

SOUTH AFRICA / JUDGMENT

**Clicks Retailers (Pty) Ltd v Commissioner for the
South African Revenue Service (CCT 07/20) [2021]
ZACC 11; 2021 (4) SA 390 (CC); 2021 (10) BCLR 1102
(CC); 84 SATC 71; 2021 BIP 16 (CC) (21 May 2021)
[2021] ZACC 11**

COURT

Constitutional Court

BEFORE

Mogoeng, Jafta, Khampepe, Madlanga, Mathopo,
Mhlantla, Theron, Tshiqi, Victor

CASE / FILE NUMBER

CCT 07/20

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CONSTITUTIONAL

COURT OF SOUTH AFRICA

In the matter

between:

Case CCT 07/20
CLICKS
RETAILERS (PTY) LIMITED
and
COMMISSIONER
FOR THE SOUTH AFRICAN
Applicant
REVENUE
SERVICE
Respondent

Neutral citation:

Clicks Retailers (Pty)
Limited v Commissioner for the South African Revenue Service
[2021] ZACC 11

Coram:

Mogoeng
CJ, Jafta J, Khampepe J, Madlanga J, Mathopo AJ,
Mhlantla J,
Theron J, Tshiqi J, Victor AJ.

Judgments:

Theron J
(unanimous)

Heard on:

17 November 2020

Decided on: 21 May 2021
ORDER
On
appeal from the Supreme Court of Appeal (hearing an appeal from the
High Court of South Africa, Western Cape Division, Cape Town),
the
following order is made: 1.
Leave to appeal is granted.
2.
The appeal is dismissed.
3.
The applicant shall pay the respondent's costs, including
the
costs of two counsel.

JUDGMENT

THERON J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, and Victor AJ concurring):

Introduction

[1] This matter concerns the tax treatment of retail loyalty programmes that are common in South Africa. The issue for determination is whether an allowance under section 24C of the Income Tax Act[1] is available to Clicks Retailers (Pty) Limited (Clicks), a retailer which operates one such loyalty programme. In the 2009 tax year, when Clicks sought to claim an allowance under the section, section 24C read:

“24C Allowance in respect of future expenditure on contracts

(1) For the purposes of this section, “future expenditure” in relation to any year of assessment means an amount of expenditure which the

Commissioner is satisfied will be incurred after the end of such year—

(a) in such manner that such amount will be allowed as a deduction from income in a subsequent year of assessment; or

(b) in respect of the acquisition of any asset in respect of which any deduction will be admissible under the provisions of this Act.

(2) If the income of any taxpayer in any year of assessment includes or consists of an amount received by or accrued to them in terms of any contract and the Commissioner is satisfied that such amount will be utilised in whole or in part to finance future expenditure which will be incurred by the taxpayer in the performance of their obligations under such contract, there shall be deducted in the determination of the taxpayer's taxable income for such year such allowance (not exceeding the said amount) as the Commissioner may determine, in

respect of so much of such expenditure as in their opinion relates to the said amount.

- (3) The amount of any allowance deducted under subsection (2) in any year of assessment shall be deemed to be income received by or accrued to the taxpayer in the following year of assessment.”[2]

- [2] Section 24C creates an exception to the general rule in the Income Tax Act that expenditure is only deductible in the year of assessment in which the expenditure is actually incurred.[3] It allows a taxpayer to defer paying tax on income if that income accrues in terms of a contract and will be used to finance future expenditure (that is, expenditure incurred in a subsequent tax year), which it is obliged to incur in terms of such contract. The tax on such income is deferred until the year of assessment in which the future expenditure is “actually incurred” – such expenditure then becoming deductible from the taxpayer’s taxable income under the general deduction formula of section 11(a) of the Income Tax Act.

Background

- [3] The applicant is Clicks, a retailer that sells merchandise, primarily in the pharmacy, health and beauty categories, to the public. The respondent is the Commissioner of the South African Revenue Service (the Commissioner or SARS as may be appropriate).
- [4] Clicks runs the Clicks ClubCard programme (loyalty programme). In terms of the loyalty programme, participating customers receive loyalty points for shopping at Clicks that can be translated into cash back vouchers, which are not redeemable for cash, but which may be off-set against the cost of Clicks merchandise, provided that the customer accumulates the requisite number of loyalty points within a qualification period.
- [5] Clicks offers loyalty programme membership free of charge to its customers. A customer is required to apply in writing or telephonically to become a member. A contract between Clicks and the customer comes into existence when the customer completes and submits the enrolment form (ClubCard contract). Upon acceptance of the customer’s application, Clicks issues a ClubCard to the customer. The customer agrees to be bound by the terms and conditions of the ClubCard contract.
- [6] In order to qualify for loyalty points at least R10 must be spent by the customer in a single purchase transaction at Clicks or one of its affinity partners. A customer thereafter earns one loyalty point for every R5 spent. Affinity partners are third party merchants from which members of the loyalty programme may earn loyalty points which can be redeemed at Clicks stores. They include Discovery, NetFlorist, Nu Metro, Specsavers, Sorbet, Avis, City Lodge and Thompsons Holidays, each of which has concluded an agreement with Clicks for the payment of commission relating to sales at those entities.
- [7] In practice, this means that Clicks deducts from its taxable income the cost of the merchandise that will be provided to customers on redemption of their cash back vouchers. The amount that Clicks seeks to claim under section 24C forms part of the stated case and is

