THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 375/09

THE COMMISSIONER FOR THE SOUTH AFRICAN
Appellant
REVENUE SERVICES

and

FOSKOR **Respondent**

Neutral citation: *The Commissioner for SARS v Foskor* (375/09) [2010] ZASCA 45 (31 March 2010)

CORAM: Navsa, Mhlantla, Tshiqi JJA, Majiedt and Saldulker AJJA

HEARD: **15 March 2010**

DELIVERED: **31 March 2010**

SUMMARY: Whether ore stockpiles constitute trading stock as described in s 1 read with s 22 of the Income Tax Act 58 of 1962 ─ rationale for these provisions discussed ─ ore subjected to complex processes which resulted in a saleable product for the manufacture of fertilizer ─ held that stockpiles constituted trading stock ─ interest on unpaid tax remitted based, inter alia, on the fact that appellant had remained passive for a lengthy period and that taxpayer had acted on legal advice.

ORDER

On appeal from: The South Gauteng Tax Court (Joffe J sitting as court of first instance).

1. The appeal is upheld and the respondent is ordered to pay 50 per cent of the appellant's costs.

2. The order of the tax court is set aside and replaced with an order in the following terms:

'1. The appeal of the appellant against the inclusion in its income of the amount of R203 205 437 as trading stock in respect of its 1999 year of assessment is dismissed.
2. The appeal of the appellant against the refusal of the respondent, in terms of s 89*quat* (3), to remit the interest of R51 170 908 imposed in terms of s 89*quat* (2) in respect of the appellant's 1999 year of assessment is upheld, and the said interest is hereby remitted.'

JUDGMENT

NAVSA JA (Mhlantla, Tshiqi JJA, Majiedt and Saldulker AJJA concurring)

[1] The question in this appeal is whether extracted, mineral-bearing ore belonging to the respondent, Foskor (Pty) Ltd (Foskor), a mining company, is 'trading stock' for the purposes of the Income Tax Act 58 of 1962 (the Act). The appellant, the Commissioner of the South African Revenue Services (the Commissioner) contends that it is. Foskor is adamant that it is not.

[2] In the event that the Commissioner is correct it would increase Foskor's initially assessed income by R203 205 437[1] rendering Foskor liable to taxation on that amount. Foskor contends that even in the event of it being so liable the Commissioner ought, nevertheless, to have exercised a discretion to remit the interest which at the relevant time was in an amount of R51 170 908.80.

[1] As at 18 September 2006 taxation on this amount was calculated by the appellant in an amount of R60 647 003.10.

[3] Thankfully, the facts in this case are largely common cause and are set out hereafter.

[4] Foskor's main business is mining, although it derives non-mining income as well, which it asserts is related to its secondary business, namely, the recovery and marketing of baddeleyite (a mineral) and the production of electrofused zirconia from zircon sand.

[5] During 1952 Foskor acquired the right to mine base minerals, including phosphates over the farms Wegsteek 30 LE, Loole 31 LE and Laaste 24 LU, all belonging to the State.

[6] During 1963 Phalaborwa Mining Company Limited (PMC) obtained the right to mine copper and other base minerals, except phosphorous minerals, over some of the areas over which Foskor held its rights.

[7] On 8 October 1979, in order to utilise the full potential of the ore body, Foskor and PMC entered into what was called an Extension-100 F agreement and an Ancillary agreement. PMC had an open pit copper mine which it could utilise optimally by extending its operations into Foskor's claims. The agreement was intended to maximise the benefit for both institutions, allowing PMC to concentrate on copper mining and Foskor on the phosphate-bearing ore, called foskorite. PMC undertook to mine the foskorite as a by-product of its copper mining operations and to deliver the ore to Foskor, which agreed to pay its mining and transport costs. Upon delivery of the ore Foskor became the owner thereof.

[8] Between the 1979 and 1998 tax years approximately 183 million metric tons of foskorite were allocated and dumped by PMC for further processing by Foskor. At the end of that period the open pit from which the ore was extracted had reached its final economic limits and could no longer continue to be

exploited.

