REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case number: 404/99

In the matter between:

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE Appellant

and

THE EXECUTOR OF THE ESTATE
OF THE LATE WALDO EARL FRITH Respondent

CORAM: **HEFER ADCJ, PLEWMAN JA, MPATI, BRAND and CHETTY AJJA**

HEARD: **17 NOVEMBER 2000**

DELIVERED: **29 NOVEMBER 2000**

Estate duty - Section 4(q) deduction - Computation.

JUDGMENT

PLEWMAN JA:

[1] I have read the judgment of Brand AJA. Unfortunately I differ from him and disagree with the conclusion to which he has come for the reasons I now give. The facts are set out in Brand AJA's judgment.

[2] The issue in the appeal is how s 4(q) of the Estate Duty Act 45 of 1955 (the Act) is to be construed. The primary rule in construction of statutory provisions is (as is well established) to ascertain the intention of the legislator and (as is equally well established) one seeks to achieve this, in the first instance, by giving the words of then enactment under consideration their ordinary grammatical meaning, unless to do so,n would lead to an absurdity so glaring that the legislature could not have contemplated n it. *Boland Bank Ltd v The Master and Another* 1991 (3) SA 387 (A).n Literal interpretation is thus a firmly established principle.

[3] S 4 of the Act lays down that the "net value of any estate" be determined by making specified "deductions" from the total value of

all property included in the estate. Ss 4(q) (one of the class of deductions so prescribed) reads:

> "(q) so much of the value of any property included in the estate which has not been allowed as a deduction under the foregoing provisions of this section, as accrues to the surviving spouse of the deceased: Provided that -
>
> (i) the deduction allowable under the provisions of this paragraph shall be reduced by so much of any amount as the surviving spouse is required in terms of the will of the deceased to dispose of to any other person or trust;
>
> (ii) no deduction shall be allowed under the provisions of this paragraph in respect of any property which accrues to a trust established by the deceased for the benefit of the surviving spouse, if the trustee of such trust has a discretion to allocate such property or any income therefrom to any person other than the surviving spouse."

To follow the arguments dealt with in the appeal attention must be focussed on the word "accrues". (It is also found in ss 4(g) and (h).)

[4] A word of warning must be sounded. The Act is a fiscal statute. It has in the forty five years of its existence been the subject of thirty seven Amending Acts. It takes its present form as a result of amending Acts - being s 5(1)(b) of Act 81 of 1985 and the substitution

of the present wording by s 6(1)(c) of Act 86 of 1987. Fiscal statutes pose their own problems.

[5] "Accrue" is a familiar word often encountered in our law - particularly, in the law of succession and in taxation legislation where it is usually encountered in disjunctive sense in phrases such as "receipts or accruals". The Shorter Oxford English Dictionary gives (in the sense appropriate to the context in which we find the word) the meaning "to come as an accession or advantage".

[6] In our jurisprudence the word is, in general, used in contexts which require that it be given the meaning "entitled to" in contrast to a meaning such as "actually receive or received". This too seems to be the sense in which the word is, for example, used in America. Black's Law Dictionary (1979 Ed) gives numerous examples illustrating this. Some of the examples are - "alimony which is due but not yet paid"; "expenses incurred but not yet paid"; "interest which has been earned but is not yet paid or payable". The primary meaning of the word accrue would thus seem to me to involve a nuance which contrasts it with a meaning such as "has been received" or "will be actually received".

[7] This however does not, of itself, resolve the conflict which has

arisen in this appeal. One could well use the word accrue in a setting such as "the value of property which will accrue to the surviving spouse in terms of the executor's final liquidation and distribution account". In this example the word would still connote "entitled to" rather than "received" but it would establish clearly the stage in the process at which the value in question must be determined.

[8] The reference in paragraph 11 of Brand AJA's judgment to the executor's contention that the deduction "includes estate duty" while the Commissioner's contention is that it "excludes" estate duty tends to obscure the real question which must be asked. This, in my view, is what the value is which is to be taken into account. This necessarily, given the nature of the conflicting views, involves asking at what point in the process dealt with in the Act is the relevant value to be determined.

[9] S (4)(q) does not contain phraseology such as is used in my example in paragraph 7 hereof. Had the legislature intended the meaning found in that example it could quite easily have so said in express terms. At the very least then the word accrue would be uncertain or ambiguous.