not in dispute. Clicks returns 2% of the value of all qualifying purchases (that is, purchases where the customer presents their ClubCard and earns loyalty points) to customers. The question whether Clicks is entitled to defer taxation on that value has significant ramifications for Clicks' tax treatment and the cash flow of its business. For the 2009

tax year, 2% of all qualifying purchases equated to around R58.5 million, in respect of which Clicks, if successful, would be entitled

to claim a deduction of approximately R36.18 million.[4] Clicks says that deferring this deduction to a subsequent year would support it to, among other things, fund its operations and investments.

- [8] In its income tax return for the 2009 tax year, Clicks included an amount of R58 550 602 in its gross income and disclosed it as "ClubCard deferred income". It claimed an allowance of R44 275 965 for future expenditure against this amount in terms of section 24C of the Income Tax Act.[5]
- [9] In broad terms, Clicks claims the section 24C allowance on the following basis. When a loyalty programme member makes a purchase above the stipulated value threshold at a Clicks store and presents her ClubCard at checkout, a contract of sale is concluded and income accrues to Clicks. By doing so, the member earns loyalty points which can later be redeemed for Clicks merchandise. This imposes an obligation on Clicks to finance future expenditure, as envisaged in section 24C, in that it must later give away (for no further consideration) stock to the value of the loyalty points when the points are redeemed. This redemption takes place when the member enters into a further contract of sale and receives discounted merchandise purchased in terms of that further contract (redemption contract).
- [10] Over the course of its dispute with SARS, Clicks' position on which contract generates income and which contract is the source of its obligation to finance expenditure has evolved. In its response to the Commissioner's initial query sheet, Clicks claimed an allowance on the basis that the ClubCard contract imposes an obligation on it to finance expenditure and that the income accrued as a consequence of qualifying purchases is "a direct result" of the ClubCard contract. In its subsequent objection to SARS's assessment, Clicks advanced a different argument, namely, that when a participating customer joins the loyalty programme, a "composite contract" comes into existence. This contract, which is "indivisible by nature", is constituted by the ClubCard contract and a contract of sale entered into by a member who presents her ClubCard at the time of the transaction.[6] The contract of sale is "a performance requirement" in terms of the ClubCard contract to the extent that if a customer does not conclude a sale contract, the loyalty programme is rendered a nullity. Accordingly, the contract of sale cannot be viewed as an independent contract for purposes of the loyalty programme. Clicks thus contended that the requirements of section 24C(2) are met in that both the obligation to finance future expenditure and the accrual of the income is in terms of a single composite contract.[7]

[11] The Commissioner disallowed Clicks' section 24C deduction for the 2009 tax year. It took the view that a section 24C allowance can be claimed only where the Commissioner "is satisfied that the income received or accrued in terms of a contract will be used to fully or partly finance the future expenditure which

will be incurred as a result of performing under the same contract". The Commissioner maintained that section 24C only permits an allowance when the income and the obligation to finance future expenditure arise under the same contract and that in Clicks' case, the income and the obligation to finance future

expenditure arise from different contracts. Each transaction in terms of which a customer purchases goods at a Clicks store

represents a separate contract, which is independent and distinguishable from the ClubCard contract. The obligation to finance future expenditure arises under the ClubCard contract whereas the income accrues to Clicks in terms of the contract of sale.

[12] Clicks appealed the Commissioner's decision to the Tax Court.[8] The matter proceeded on the basis of a stated case. The sole issue before the Tax Court was whether Clicks was entitled to an allowance under section 24C having regard to the basis on which the Commissioner had disallowed the deduction.[9]

[13] The Tax Court found in favour of Clicks. It found that the contract of sale results in two things, namely, the earning of income and the obligation to finance future expenditure. The contract

that gives rise to both the income and the obligation to finance expenditure is therefore the sale contract. The Tax Court put the matter thus:

"I agree with [Clicks'] submission that it is artificial to regard the future expenditure the taxpayer will incur when a customer redeems a voucher as arising under a 'different contract' to the first purchase and sale contract concluded with the same customer (and pursuant to which the points concerned were generated). In fact, in my view, it is not only artificial

to do so but it is factually incorrect. The first purchase and sale agreement incorporates the terms of the ClubCard

contract. Despite that the first purchase and sale contract remains the contract that triggers both the earning of income by [Clicks] as well as an obligation by [Clicks] to incur future expenditure."