[9] From the ore dumped by PMC Foskor extracted phosphates and other minerals by way of the following processes:

(a) the phosphate-bearing ore is loaded and hauled to a primary crusher and then conveyed to secondary and tertiary crushers for further crushing;
(b) the crushed material is then conveyed to Rod and Ball mills for milling to liberate the mineral particles from the ore;
(c) the pulp containing the minerals is then pumped to a flotation plant where the minerals of economic importance are separated by means of three metallurgical processes, namely, a froth flotation process, a magnetic concentration step and a gravity separation process;
(d) the product from these processes are various concentrates. The phosphate concentrate which is the main object of the enterprise is then dried and stockpiled.

[10] The phosphate concentrates are sold to customers worldwide, who in turn use the phosphate minerals contained in the concentrate mainly for making fertilizers.

[11] Baddeleyite, a mineral which is contained in the foskorite is also recovered by Foskor and furthermore, low concentrates of copper sulphide minerals are extracted and contribute to the appellant's income. Magnetite which is recovered from the ore is also stockpiled as a possible future source of iron and titanium.

[12] It is also true that in its unprocessed form the foskorite is un-saleable largely because of the prohibitive costs of the processing referred to above. It is, however, not contested that the stockpiles can be valued.

[13] The amount of R203 205 437, which the Commissioner included in a revised tax assessment, in 2006, for the 1999 year of assessment, in Foskor's taxable income, represents closing stock on hand as at 30 June 1999 within the definition of 'trading stock' in s 1 of the Act. The amount itself is the accumulated cost incurred by Foskor in terms of the agreement referred to in para 7 above, reduced by the costs relating to the usage of the foskorite ore dumps since

dumping commenced.

[14] In the 1991 and 1992 years of assessment a debate had arisen between Foskor and the Commissioner concerning the question presently being addressed, namely whether the foskorite dumps were trading stock. Foskor took legal advice. After submissions were made to the Commissioner, the latter consequently assessed Foskor on the basis that the dumps did not constitute trading stock. For more than two decades the Commissioner did not bring the dumps into account on the income side in determining Foskor's tax liability. That attitude changed with the revised assessment presently in dispute.

[15] The Johannesburg Income Tax Special Court upheld Foskor's appeal against the Commissioner's assessment, hence the present appeal by the latter. To answer the question posed in this appeal it is necessary to have regard to the applicable statutory provisions and then to apply them to the facts set out above.

[16] The relevant parts of s 22 of the Act read as follows:

'(1) The amount which shall, in the determination of the taxable income derived by any person during any year of assessment from carrying on any trade (other than farming), be taken into account in respect of the value of any trading stock held and not disposed of by him at the end of such year of assessment, shall be—

(a) in the case of trading stock other than trading stock contemplated in paragraph (b), the cost price to such person of such trading stock, less such amount as the Commissioner may think just and reasonable as representing the amount by which the value of such trading stock, not being shares held by any company in any other company, has been diminished by reason of damage, deterioration, change in fashion, decrease in the market vale or for any other reason, satisfactory to the Commissioner. . .;

(2) The amounts which shall in the determination of the taxable income derived by any person during any year of assessment from carrying on any trade (other than farming), be taken into account in respect of the value of any trading stock held and not disposed of by him at the beginning of any year of assessment, shall—

(a) if such trading stock formed part of the trading stock of such person at the end of the immediately preceding year of assessment be the amount which was, in the determination of the taxable income of such person for such preceding year of assessment, taken into account in respect of the value of such trading stock at the end of the preceding year of assessment; or

(b) if such trading stock did not form part of the trading stock of such person at the end of the immediately preceding year of assessment, be the cost price to such person to such trading stock.'

