

SOUTH AFRICA / JUDGMENT

# Gerber v Commissioner for Inland Revenue (24/88) [1989] ZASCA 91; [1989] 4 All SA 950 (AD) (29 August 1989)

[1989] ZASCA 91

## COURT

Supreme Court of Appeal

## BEFORE

Corbett, Hoexter, Nestadt, Vivier, Nicholas

## CASE / FILE NUMBER

24/88

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

**Source record****SOLOMON MARTIN GERBER and****THE COMMISSIONER FOR INLAND REVENUE****Case No. 24/88 - mp****IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE****DIVISION****In the matter**

between:

SOLOMON MARTIN GERBER Appellant and THE

COMMISSIONER FOR INLAND REVENUE Respondent

CORAM: CORBETT, CJ, HOEXTER, NESTADT, VIVIER, JJA et NICHOLAS,

AJA

HEARD: 23 May 1989 DELIVERED: 29 August 1989

**JUDGMENT**

HOEXTER, JA

2

In respect of assessments to normal tax raised

by the respondent upon the appellant taxpayer for the year of assessment ended 28 February 1982 and 28 February 1983 the appellant lodged objections which were disallowed by the respondent. Thereafter the appellant appealed to the Transvaal Income Tax Special Court. In the course of the proceedings in the Court a quo the respondent's representative requested that the assessments be set aside and be referred back to the respondent. The Special Court dismissed the appeal and confirmed the assessments; and in so doing impliedly rejected the request made

on behalf of the respondent. Against the whole of the judgment of the Special Court the appellant appeals and the respondent cross-appeals. In terms of sec 86A(5) of the Income Tax Act, No 58 of 1962 ("the Act") the President of the

Special 3 Special Court granted leave to appeal direct to this Court. The appellant is a chartered accountant. He is a partner in a firm of chartered accountants based primarily in Johannesburg. The appellant is in charge of his firm's tax department and he is well-versed in the intricacies of tax law. The appellant appeared in person before this Court and argued the matter with ability. At the hearing before the Special Court the appellant gave evidence. He said that in the course of his professional practice he had in the past often been consulted with regard to those financial operations which are commonly known as "dividend-stripping"; and that in 1982 he decided to embark thereon for his own account. The basic concept of dividend-stripping and the essential techniques in carrying it out were examined by this Court in *Commissioner for Inland Revenue v Nemoiim*

(Pty) 4 (Pty) Ltd 1983(4) SA 935(A). That was a case in which the taxpayer indulging in dividend-stripping was a company; and, by reason of the provision of sec 10(1)(k) of the Act, the dividends declared by the companies stripped which were received by the taxpayer were exempt from tax in its hands. (See 943D). In the case of a natural person, however, dividends received by an individual are not exempt from tax and such dividends therefore form part of his "gross income", "income" and, subject to the deductions provided by sec 19, "taxable income" as defined in the Act. The appeal and the cross-appeal relate to the manner in which deductions from income derived from dividends are, in a case of this kind, to be calculated in terms of the Act. Although the appellant's objections are confined to assessments raised in respect of the 1982 and 1983 tax years, an appreciation of the thrust of the

appellant's 5. appellant's argument requires a brief exposition of the appellant's dividend-stripping operations over a longer period, namely 1981 to 1986. For present purposes these may be summarised as follows:-

(a) On 10 November 1981 the appellant bought the whole of the issued shares of a private company called Walt and Bild (Pty) Ltd ("W & B") for R770 452. (b) On 26 November 1981 W & B declared a dividend of R789 890 in favour of the appellant. (c) The declaration of the dividend mentioned in (b) above reduced the value of the W & B shares which were valued, as at 28 February 1982, at R561. (d) On 7 February 1982 the appellant bought the whole of the issued shares of a private company called Amalgamated Granite Industries (Pty) Ltd ("Anberg") for R213 081.

(e) On ....

6.

