of the two close corporations.

[3] The Trust was founded in March 1994 and the provisions relevant to this case were agreed upon by the parties in a Statement of Agreed Facts placed before the court *a quo.* They were these:

’10.1 Mr Retief and his wife, Dalene Retief, have been named as capital and income beneficiaries of the Trust;

10.2 the unnamed issue and further descendents of Mr Retief have been the only other capital and income beneficiaries;

10.3 the object of the Trust has been to look after the welfare of the beneficiaries;

10.4 the trustees of the Trust have had the absolute discretion to decide:

10.4.1 whether and when any income shall be distributed among the beneficiaries;

10.4.2 in the event of a distribution of income, to which beneficiaries and in what respective proportions such income shall be distributed, in accordance with the view taken by the trustees as to what is necessary or desirable for the welfare of the beneficiaries;

10.4.3 whether to distribute capital assets of the Trust to the beneficiaries at any time prior to the termination of the Trust;

10.4.4 in the event of a distribution of capital assets, to which beneficiaries and in what respective proportions such assets shall be distributed, in accordance with the view taken by the trustees as to what is necessary or desirable for the welfare of the beneficiaries;

10.5 Mr Retief, alone among the trustees of the Trust, has had the right to nominate a replacement for himself as trustee in the event of vacating his position as trustee.’

[4] During 1995 and 1996 both respondents and in particular the first respondent experienced a strong inflow of cash and a decision was then made to make use of these funds. It was decided that the Trust would acquire assets which would be funded by way of loans by the respondents to the Trust. The idea was that for the purpose of estate planning the growth in the investments would vest in the Trust. To this end ten policies were taken out with Sanlam. The premiums were paid by the two respondents and recorded in the books of account as loans to the Trust. In

addition a number of fixed properties were purchased in the name of the Trust variously at Langebaan, Randburg and Durbanville, together with two farms. The funding was again effected by way of loans from the respondents to the Trust. The statement of agreed facts recorded that according to the financial statements of the first respondent, at the end of the 1996 year of assessment, the outstanding loans by it to the Trust stood at R254 000. By the end of the 2000 tax year, the cumulative total was R43 009 380. No interest was payable by the Trust, save for the year 2000 in which interest in the amount of R3 919 074 was levied in the books of account. Insofar as the second respondent is concerned, the cumulative total at the same time was R14 557 290. Similarly, no interest was payable. In respect of all the loans no terms of repayment were recorded.

[5] The parties led evidence before the court *a quo* and the judgment contains findings of fact on such evidence. The findings were not disputed before us. The following was the finding in regard to the policies and immovable properties purchased in the name of the Trust:

'3.7 Ten Sanlam policies were purchased by the trust with the advances made to it by Airworld and (Com) Inter. Although the evidence on behalf of the appellants was to the effect that the intention was to utilise the trust policies to provide security for the liabilities of the appellants, the documentation relied upon by the appellants indicates that only six policies were ceded, and that the cessions were to secure the debts of the trust and not the debts of Airworld or (Com) Inter. The cessions were to provide security for the debts of the trust. The trust's financial statements do not reflect that the policies were ceded in respect of any liabilities of either Airworld or (Com) Inter. The financial statements of (Com) Inter also do not reflect that any trust policies were ceded or provided as security in respect of its liabilities. The financial statements of Airworld indicate that certain trust policies and certain (Com) Inter policies were encumbered in favour of Stannic as security, but it seems that only two of the relevant trust policies were in fact ceded to Stannic. The cession documents relating to the six policies which were ceded to the appellants' bankers were ceded

> "as voortdurende dekkende sekuriteit vir enige bedrag wat die sedent nou of te enige tyd hierna aan die bank verskuldig is of mag wees'.

The 'sedent' is the trust. Two unlimited guarantees were however provided by the trust, one in respect of Airworld and the other in respect of (Com) Inter. In these guarantees the trust bound itself as surety to Volkskas Bank in respect of the liabilities of Airworld and (Com) Inter respectively. Both guarantees were signed on 8 October 1996.

3.8 The financial statements of the trust do not reflect that any of the immovable properties owned by it were encumbered in any way in favour of a financial institution in respect of liabilities incurred by either of the appellants. However, Van Heerden testified that in respect of some of the

properties, covering bonds were registered. This evidence was not supported by the trust's financial statements.'

[6] In 2003 the Commissioner in the case of the first respondent raised an assessment for payment of STC for the tax years 1998, 1999 and 2000. The total amount, together with interest, was some R8m. The second respondent in turn was assessed to be liable for an amount of R2,7m in respect of the tax years 1998 and 1999. The basis of the assessments as recorded in a letter by the Commissioner dated 17 July 2003 was that the two respondents were liable for STC as the amounts of the loans made by them to the Trust during the years in question were deemed to be dividends by virtue of the provisions of s 64C(3)(a) of the Act. The Trust, it was contended, was a 'recipient' of amounts deemed to have been declared as dividends because a shareholder of the company, Retief, was a 'beneficiary' of the Trust as contemplated by the definition of 'recipient' in s 64C(1)(c). By virtue of the definition of 'shareholder' in s 1 of the Act, a member of a close corporation is a shareholder for purposes of s 64C. It was further recorded that according to the financial statements of both the first and second respondents and their tax returns, the deemed dividends did not exceed the profits and reserves which were available for distribution. An objection by both close corporations in terms of s 81 of the Act was disallowed and the appeal to the Tax Court resulted.