[17] The definition of trading stock in s 1 of the Act, prior to an amendment

after 2001, reads as follows:

‘ “Trading stock” includes anything produced, manufactured, purchased or in any other manner acquired by a taxpayer *for purposes of manufacture*, sale or exchange by him or on his behalf, or the proceeds from the disposal of which forms or will form part of his gross income, or any consumable stores and spare parts acquired by him to be used or consumed in the course of his trade, but does not include a foreign currency option contract and a forward exchange contract as defined in section 241(1).’

[18] The rationale for the existence of these provisions, which bears upon the central question in this appeal, is explained in the judgment of this court in *Richards Bay Iron & Titanium (Pty) Ltd & another v Commissioner for Inland Revenue* 1996 (1) SA 311 (A) at 316F-317D:

‘The South African system of taxation of income entails determining what the taxpayer’s gross income was, subtracting from it any income which is exempt from tax, subtracting from the resultant income any deductions allowed by the Act, and thereby arriving at the taxable income. It is on the latter income that tax is levied. . . .Where a taxpayer is carrying on a trade, any expenditure incurred by him in the acquisition of trading stock is deductible in terms of s 11 *(a)* of the Act because it is expenditure incurred in the production of income, and it is not of a capital nature. Income generated by the sale of such stock is of course part of the trader’s gross income. Where in his first year of trading a trader has bought, and thereafter sold, all the stock which he acquired during that year, no problem arises. There will be a perfect correlation between the trading income earned and the expenditure incurred in that particular year in purchasing and selling the stocks sold, and the difference between the two sums will give a true picture of the result of the year’s trading. There will be no stock on hand at the close of the year of which account need be taken. Contrast with that situation a situation in which the trader, having sold all the stock acquired earlier during that year at a substantial profit, purchases large quantities of stock just prior to the close of his tax and trading year. If he were permitted to deduct the cost of purchasing that stock from the income generated by his sales, without acknowledging the benefit of the stock acquired, he would be escaping taxation in that year on income which otherwise would have been taxable by the simple expedient of converting it into trading stock of the same value. That process could be repeated every year *ad infinitum*. It is true that there would ultimately have to be a day of reckoning when trading finally ceases, but the fact remains that the taxpayer will have been enabled to avoid liability for tax until that point is reached.’

[19] It is the conduct referred to in the last three sentences of the passage set out in the preceding paragraph that Foskor is accused of by the appellant.

[20] In *Richards Bay*, Marais JA had regard to Australian Tax Law which has much in common with our system of taxation and referred, inter alia, to *Federal Commissioner of Taxation v St Hubert’s Island Pty Ltd (in Liquidation)* (1978) 78 Australasian Tax Reports 452, where Stephen J concluded that, only ‘by taking account of stock-in-trade in the conventional way can a correct reflex of the

trader's income *for the accounting period* be obtained.'[2] (My emphasis.)

[21] Historically, trading stock denoted goods acquired by a trader or dealer and held for sale. Both in Australia and South Africa the narrower view of what constituted trading stock gave way to the wider view to include raw materials acquired for purposes of manufacture, components and partly manufactured goods.[3]

[22] As pointed out above PMC extracted the ore and delivered it to Foskor whereupon Foskor became the owner. The pre-trial minute records an admission on behalf of Foskor that it had 'acquired' the ore. This appeal turns on whether the foskorite dumps were acquired by Foskor for 'the purpose of manufacture' in terms of the definition of 'trading stock' (highlighted in para 16 above). A decision in the affirmative will mean success for the Commissioner on this question. The remittal of interest is an issue that will flow from a decision on the primary question.

[23] The court below considered *Secretary for Inland Revenue v Safranmark (Pty) Ltd* 1982 (1) SA 113 (A) at 122G-H, which quoted with approval, the following statement by Miller J in *ITC 1247* 38 SATC at 31:

'That the ordinary connotation of the term "process of manufacture" is an action or series of actions directed to the production of an object or thing which is different from the materials or components which went into its making, appears to have been generally accepted. The emphasis has been laid on the difference between the original material and the finished product.'