[14] The Commissioner appealed to the Supreme Court of Appeal.[11] It is pertinent to note that the appeal was heard shortly after that Court handed down judgment in Big G.[12] In that case, the Supreme Court of Appeal was also called upon to interpret and apply section 24C of the Income Tax Act. Its decision followed on from a series of cases in which the Tax Court confirmed that the future expenditure must be incurred in the performance of obligations under the same contract as the contract under which the income was received by or accrued

to the

taxpayer.[13] In Big G (SCA), the Supreme Court of Appeal confirmed that section 24C(2) does not envision different income-earning and obligation-imposing

contracts.[14] The Court expressly rejected the notion that section 24C applies where two or more different contracts are “inextricably linked”, [15] reasoning that the Legislature had not used the term “scheme” or “transaction”. Instead, the operative concept was “contract”. [16] It held that section 24C “required that the taxpayer incur the expenditure in the performance of its obligations in terms of the same contract as the contract under which it received income”. [17]

[15] Before the Supreme Court of Appeal, it appears that Clicks persisted with the contention that it earned income and incurred an obligation to finance future expenditure in terms of the same contract, namely, the sale contract in terms of which a qualifying purchase is made. It accepted that because the ClubCard contract does not itself give rise to any exigible obligation on Clicks to issue rewards, it did not give rise to an obligation to finance future expenditure. Instead, so the argument went, the conclusion of the sale contract brings into existence and determines the content of Clicks’ obligation to honour redemption of points and, in doing so, incur expenditure. The sale contract is thus both income-earning and obligation-imposing.

[16] The issue before the Supreme Court of Appeal was whether it was the sale contract that gives rise to the obligation to grant rewards and finance future expenditure, as opposed to either the ClubCard contract or the redemption contract. If the former is the obligation-producing contract, then the same-contract requirement in Big G (SCA) would be satisfied. If, on the other hand, the ClubCard contract is the obligation-producing contract, then that requirement would not be satisfied.

[17] Turning to the question whether Clicks satisfied the same contract test endorsed in Big G (SCA), the Court said:

“The contract that creates the right to income by Clicks is the first contract of sale. However, the contract that obliges Clicks to honour the vouchers and thereby incur expenditure, when a customer concludes the second contract of sale with Clicks, is neither that contract, nor the second contract of sale, but the ClubCard contract. Consequently, the expenditure incurred by Clicks in honouring the vouchers does not arise in terms of the same contract i.e. the first contracts of sale, but in terms

of the separate and distinct ClubCard contract.”[18]

[18] Thus, it could not be said that the income received and the future expenditure sought to be deducted arose from the “same contract” for purposes of section 24C(2). As an aside, the court observed that when Clicks initially responded to SARS’s query sheet, it adopted the position that the income it earned in terms of the contract of sale was a “direct result” of the ClubCard contract. When Clicks eventually objected to SARS’s assessment, it accepted that members are awarded points as a result of the ClubCard contract but that the customer’s presentation of their ClubCard contract at the till-point was “inextricably linked” to each

sale contract. The difficulty, noted Dlodlo JA, was that the Supreme Court of Appeal's judgment in Big G (SCA) had expressly rejected the notion that section 24C applies to "inextricably linked" contracts.[19] Accordingly, it did not matter that the loyalty programme (and therefore the ClubCard contract in terms of which expenditure is financed) could not function without the contract of sale in terms of which income is earned. The Supreme Court of Appeal upheld the Commissioner's appeal and set aside the order of the Tax Court.

This Court's decision in Big G

[19] The Supreme Court of Appeal's decision in Big G (SCA) was taken on appeal to this Court.[20] The taxpayer in Big G was a franchisee operating certain restaurants in terms of written franchise agreements concluded with a franchisor, the Spur Group

(Pty) Limited. It had claimed a section 24C allowance for income it earned in terms of contracts for the sale of food in its restaurants that it would use to finance expenditure it incurred in revamping its restaurant premises, as it was obliged to do in terms of its franchise agreements. The Commissioner disallowed the allowance on the basis that the income received by the taxpayer during the relevant years of assessment was not in terms of the franchise agreements from which an obligation to finance future expenditure arose, and the obligation was neither unconditional nor certain, as required by section 24C(1).

[20] The taxpayer had succeeded in the Tax Court, which concluded that a taxpayer could claim a section 24C allowance where the income-earning contract and the contract giving rise to the obligation to finance future expenditure are inextricably linked.[21] As noted, the Supreme Court of Appeal in both Big G (SCA) and the present matter rejected this approach.

[21] In Big G, this Court accepted that it is a requirement of section 24C(2) that the contract in terms of which the income that is to finance future expenditure is received must be the same contract under which the obligation to finance future expenditure arises. However, it also held that two or more contracts may be so inextricably linked that they may satisfy this requirement of "sameness".[22] On the facts of that case, there was a lack of correlation between the income-producing sale of food contracts and the obligation imposing franchise agreements which meant that they did not meet the sameness required by section 24C.