- (e) On 20 September 1982 Anberg declared a dividend of R218 481 in favour of the appellant. (f) The declaration of the dividend mentioned in (e) above reduced the value of the Anberg shares which were valued, as at 28 February 1983, at R4 498. (g) On 1 February 1983 the appellant bought the whole of the issued shares of a private company called South Rand Pharmacy (Pty) Ltd ("SRP") for R304 007.
- (h) On 25 February 1983 the appellant bought the whole of the issued shares of a private company called Osher Jewellers Wholesalers (Pty) Ltd ("OJW") for R104 514.
- (i) On 28 February 1983 W & B declared a further dividend of R1 448 in favour of the appellant.
- (k) During....

7

- (k) During the 1984 tax year Anberg declared a further dividend of R4 296 in favour of the appellant. (l) During the 1984 tax year SRP declared a dividend of R311 407 in favour of the appellant. (m) During the 1984 tax year OJW declared a dividend of R107 077 in favour of the appellant. (n) On 18 February 1985 W & B declared a further dividend of R5 945.38 in favour of the appellant. (o) In the 1985 tax year the appellant sold the Anberg shares for R402. (p) In the 1986 tax year the appellant sold the W & B shares for R200.

In the original assessment of the appellant's liability

8

liability to normal tax for the 1982 tax year the respondent(1) allowed, in terms of sec 19(3) of the Act, a deduction of

33 1/3% in respect of the W & B dividend (see (b) above); and(2) allowed as expenditure a deduction of the full purchase price of the W & B shares (see (a) above). This resulted in an assessed loss of R179 411 and a consequent credit of R58 084 in favour of the appellant. In the additional assessment for the 1982 tax year and in the original assessment for the 1983 tax year the respondent adopted a different approach. He took the aggregate of the dividends and the value of the shares at the end of the tax year and deducted therefrom the cost of the shares acquired during the tax year or, in the case of shares acquired before the commencement of the tax year, their value at the beginning of the

tax 9 tax year. This net figure the respondent treated as a dividend and in respect thereof he allowed a deduction of 33 1/3%. During the tax year ended 28 February 1982 the only dividend received was from W & B; and the respondent's calculation involved the addition of R789 890 (see (b) above) and R561 (see (c) above) which yielded a total of R790 451, from which he subtracted R770 452 (see (a) above) to produce a figure of R19 999; in respect whereof a deduction of 33 1/3%

in terms of sec 19(3) of the Act was allowed. Hence the respondent's statement, reflected in the remarks column of the 1982 additional assessment: "Income from dividend-stripping taxed R13 333". During the tax year ended 28 February 1983 both Anberg and W & B produced dividends. In the original assessment for the 1983 year the respondent's

calculations

10

calculations involved the addition of R218 481 (see (e) above), R4 498 (see (f) above) and R1 448 (see (j) above) which yielded a total of R224 427, from which he subtracted R213 081 (see (d) above) to produce a net figure of R11 346; in respect whereof a 33 /3% deduction in terms of sec 19(3) of the Act was allowed. Hence the respondent's statement in the remarks column of the 1983 original assessment: "Income from dividend-stripping taxed R7 564". Before turning to a consideration of the appellant's main contentions it is convenient at this juncture to quote the provisions of sec 8D and of subsecs 19(1), (2) and (3) of the Act. Sec 8D was inserted by sec 7(1) of Act No 96 of 1981. As amended by sec 8 of Act 121 of 1984, the amendment being effective from the commencement of years of assessment ending on or after 1 January 1985, sec 8D provided as follows:-

"8D. For

11

"8D. For the purposes of this Part, where the trading stock held by any person on or after 2 October 1981 includes or consists of any share, or any interest in any share, in a private company (other than a close corporation), there shall be included in the income derived by such person -

(a) during the year of assessment during which such share is disposed of by him;

or

(b) if the share is not disposed of by him, during the year of assessment during which such company is placed in liquidation or is deregistered or otherwise ceases to exist,

so much of the amounts of any dividends received by or accrued to him in respect of such share or interest during the period during which the share or interest was held by him as, by reason of the provisions of section 10(1)(k) or 19(3), were not includable in his taxable income for the current or any previous year of assessment, but excluding any portion of a dividend distributed more than four years prior to the year of assessment in question or out of profits derived by the company during the year of assessment of the company during which such dividend was distributed or during the immediately preceding year of assessment of the company."