[24] In *Safranmark* the court had to decide whether the tax authorities were correct in disallowing deductions in respect of machinery allowances. The allowances were deductible if the machinery was 'used directly in a process of manufacture' or in a process of a similar nature to a process of manufacture. That case involved raw chicken and its subsequent treatment in order to be sold at

[2] See *Richards Bay op cit* at 317D-J.
[3] *Richards Bay op cit* at 318C-E.

fast food outlets. The taxpayer contended that the final product sold to consumers had been subject to a process of manufacture. This court had regard to the specialised plant and machinery, the human effort and labour employed, the volume of production and importantly that the end product was significantly different from the raw material, not only in nature but in utility and value. At 124A-B the majority of the court held as follows:

'The conclusion to be drawn from the above is that not only did each of the ingredients cease to retain its individual qualities but upon completion of the process a different compound substance having a special quality as such . . . has been produced . . .'

[25] The court below concluded that the processes referred to in para 9 above, employed in relation to the foskorite, were not such that a different finished product emerged. It said the following (at para 26):

'What is sold to customers is the phosphates originally found in the phosphate-bearing ore, and no different substance with different qualities has been produced. All that occurs is a process which liberates the mineral particles from the ore and which separates the mineral particles.'

[26] The court below thought it significant that the Act distinguished between manufacturing and mining. It had regard to the definition of mining in the Act, which includes 'every method or process by which any mineral is won from the soil or from any substance or constituent thereof'. Manufacturing on the other hand is not defined. The court below referred to *ITC* 1455, 51 SATC 111 where the treatment of magnetite ore was considered. The following passage from that case was relied on by the court in support of its ultimate conclusion:

'It is tempting to compare appellant's operation to the production of gold bullion on a gold mine. The gold ore exists in discreet particles in the rock. The mined rock is crushed and the gold is leached out. The gold ore is then heated and bullion is poured. In ordinary parlance the latter operation will not be referred to as the manufacturing of gold but to the mining of gold . . . Another comparison is with diamond mining. It must in that context be accepted that all the acts done, whether underground or on the surface, to win diamonds will be regarded as mining operations . . . These two instances differ from the present instance in that in those cases one mines for gold and diamond. The gold and diamond is already in the earth. One merely isolates it. In the case of iron production the iron is not in the ore. Iron oxide is. The iron is produced by an industrial process and not a mining process.'

[27] In para 29 of its judgment the court below said the following:

'In the result it must be held that the phosphates sold by the appellant occurs naturally in the earth and the phosphates is not, and cannot be manufactured, just as gold or diamonds cannot be manufactured but can only be mined. The phosphate-bearing ore was therefore not acquired for the purpose of manufacture. Regard being had to the purpose requirement as contemplated in the first part of the definition, the ore stockpiles do not constitute trading stock in terms of that part of the definition.'

[28] In its submissions before us Foskor adopted and advanced the reasoning of the court below set out in the preceding three paragraphs.

[29] In *Richards Bay* minerals were extracted from coastal dunes. Two companies had joined forces to extract and beneficiate those minerals which were valuable. In the course of complex operations heavy mineral concentrate is produced. During the course of these operations there are brought into existence stockpiles of materials. It was the status in tax law, of some of those stockpiles, that was decided in that case. Counsel on behalf of the taxpayer had submitted that the stockpiles were not saleable assets in the form in which they existed and that they all required to be subjected to further processing before anything capable of being sold was realised or emerged and it could never have been intended that those stockpiles should be assigned a value. Furthermore, it had been contended that had the legislature intended anything that was being used in a process of manufacture to be regarded as trading stock, it would have employed specific language to that effect.