[10] The practical effect of interpreting the section as appellant

would have it is an increase in the amount of duty payable. With fiscal provisions where a doubt arises, the construction against the larger imposition is to be adopted. *Borcherds, NO v Rhodesia Chrome and Asbestos Co Ltd* 1930 AD 112 at 119; *Commissioner for Inland Revenue v McNeil* 1959 (1) SA 481 (A) at 489 B-D.

[11] But I do not view the matter as being in doubt. The practical implications referred to in paragraph 14 of Brand AJA's judgment (which he refers to as "a certain awkwardness") to me indicates a result which the legislature could not have intended. I am aware that situations may occur where a measure of "back calculation" is called for. An example may arise from the provisions of s 7(3)(a) of the Value-added Tax Act No 89 of 1991 where the price is or is deemed to include VAT. But where in the present statute is there any suggestion that one must engage in arithmetic or algebraic gymnastics when applying it?

[12] The determination of the dutiable amount in the Act is to follow a process whereby one is able to establish the charge which is to be raised in the executor's liquidation and distribution account. I find nothing in the Act to suggest that the very charge one is seeking to determine is to be used to determine itself. There is furthermore nothing in s (4)(q) to suggest that it is concerned with

what the surviving spouse will ultimately receive from the executor. What it is concerned with is the determination of a charge which must be made against the estate and therefore included as a charge in the account, which account will establish the sum (if it is a monetary amount) which the surviving spouse will receive. The focus is on what the surviving spouse is entitled to from the will, not her ultimate cash receipt. That this is so is in my view supported by the wording of the section which concerns itself with "the value of any property included in the estate" (and not with the surviving spouse).

[13] The inherent circularity of the procedure Brand AJA's judgment suggests would seem to me to be totally unnecessary if the relatively simple scheme of the Act is followed. The scheme of the Act is that estate duty is to be charged on a dutiable amount "calculated in accordance with the provisions of the Act" (s 2(2)). What constitutes an estate for this purpose is expressly set out (s 3). The "net value" of the estate is determined by making the specified deductions (which do not, in terms, include deductions of notional amounts) (s 4). Thereafter an additional abatement of R1 million is made (s 4A). The appellant's contention thus would seem to rest on the introduction into the process of computation of a deduction which is not provided for in the Act.

[14] In Brand AJA's judgment a paragraph is quoted from Meyerowitz, *Administration of Estates, Estate Duty and Capital Transfer Tax* 6th Ed. It seems to me that regard should also be had to another and (simply for convenience) I will then set out both. They read as follows:

> "27.1 The duty is imposed on the dutiable amount. The dutiable amount is determined by a series of steps. The start is the gross value of the estate, that is the total values of all the property which by definition must be included in the estate. From this gross value there must be deducted all the amounts and values allowed by the Act, the balance being termed the net value. From this net value there is deductible an abatement, currently R1 million, the balance being the dutiable amount on which the duty is calculated."
>
> "30.5 In previous editions I exemplified the practice whereby, in the case of allowable deductions in respect of the residue or the usufruct of the residue accruing to a surviving spouse or charity, the 'net amount' is determined by taking into account the estate duty as liability which reduces the allowable deduction and in consequence increases the 'net amount'. This practice involves a duty on duty situation. Where the rate of duty is 25% the calculation of duty on duty results in an amount equal to 33,33% of the 'net amount' before taking the duty into

account. It is my view that there is no warrant in the Estate Duty Act for this practice. Section 4 of the Act sets out the allowable deductions in determining the 'net amount' and it is this 'net amount' on which duty is imposed. It is fallacious to determine the net amount on which duty is payable and then bring in the duty so calculated as liability (not provided for) in order to redetermine the 'net amount'."

The fact that the author at an earlier time held (for whatever reason) a different view seems to me irrelevant.