[7] The court recorded that the following issues were before it for decision:

'5.1 Whether the trust was a "recipient" in relation to Marius Smit Retief, the sole member of Airworld and (Com) Inter as contemplated in section 64C(1);

5.2 Whether the loans to the trust constituted "distributions" as contemplated in section 64C(3)(a);

5.3 Whether the loans fell within the exemption provisions of section 64C(4)(c); in particular whether the loans exceeded the appellant's profits and reserves which were available for distribution;

5.4 Whether the loans fell within the exemption provisions of section 64C(4)(d) in respect of Airworld's 2000 year of assessment; in particular whether the rate of interest which was charged on the loan was not less than the official rate of interest as defined in paragraph 1 of the Seventh Schedule of the Act.'

On this legal issue the president of the court, sitting with assessors, found in favour of the first and second respondents on the first point. This finding rendered it unnecessary, in the view of the president, to decide the other points and accordingly in respect of them no finding was made.

[8] The conclusion reached was that the Trust was not a 'recipient' as contemplated in s 64C(1)(c) because 'beneficiary' in that sub-section refers only to beneficiaries having vested rights. Neither Retief nor his wife, though named beneficiaries in the Trust, had vested rights as the trustees had an absolute discretion to whom to distribute the income and capital of the Trust. Neither was therefore a 'beneficiary'.

[9] Before dealing with the Commissioner's attack on the judgment it is necessary, in order to follow the argument, to quote the sections as they read during the relevant years. Section 64B(2) imposed the tax. It read:

'64B(2) There shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the secondary tax on companies, which is calculated at the rate of 12,5 per cent of the net amount, as determined in terms of subsection (3), of any dividend declared by any company on or after 14 March 1996.'

The deeming provisions were contained in s 64C:

'(1) For the purposes of this section 'recipient', in relation to any company, means –

(a) any shareholder of such company;

(b) any relative of such shareholder; or

(c) any trust of which such shareholder or relative is a beneficiary.

(2) For the purposes of section 64B any amount which is in terms of subsection (3) deemed to have been distributed by a company to a recipient, shall, subject to the provisions of subsection (4), be deemed to be a dividend declared by such company, notwithstanding the fact that such amount may have been so distributed by way of a loan or credit to the recipient or that the recipient may in consequence of such distribution have assumed any other form of obligation to make a future payment to the company.

(3) For the purposes of subsection (2) an amount shall be deemed to have been distributed by a company to a recipient if –

(a) any cash or asset is distributed by the company to or for the benefit of such recipient;

(b) the recipient is released from any obligation measurable in money which is owed to the company by the recipient;

(c) any debt owed by the recipient to any third party is paid or settled by the company;

(d) any amount represents an amount which has been adjusted or disallowed in accordance with the provisions of section 31.'

Section 64C(4) read:

'The provisions of subsection (3) shall not apply–

. . .

(c) to so much of any such amount distributed (other than . . .) as exceeds the company's profits and reserves which are available for distribution . . .: Provided that any prohibition or limitation on any

such distribution contained in the company's memorandum and articles of association or founding statement or any agreement shall be disregarded in the application of this paragraph.

(d) to any loan granted–

(i) which is denominated in the currency of the Republic, in respect of which a rate of interest not less than the 'official rate of interest', as defined in paragraph 1 of the Seventh Schedule . . .

is payable by the recipient.'

To complete the discussion of the legislation it is necessary to quote the definition of 'connected person' in s 1:

'Means –

(b) in relation to a trust –

(i) any beneficiary of such trust; and

(ii) any connected person in relation to such beneficiary.'

And the definition goes on to record that

'. . . in this definition the expression 'beneficiary' means any person who has been named in . . . the will or deed of trust concerned –

(i) as a beneficiary; or

(ii) as a person upon whom the trustee of the trust has the power to confer a benefit from such trust.'

Of significance, as will later be seen, is that Part 7 (which contains s 64C) was introduced by the same amending legislation in 1993 (Act 113 of 1993) as the definition of 'connected person'.

[10] Counsel were agreed that the word 'beneficiary', when used in relation to property and standing alone is capable of any one of the three meanings attributed by Centlivres J in *In Re Estate Scholtz* 1937 CPD 146 at 147, namely:

'(a) [A]ny person whether born or unborn, certain or uncertain who has any interest, whether vested or contingent, or

(b) any living person who has a vested or contingent interest, or

(c) any person who has a vested interest.'

They were further *ad idem* that, as in a case of interpretation of all other statutes, fiscal legislation is to be interpreted by ascertaining what the Legislature intended in using the words it chose to use (*Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* 1975 (4) SA 715 (A) at 727G-H). Of cardinal importance is the scope and purpose of the legislation and the context in which the words or phrases are used (*Standard General Insurance Co Ltd v Commissioner for Customs and Excise* 2005 (2) SA 166 (SCA) para 25).