[30] The Tax Court in *Richards Bay* was prepared to assume that the material in the stockpiles was un-saleable in its then condition and that there was no market for it, but nevertheless held that they fell squarely within the definition referred to above. This court said the following about that part of the definition of 'trading stock' highlighted in para 17 above (at 325C-F):

'Those words are quite plain and unambiguous. It is inherent in them that, in order to fall within the definition, what the taxpayer produces, manufactures, purchases or otherwise acquires need not be intended to be disposed of in the state in which it then is. It suffices that it is intended to be used for the purpose of manufacturing something. Nor does it

matter whether or not that which is intended to be used is capable of realisation or sale in the state in which it then is. . . . What brings it into the definition notwithstanding that its sale or exchange was not contemplated is its intended use for purposes of manufacture.'

[31] Foskor sought to distinguish the *Richards Bay* case on the basis that counsel representing the taxpayer in that case had made a concession ─ he had stated that he could not argue with any conviction that the stockpiles in that case had not been 'produced' or 'manufactured' within the meaning of the definition of 'trading stock'. Foskor submitted that it was consequently unnecessary for the court in *Richards Bay* to decide whether the taxpayer was precluded from contending that the stockpiles were mining stock because that point had not been made in its grounds of objection.[4]

[32] The following part of the dictum in the *Richards Bay* case, referred to in the preceding paragraph, is important:[5]

'It is therefore unnecessary to detail the evidence given in regard to those processes; it suffices to say that it establishes that the processes do indeed fall within the definition.'

The central issue in that case was whether or not the stockpiles had been manufactured or produced within the meaning of the definition and this court answered it in the affirmative.

[33] In *Secretary for Inland Revenue v Hersamar (Pty) Ltd* 1967 (3) SA 177 (A), this court, in determining whether a taxpayer was entitled to allowances in respect of machinery or plant used in a 'process of manufacture', said the following (at 186H-187A):

'Neither of the governing words in the phrase under consideration, viz. "process" and "manufacture", are words of any exact significance. Consequently the whole phrase, "a process of manufacture", is one to which it may be very difficult to assign a meaning expressed in terms which would properly distinguish between all cases which fall within the scope of the phrase and those which should fall outside its scope.'

[34] At 187B-C of the *Hersamar* case the following passage from *ITC* 1052, 26

[4] At 328H-329C.
[5] At 328I.

SATC 253 at p 255 was referred to:

'the article claimed to have resulted from a process of manufacture must be essentially different from the article as it existed before it had undergone such process.'

[35] Williamson JA in the *Hersamar* case, commenting on that passage, said the following:

'[I]t must be recognised that the term "essentially" obviously imports an element of degree into the determination of the sufficiency of the change that must be effected for a process to be one of "manufacture". As a result of being processed, a change may take place in regard to the nature or form or shape or utility, etc., of the previous article or material or substance. There can be no fixed criteria as to when any such change can be said to have effected an essential difference. It is a matter to be decided on the particular facts of the case under consideration. The most exhaustive examination of imaginary examples of change really does not carry the matter further.'[6]

[36] In *Secretary for Inland Revenue v Cape Lime Co Ltd* 1967 (4) SA 226 (A) the taxpayer produced lime from raw material available on its land in the form of natural deposits of limestone. It utilised a reduction plant two and a half miles away from the quarry. It had purchased two new lorries for use in the carriage of the limestone from the quarry to the reduction plant. The question for decision was whether the lorries had been brought into use by the taxpayer 'for the purposes of his trade and used by him directly in a process of manufacture', within the meaning of s 12(1) of the Income Tax Act 58 of 1962, thereby entitling it to the deductions provided for. At the reduction plant there were crushers that broke up the limestone to a size that would enable it to be fed into kilns. The court concluded that the trucks were used in the process of manufacture of hydrated lime.

[37] We were referred to several cases decided in other jurisdictions, including Australia and Ireland, which were concerned with whether or not particular items were manufactured or produced. I agree with what is stated by Windeyer J in a decision of the High Court of Australia *MP Metals Pty Ltd v Federal Commissioner of Taxation* [1968] HCA 89; (1968) 117 CLR 631 (at para 16):

[6] At 187C-F.