[15] Brand AJA finds support for the appellant's construction in the cases of *Estate Smith v Estate Follet* 1942 AD 364 and *Greenberg and Others v Estate Greenberg* 1955 (3) SA 361 (A). The first mentioned case held that a *fiduciary* burdened with a *fidei commissum residui* cannot dispose of any property to his wife by a donation uncompleted by delivery at the time of his death. The case involved somewhat complicated provisions of two wills and a deed of donation. The question in issue was the power of a fiduciary heir to deal with property bequeathed to him – being property subject (in itself) to a *fidei commissum*. There is a statement (at 383) that under our system of administration of the estates of deceased persons an heir is in effect a residuary legatee (and that)

"when we speak of his inheritance we mean either the property

> which he is entitled to claim from the executors of the estate of the deceased or his legal right to claim such property derived from the will. The heir in this sense is entitled, after confirmation of the executor's account to certain rights of action against the executors to claim what is due to him whether it be payment of money or delivery of moveables or transfer of unmovable property".

In the context this is true. But how it can be suggested that it, or the analogy suggested as to the position of the heir, assists in the construction of the statute in question in this case is not clear. In the *Greenberg* case one finds the statement (p 364) that:

> "The position under our modern system of administering deceased estates is that when a testator bequeaths property to a legatee the latter does not acquire the *dominium* in the property immediately on the death of the testator but what he does acquire is a vested right to claim from the testator's executors at some future date delivery of the legacy, i.e. after confirmation of the liquidation and distribution account in the estate of the testator."

I am equally unable to discern from this why what "accrues" to a surviving spouse would for the purposes of s 4(q) be considered to be some after-duty figure. The section, in my view, is concerned with property derived from the will and neither authority can assist

when construing s 4(q).

[16] The submission of counsel that the tax authorities have consistently over time construed and applied s 4(q) in the manner contended for by appellant is accepted in the judgment of Brand AJA as providing an aid to the construction of the section. While this principle has been recognised in our courts (see *R v Detody* 1926 AD 198) it is only invoked in cases where there is ambiguity in an enactment. I find none here. In any event, however, I would hesitate to invoke the principle. Thirty seven amending acts in forty five years is suggestive of *ad hoc* fiscal re-arrangement and not consistent legislative approach.

[17] The order I make is:
The appeal is dismissed with costs.

C PLEWMAN JA

CONCUR:
HEFER ADCJ)
MPATI AJA)

BRAND AJA

[1] This is an appeal from the Transvaal Income Tax Special Court. It concerns the calculation of estate duty payable in terms of the Estate Duty Act 45 of 1955 ("the Act"). The issue relates to the determination of the amount of a **deduction** under s 4(q) of the Act.

[2] According to s 2 - read with the provisions of the first schedule - estate duty is charged at the rate of 25% of the **dutiable amount** of the estate. The calculation of the dutiable amount involves a series of steps. The starting point is to establish the gross value of the estate, i.e. the aggregate of the **values** of all the **property** of the deceased. Section 3 lays down what constitutes the property of the deceased whereas s 5 stipulates how such property is to be valued. The next step is to determine the **net value** of the estate by subtracting the amounts allowed as **deductions** under s 4. The final step is to deduct from the net value, the abatement of R1 million provided for in s 4A . The balance then constitutes the **dutiable amount** upon which estate duty is calculated. (see Meyerowitz: *Administration of Estates, Estate Duty and Capital Transfer Tax,* 6th Ed, para 27.1)

[3] Section 4 provides a list of various deductions. These include all the liabilities of the deceased and the costs pertaining to the administration of his estate. The provision in issue in this case is s 4(q) which section, insofar as it is relevant hereto, reads as follows:

"4. Net value of the estate.

The net value of the estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say:

(q) so much of the value of any property included in the estate which has not been allowed as a deduction under the foregoing provisions of this section , as accrues to the surviving spouse of the deceased: Provided that ...

[4] Section 4(h) is also of some relevance. It provides for the deduction of the "value of any property included in the estate ... which accrued or accrues" to certain institutions, including charitable institutions.

[5] The background facts are not in dispute. The deceased, Mr Waldo Earl Frith, died on 25 February 1997. He was survived by his spouse, three children and seven grandchildren. In terms of his will he bequeathed R750 000,00 to each of his children, R100 000 to each of his grandchildren, R25 000 to a charity and R14 000 to his erstwhile employees. The specific bequests in the will thus amounted to R2 989 000,00. In terms of clause 3 of the will the deceased bequeathed the "entire residue" of his estate to his wife.

[6] From the outset, it was common cause between appellant ("the commissioner") and respondent ("the executor") that the bequest to the surviving spouse of the deceased qualifies as a deduction in terms of s 4(q). The dispute relates to the quantification of this deduction.