During

12

During the 1982 tax year the special provisions of the Act applicable to dividends were subsections 19(1), (2) and (3). During the 1983 tax year they were subsections 19(1), (1A),

(2) and (3). For purposes of the appeal nothing turns on sec 19(1 A). As they read in the 1983 tax year subsections 19(1), (2) and (3) provided:-

"19. (1) The provisions of section 11(a), (b), (i) and (j) and section 20 shall, subject to the provisions of sub-section (2) of this section, mutatis mutandis apply in relation to any income derived by any person in the form of dividends.

(1A) .

(2) In respect of expenditure and losses not of a capital nature incurred by any person (other than a company) in the production of his income from dividends, the amounts to be deducted under section 11(a), (b), (i) and (j), as applied by sub-section (1) of this section, and the amount to be deducted

under

13

under sub-section (1A) of this section,

shall in total be an amount which bears

to the sum of the expenditure, losses

and amount which but for this sub-

section would have been allowed to be

deducted under the said provisions the

same ratio as the amount of such divi-

dends as calculated after allowing the

deduction under sub-section (3) of this

section, bears to the amount of such

dividends as calculated before allowing

such deduction.

(3) In respect of income in the form of

dividends (other than any portion of a dividend included in a taxpayer's income under section 8D and any dividends referred to in section 11(s)) derived by any person other than a company there shall be allowed as a deduction in the determination of the taxable income of such person an amount representing a percentage of such dividends calculated in accordance with the following scale:-

Where

14

Where, but for the Percentage of provisions of this aforesaid sub-section, sub-section dividends to

(2) and section twenty be deducted the taxable income of the taxpayer for the year of assessment in question - would not exceed R2,600 100 per cent would exceed R2,600 but

not R2,800 94 "

would exceed R4,600 33 /3 per cent"

In framing his objections to the assessments in question the appellant contended that the respondent's original assessment for the 1982 tax year had been correctly determined; that it should be reinstated; and that the assessment for the 1983 tax year should have been determined in similar fashion. In a letter to the respondent dated 21 October 1985 the appellant advanced, inter alia, the

following

15

following contentions:-

"7. During the 1982 tax year the cost of the shares acquired by me amounted to R983 533 and the cost of the shares acquired by me during the 1983 tax year amounted to R408 521. These two amounts are therefore deductible in the 1982 and 1983 tax years respectively in terms of the provisions of Section 11(a).

8. During the 1982 tax year I received dividends of R769 891 which formed part of my 'gross income' for the year and as no portion of this amount is deductible this amount also forms part of my 'income' and 'taxable income' for the year. However, in terms of the provisions of Section 19(3) of the Act I am entitled to an allowance in respect of these dividends of an amount equal to one-third of the dividends

The total dividends received by me during

the 1983 tax year in respect of private company shares in terms of private company share dealing operations amounted to R219 929. This amount once more forms part of my 'gross income' 'income' and 'taxable income' for the 1983 tax year. I am, however, furthermore entitled to the allowance in respect of this amount of one-third thereof in terms of the

provisions

16

provisions of Section 19(3) of the Act.

As the dividends derived in respect of shares held as trading stock the allowance

in terms of Section 19(3) of the Act in

respect of the years in question are subject to the provisions of Section 8D of the Act.....