'I have considered cases to which I was referred and also some others concerning the denotation of the word "manufacture" appearing in other Acts. I have gained only two things from them. One is a conviction of the futility of trying to decide the present case by observations made about other facts and other Acts. The other is that the expression "manufactured goods" is not a technical term capable of a precise definition universally applicable.'

[38] At para 15 of *MP Metals* the following appears:

'Whether or not a particular article answers the description "manufactured goods" must depend upon the context of language and subject matter in which the phrase is used.'

Later in the same paragraph, Windeyer J said:

'It is no doubt true that all manufacturing involves the making of a new thing.'

The learned judge referred to the following statement by Darling J in *McNicol v Pinch* (1906) 2 KB 352 at p 361:

'[T]he essence of making or of manufacturing is that what is made shall be a different thing from that out of which it is made.'

He observed that this does not, however, supply the answer to the following question: What is a different thing?

[39] The present case has to be decided against the background of the rationale for the provisions relating to 'trading stock' and the progressive inclusion of raw materials acquired for the purposes of manufacture so as to widen the net to ensure proper accountability in each tax year.

[40] In the present case the ore is mined and extracted by PMC. It is acquired by Foskor upon delivery by PMC. It is acquired so as to subject it to the processes referred to in para 9. It is common cause that before the ore is subjected to those processes it is not saleable. Subsequent to these processes Foskor has a worldwide market for the end products.

[41] That part of the judgment in *ITC* 1455, cited and relied on by the court below (and referred to in para 26 above), must be seen in proper perspective. In that case the Tax Court was called upon to consider the effect of an amendment to the then Sales Tax Act 103 of 1978 which extended the definition of 'mining

operations'. The relevant part of the amended provision[7] reads as follows:

'[T]he expression "mining operations" means those operations the essential object of which is the recovery of mineral or oil deposits from the earth, including operations concerned with prospecting for such deposits, the extraction of the deposit-bearing materials from the earth and the treatment of those materials for the purpose of recovering such deposits therefrom.'

[42] In *ITC* 1455 the distinction between mining operations and manufacturing was important for the ensuing sales tax implications. The extended definition as can be seen from the text of the amendment, set out in the preceding paragraph, clearly covers treatment of ore beyond its extraction from the earth and includes the further treatment of the raw material.

[43] Furthermore, it is true that when a mining house extracts gold ore and then subjects it to processes including refinement one would be hard-pressed not to concede that the mining house in question has mined the gold. So too, when diamonds are extracted from the earth by a diamond mining company and then subjected by it to cutting and other processes one would readily concede that the diamonds it then onwards sells to jewellers and others had been mined by it.

[44] In the present case, the mining is done by PMC. The ore, after it is acquired by Foskor, is subjected by it to what is set out in para 9 above as part of a process towards the ultimate end, namely, the fertilizer produced by its customers. The foskorite ore is acquired by Foskor for the purpose of manufacture towards that final object. The fertilizer, although it contains phosphates, is a product substantially different to the foskorite ore. One would not in ordinary parlance speak of mining fertilizer, particularly where the mining institution and the producers of the intermediate and end products are distinct.

[45] In my view, the submission that the phosphate minerals that occur naturally in the earth are contained in what is sold to fertilizer producers worldwide and that the end product was therefore not manufactured, is too simplistic. It ignores not only the complexity of the processes to which the ore was subjected but the fact that in the result several minerals are separated and sold independently. It also ignores the fact that before the processes referred to the ore is not saleable but that what is produced thereafter has a worldwide market. Put simply, the end products that emerge after the processes referred to

[7] Inserted by s 8 of the Sales Tax Amendment Act 102 of 1985 (with effect from 31 July 1985).

above are significantly different from the raw ore.