[11] Counsel for the Commissioner attacked the findings of the court *a quo* on a number of grounds. The first was that s 64C is an anti-tax avoidance measure and is designed to prevent circumvention of STC. Accordingly the word ‘beneficiary’ must be given the meaning which will make the provision effective rather than ineffective. In this regard reference was made to *Gartside v Inland Revenue Commissioners* [1968] 1 All ER 121 (HL) at 131d-e. Secondly, the Special Court’s reliance on the definition of ‘beneficiary’ in the *Concise Oxford Dictionary* (10 ed revised) as ‘someone who gains benefit from something, especially a trust or will’, did not support its view that ‘beneficiary’ should be confined to those with vested rights to income or capital. In the context of trusts, so it was submitted, the word ‘beneficiary’ extends naturally to those potentially entitled to enjoy proprietary benefits under the trust. Thirdly, by the use of the words ‘any relative’ of a shareholder in the definition of ‘recipient’ the legislator made it clear that a direct proprietary benefit was not required. An indirect benefit via blood or marriage would suffice. There is, so the argument went, no legislative rationale for requiring a connection between the shareholder and the amount distributed to be a direct, immediate or ‘vested’ one. Fourthly, reference was made to s 25B of the Act to demonstrate that the Legislature, when it came to taxing income, distinguished between the situation where trust beneficiaries have a vested right to income of a trust and the situation where they have no such right. Reliance was placed on *Minister of the Interior v Machadodorp Investments (Pty) Ltd* 1957 (2) SA 395 (A) at 404D and *Consolidated Textile Mills Ltd v President of the Industrial Court* 1989 (1) SA 302 (A) at 308C-D for the proposition that there is a presumption or reasonable supposition that the same words or expressions in the same Act are intended to bear the same meaning where no indication to the contrary is given. The remainder of the argument on behalf of the Commissioner was devoted to an attack on the respondents’ reliance on the definition of the expression ‘connected person’ and the subsequent amendment to the definition of ‘recipient’ in the year 2000.

[12] In support of the argument that the word ‘beneficiary’, as used in the definition of ‘recipient’, was intended to relate only to beneficiaries with vested interests, counsel for the respondents relied in the main upon the contrast between the definition of ‘recipient’ in s 64C(1) and the definition of ‘connected person’. It was the

same amending legislation, as pointed out earlier, which introduced both provisions. It is principally on this issue which the respondents' case turns and which persuaded the court *a quo* to find in their favour.

[13] I do not consider that merely because the section is an anti-tax avoidance measure the broadest possible meaning must be given to the term 'beneficiary'. It still remains a question of interpretation, regard being had to the relevant provisions as a whole, to determine what the legislator intended to include in the anti-tax avoidance measure and what it intended to exclude. STC is only payable once a dividend is declared by a company. Similarly, the deeming provisions are only triggered once a benefit in one of the forms set out in ss (2) and (3) of s 64C accrues to a 'recipient'. Absent such benefit no liability for STC is incurred by the company. The accent in ss 64C(2) and (3) is on a monetary benefit being received by a shareholder, whether directly or indirectly. A named potential beneficiary in a discretionary trust, such as Retief, where the trustees have not exercised their discretion in favour of him, has no right to any benefit. It is common for discretionary trusts to be formed with the intention of divesting the founder of the trust of his assets, the idea being that such person's spouse, children or other descendants may benefit as beneficiaries but not such person himself. Such a trust also serves the purpose of being a vehicle for 'growth assets' in order that the growth in value of the assets should not take place in the hands of the founder. It is regarded as sound estate planning. The person is often named as a potential beneficiary without there ever being any intention that he will in fact receive any benefit from the trust. The reason is simple. There would be no point to the estate planning if the advantage sought to be gained would be nullified by placing the growth back in the hands of the original person.

[14] It is, to my mind, understandable that the legislature, realising that a potential beneficiary has no right to income or capital of the trust until the trustees exercise their discretion and he or she adiates, intended to exclude him or her from the concept of beneficiary. This would accord with a clear distinction in the definition of 'connected person' which includes ' . . . a person upon whom a trustee of the trust has the power to confer a benefit from such trust' and the absence in the definition of 'recipient' of the same words. The inescapable conclusion is that it was not intended

to include trusts as ‘recipients’ where the beneficiary, though named, has no immediate right to benefits. As argued by counsel for the respondents, as soon as he or she accepts a benefit under the trust, he or she become beneficiaries, the trust becomes a recipient, and the respondents will be liable to STC. This is so because the benefit then accrues.

[15] In 2000 the definition of ‘recipient’ was amended to mean:

‘(a) any shareholder of such company;

(b) any connected person in relation to such shareholder.’

This is, to my mind, consistent with the conclusion that the legislature purposely omitted as ‘recipients’ those trusts in which the shareholder had no vested rights but later decided to include them. It is not a case of interpreting legislation by reference to subsequent enactments. It is simply a case of recognising that one category was excluded from the net and later included.

