

SOUTH AFRICA / JUDGMENT

# Odendaal v Kommissaris van Binnelandse Inkomste (193/96) [1998] ZASCA 7; 1998 (3) SA 318 (SCA); [1998] 2 All SA 461 (A) (13 March 1998)

[1998] ZASCA 7

## COURT

Supreme Court of Appeal

## BEFORE

Van Heerden, Hefer, Marais, Schutz, Melunsky

## CASE / FILE NUMBER

193/96

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### Rapporteurbaar

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invul van besonderhede van ontwikkelingskoste; naamlik die saldo oorgedra vanaf die vorige jaar, koste aangegaan gedurende die betrokke belastingjaar, die bedrag as aArekking toegelaat vir laasgenoemde jaar, en die saldo oorgedra na die volgende jaar. Indien 'n boer gedurende die betrokke belastingjaar 'n verlies gely het, volg uit wat reeds ges is dat in die IB48 vorm geen bedrag as aftrekking toegelaat word nie, en dat die saldo oorgedra vanaf die vorige jaar (indien enige) plus die ontwikkelingskoste aangegaan gedurende die betrokke jaar (indien enige) as saldo na die volgende jaar oorgedra word. Gedurende die belastingjare 1984 tot 1991 het die appellant in die distrik van Standerton geboer. In elk van die 1984 tot 1990 jare het hy 'n verlies gely en nie 'n belasbare inkomste gehad nie. In die state voorberei deur sy rekenmeester, wat sy opgawes vergesel het, is telkens die saldo van ontwikkelingskoste wat van die vorige jaar oorgebring is, vermeld; daaronder besonderhede van sodanige koste aangegaan in die betrokke belastingjaar uiteengesit, en dan die totaal van die saldo en laasgenoemde koste bereken. Wat betref die 1984, 1986 en 1987 belastingjare is egter rekenkundige foute by die invul van elke van die toepaslike IB48 vorms begaan. Di was in hoofsaak daaraan te wyte dat bogenoemde totaal, in plaas van slegs die betrokke jaar se ontwikkelingskoste, op elk van die vorms ingevul is as die koste wat in daardie jaar aangegaan is. Dit het meegebring dat in die 1984 tot 1990 IB48 vorms foutiewe saldos na elk van die daaropvolgendejare oorgedra is. Wat betref die

1986 en 1987 belastingjare was daar dus 'n tweeledige fout; nie net was die saldo oorgebring vanaf die vorige jaar verkeerd nie, maar is 'n onjuiste bedrag as die betrokke jaar se ontwikkelingskoste bepaal. Die gevolg was dat in die 1990

IB48 vorm die saldo oorgedra na die volgende belastingjaar aangedui is as meer as R5 miljoen terwyl dit, as die foute nie begaan was nie, R2 094 511 Anders as in die 1984 tot 1990 belastingjare, het die appellant in die 1991 jaar 'n wins gemaak. Toe sy belasbare inkomste bereken is, is bogenoemde foute nagespeur en in die aanslag vir die 1991 jaar reggestel. Slegs die bedrag van R2 094 511 is dus as aftrekking ten opsigte van ontwikkelingskoste toegelaat. Dit het op sy beurt meegebring dat die appellant volgens die 1991 kennisgewing van aanslag heelwat meer belasting moes

betal as wat die geval sou gewees het indien die saldo wat ooreenkomstig die oorspronklike 1990 IB48 vorm oorgedra was, in aanmerking geneem is. (Daar is later 'n gewysigde kennisgewing van aanslag vir die 1991 belastingjaar uitgereik maar die wysigings daarin vervat is nie tans ter sake nie.)

Ten tye, ofna uitreiking, van bogenoemde kennisgewing van aanslag het die respondent die foutiewe saldo wat volgens die oorspronklike 1990 IB48 dat die kernvraag vir beslegting was of die saldo wat volgens die oorspronklike 1990 IB48 vorm na die 1991 belastingjaar oorgedra is, instede van die verbeterde saldo, in die aanslag vir daardie jaar (en gevolglik ook in die gewysigde aanslag) in aanmerking geneem moes gewees het;

(b)

(c) dat die respondent nie op die bepalings van art. 79 van die Wet kon steun nie onder andere omdat die kennisgewing van aanslag vir die 1991 belastingjaar en die verbeterde IB48 vorms uitgereik is meer as driejaar na die datums van die aanslae en die IB48 vorms vir die 1984, 1986 en 1987 belastingjare. (Soos wel bekend, skryf art. 79(1) voor dat die respondent in omskrewe gevalle 'n gewysigde aanslag moet doen.) Dit is gewens om op hierdie stadium na die bepalings van 'n aantal

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Artikel 81(1) van die Wet maak voorsiening vir 'n beswaar teen 'n aanslag en subartikel (5) skryf voor dat indien geen beswaar gemaak is nie die aanslag finaal en afdoende is. Voor ons, en blykbaar ook in die hof a

quo

. was

dit tereg gemene saak dat in 'n geval waarin art. 79 nie van toepassing is nie, sodanige finaliteit intree wat beide die belastingpligtige en die respondent betref

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1953(2) SA 573 (A) 582).