[7] The total value of the property in the estate was determined at R13 560 363,33. The total claims against the estate and costs of administration amounted to R280 411,90.

[8] If the liabilities and legacies are deducted from the gross value of the estate, the balance is R10 290 951,00. The executor's contention is that this is the amount to be deducted under the section and that the dutiable amount is therefore to be calculated as follows:

Total assets	R13 560 363,00
Less liabilities	280 412,00
	R13 279 951,00
Less deduction of legacy to charity in terms of s 4(h)	25 000,00
Less deduction of bequest to surviving spouse in terms of s 4(q)	10 290 951,00
	R2 964 000,00
Less abatement in terms of s 4A of the Act	1 000 000,00
	R1 964 000,00

[9] Since s 2 of the Act, read with the first schedule thereto, provides for estate duty to be calculated at 25% of the **dutiable amount**, the executor's contention is that the amount of estate duty payable is R491 000,00.

[10] The contention by the commissioner, on the other hand, is that the amount to be deducted under s 4(q) is not R10 290 951,00 but R9 636 284,00 (i e R654 666 less); that the dutiable amount is therefore R2 618 666,00 and the estate duty payable equal to 25% thereof, that is R654 666,00.

[11] The difference between the dutiable amounts contended for by the parties respectively is therefore equal to the estate duty payable on the commissioner's calculation. This directs the focus to the very essence of the dispute between the parties. According to the executor, the amount to be deducted under s 4(q) includes estate duty. The commissioner, on the other hand, contends that estate duty is to be excluded from the deduction under s 4(q).

[12] The commissioner issued an estate duty assessment based on his view. In his letter of objection the executor failed to persuade the commissioner to change his mind. Consequently, the executor lodged an appeal to the Special Court.

[13] At the hearing before the Special Court, the executor called no witnesses. His case was based on the facts which were common cause. On behalf of the commissioner one witness was called, namely Mrs Marx. She is employed in the head office of the commissioner in the section involved with the assessment of estate duty.

[14] What emerges from Mrs Marx's evidence is that the acceptance of the commissioner's view that the s 4(q) deduction excludes estate duty requires the estate duty to be calculated before the amount of the deduction can be determined. That obviously creates a certain awkwardness. According to the scheme of the Act, deductions are determined for purposes of assessing estate duty and not the other way round. Moreover, logic suggests that if the estate duty is to be determined for purposes of calculating the deduction under s 4(q) which in turn is a prerequisite for determining the estate duty itself, the result may very well be something of a merry-go-round. From Mrs Marx's evidence it appears, however, that in practice the problem is resolved by means of an algebraic formula.

[15] It also appears from Mrs Marx's evidence that she is not the inventor or author of the formula. For example, an exposition and

explanation of the formula is to be found in the first edition of Meyerowitz, *Estate Duty and Donation Tax,* 111 *et seq* which was published in 1955 (see also NJ Wiechers and I Vorster, *Administration of Estates,* 9 - 28).

[16] In the court *a quo* the correctness of the formula applied by Mrs Marx was not disputed. Likewise, it was common cause between counsel in this Court that if the commissioner's approach is to be accepted as correct in principle, the formula applied by Mrs Marx provides the proper solution to the apparent merry-go-round. Since neither the formula itself nor its application to the facts of this matter are in dispute, it is unnecessary to deal with it in any detail. Suffice it to state the essential principles underlying the formula. The starting point of the formula is based on the supposition that the whole of the residue, after deduction of the liabilities and legacies, is deductible under s 4(q).On the basis of this supposition a "notional dutiable amount" and "notional estate duty" is then calculated. The amount of this notional estate duty is then subtracted from the residue. As a consequence the s 4(q) deduction is decreased with the further consequence that the dutiable amount and the estate duty calculated thereon are increased. The next step in the formula is to deduct the estate duty so increased from the residue. This results in a further increase in the estate duty. The same process is repeated until the

stage is reached where the difference between the amount of estate duty arrived at before and after the deduction of the increased duty is so negligible that it can be ignored. On the facts of the present matter, for example, the amount of estate duty arrived at in the penultimate calculation was R654 666,04. When this amount was subtracted from the s 4(q) deduction and consequently added to the dutiable amount the estate duty calculated on the thus increased dutiable amount was R654 666,51, i e less than one Rand. That is where, according to the formula, the process of repeated calculations was terminated.