[16] The argument on behalf of the Commissioner that, because the legislature in s 25B considered it necessary to narrow down the meaning of ‘beneficiary’ to mean ‘vested beneficiary’, it follows that where beneficiary is used elsewhere in the Act, it must be given its broader meaning, is to my mind unpersuasive. Subsection (1) does not characterise a person who does not have a vested right to income as a ‘beneficiary’. All it does is to confirm that income which is derived for the immediate or future benefit of the beneficiary with a vested right to such income accrues to such person. Similarly it distinguishes a situation where the income is deemed to accrue to a trust. Subsection (2) deals with the position where a beneficiary becomes such as a consequence of the trustee exercising his discretion and confirms, as submitted by counsel for respondents, the established ‘conduit pipe principle’, namely that where income is awarded to a beneficiary by virtue of the exercise of the trustee’s discretion in the same year in which the income arises, such income is regarded as accruing direct to such beneficiary. The enactment in bringing about nothing new is of no assistance in the interpretation of the words with which we are dealing. As stated by the president, the reference to vested rights in this section is necessary in order to fix liability for taxation on persons having such rights.

[17] The remaining arguments of the appellant do not persuade me that the interpretation contended for by him is to be preferred. To conclude, I consider that the Tax Court correctly found that it was intended that 'beneficiary' as used in s 64C(1)(c) was restricted to a 'vested beneficiary' and did not include a person like Retief who was at the relevant times a potential beneficiary. This finding renders it unnecessary to deal with the other issues.

[18] I would dismiss the appeals with costs.

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P C COMBRINCK
JUDGE OF APPEAL

Concur:

FARLAM JA

HURT AJA:

[19] I have read the judgment prepared by my brother Combrinck. I find myself in respectful disagreement with him in relation to his interpretation of s 64C of the Income Tax Act 58 of 1962. In the view which I take, the appellant (to whom I shall refer as 'the Commissioner') was correct in treating the payments made by the first respondent ('Airworld') and the second respondent ('RCI') as being, at least in part, subject to Secondary Tax on Companies ('STC') in terms of s 64B (2) of the Act. Where applicable, I shall refer to Airworld and RCI collectively as 'the respondents'.

[20] The judgment of Combrinck JA sets out the history of the formation of Airworld and RCI, the formation of Die Marius Smit Retief Familietrust ('the Trust') and the transactions between them during the period between 1997 and 2000. The main issue in the appeal concerns the interpretation of s 64C(1)(c) and, in particular, the meaning to be attributed to the word 'beneficiary' in that section.

[21] Sections 64B and 64C were inserted into the Act by the Income Tax Amendment Act 113 of 1993. Their insertion heralded the imposition, in terms of s 64B(2), of STC, a tax which was to be levied on all dividends declared by companies on or after a specified date. The word 'companies' includes, within its scope, close corporations such as Airworld and RCI.[1] The tax was to be levied at the source of payment, so that the company declaring the dividend would be liable for payment and treated as the taxpayer. In terms of s 64B(7) read with the definition of 'dividend cycle' in s 64B(1), the tax was effectively payable within one month of the date on which the dividend was declared or, if a subsequent date for payment of the dividend was specified, within a month of that date.

[22] Section 64C was headed '*Certain amounts distributed deemed to be dividends*' and that represents a crisp summary of its contents. Subsections (1) to (3) read as follows:

'(1) For the purposes of this section 'recipient', in relation to any company, means–

(a) any shareholder of such company;

(b) any relative of such shareholder; or

(c) any trust of which such shareholder or relative is a beneficiary.

(2) For the purposes of section 64B any amount which is in terms of subsection (3) deemed to have been distributed by a company to a recipient, shall, subject to the provisions of subsection (4), be deemed to be a dividend declared by such company, notwithstanding the fact that such amount may have been so distributed by way of a loan or credit to the recipient or that the recipient may in consequence of such distribution have assumed any other form of obligation to make a future payment to the company.

(3) For the purposes of subsection (2) an amount shall be deemed to have been distributed by a company to a recipient if–

(a) any cash or asset is distributed by the company to or for the benefit of such recipient;

(b) the recipient is released from any obligation measurable in money which is owed to the company by the recipient;

(c) any debt owed by the recipient to any third party is paid or settled by the company;

(d) any amount is used or applied by the company in any other manner for the benefit of the recipient; or

(e) such amount represents an amount which has been adjusted or disallowed in accordance with the provisions of section 31.'

[1] Item (f) of the definition of 'company' in s 1.

[23] In an ideal State, where every person, natural or juristic, is aware of the benefits which the population derives from collected tax and of the consequent responsibility to contribute what is due, the legislator would presumably have been content to let s 64B stand on its own. But the legislator in this imperfect world must be ever alert to thwart the relentless ingenuity of accountants, tax consultants, lawyers and even the lay person, by anticipating possible ways and means by which the prescripts of tax legislation might be avoided. And that was the obvious purpose behind the inclusion of s 64C. The legislator foresaw that a company might find other ways of transferring its profits to its shareholders than by the process of distributing them directly in the form of dividends. So the 'mischief' which the legislator sought to prevent by enacting s 64C was the avoidance by companies of liability for STC, by disguising what was in truth a dividend distribution as some other form of transaction. In this regard the legislator plainly foresaw two possibilities. Traditionally the recipients of a dividend declared by a company are the shareholders. The first possibility was that the company might make the payment (or transfer the benefit measurable in money), not to the shareholder, but to a person associated with the shareholder who would be in a position, informally, to pass it on to the shareholder. Such an arrangement would make it difficult, if not impossible, for the Commissioner to identify the transaction as the distribution of a dividend. This was plainly the reason for the broadening of the class of 'recipients' in subsec (1). The second possible 'loophole' which the Legislature sought to close related to the type of transaction, under the guise of which what was effectively the payment of a dividend, could be made. The result was the deeming stipulation in subsec (3), in which various means of transferring a benefit measurable in money from the company to the recipient are listed.