9. The shares acquired by me during the 1982 and 1983 tax years form part of my 'trading stock' which is defined in Section 1 of the Act to include '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.' As

has been set out above the shares were

acquired in order to receive dividends and thereafter to be disposed of for the maximum achievable consideration at the most appropriate time, but nevertheless as soon as possible

17. In the 1984 and 1985 tax years amounts of R526 950 and R51 851 are includable in my income in terms of Section 8D and in the 1986 and subsequent tax year the provisions of Section 8D will similarly apply to the shares in the companies of which I likewise dispose.

18. The 17

18. The additional 1982 and the original 1983 assessments have therefore been incorrectly issued as they do not grant the allowances and deductions which are recoupable by Section 8D. Clearly, the amounts on which I have been taxed together with the amounts includable in my income in future years in terms of Section 8D would result in a tax liability which would cripple me financially and possibly even lead to my sequestration.

At the hearing of the appeal to the Special Court the appellant gave evidence. He was closely cross-examined as to the motives which had prompted him to engage in the dividend-stripping operations in question. The effect of the appellant's evidence was that he regarded the dividend-stripping operations as a profit-making scheme; and that he had, in fact, made substantial profits therefrom. He pointed out that over the period 1982 to 1985 his profits had amounted to nearly R100 000. In the course of cross-examination it was put

to

18

to the appellant that in undertaking the dividend-stripping operations his sole purpose had been "to claim a loss for tax purposes, namely the difference between the cost and selling price of the shares". The appellant firmly denied that this had been the case. No evidence was adduced on behalf of the respondent.

Having summarised the appellant's grounds of objection

to the assessments in question the President of the Special Court

(O'DONOVAN, J) in the course of his judgment remarked:-

" It was contended by the Commissioner's representative, Mr Truter, that the cost of the shares in question is not allowable as a deduction in terms of section 11(a) read with section 23(g) of the Income Tax Act, because it was of a capital nature, or alternatively because the cost was not wholly or exclusively laid out or expended for the purpose of trade, and he requests that the assessments in question be referred back to the Commissioner for recalculation in accordance with a finding by the Court upholding this contention."

The

19

The contention so advanced on behalf of the respondent in the Court below was rejected. The learned Judge pointed out that in the *Nemoiim* case (*supra*) -

" in circumstances which were in principle similar to those in the present case, it was common cause, and was accepted by the Court, that *Nemojim's* operations constituted trading, and that the shares acquired by it constituted trading stock."

Proceeding to deal with the issue raised by the appellant's grounds of objection the President of the Special Court expressed the opinion that its determination depended entirely upon a construction of sec 19(1) of the Act; and that the provisions of sec 19(2) were irrelevant. On the wording of sec 19(1) the Court *a quo* was satisfied that expenditure and losses should, in the first instance, be set off against dividend income. The

learned Judge concluded that the respondent had been

correct

20

correct in deducting expenditure and losses incurred in the production of dividends from the dividends, and in issuing assessments on that basis. The learned Judge further declined to revise or adjust the effect of sec 19(1) by reference to the provisions of sec 8D of the Act. In this connection he remarked in his judgment:-

"It appears from the evidence led that an amount of R6 666 was allowed to the appellant as a deduction in terms of section 19(3) from

net dividends received from Walt and Bild (Pty) Ltd

in the 1982 year of assessment. The appellant's shares in this company were disposed of in the 1986 year of assessment and section 8D would accordingly apply thereto. A similar situation arises from the disposal by the appellant in the 1985 year of assessment of his shares in Anberg (Pty) Ltd, a one-third deduction, in the amount of R3 782, having been allowed in the 1983 year of

assessment in terms of section 19(3). It is, however, difficult to see how the enactment of section 8D in 1981 can modify the effect of section 19(1) upon which, it seems to the Court, the appellant's appeal depends."