[46] In my view, the distinction sought to be made between mining operations and manufacture, in the present context, is unhelpful. In a legal opinion obtained by Foskor the distinction between mining operations and manufacturing was drawn in an effort to substantiate the view that the stockpiles were not trading stock. In that opinion reference is made to allowances to which miners are entitled in relation to capital expenditure. Furthermore, the opinion refers to the deductibility of expenditure in connection with prospecting and exploratory work. We were, however, not referred by Foskor to any provision of the Act or to any other statute which, in the circumstances of this case, would have entitled Foskor to the benefits of a distinct tax regime or which would in some other way have afforded it tax relief in the form of an allowance or deduction. More importantly, it does not appear that Foskor, during the lengthy period when it completed tax returns on the basis that the ore stockpiles did not constitute trading stock within the meaning of s 1 of the Act, claimed any particular mining deduction, allowance or other benefit. This might be due to the fact that PMC conducted the mining.

[47] It is important to bear in mind that the deductions claimed by Foskor were in relation to the cost of acquiring the ore stockpiles, which is the kind of expenditure that in the ordinary course is deductible in bringing trading stock into account.

[48] In my view, the *Richards Bay* case is not distinguishable. The fact that the ore was not saleable before the processes referred to above does not exclude it from constituting trading stock. The primary question, for all the reasons set out above, is answered in favour the Commissioner. This leads to the question, whether the Commissioner justifiably did not remit the interest that would in the ordinary course have been imposed on the taxable amount.

[49] Section 89*quat* (2) regulates the payment of interest on the underpayment

of provisional tax. Section 89*quat* (3) provides as follows:

'Where the Commissioner having regard to the circumstances of the case is satisfied that any amount has been included in the taxpayer's taxable income or that any deduction, allowance, disregarding or exclusion claimed by the taxpayer has not been allowed, and the taxpayer has on reasonable grounds contended that such amount should not have been so included or that such deduction, allowance, disregarding or exclusion should have been allowed, the Commissioner may, subject to the provisions of section 103 (6), direct that interest shall not be paid by the taxpayer on so much of the said normal tax as is attributable to the inclusion of such amount or the disallowance of such deduction, allowance, disregarding or exclusion.'

[50] In the Tax Court Foskor contended that even if it failed on the merits the Commissioner should remit the interest which would otherwise be payable. Before us it persisted in that submission. The basis on which this submission rests is set out hereafter. Prior and subsequent to the Tax Court judgment in *Richards Bay* it had taken legal advice in respect of the stockpiles in question on the strength of which it had regulated its affairs. It provided the opinion to the Commissioner who, for more than two decades, had not considered the stockpiles to form part of Foskor's trading stock.

[51] It is true that Foskor does not appear to have taken legal advice subsequent to the decision of this court in *Richards Bay*. However, the court below itself saw merit in Foskor's approach. In my view, on the basis contemplated in s 89*quat* (3), we can consider that issue afresh and substitute the Commissioner's decision in this regard.[8]

[52] What remains is the question of costs. The appeal was clearly warranted and the Commissioner has been successful on the primary question. Foskor, on the other hand, will as a result of the conclusion reached above in respect of the remittal of interest be the beneficiary of substantial financial relief approximating the amount of taxation for which it is liable. In my view, considering the importance and extent of the primary question and taking into account all the circumstances of the case, including the Commissioner's passive position for a

[8] See s 89*quat* (5).

considerable period of time, a cost order restricting the appellant to recovery of 50 per cent of its costs is warranted.

[53] The following order is made:

1. The appeal is upheld and the respondent is ordered to pay 50 per cent of the appellant's costs.

2. The order of the tax court is set aside and replaced with an order in the following terms:

'1. The appeal of the appellant against the inclusion in its income of the amount of R203 205 437 as trading stock in respect of its 1999 year of assessment is dismissed.

2. The appeal of the appellant against the refusal of the respondent, in terms of s 89*quat* (3), to remit the interest of R51 170 908 imposed in terms of s 89*quat* (2) in respect of the appellant's 1999 year of assessment is upheld, and the said interest is hereby remitted.'

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M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	O Rogers SC
	Instructed by The State Attorney Cape Town The State Attorney Bloemfontein
For Respondent:	P J J Marais SC J Truter

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