[24] The crucial question in this appeal is: What did the Legislature intend the word 'beneficiary' to mean in subsec (1)(c)? There is, in fact, a definition of the word 'beneficiary' in the Act. It is to be found in the definition of the term 'connected person' in s 1. For reasons which I intend to set out later, I do not think that this definition is of any assistance in arriving at an acceptable interpretation of s 64C(1)(c). For present purposes it will suffice to point out that the defined meaning in the definition of 'connected person' is prefaced by the words 'in this definition the

expression "beneficiary" means'. This is a clear indication of an intention to confine this defined meaning to the context of the definition of ‘connected person’.

[25] The first part of the process of interpretation must be to consider the words of subsec (1) to decide whether their meaning is clear. In this regard, counsel for the respondents submitted, and the court *a quo* found, that the word 'beneficiary' could have more than one meaning. That is by no means a novel situation when it comes to the interpretation of language. But the question is whether the word, properly considered in its context, is nevertheless ambiguous. Most of the rules of interpretation have been devised for the purpose of resolving apparent ambiguity and arriving at an interpretation which accords as well as possible both with the language which the Legislature has used and with the apparent intention with which the Legislature has used it. In recent years courts have placed emphasis on the purpose with which the Legislature has enacted the relevant provision. The interpreter must endeavour to arrive at an interpretation which gives effect to such purpose. The purpose (which is usually clear or easily discernible) is used, in conjunction with the appropriate meaning of the language of the provision, as a guide in order to ascertain the legislator's intention.[2] Thus, in *Standard General Insurance Co Ltd v Commissioner for Customs and Excise*,[3] Nugent and Lewis JJA said:

'Rather than attempting to draw inferences as to the drafter's intention from an uncertain premise we have found greater assistance in reaching our conclusion from considering the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation. As pointed out by Nienaber JA in *De Beers Marine*[4] when dealing with the meaning of "export" for the purpose of s 20(4) – which draws a distinction between export and home consumption – the word must "take its colour, like a chameleon, from its setting and surrounds in the Act".'

[26] In following the precept to consider the word 'beneficiary' in its context, it is relevant, in this case, to bear in mind that ss 64B and C deal with a type of tax which is *sui generis* in the Act. The 'setting and surrounds' of the word are therefore possibly more restricted than usual. It is also relevant to bear in mind the circumstances in which s 64C will come into play. A company will have made a 'distribution' (I shall use this general term for the purpose of referring to any of the

[2] The so-called method of 'purposive construction'.
[3] 2005 (2) 168 (SCA) para 25
[4] *De Beers Marine (Pty) Ltd v Commissioner, SARS* 2002 (5) SA 136 (SCA) para 7.

various transactions falling within the ambit of subsec (3)). This may have been done by a direct payment in cash or by any of the less direct transactions listed in subsecs (b) to (e) of subsec (3). The distribution will have been made to the shareholder or some other person or entity. Where it is made to the shareholder, there can be little doubt that it is made for his benefit, and there will be no difficulty in concluding that it is to be treated as the surrogate of a 'dividend'. Where the distribution is made to a person or entity other than the shareholder, the question which immediately arises is: Why would the company decide to confer a benefit on that particular person or entity? It must be borne in mind that the type of distributions clearly in contemplation in the subsection are those which offer little or no quid pro quo to the company. If there *is* a *quid pro quo*, eg the settlement of a debt owed by the company or a loan at a market-related rate of interest, the provisions of subsec (4) render the deeming provisions of subsec (3) inapplicable.

[27] But if the distribution does not fall within the class of genuine transactions envisaged in subsec (4), the question why the distribution was made in the first place remains unanswered. Companies do not operate without motivation or reason and ordinary commercial companies do not give their assets away capriciously. Applying these considerations, the purpose (and accordingly the intention) behind subsec (1) becomes clearer. If an apparently gratuitous distribution is made to a relative of a shareholder, the probabilities are overwhelming that the proceeds of the distribution are intended, by the company, to reach the shareholder. Certainly that would be the view of the hard-bitten commercial cynic and I think that it is safe to accept that those who are responsible for drafting tax legislation will by now, after nearly 50 years of tinkering with the Act, have an appropriate measure of cynicism in their makeup. The word 'relative' is specifically defined in the Act. The relevant portion of the definition reads:

' " relative" in relation to any person, means the spouse of such person or anybody related to him or his spouse within the third degree of consanguinity, or any spouse of anybody so related . . . '

This definition embraces a wide range of people. It includes, for instance, the wife of the person's nephew or the husband of the niece of the person's spouse. There is nothing in subsec (1)(b) which requires the 'relative' to have any special commercial relationship with the shareholder. It is plain that, as far as the legislator is concerned,

once the company makes a distribution of this nature to a relative of the shareholder STC is payable by the company.