21

The Special Court's aforementioned rejection of the contentions by the respondent's representative that the appellant's dividend-stripping operations did not constitute the carrying on of a "trade" within the meaning of the Act, and that the cost price of the shares in question was a capital expense, forms the basis of the cross-appeal. In argument before us it was urged on the respondent's behalf that the cost of the shares was expenditure incurred not in the production of income but in the creation of an assessed loss; that, therefore, the deduction of such expenditure was not allowable under sec 11(a) of the Act; and that it was specifically precluded under sec 23(g).

22The ground has now been cleared for a consideration of the merits of the appeal and the cross-appeal. It is convenient to begin with the question, material alike to the appeal and the cross-appeal, whether the appellant's dividend-stripping operations constituted the carrying on of a "trade" within the meaning of the Act. If that question is answered in the negative it will follow that the cost of the shares in question cannot be deductible in terms of sec 11(a) or sec 23(g). An affirmative answer to the question would, on the other hand, be fatal to the cross-appeal. For if the appellant's dividend-stripping amounted to a trading in shares their purchase price would represent expenditure not of a capital nature which was incurred in the production of income (thus qualifying for deduction in terms of sec 11(a)) and exclusively expended for the purposes of the appellant's trade (and thus not precluded from

deduction

23

deduction under sec 23(g)). Counsel for the respondent urged upon us that although the definition of "trade" in the Act is couched in wide terms, such definition would not embrace a financial operation whose object was to make a loss rather than a profit; and, so proceeded the argument, the sole object of the appellant's dividend-stripping was to produce a loss redounding to the appellant's fiscal advantage. For the reasons which follow this last submission cannot be sustained. The facts of the instant case represent, I think, a classic example of "dividend-stripping"; and it is no less clear that the appellant made a business venture of such operations. Insofar as the nature of these operations is concerned, the essential facts of the present case bear a strong resemblance to those of the Nemojim case (supra), in which it was common cause (see 947D) that the Nemojim

company

24company had been carrying on the trade of dealing in shares within the RSA, and the appeal was dealt with on that footing. In regard to the issue whether or not the appellant was trading in shares I am unable to find any significant difference sufficient to provide a basis for

distinguishing the present case from the Nemojim case. Furthermore, on the evidence adduced in this case there is, so I consider, insufficient foundation for the argument that the appellant's dividend-stripping operations were designed to make a loss. The uncontradicted testimony of the appellant was that throughout his dividend-stripping operations he intended to reap commercial profits. It is true that the appellant proceeded upon the assumption that in the determination of his taxable income the cost of the shares in question would be allowed in full as deductions under sec 11(a) of the Act. It is the validity or otherwise of that proposition which is the .

main

25

main issue in this appeal. But there can be no doubt, I think, that the appellant genuinely entertained a conviction that the full cost of the shares in question was properly so deductible. If in the result the appellant has mis-conceived the fiscal position then the application of sec 8D of the Act may well render his dividend-stripping operations commercially unprofitable and perhaps even financially calamitous to him. But the fact that the appellant's after-tax position is a dismal one does not mean that his operations were designed to make a loss rather than a profit. In my view the facts of the instant case point clearly to the conclusion that the appellant's dividend-stripping operations constituted the carrying on of a trade within the meaning of sec 1 of the Act; that the shares in question were acquired by the appellant as his trading stock; and that the cost thereof should rank as expenditure in the production of income.

Accordingly

26 Accordingly the cost of such shares is deductible in the manner and to the extent prescribed by secs 11 (a) and 19 of the Act. It follows that the cross-appeal cannot succeed. I turn to the merits of the appellant's contentions in regard to the appeal. It is clear that this can succeed only if the application of sec 19(1) and (2) to the facts can somehow be displaced. If sec 19(2) has to be applied it follows that the amount of the expenditure to be deducted under sec 11(a) must be scaled down in the same fashion in which the deduction in respect of income in the form of dividends is scaled down in terms of sec 19(3). The appeal can succeed only if the total cost of the shares acquired in the 1982 tax year (R983 533) is allowed as expenditure in that year; and if the total cost of the shares acquired in the 1983 tax year (R408

521) is similarly allowed in the 1983 tax year.