Issue for determination

[22] The crisp issue for determination in this matter is whether Clicks can claim an allowance under section 24C in respect of income it earns in terms of its loyalty programme. Following this Court's decision in Big G, a section 24C allowance may be claimed either when the traditional same-contract requirement is met or when the income and the obligation to finance expenditure arise from two or more contracts that are so inextricably linked that they meet the requirement of "sameness".

Jurisdiction and leave to appeal

[23] Clicks seeks leave to appeal against the Supreme Court of Appeal's

judgment on the basis that the matter engages this Court's general jurisdiction under section 167(3)(b)(ii) of the Constitution

in that leave to appeal ought to be granted because it raises an arguable point of law of general public importance which ought to be considered by this Court.

[24] In Big G, the majority held that the question whether a contract that imposes an obligation to incur future expenditure is so interlinked to a contract in terms of which income is earned that the income earned in terms of the latter contract can be held to be income that accrues in terms of the former contract is a "quintessential point of law".[23] This finding accords with the accepted approach in our law that the interpretation of contracts is a matter of law and not of fact.[24] So, while this matter ostensibly involves the "mere" application of a legislative provision, the application of that provision turns on the nature of the relationship between Clicks' ClubCard contracts. That, in turn, requires us to interpret those agreements. In Big G, Madlanga J also noted that this interpretive question is "closely bound up with the interpretation of section 24C(2): what is the nature of the contract envisaged in the section?".[25] It is also trite that the interpretation of legislation is a legal issue.

[25] In this Court, the Commissioner claims that to the extent that the application raises a question of law, the question is one that has already been decided in Big G, and that this Court should not decide it again. This argument must be rejected. The legal question of contractual interpretation is not the same question this Court answered in Big G and neither is the question of statutory interpretation. In this case, we must go further and ask: what does it mean for two or more contracts to be so inextricably linked that they meet the requirement of "sameness", as introduced in Big G? In other words, this Court must "put meat on the bones" of the sameness test in the context of inextricably linked contracts. In the same way common law rules are developed incrementally through their application to novel factual scenarios, we must now determine how, if at all, the interlinked contracts at issue here meet the requirement of sameness.[26]

[26] The question whether, on a proper interpretation of section 24C(2) and Clicks' loyalty programme contracts, Clicks is entitled to claim a deferred income allowance is arguable. The answer to this question is not readily apparent, which is evidenced by the divergent approaches taken by the Tax Court and Supreme Court of Appeal.[27]

[27] Is this a legal question of general public importance? In Big G, this Court took judicial notice of the fact that its answer to the interpretive question before it could affect other Spur franchisees

throughout South Africa.[28] Similarly, a decision in this matter implicates not only the interests of Clicks, but also the interests of all other retailers

who offer similar loyalty programmes. Examples of such retailers given are Pick n Pay, DisChem, Ster Kinekor and Exclusive

Books. Their similarities to the Clicks loyalty programme have been specifically pleaded.

[28] In Paulsen, this Court held that in order to determine whether a point of law “ought to be considered” by this Court, regard must be had to the factors that are relevant when determining whether it would be in the interests of justice to grant leave to appeal.[29] These include prospects of success and the public interest in the issues raised.[30]

[29] Unlike in Big G, Clicks relies on linked contracts between the same parties. It has, at the very least, established that its loyalty programme contracts collectively give effect to Clicks’ undertaking to members that it will reward qualifying purchases with loyalty points that can be redeemed for discounts on Clicks merchandise. The loyalty programme contracts relied upon by Clicks are more interrelated and complementary than the contracts relied on in Big G. The application has reasonable prospects of success.

[30] As stated, this appeal involves issues of general public importance and the outcome of this Court’s decision will likely have implications on the tax positions of other entities that operate similar loyalty programmes. For these reasons, leave to appeal should be granted.

Analysis

of section 24C(2)

[31] Distilled to its essence, section 24C(2) has three requirements. There must be (a) income earned by a taxpayer in terms of a contract (the income-producing contract); (b) an obligation on the taxpayer under a contract that requires future expenditure, which will be financed by this income (the obligation-imposing contract); and (c) contractual sameness. In the wake of Big G, this third requirement can be achieved either on a same contract basis (the income-producing contract and obligation-imposing contract are literally the same contract) or on a sameness basis (the income and obligation to finance expenditure are sourced in two or more contracts that are so inextricably linked that they meet the requirement of sameness).[31] Clicks contends that it can claim a section 24C allowance on either a same-contract basis or a sameness basis.

[32] Clicks relies on the contract of sale as the income-producing contract. It is this contract that generates the income that Clicks utilises to finance future expenditure in performance of its obligation to redeem loyalty points and hand over discounted merchandise. To determine whether Clicks can claim a section 24C allowance, regard must therefore be had to the sale contracts that Clicks enters into with a customer who presents their ClubCard at checkout. Clicks may enter into other sale contracts with customers who are not loyalty programme members, or with loyalty programme members who do not present their ClubCard at checkout, but Clicks does not claim an allowance in respect of income earned under those sale contracts.