[17] In cross examination, Mrs Marx conceded that the algebraic formula applied by her is not specifically provided for in the Act. Nevertheless, she stated, it has been applied consistently by the commissioner since before the commencement of the present Act when giving effect to similar provisions in the Death Duties Act 29 of 1922. In this regard it was pointed out by Mrs Marx that, although s 4(q) of the Act was only introduced by Act 81 of 1985, the same problem occurred and still occurs in determining the amount of a deduction under s 4(h) when the residue of an estate is bequeathed to a charity. Unlike s 4(q), s 4(h) was incorporated in the Act from its inception and in fact echoes the provision of s 4(a) (viii) of the 1922 Act.

[18] Mrs Marx's evidence in this regard is borne out by a reference to the author Meyerowitz's commentary on the 1922 Act in *The Law and Practice of Administration of Estates*, 2 Ed (1954) 324.

[19] Subsequent to the enactment of the present Act in 1955, Meyerowitz persisted in his exposition and approval of the commissioner's practice to exclude estate duty from the deduction under s 4(h) where the residue of the estate had been bequeathed to charity. After the incorporation of s 4(q) in 1985, Meyerowitz also subscribed to the commissioner's method of determining deductions under this section where the residue of the estate had been bequeathed to the surviving spouse. (See e.g. Meyerowitz, *Estate Duty and Donation Tax*, 1 Ed (1955) 115 *et seq;* 2 Ed (1962) 133 *et seq;* 6 Ed (loose leaf) prior to 1998, para 30.32 *et seq.*)

[20] In 1998 Meyerowitz changed his mind, as appears from the following statement in the current edition of his book, para 30.5:
"In previous editions I exemplified the practice whereby, in the case of allowable deductions in respect of the residue ... accruing to a surviving spouse or charity, the 'net amount' is determined by taking into account the estate duty as a liability which reduces the allowable deduction and in consequence increases the net amount. This practice involves a duty on duty situation. Where the rate of duty is 25% the

calculation of duty on duty results in an amount equal to 33,33% of the 'net amount' before taking the duty into account. In my view there is no warrant in the Estate Duty Act for this practice. Section 4 of the Act sets out the allowable deductions in determining the 'net amount' and it is this 'net amount' on which duty is imposed. It is fallacious to determine the net amount on which duty is payable and then bring in the duty so calculated as a liability (not provided for in section 4) in order to re-determine the net amount."

[21] On behalf of the executor the only direct authority relied upon in the court *a quo* as well as in this Court is the aforegoing statement by Meyerowitz. In holding for the executor, the court *a quo* did not, however, rely on this statement.

[22] The starting point of the court's reasoning was a concession by Mrs Marx that if the surviving spouse was the sole beneficiary under the will, the whole bequest would have been deductable under s 4(q) with the result that no estate duty would be payable. On the basis of this concession the Special court proceeded to formulate its reasoning as follows:

> "1. Had the will provided that the total estate devolves upon the surviving spouse no estate duty would have been payable (Section 4(q))

2. Estate duty is payable solely because of the legacies (Mrs Marx agreed with this.)

3. The amount of the legacies, the cause of the liability to pay estate duty amounts to the sum of R2 989 000 (common cause)

4. From this amount two deductions must be made:

4.1 R25 000 in terms of section 4(h) ...

4.2 R1 million in terms of section 4(A)

5. The balance which constitutes the amount upon which estate duty is payable is thus the sum of R1 964 000,00.

6. The duty payable on the sum of R1 964 000,00 (25%) is R491 000

For purposes of this case the foregoing is the only manner in which the provisions of the Act can and should be applied. Any calculation, other than that set out above, is unjustified and wrong."

[23] Though the reasoning of the court *a quo* is attractive in its simplicity and logical progression, I find it lacking in one fundamental respect. By calculating estate duty not on the dutiable amount properly calculated, but simply on bequests which are undoubtedly not deductable in terms of s 4, it effectively ignores the provisions of s 4(q). Since the outcome of the whole case depends on an interpretation of s 4(q), this section cannot be ignored.

[24] In this Court it was common cause that the ultimate question to be decided is whether that portion of the residue which will go to the *fiscus* in the form of estate duty can be said to be included in "the value of the property" which "accrues to the surviving spouse of the deceased" as contemplated in s 4(q).