In summary the appellant's chief contentions came

to 27

to the following. By way of a prelude the appellant emphasised that failing the deduction of the aforesaid expenditures he would, by reason of the operation of the provisions of sec 8D of the Act, eventually be taxed in respect of the 1984-1986 tax years on a taxable income which was wholly disproportionate to the actual economic profit derived from his dividend-stripping operations. As a general proposition the appellant submitted that so crippling and inequitable a

fiscal result could hardly have been within the contemplation of the legislature; and that the relevant provisions of the Act should be so construed as to avoid it. More specifically the appellant submitted that sec 19(1) - and likewise its companion sec 19(2) - had no application to the facts of the present case. The appellant submitted that sec 19(1) and 19(2) were not intended to be comprehensive and exhaustive, and that they had been designed to operate only where a deduction under

sec

28

sec 11(a) might not have been allowed and (I quote from the appellant's heads of argument):-

"...because of the fact that the receipt of

dividends is not in itself a trade."

The submission was that the field of application of sec 19(2) was confined to what may for present purposes be described as "non-traders" in shares : sec 19(2) was intended to apply

to dividends accruing from investment and not, as in the

instant case, to dividends which were the fruit of trading

in shares. In support of this argument we were referred to

certain passages in Meyerowitz & Spiro, Income Tax in SA

(Permanent Volume) and in Silke, SA Income Tax, 10 ed.

Meyerowitz & Spiro (par 993 at pp 364/5) express the following

view:-

"993. Section 19(1) applies the provisions of sections 11 (a) and (b) (relating to expenditure, not of a capital nature, incurred in the production of income),

of

29

of section 11(i) and (j) (relating to bad and doubtful debts) and of section 20 (relating to the set-off of assessed losses from trade) to income derived in the form of dividends but subject to section 19(2) which provides for a deduction of a percentage only of the expenditure. We consider that these provisions are confined to the case where the shares concerned are held as a fixed investment and that where the taxpayer is a share-dealer i.e. the shares in question were acquired by him as stock-in-trade in the course of trade as a share-dealer, section 19(2) is not applicable. Instead the share-dealer is entitled to deduct the whole of his expenditure, incurred (if not of a capital nature) under section 11(a) or (b) and to set-off any loss under section 20, without any limitation

as to the percentage as provided in

section 19(2). Such expenditure will include the purchase price of the shares and other expenditure, such as interest on borrowed money, overheads etc."

A similar suggestion is made by Silke, par 9.30.

In the passage from Meyerowitz & Spiro quoted above

the

30

the learned authors advance no reason for so limiting the application of sec 19(2). There appears to me to be no

consideration of principle which in this particular context impels one to draw such a distinction between shares held as a fixed investment and shares acquired as stock-in-trade. Moreover, an examination of the history of the Act in regard to the treatment of income from dividends tends, I think, to militate against the appellant's submission. Prior to the Income Tax Act, 1960 ("Act No 58 of 1960") income from dividends did not form part of the taxable income of the taxpayer as determined for normal tax; it was only in determining the amount of income subject to super tax (see sec 27 of the Income Tax Act, 1941 ("Act 31 of 1941")) that dividends received or accrued from a company (which were exempt from tax under sec 10(1)(k) of Act 31 of 1941) were taken into account. Sec 8 of Act 58 of 1960 amended sec 11 of Act 31

31

of 1941 inter alia by the insertion after sec 11(3) of a subsection 3 bis. Subsec 3 bis of sec 11 was the precursor of sec 19 of the Act. The provisions of paragraphs (a), (b) and (c) of subsec 3 bis thus introduced into sec 11 correspond in substance with subsections (1), (2) and (3) of sec 19 of the Act. In a taxing statute "one has to look merely at what is clearly said" (per ROWLATT, J in *Cape Brandy Syndicate v IRC* 1921 (1) KB 64 at 71.) See further: *Canadian Eagle Oil Company Limited v R* 1946 AC 119 (HL)). There is no ambiguity about sec 19(1), and, as pointed out in the judgment of the Special Court, sec 19(1) can hardly be affected by the provisions of sec 8D which was introduced into the Act at a much later date.