[33] As noted, the parties have proceeded on a stated case and there is no

dispute that (a) the contract of sale generates income and (b) the issuing of points under the ClubCard contract gives rise to an obligation to finance future expenditure by Clicks. The parties have also agreed on the quantum of the section 24C allowance to which Clicks would be entitled in the event this Court finds in its favour.

[34] The Commissioner initially sought to advance an additional contention in the Tax Court to the effect that the obligation on Clicks to finance future expenditure was merely a contingent one and that the claimed section 24C allowance should be disallowed for that reason too. The Tax Court rejected this and held that this contention was not available to SARS as it was not the basis of the disputed assessment and neither had it been pleaded on behalf of SARS.[32] The Commissioner does not pursue this contention in this Court.

Can Clicks claim a section 24C allowance?

[35] Both the Tax Court and Supreme Court of Appeal considered whether the income and obligation to incur future expenditure arise from the same contract. The Tax Court concluded that it was both artificial and factually incorrect to regard the future expenditure Clicks will incur when a loyalty programme member redeems a voucher as arising from a “different contract” to the one under which the ClubCard points were earned. The Tax Court found that the qualifying purchase triggers both the earning of income by Clicks and an obligation to finance future expenditure.³³

[36] As mentioned, on appeal, the sole issue before the Supreme Court of Appeal was whether the contract of sale was both income-earning and obligation-producing.

If the contract of sale was the source of both income and the paired obligation to finance future expenditure, the same-contract

requirement would be satisfied. However, the Court held that Clicks earns income in terms of the sale contract but incurs the obligation to finance future expenditure in terms of the ClubCard contract. In light of this, the Court concluded that the loyalty programme contracts did not satisfy the same-contract requirement.[33] The Court also deemed it to be irrelevant that the contracts “may be . . . inextricably linked”.[34]

[37] The Tax Court held that the qualifying purchase generates both the income and the paired obligation to finance future expenditure, by triggering the award of loyalty points.³⁶ The Supreme Court of Appeal also recognised that the qualifying purchase triggers and gives content to Clicks’ obligation to award points.[35] The main judgment held that “when a qualifying contract of sale is concluded, the obligation on Clicks either to issue vouchers or to honour them, as the case may be, in terms of the ClubCard contract, becomes exigible”. [36] In a similar vein, the concurring judgment held that “[i]f the customer has concluded a ClubCard contract and presents the card at the point of sale, Clicks incurs an obligation under the ClubCard contract to award them points”.[37]

[38] In order to be entitled to a discount equal to the number of points earned during a given qualification period, a customer must conclude a ClubCard contract. This is the contract that entitles the customer to the discount and, if Clicks were to renege on its obligation to honour the redemption of points, the customer's cause of action would be based on the ClubCard contract. As I discuss in more detail below, the sale contract is closely linked to the ClubCard contract because (subject to sufficient points being earned) it triggers Clicks' obligation under the ClubCard contract.[38] But while the obligation to honour a redemption of points and the earning of income may occur simultaneously, the obligation is sourced in the ClubCard contract and the income accrues in terms of the sale contract. For these reasons, Clicks cannot claim a section 24C allowance on a same contract basis.

[39] In Big G this Court expressly accepted the possibility that more than one contract may constitute the "same" contract for purposes of section 24C(2). It held:

"[I]t is a requirement of section 24C(2) that the contract in terms of which the income that is to finance future expenditure is received or accrues must be the same contract under which the expenditure is incurred. So, there is a requirement of "sameness".

But I do not read the sameness requirement to connote that there must, for example, in the case of a written contract, be one piece of paper stipulating for the earning of income and the imposition of future expenditure. Two or more contracts may be so inextricably linked that they may satisfy this requirement."⁴¹

The import of Big G is that a taxpayer can now claim a section 24C allowance even if the income and the paired obligation to finance future expenditure are generated by different interlinked contracts, as long as those contracts satisfy the requirement of sameness. The operative word is therefore sameness.

[40] In Clicks' submissions in this Court, there is a notable lack of engagement with the meaning of "sameness" and why the loyalty programme contracts do or do not meet the requirement of sameness. Its submissions instead focus on whether the loyalty programme contracts are inextricably linked. This approach misunderstands Big G, which does not say that all the taxpayer needs to show is that the income-generating contract and obligation-imposing contract are inextricably linked. What this Court said in Big G is that the taxpayer must show that the inextricable link between two contracts is such that the contracts meet the section 24C(2) sameness requirement.

[41] This does not render the "inextricable link" factor irrelevant. If the contracts are not inextricably linked to each other, the criterion of sameness is not likely to be satisfied. Also, logically, one cannot ascertain whether there is sameness between two contracts until the links between them are examined.