[25] The first step in the argument on behalf of the commissioner was to give a meaning to the term "accrue". Although this term is not defined in the Act and has not as yet been judicially interpreted for purposes of the Act, counsel for the commissioner referred to authorities in which this term had been interpreted, within the context of the definition of "gross income" in section 1 of the Income Tax Act, 1962 (Act 58 of 1962), to mean "to become entitled to" (see eg *Commissioner for Inland Revenue v People's Stores* 1990 (2) SA 353 (A) 362 G - H). The further submission on behalf of the commissioner was that the same meaning should be ascribed to the term "accrue" in s 4(q) of the Act.

[26] The next step in the argument on behalf of the commissioner focuses the attention on what an heir, to whom the residue of the estate had been bequeathed, can be said to become entitled to in terms of our law of succession. This question, counsel for the Commissioner

submitted, was answered by this Court in *Estate Smith v Estate Follett* 1942 AD 364.

[27] In the *Estate Smith* - case, the testatrix, Mrs Follett, bequeathed the residue of her estate to her son, who donated the rights which accrued to him under the will of his mother to his wife. The deed of donation was executed after the death of Mrs Follett, but prior to the finalisation of the liquidation and distribution account in her estate. One of the questions pertinently considered by Watermeyer JA (at 382 of the report) related to the nature of the right that was donated, i e the right that accrued to the residuary heir.

[28] The learned Judge commenced his answer to this question by explaining the difference between Roman Law and South African Law in this regard. In Roman Law, he stated, the heir was a universal successor to the whole estate of the deceased person. His position was more analogous to that of the modern executor, save that, unlike the executor, the heir was the *dominus* of the estate. Watermeyer JA then proceeded to express himself as follows (at 383 of the report)

> "The notion of an inheritance as the whole estate of a deceased person, ... no longer exists in our law. Under our system of administration of the estates of deceased persons an heir is in

effect a residuary legatee In the present case, at the time when the deed of donation was executed, the liquidation and distribution account in the estate of Mrs Follett had not yet been confirmed and Smith's right to claim payment or delivery or transfer of his inheritance, though vested, was not yet enforceable by action. Clearly what had then accrued to Smith was not the ownership of specific assets but the right to claim from the executors of Mrs Follett's estate at some future time after confirmation of the liquidation and distribution account satisfaction of his claim under that account."

[29] Counsel for the commissioner also relied on the judgment of Centlivres CJ in *Greenberg and Others v Estate Greenberg* 1955 (3) SA 361 (A) 364, where it was decided that the principles enunciated in *Estate Smith v Estate Follett (*supra) with reference to residuary heirs (and confirmed in *Commissioner for Inland Revenue v Estate Crewe and Another* 1943 AD 656 at 669 and 692), also apply to legatees.

[30] In *De Leef Family Trust and Others v Commissioner for Inland Revenue* 1993 (3) SA 345 (A) the judgments in *Estate Smith* (supra) and *Estate Greenberg* (supra) were again confirmed. At 358 E - G of the report Joubert ACJ, however, added the following rider:

> "[A]lthough these judgments speak of 'confirmation' of estate accounts by the Master no provision is made for confirmation, as such, in the Administration of Estates Act, 66 of 1965 ... It is suggested that 'confirmation' in this context should be taken as a reference to the fact that the accounts had lain for inspection, without objection, for the statutory period"

[See also s 35, and particularly s 35 (12), of Act 66 of 1965]

[31] In the light of these authorities, counsel for the commissioner submitted, the question is whether it can be said that that portion of the residue that must go to the *fiscus* in the form of estate duty, can be said to accrue to the surviving spouse in the sense that she can claim payment of this amount from the executor in terms of the liquidation and distribution account. This question, counsel submitted, must be answered in the negative. Under ss 12 and 19 of the Act, estate duty is to be paid by the executor out of the assets of the estate. The amount payable as estate duty can therefore never be allocated to the surviving spouse in terms of the liquidation and distribution account and she is not entitled to claim this amount from the executor.

[32] The counter-submission on behalf of the executor was that, on a proper interpretation of s 4(q), the residue which "accrues to the

surviving spouse" in terms of the will includes the estate duty to be paid by the executor. In support of this submission various arguments were raised. I propose to deal with these arguments separately.