[28] Is there any indication, anywhere in s 64C, that, in the situation where the company makes a distribution to a trust, the legislator intended that STC should only become payable in limited circumstances, depending on some sort of commercial relationship between the trust and the shareholder or between the trust and the shareholder's relative? I think that the question needs only to be posed to be answered in the negative. What is significant is that the legislator did not confine the class of 'recipient' in subsec (3)(c) only to trusts in which the shareholder is the beneficiary, but it extended its hypothetical 'net' to trusts in which a 'relative' is the beneficiary. The submission on behalf of the respondents is that, if regard is had to the definition of 'beneficiary' for the purposes of defining the expression 'connected person' in s 1, it appears that the legislator intended to draw a distinction between a beneficiary who had a vested right to claim benefits from a trust, and a beneficiary in respect of whom the trustees had a discretion to confer benefits. Counsel for the respondents submitted that, where the word was used without any qualification, it should be assumed that it was used in the sense of a 'beneficiary with a vested right'. I shall deal with this submission (which was adopted by the court *a quo* as the basis for allowing the respondents' appeal to it) later in this judgment. In my view, and considering the word in the light of the provisions of ss 64B and 64C, the indications are clear that when the legislator used the word 'beneficiary' in subsec (1)(c), it did not intend that word to be given a restricted meaning. I consider that to give it its 'ordinary meaning' of 'a beneficiary named as such in the trust deed' satisfactorily achieves the legislator's object in enacting the deeming provisions of s 64C. That being so, the process of scouring the Act to find other possible meanings of the word can only be helpful if those other meanings fit comfortably into the context of s 64C and are also consistent with the purpose behind the section.

[29] I therefore turn to a consideration of the argument adopted by the learned President of the court *a quo* and presented to this court by counsel for the respondents. The respondents paid more than R10 million to the Trust during the years of assessment. Except for a belated book entry reflecting that interest was payable to Airworld in the 2000 tax year, these 'loans' were interest-free. The

distributions plainly fell within the ambit of subsec (3)(a). There was a suggestion during evidence that the motive for these loans was to enable the Trust to acquire assets which it could use for the purpose of providing security for the liabilities of the respondents. But the suggestion was faint; there was little or no accounting evidence to back it up and counsel for the Commissioner treated it, during cross-examination of the respondents' witness, Mr R van Heerden, with an understandable measure of scorn. It is apparent that the court *a quo* did not accept this as the true motivation for the interest-free loans. We are thus left with a situation where there was, during the relevant tax years, the transfer of a very large amount of money from the respondents to the Trust without any adequate explanation as to why this should have been done. Counsel for the respondents submitted that it was important to bear in mind, in relation to this Trust, that it is what is broadly referred to as a 'discretionary trust', in as much as the trustees have a discretion as to when, how and to whom to pay the income of the Trust. Accordingly, so the argument ran, the mere mention of a person's name as beneficiary in the trust deed was no guarantee that the person would, in fact, obtain a benefit. Such a person was only a 'potential beneficiary' until the trustees had exercised their discretion and decided to make a payment to him or grant him some other benefit out of the trust. Then he would have graduated from being a 'potential beneficiary' because he would have a vested right to the benefit which the trustees had decided to convert. This was significant, counsel submitted, because, in the definition of 'beneficiary' for the purposes of the definition of 'connected person' in s 1, the legislator had specifically distinguished between a beneficiary named as such in the trust deed and a person named as 'a person upon whom the trustee of the trust has the power to confer a benefit from such trust'. This indicated that the legislator distinguished between beneficiaries who were named as such and 'potential beneficiaries'. Counsel suggested that this would be a distinction without a difference unless the legislator had in mind beneficiaries with vested rights and beneficiaries who had not yet acquired vested rights pursuant to the exercise of a discretion by the trustees. The result, so the argument concluded, was that where the legislator used the unqualified word 'beneficiary' (as in subsec 64C(1)) it intended to refer to a beneficiary with a vested right. Subsection (1)(c) was therefore inapplicable to the payments made to the Trust because, in this instance, the trustees had not exercised their discretion to pay any of the potential beneficiaries.

[30] This argument is, in my view, flawed in several respects. The first is that without considering the word 'beneficiary' in its context in s 64C (read, of course, with its related s 64B), reference was made to a definition of the word elsewhere in the Act in relation to the definition of another term used elsewhere in the Act. This has been labelled as a doubtful method of arriving at a reliable interpretation of a word or phrase in this type of statute. In *Standard General Insurance*, Nugent and Lewis JJA said:

'In our view some caution is required before attributing an intention to the drafter of legislation by inference. Giving meaning to particular words by drawing upon language that is used elsewhere in a statute is no more than the application of a process of logical reasoning – it is usually reasonable to infer that the compiler of a single document has used language consistently throughout. But where a voluminous and complex statute has been repeatedly amended, probably by various drafters, over a long period of time – as in this case – that inference will not necessarily be sound.'