But a finding that the sale contract and ClubCard contract are inextricably linked will not be the end of the matter. The

determinative question is whether they are so inextricably linked that they satisfy the requirement of sameness.

[42] Clicks seeks to demonstrate that the factual and legal links between the ClubCard contract and the sale contract are such that the two contracts are “inextricably linked” for purposes of

section 24C. Overall, Clicks says that the contracts operate together – both in producing income for Clicks and in

generating its obligation to finance future expenditure. Clicks emphasises that the conclusion of the ClubCard contract does not itself generate any real obligations and that the obligation to award points, while governed by the terms of the ClubCard contract, is only triggered and given content when a qualifying purchase is made.

This, it submits, creates a correlation between the income-generating contract and obligation-imposing contract.

[43] The Commissioner says that “inextricable” means incapable

of being disentangled or untied. A link or connection is not sufficient. The test proposed by the Commissioner is whether

each contract has the necessary features which enable it to stand on its own. If the ClubCard contract and sale contract each can stand on their own, they are not inextricably linked. Because a loyalty programme member can buy products at Clicks without presenting her ClubCard (and thus without earning loyalty points), and a person can become a loyalty programme member without making any qualifying purchases (again, without earning any loyalty points), each of the two contracts can stand on its own. The two are not “inextricably linked”, so the Commissioner’s argument goes. The Commissioner also points to the fact that when a loyalty programme member presents her ClubCard when entering into a purchase contract with a Clicks affinity partner, income accrues to the affinity partner but the obligation to finance future expenditure is imposed on Clicks in terms of the ClubCard contract. This in effect breaks the link between the income and the future expenditure insofar as the income accrues to the affinity partner yet it is Clicks that becomes seized with the obligation to finance the future expenditure.

[44] Our jurisprudence establishes that there is an “inextricable link” when an issue, claim, contract or conduct cannot be determined or assessed without another, or the legal consequence of the one cannot be understood or measured without reference to another.

[39] In my assessment, there is an inextricable link between the sale contract and the

ClubCard contract to the extent that both contracts operate together to give effect to Clicks’ loyalty programme. This is by design. Clicks undertakes to honour a redemption of loyalty points and hand over discounted merchandise to a loyalty

programme member only if the member has spent enough money at Clicks within a qualifying period. Only once there is qualifying

expenditure does Clicks' obligation under the ClubCard contract have any practical consequence. In other words, while it is true that the ClubCard contract is the foundation of the contractual arrangement that gives effect to Clicks' loyalty programme, it is the contract of sale that lends specificity and content to the terms of the ClubCard contract, effectively establishing the specific ambit of the obligation incurred by Clicks.[40]

[45] Thus, within the context of the loyalty programme, the two contracts are inextricably linked to the extent that (a) obligations under the ClubCard contract are triggered by the sale contracts; (b) Clicks' obligation to finance expenditure when ClubCard points are redeemed is determined with reference to the amount of income earned in terms of one or more contracts of sale; and (c) there is a significant factual overlap and nexus between them. But do the links between the two contracts give rise to a sameness between them?

[46] Whatever the outer limits of the concept of sameness in this context may be, at a minimum both the earning of income and the obligation to finance future expenditure must depend on the existence of both contracts. If either contract can be entered into and exist without the other, they can hardly achieve sameness.

[47] It is so that the accrual of income under a sale contract triggers and quantifies Clicks' obligation to finance future expenditure but again, the actual obligation is sourced in the ClubCard

contract and does not depend on the existence of a sale contract. Likewise, the sale contract does not owe its existence to the ClubCard contract. Income earned under the sale contract does not accrue to Clicks necessarily because it has undertaken an obligation to honour the redemption of loyalty points in the event that its ClubCard members earn points and become entitled to a discount. Clicks earns income through the sale of merchandise and not through entering into ClubCard contracts with its customers. Of course, the existence of a ClubCard contract may drive sales of Clicks merchandise, but income that accrues, in legal terms, is attributable to the relevant contract of sale. Clicks would earn the income regardless of whether there is a ClubCard contract in place.

[48] There are many other respects in which the contracts function independently. Each contract of sale constitutes a complete contract on its own, with terms that are different from the ClubCard contract. In fact, the terms of each sale contract are the same regardless of whether the purchaser is a loyalty programme member and regardless of whether a ClubCard is presented. The generation of income is not regulated by the ClubCard contract and no aspect of the sale contract is dictated by the ClubCard contract.