[33] His first argument was based on the premise that all the assets in the estate must accrue to someone. Since the surviving spouse is the residuary heir, so the argument went, she is entitled to everything that does not accrue to someone else. I think the answer to this argument is that the very premise on which it is based is in conflict with the line of authority that I have referred to. In the light of these authorities it is simply not true to say that all the assets in a deceased estate must accrue to someone. As pointed out by Centlivres CJ in *Greenberg v Estate Greenberg (*supra) at 364 H the mere fact that a specific asset or a specific sum of money is bequeathed to a legatee in terms of a will does not mean that the legatee becomes entitled to that sum of money or that the asset accrues to the legatee. If the asset has to be sold in order to meet the liabilities of the estate, or if part of the sum of money is utilised for that purpose, all that will accrue to the legatee is the balance of the sum of money or the proceeds of the asset. Since in our law an heir is a residuary legatee, the same principle must apply to him (or her). The mere fact that all the remaining assets are bequeathed to him in terms of the will does not mean that all the remaining assets **accrue** to him. What accrues to the

residuary heir is the right to claim from the executor of the estate, after finalisation of the liquidation and distribution account, those specific assets or that some of money allocated to him in terms of the account, after provision has been made for payment of the liabilities of the estate, including estate duty.

[34] Counsel for the executor conceded, at least by implication, that the argument under consideration is in conflict with the line of authorities that I have referred to. His answer was that these judicial pronouncements regarding the rights of heirs and legatees must be confined to the context of those cases. I do not agree. These judgments are widely accepted as laying down principles of general application [see e g Corbett, Hahlo, Hofmeyr and Khan, *The Law of Succession in South Africa*, p 10 *et seq* and Meyerowitz, op cit, par 18.12.]

[35] The second argument advanced by the executor's counsel is based on what counsel suggested as an analogy from the application of the Income Tax Act 1962 (Act 58 of 1962). In terms of the Fourth Schedule to the Income Tax Act, counsel pointed out, the employer is obliged to deduct income tax from the employee's salary. Nevertheless, counsel submitted, it has never been suggested that the tax so deducted must be excluded from that which "accrues" to him

(or her) as part of his "gross income" within the meaning of the definition of that term in s 1 of that Act. By the same token, counsel submitted that there is no basis for excluding the amount earmarked for estate duty from the residue which accrues to the surviving spouse within the meaning of s 4(q).

[36] The analogy is not an appropriate one. In the present context the scheme of the Income Tax Act is materially different from the scheme of the Act under consideration. The essential difference is that according to the scheme of the Income Tax Act, the employee is liable to pay income tax on the income which accrues to him, i e on his whole salary including the amount which is subsequently to be paid by him as tax. In terms of the Fourth Schedule, the employer is obliged to deduct such income tax and to pay it over on behalf of the employee. That does not make the employer liable for the income tax of the employee, it remains the liability of the employee. According to the Estate Duty Act, the liability to pay estate duty is imposed on the executor, not on the heir. The executor does not pay estate duty on behalf of the heir. He (or she) does so in compliance with his (or her) own obligation and the heir never becomes entitled to claim the amount utilised by the executor for that purpose.

[37] The third argument on behalf of the executor was that the

formula applied by the commissioner for calculating estate duty in order to determine the s 4(q) deduction (which formula involves *inter alia* the calculation of a "notional dutiable amount" and "national estate duty") is not prescribed by the Act and that this elaborate process could not have been intended by the legislature to form part of the relatively simple scheme of the Act.

[38] Although it is true that the formula applied by the commissioner is not specifically prescribed by the Act, the Act must not be read in *vacuo.* It must be read against the background of relevant legal principles which are to be found, *inter alia*, in the common law of succession and the provisions of the Administration of Estates Act 66 of 1965.

[39] If it is established in accordance with these relevant legal principles that the amount which **accrues** to the surviving spouse within the meaning of s 4(q) does not include estate duty, the mere fact that no formula is specifically prescribed for determining the estate duty to be subtracted , can not derogate from the true meaning of the section. The fact that the underlying mathematical justification for the formula may be difficult to understand for laymen in the field of mathematics is likewise of no consequence. The statement that a relatively simple scheme implies only simple formulae in its

application, is a *non sequitur*. It would have been different if it transpired that there was no mathematical formula available to calculate the estate duty at the stage when the s 4(q) deduction has to be determined. In such event the conclusion would have been justified that the legislature could not have intended a calculation which was a mathematical impossibility. However, that problem does not arise in this case. On the contrary, the formula applied by the commissioner has been applied for over eighty years and it was pertinently conceded on behalf of the executor that the correctness of the formula applied by the commissioner is not in dispute. Moreover, in the light of this concession, it was, in my view not open for the executor's counsel to criticise concepts such as "a notional dutiable amount" and "notional estate duty" which are integral parts of a formula, the correctness of which is not disputed.