It is true, as counsel pointed out, that the definition of 'connected person' (incorporating the definition of 'beneficiary') was inserted into the Act by the same amending Act (113 of 1993) as were ss 64B and 64C. But the destination of the definition of 'connected person' and its application in the Act were materially different from those of the new provisions for the imposition of STC.[5] In any event, there is clearly a material difference between a 'named beneficiary' on the one hand, and a beneficiary who is not named but who falls within a specified or discernible class to which the trustees are empowered, in their discretion, to grant benefits on the other. In the definition of 'connected person', the legislator made it clear that the term 'beneficiary' should be taken to include either of these categories. Its use of the unqualified word in subsec (1)(c) should, in my view, be taken to indicate that it intended to refer to a 'named beneficiary'.

[31] The second error in the argument is that, having decided that subsec (1)(c) might refer to beneficiaries with vested rights, there was no attempt to test the decision to ascertain whether it measured up to the legislator's purpose and intention. If this had been done, it would have been apparent that the problems which the restricted meaning would have created for the Commissioner would have been enormous. I do not intend to deal with them in any detail here. A further

Above, para 22.

[5] De Koker, *Silke on South African Income Tax* (Memorial Ed), Vol I p 1.16B cites these. They include s 11(e), 11(gA), 11(gC), 11(o), 12B, 12C and 23G.

pertinent consideration would be that the restricted definition would make it easy for shareholders and their companies to avoid STC by creating 'discretionary trusts' in which the trustees simply declined to exercise their discretion during any period in which STC might become payable. Counsel was constrained to concede that he could not go so far as to assert that, for subsec (1)(c) to apply, the trust beneficiary must have a vested right to the particular distribution. But he submitted that what was meant by the concept of 'beneficiary with a vested right' was a beneficiary who had actually had a benefit of some sort conferred on him by the trustees. From this moment on, he said, that person would fall within the ambit of s (1)(c). In other words, 'once a beneficiary with a vested right, always a "beneficiary" within the meaning of subsec (1)(c)'. This, he said, would apply regardless of whether there was any link between the object of the vested right and the distribution made by the company. Counsel was unable to give a satisfactory answer to the question whether subsec (1)(c) would come into play if the 'beneficiary' had had no vested right at the time of the distribution but acquired one (perhaps, even, by the proceeds of the distribution being given to him by the trustees) at some later date. As indicated on more than one occasion earlier in this judgment, STC is payable as a result of the distribution. Liability for it does not depend upon its ultimate destination. It is by no means clear, on the restricted interpretation opted for by the respondents, how and when STC would become payable if a distribution is made to a trust during one dividend cycle, and the trustees exercise their discretion to make a payment for the first time to the shareholder or his relative in the following tax year or during a subsequent cycle.

[32] As an example, a consideration of the terms of the Trust deed also demonstrates, on a practical level, how the purpose of the legislation would be frustrated by giving 'beneficiary' the restricted meaning. The deed defines the trust beneficiaries in the following terms:

'1. In hierdie Trustakte, tensy die teendeel duidelik uit die samehang blyk, sal . . .

1.4 Die woord "begunstigde" MARIUS SMIT RETIEF . . . , sy vrou DALENE RETIEF . . . en die nakomelinge en verder afstammelinge van die gesegde MARIUS SMIT RETIEF, beteken, en "inkomstebegunstigdes" sal 'n ooreenstemmende betekenis hê.'

The object of the Trust is stated to be to provide for the welfare of the beneficiaries. Retief is a trustee with unfettered power to nominate and appoint a successor in the

event of his vacating the post. In the event of one of the other two trustees vacating office, Retief and the remaining trustee have the power to appoint a successor. A majority of the trustees (of whom Retief must be one) has the power to dismiss the third trustee: otherwise all decisions by the trustees are required, for them to be effective, to be unanimous. Insofar as the trustees' discretion is concerned, it is plainly more apparent than real. First, it is stipulated that the only persons to whom the income of the trust may be distributed are the income beneficiaries. It is also stipulated that income which is not distributed must either be held back as undistributed income or capitalized. The trustees do, however, have a discretion as to whether and when to make payment and as to which of the beneficiaries should receive it. There is a mention in the deed that the trustees have a similar discretion to make payments of the trust capital to the 'kapitaalbegunstigdes' from time to time, but these beneficiaries are not defined. It must be inferred that they are the remaindermen. In this regard the deed provides that the trust will terminate six months after the death of the longer living of Retief and his spouse, and that any undistributed income and the capital will, at that date, be distributed to the 'kapitaalbegunstigdes' in such proportions as the trustees may in their discretion decide. It was stated in evidence that this is a fairly common form of trust deed used for 'estate planning'. Indeed it is a form of trust that is regularly encountered in tax litigation. The striking feature of it, in relation to this case, is that the only conceivable beneficiaries are Retief, his spouse and their descendants. All of these beneficiaries fall squarely within the ambit of subsec 64C(1)(c). This is accordingly not a type of trust in which the trustees have a discretion to benefit anyone other than 'recipients' as defined in the subsection. The authority of Retief plainly pervades the trust. His co-trustee, Mr J D Coetzee, acknowledged in the course of his evidence that Retief is a headstrong man who ignores advice if it doesn't suit his wishes. Both his co-trustees are employed by Retief and, indeed, the evidence was that the Coetzee family had been employed as accountants and auditors of the Retief family businesses since the mid 1950's. The circumstances are strikingly similar to those outlined in *Badenhorst v Badenhorst*[6] (2006 (2) SA 255 (SCA) paras 10 and 11). For all practical purposes a payment to the Trust is equivalent to a payment to Retief, for he has the power to direct its ultimate destination. It would, in my view, be ludicrous for the respondents to be able to rely on the circumstance that the trustees had not