Sec

32 Sec 19(1) expressly provides that, subject to the provisions of sec 19(2), the provisions of sec 11(a) shall, mutatis mutandis, apply "in relation to any income derived by any person in the form of dividends." Looking fairly at the language of sec 19 as a whole the interpretation for which the appellant contends appears to me to be an artificial and unsound one. When effect is given to the plain and ordinary meaning of the words in sec 19 it is clear, I think that sec 19(2) applies fully to the facts of the present case. The appellant also sought to enlist support for his construction of sec 19 by reference to sec 22 of the Act. It was said that an application of sec 19(2) to the facts of a case such as the present one created practical problems in the process of taking into account

amounts in respect of the values of trading stocks as prescribed by sec 22. It is unnecessary to examine the argument in detail. In the

Nemojim

33Nemojim case (supra) it was pointed out (at 957 C/D) that the provisions of sec 22 cannot be interpreted in such a way as to override the basic provisions of the Act affecting the deductibility of expenditure. In my opinion such problems of accounting as may arise upon an application of sec 22 cannot assist in the interpretation of the provisions of sec 19. In the judgment of the Court a quo O'DONOVAN, J stated that sec 19(2) was not relevant to the facts of the instant case. Here, so it seems to me, with respect, the learned Judge erred. Once it is accepted (as the Court below correctly accepted) that sec 19(1) applies, the further conclusion is inescapable that sec 19(2) likewise has application. Not only does a perusal of sec 19 as a whole show that its constituent subsections are logically related and interlinked, but in addition sec 19(1) expressly provides that

34

that its application is subject to the provisions of sec 19(2). That conclusion, as indicated earlier in this judgment, determines the fate of the appellant's appeal. It follows that in the determination of the appellant's taxable income for the tax years 1982 and 1983 the respondent should have scaled down both the total dividends under sec 19(3) and the total cost of the shares under sec 19(2). Arithmetically such a computation yields the same result as that produced by the calculation adopted by the respondent and accepted by the Court below. It follows that the appellant failed to discharge the onus which he bore of showing that the amounts included in the additional 1982 assessment and the 1983 original assessment were not taxable; and that the Special Court correctly confirmed the assessments.

The pervasive theme underlying the argument

presented

35

presented to us by the appellant was his insistence upon the financially oppressive and inequitable consequences flowing from the operation of sec 8D upon the appellant's particular adventure of trading in shares. Should it transpire that in practice the application of sec 8D generally involves crippling financial effects which were neither fore-seen nor intended when sec 8D was inserted in 1981, then this is a matter to which Parliament may choose to direct its attention. However, without wishing to appear unsympathetic to the plight of the appellant in the instant case, I point out that though the consequences of sec 8D can be dire, they are not inescapable. They may be avoided by the simple expedient of deferring the sale of the shares in question until the lapse of the four-year period stipulated in the exclusionary provision of sec 8D.

For

36

For the reasons foregoing it follows that both the appeal and the cross-appeal must fail. In all the circumstances of the present matter it seems to me that the justice of the case will be met by making no order as to costs. The appellant's appeal is dismissed. The respondent's cross-appeal is also dismissed. No order is made as to costs.

G G HOEXTER, JA

CORBETT, CJ )

NESTADT, JA )

CONCUR

VIVIER, JA )

NICHOLAS, AJA )

---

**Source & reproduction note**

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE      <https://www.saflii.org/za/cases/ZASCA/1989/91.html>

CASE PAGE              <https://chat.esheria.ai/case-law/south-africa/gerber-v-commissioner-unknown-topic-asca-1989>

Prepared on 11 October 2026 · Esheria