Conclusion

- [49] The two contracts relied on to found Clicks' claim for a section 24C allowance function in tandem to give effect to the loyalty programme. This functional relationship manifests in a number of factual and legal links between the two contracts, but these links do not render either contract dependent on the other for its existence, nor is their effect that income can only accrue to Clicks if both contracts are in place. The contract under which income accrues (the contract of sale) and the contract under which the obligation to finance future expenditure arises (the ClubCard contract) are simply too independent of each other to meet the requirement of contractual sameness. Whilst they may operate together within the context of the loyalty programme, and in that sense are inextricably linked or connected, this link is not sufficient to render the contracts the same for the purposes of section 24C. The contracts therefore fall short of the sameness that is required by section 24C.
- [50] Clicks cannot claim a section 24C allowance on either a same-contract basis or on a sameness basis. In the circumstances, the appeal must fail. There is no reason why costs should not follow the result.

Order

- [51] In the result, the following order is made:

1. Leave to appeal is granted.

For the Applicant: For the Respondent: M Blumberg SC and P Olivier instructed by Edward Nathan Sonnenbergs Incorporated P Ellis SC and R M Molea instructed by State Attorney, Pretoria

- [1] 58 of 1962.
- [2] The definition of "future expenditure" in section 24C(1) was amended by the Taxation Laws Amendment Act 25 of 2015 which commenced on 8 January 2016. The amendment bears no relevance to the present matter.
- [3] Section 11(a) of the Income Tax Act allows deductions in respect of expenditure which is actually incurred in the current year of assessment. If the expenditure is not yet actually incurred, it will not be deductible in terms of the section.

Section 11(a) provides as follows: "11 General deductions allowed in determination of taxable income

- (1) For the purposes of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived—
 - (a) Expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature."

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- [4] This quantum has been agreed between the parties, based on a cost of sales percentage of approximately 75%. This means that, for example, if a customer redeems a cash back voucher of R50, the amount claimable as a section 24C allowance is R37.81.
- [5] In this Court, Clicks now claims a revised allowance in the amount of R36 180 550.
- [6] Various terms have been used to describe this contract, including “the first purchase of sale contract” and the “qualifying purchase contract”.
- [7] This being the composite contract that comes into existence when a customer signs up to become a member of the loyalty programme.
- [8] Clicks Retailers (Pty) Limited v The Commissioner for the South African Revenue Service, unreported judgment of the Tax Court, Cape Town Case No 13988 (1 November 2018) (Tax Court judgment).
- [9] Id at para 10.
- [10] 10 Id at para 36.
- [11] Commissioner, South African Revenue Service v Clicks Retailers (Pty) Ltd [2019] ZASCA 187; 2020 (2) SA 72 (SCA) (Supreme Court of Appeal judgment).
- [12] Commissioner, South African Revenue Service v Big G Restaurants (Pty) Ltd [2018] ZASCA 179; 2019 (3) SA 90 (SCA) (Big G (SCA)).
- [13] ITC 1667 (1999) 61 SATC 439 (C), ITC 1697 (1999) 63 SATC 146 (N) and ITC (2016) 1890 19 SATC 62 (C).
- [14] Big G (SCA) above n 12 at para 14.
- [15] Id at paras 19-20.
- [16] Id at para 21.
- [17] Id.

- [18] Supreme Court of Appeal judgment above n 11 at para 18.
- [19] Id at para 17.
- [20] Big G Restaurants (Pty) Ltd v Commissioner, South African Revenue Service [2020] ZACC 16; 2020 (6) SA 1 (CC); 2020 (11) BCLR 1297 (CC) (Big G).
- [21] B v Commissioner for the South African Revenue Service 2017 JDR 1735 (WCC) (Big G (Tax Court)) at para 59.
- [22] Big G above n 20 at para 18.
- [23] In Big G above n 20, Madlanga J said the following at para 11: “Do we have jurisdiction? I believe we do. This matter involves the interpretation of the franchise agreements and the individual contracts of sale of food. In this regard, the question is whether the franchise agreements and the contracts of sale of food are so interlinked that the sale of food income may be held to be income that accrues in terms of each franchise contract; each franchise agreement, of course, being the contract that imposes the obligation to revamp in future and thus creates the future expenditure. This interpretative question is a quintessential point of law. This question is also closely bound up with the interpretation of section 24C(2): what is the nature of the contract envisaged in the section? This element of interpretation adds to the legal character of the question to be determined.”
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- [24] KPMG Chartered Accountants (SA) v Securefin Ltd [2009] ZASCA 7; 2009 (4) SA 399 (SCA) at para 39.
- [25] Big G above n 20 at para 11.
- [26] In K v Minister of Safety and Security [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 16, this Court explained the manner in which common law rules are incrementally developed by courts: “From time to time, a common-law rule is changed altogether, or a new rule is introduced, and this clearly constitutes the development of the common law. More commonly, however, courts decide cases within the framework of an existing rule. There are at least two possibilities in such cases: firstly, a court may merely have to apply the rule to a set of facts which it is clear fall within the terms of the rule or existing authority. The rule is then not developed but merely applied to facts bound by the

rule. Secondly, however, a court may have to determine whether a new set of facts falls within or beyond the scope of an existing rule. The precise ambit of each rule is therefore clarified in relation to each new set of facts. A

court faced with a new set of facts, not on all fours with any set of facts previously adjudicated, must decide whether a common-law

rule applies to this new factual situation or not. If it holds that the new set of facts falls within the rule, the ambit of the rule is extended. If it holds that it does not, the ambit of the rule is restricted, not extended.”