[6] 2006 (2) SA 255 (SCA) paras 10 and 11.

yet made a decision to pay any amount out of the trust to any of the beneficiaries, to avoid liability for STC. Such a result would fly in the face of the legislators clear intention.

[33] The respondents contended, finally, that when the definition of 'recipient' was amended in 2000 to include 'any connected person in relation to such shareholder' the legislator made it plain that it was extending the ambit of the section so as to catch in the net not only beneficiaries with a vested interest but also potential beneficiaries. That is not, in my view, an obvious inference. It is just as likely that the legislature intended to clarify what the section was supposed to cover – all those who might be the recipients of a gratuitous benefit.

[34] I accordingly conclude that the contentions of the Commissioner should be upheld and that the payments made by the respondents to the trust must be treated as 'distributions to a recipient' for the purposes of assessing the respondents' liability for STC.

[35] There remains the issue whether the exclusions in s 64C(4)(c) and/or 64C(4)(d) apply to any portion of the distributions. In this regard an unusual situation has arisen. Although the president in the court *a quo* outlined some of the evidence adduced before him and his assessors and, at least in relation to the respondents' alleged motive for having made the loans to the Trust, stated a finding as to its acceptability, his judgment dealt only with the question of interpretation of s 64C(1)(c). As this was a question of law, his assessors did not participate in this aspect of the judgment. In view of his decision, the learned judge did not find it necessary to consider the other issues before the court. These, in fact, were issues in regard to which the assessors, in their capacity as experts, would have had to participate in the final decision. As matters turned out, then, there is no judgment by the court *a quo* on the question whether the exclusions apply and, if so, to what extent they affect the quantum of the assessment. The Special Court stated in this regard:

'During the course of the hearing we were advised that the respondent (*sc.* the Commissioner) concedes that the assessments which were made are excessive and should be referred back for reassessment in terms of section 83(13)(a)(iii) of the Act. There will accordingly be an order to this effect, but if any further directions in this regard are required from the court or if any further

submissions are to be made, counsel are requested to see me in chambers within five (5) days from the date on which this judgment is delivered so that these aspects may be finalized.'

[36] Somewhat curiously, having ruled that the appeals should succeed (which had the necessary consequence that Airworld and RCI were not liable to pay STC) the President nevertheless added the following order :

'The matters are referred back to the Commissioner for reassessment in terms of section 83(13)(a)(iii) of the Act to the extent that there were retained earnings available for distribution as dividends.'

The meaning and effect of this referral is by no means clear, but one infers that it related to the question whether there were retained earnings which might have been left out of the reckoning as assets available for distribution within the meaning of s 64C(4)(b). Whatever the reason for this paragraph in the order, the matter is complicated by conflicting requests made on behalf of the Commissioner concerning the form of order which this court should make. In the notices of appeal the court is asked to reverse the decision of the court *a quo* and refer the matter back 'to the Commissioner for reassessment in terms of s 64C'. At the conclusion of the heads of argument prepared by counsel for the Commissioner, this court is requested to remit the matter for reassessment only in respect of Airworld, such further assessment to be 'in accordance with the terms of this court's judgment'. The reason for excluding RCI from the remittal is by no means clear. I assume that the reference to 'the terms of this court's judgment' is a reference to the issues relating to the applicability or otherwise of the exclusions under s 64C(4) in respect of which there is no judgment from the court *a quo*. What is clear, though, is that the Commissioner concedes that the original assessments were incorrect and that the parties were in agreement, in the court *a quo*, that there would have to be reassessments if STC were to be paid at all.

[37] It seems to me that if this court were to comply with counsels' request to express views as to the extent of the applicability of the exclusionary provisions in s 64C(4), before any such reassessment is made, the court would effectively be giving an opinion to the parties. Ordinarily, the proper order following upon the decision that the Special Tax Court was wrong in holding that ss 64B and 64C did not apply, would be to remit the matter to that court. But, on a practical level, since the reassessment has to be carried out, and since any party aggrieved by such reassessment has a

right of objection and appeal in terms of s 83(14), it seems that the most appropriate course for this court to adopt is to give effect to the parties' request for the matter to be remitted directly to the Commissioner.

[38] The appeals succeed with costs, including those occasioned by the employment of two counsel. The order of the Special Court is replaced by the following:

‘(1) The appeals against the assessments are dismissed.

(2) The matters are remitted to the Commissioner in terms of s 83(13)(a)(iii), for reassessment in terms of s 64C.’

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HURT AJA

CONCUR:

HOWIE P

LEWIS JA