[40] This bring me to the final argument on behalf of the executor which is based on the view expressed in Meyerowitz *op cit* 30.5 quoted in paragraph [20] above. According to this view the commissioner's approach cannot be accepted because it involves a "duty on duty situation" with the result that the rate of duty is increased from 25% to 33, 33% of the "net amount".

[41] I doubt whether it is correct to speak of a "duty on duty

situation" where the exclusion of estate duty from the amount deducted under s 4(q) gives rise to an increase in the duty eventually assessed. I also have difficulty with the statement that the rate of duty is increased from 25% to 33, 33% of the net amount. The rate remains 25% of the "net amount". The question is how this "net amount" is to be calculated.

[42] However, be that as it may, if the commissioner's approach is supported by a proper interpretation of s 4(q) the mere fact that the result of this approach may be described as a "duty on duty situation" is of no consequence.

[43] In all the circumstances I hold the view that the commissioner's approach is indeed supported by a proper interpretation of the provisions of s 4(q). It is clear, in my view, that the word "accrues to" in the section must be understood to mean "entitled to". According to the established principles of our law of succession a residuary heir is only entitled to claim, that part of the residue which is allocated to the heir in the liquidation and distribution account. Thus understood, it is clear that the amount to be paid as estate duty cannot be said to accrue to the heir.

[44] Upon my understanding of s 4(q) its provisions cannot be

said to be ambiguous. However, even if I were to find these provisions ambiguous I would still come to the same conclusion regarding the interpretation of the section for the reasons that follow:

[45] As I have indicated, it appears that the concept of a deduction being constituted by that which "accrues to" an heir or legatee was incorporated not only in s 4 (h) of the present Act since 1955, but also in s 4(a) (viii) of the Death Duties Act 29 of 1922, which is the precursor to s 4(h). From the evidence of Mrs Marx it appears that the commissioner's practice in relation to s 4(h) and its precursor in those instances where a charity was nominated as the residuary heir, had been consistently applied since 1922, to exclude the estate duty from the residue for purposes of the deduction under those sections. Not only does this evidence of Mrs Marx stand uncontroverted, it is borne out by textbook writers on the subject. (See paragraphs 18 and 19 above)

[46] In *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 532 [HL] 591 it was recognised by the House of Lords - per Lord Macnaghten - that when tax legislation follows a continuous practice in the department responsible for it's administration, repeating the very words on which the practice was founded, it is fair to infer that the legislature in enacting the statute

intended those words to be constructed in the manner understood by the department. This approach has been accepted as applicable in South Africa by Greenberg J in *Randfontein Estates Gold Mining v Minister of Finance* 1928 WLD 77 at 83 and 84. (See also *R v Lloyd* 1920 AD 474 at 475 and "*Practice as an Element in the Interpretation of Taxation Legislation*", Taxpayer (1958) p 4 - 6). I am in respectful agreement with this approach. Of course, the practice of the department cannot run counter to the language used by the legislature and regard to continuous previous practice will only be permissible when the provisions to be interpreted are ambiguous. With these qualifications I find it a fair inference that the legislature intended the practice adopted by the department responsible for the administration of the legislative provisions over many years to be continued when the legislature re-enacts the provision which forms the basis of the longstanding practice.

[47] Therefore, on the assumption that the wording of s 4(q) is ambiguous, I think it is legitimate to infer that, when this section was introduced in 1985, the legislature intended it to be applied in accordance with a practice founded on almost identical provisions in previous legislation and followed by the commissioner for more than sixty years at that time.

[48] For these reasons I would uphold the appeal and make the following order:

(a) the appeal is allowed with costs, including the costs occasioned by the employment of two counsel.

(b) The order of the court *a quo* is set aside and altered to read:

"The appeal is dismissed with costs"

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BRAND AJA

CONCURRED: CHETTY AJA