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[27] In ITC 1667 (1999) 61 SATC 439 at para 13, the Tax Court confirmed that the operative concept in section 24C was “contract” and not “scheme” or “transaction” and concluded that “it is a clear requirement of section 24C . . . that the expenditure must be incurred . . . in terms of the same contract as the contract under which the income was derived”. In ITC 1697 (1999) 63 SATC 146 at 158 and ITC 1890

(2016) 19 SATC 62, it reached the same conclusion. These decisions stand in contrast to the Tax Court’s decision in both *Big G* (Tax Court) and the present matter. The Supreme Court of Appeal’s approach has been more consistent but has conflicted with that of the Tax Court on two occasions (in *Big G* and again in this case).

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[28] 28 Big G above n 20 at para 14.

[29] Paulsen v Slip Knot Investments 777 (Pty) Ltd [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 17.

[30] SATAWU v Garvas [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 33 and Dladla v City of Johannesburg

[2017] ZACC 42; 2018 (2) SA 327 (CC); 2017 (2) BCLR 119 (CC) at para 34.

[31] I will refer to the test for determining sameness, which was delineated in Big G, as the “sameness test”.

[32] Tax Court judgment above n 8 at paras 38-9. In this regard, the Tax Court noted: “It was also argued on behalf of the Commissioner that the appeal should fail because the obligation to incur future

expenditure was a contingent liability as Clicks has not succeeded in discharging the onus resting upon it to convince the court that there was a sufficient measure of certainty that the expenditure will be incurred due to the fact that such obligation only arose if triggered by the customer when making a second purchase. The Commissioner’s difficulty with this submission is that this was not the basis upon which the Commissioner disallowed

Clicks’ section 24C claim. This was also not pleaded in the Commissioner’s rule 31 statement.” 33 Id at para 36.

[32] Tax Court judgment above n 8 at paras 38-9. In this regard, the Tax Court noted:

“It was also argued on behalf of the Commissioner that the appeal should fail because the obligation to incur future

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Clicks' section 24C claim. This was also not pleaded in the Commissioner's rule 31 statement." 33 Id at para 36.

[33] Supreme Court of Appeal judgment above n 11 at para 18.

[34] Id at para 17: "The difficulty . . . is that, as pointed out above, this court in Big G expressly rejected the notion that the section applies where there are different contracts but they are 'inextricably linked'. Consequently, the fact that the ClubCard contract may be inextricably linked to the first contracts of sale concluded between a customer and Clicks for the purchase of merchandise, and that the ClubCard programme could not function without these sales, matters not." 36 Tax Court judgment above n 8 at paras 32 and 36.

[34] Id at para 17:

"The difficulty . . . is that, as pointed out above, this court in Big G expressly rejected the notion that the section applies where there are different contracts but they are 'inextricably linked'. Consequently, the fact that the ClubCard contract may be inextricably linked to the first contracts of sale concluded between a customer and Clicks for the purchase of merchandise, and that the ClubCard programme could not function without these sales, matters not." 36 Tax Court judgment above n 8 at paras 32 and 36.

[35] Supreme Court of Appeal judgment above n 11 at para 19.

[36] Id.

[37] Id at para 28.

[38] It was common cause between the parties that merely entering into the ClubCard contract does not trigger a member's entitlement to points. Only entering into a qualifying sale does. The position is correctly summarised in the judgment of the Tax Court at para 31: "Factually, no income is earned upon the conclusion of the ClubCard contract. Also no obligation to incur future

expenditure arises upon the conclusion of the ClubCard contract. The ClubCard contract merely records the terms upon which [Clicks] is to reward the ClubCard holders in respect of their future purchases." 41 Big G above n 20 at para 18.

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[39] In *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 (8) BCLR 950 (CC) at para 14, Madlanga J identified an issue at the centre of the matter, which, although pleaded discretely, was nevertheless

inextricably linked to another issue in that it was incapable of being determined without reference to that other issue. And in *Mutual and Federal Insurance Company Limited v KNS Construction (Pty) Limited* [2016] ZASCA 87; 2016 JDR 1489 (SCA) at para 14, the Supreme Court of Appeal held that a guarantee was inextricably linked to the underlying contract because the breach of that contract triggered the obligations under the guarantee.

[40] This was also recognised by the Supreme Court of Appeal, which accepted that the qualifying purchase triggers and gives content to Clicks’ obligation to award points. In this regard, the Court noted at para 19 that “when a qualifying contract of sale is concluded, the obligation on Clicks either to issue vouchers or to honour them, as the case may be, in terms of the ClubCard contract, becomes exigible”.

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