In die afwesigheid van enige tersaaklike beswaar deur die appellant, het die vraag geformuleer in (a) hierbo hom dus gereduseer tot die enger vraag of die

vasstelling van ontwikkelingskoste in elk van die 1984, 1986 en 1987

belastingjare 'n aanslag was, of 'n integrale deel was van die aanslag in die

Onderhewig aan voorbehoude wat nie vermeld hoefte word nie, bepaal

art. 20(1) van die Wet dat ten einde die belasbare inkomste deur 'n persoon

verkry uit die beoefening van 'n bedryf in die Republiek vas te stel, teen die

aldus verkre

inkomste in vergelyking gebring word "enige balans van 'n

vasgestelde verlies deur die belastingpligtige in 'n vorige jaar gelyk wat van die

vorige jaar van aanslag oorgebring is." Vir doeleindes van toepassing van die

artikel word "vasgestelde verlies" in subartikel (2), vir sover ter sake, omskryf

as " 'n bedrag waarmee die aftrekkings ingevolge artikels 11 tot en met 19 toelaatbaar, die inkomste te bowe gegaan het ten opsigte

waarvan hul aldus

toelaatbaar is."

Artikel 1 l(x) van die Wet magtig die aftrekking van enige bedrag wat

ingevolge ander bepalings "van hierdie Deel" toegelaat word om van die

"(3) Die bedrag waarmee die totale onkoste gedurende 'n jaar van

aanslag ten opsigte van die in items (c) tot en met (j) van

subparagraaf (1) bedoelde aangeleenthede deur 'n boer aangegaan,

die belasbare inkomste (soos bereken voor die toestaan van die

aftrekking van bedoelde onkoste en voor die insluiting soos hiema

bepaal van bedoelde bedrag in die boer se inkomste) gedurende

daardie jaar van aanslag deur hom uit boerdery verkry, te bowe

gaan, word ingesluit by sy inkomste uit bedoelde boerdery vir

daardie jaar en oorgedra en by die toepassing van subparagraaf (1)

geag onkoste te wees wat gedurende die eersvolgende jaar van

aanslag deur hom aangegaan is ten opsigte van die in genoemde

items bedoelde aangeleenthede."

13 daaropvolgende belastingjaar aangegaan is.

In die lig van bogenoemde bepalings van die Wet kan die bevindings van

die verhoorhof soos volg saamgevat word. Die IB48 vorms vir die 1984, 1986

en 1987 belastingjare het nie 'n aanslag soos omskryf in art. 1 van die Wet bevat

nie. Meer bepaald het hulle nie "die vasstelling deur die Kommissaris ... van

'n verlies wat in vergelyking gebring kan word" tot inhoud gehad nie. Die rede

is dat die appellant in geen van die drie belastingjare 'n wins uit sy boerdery gemaak het nie en dat die ontwikkelingskoste wat hy in elk van daardie jare opgeloopt het dus telkens geag moes word in die daaropvolgende belastingjaar aangegaan te gewees het. Daarom kon die koste wat in enige van die drie jare aangegaan is nie 'n verlies in die betrokke jaar meegebring het nie. Voorts was geen van die IB48 vorms 'n integrale deel van die toepaslike kennisgewing van aanslag nie, en wel omdat die ontwikkelingskoste geen rol in die aanslag 14 gespeel het nie.

In hierdie hof het die appellant se advokaat in eerste instansie gesteun op paragraaf (a) van die woordomscrijwing van "aanslag" in art.1 van die Wet, naamlik "die vasstelling . . . van 'n bedrag waarop 'n ingevoerde hefbare belasting opgel

kan word." Die betoog was dat 'n IB48 vorm die berekening van belasbare inkomste uit boerdery bevat en daarom ten minste 'n integrale deel van die verwante kennisgewing van aanslag is. Die eenvoudige antwoord hierop is dat 'n mens in die onderhawige geval nie met 'n vasstelling soos bogenoemde ten doen het nie. In die 1984, 1986 en 1987 belastingjare het die appellant immers telkens 'n verlies gely. Die resultaat was dat in elk van die betrokke kennisgewings van aanslag 'n verlies vasgestel is binne die raamwerk van paragraaf (c) van die omscrijwing van "aanslag", naamlik 'n verlies wat in verrekening gebring kan word.

15 In die alternatief is aangevoer dat die bepaling van ontwikkelingskoste in die drie IB48 beskou moet word as die vasstelling van 'n verdere verlies wat

die appellant gely het. Die argument het min of meer soos volg verloop.

Ingevolge art. 11(x), saamgelees met art. 26(1), van die Wet moet as aftrekkings toegelaat word enige bedrae wat ooreenkomstig die Eerste Bylae van die inkomste van 'n boer afgetrek kan word.

Kragtens paragraaf 12(1) van die Bylae is ontwikkelingskoste aftrekbaar by die vasstelling van 'n boer se inkomste. Sodanige koste is dus 'n "vasgestelde verlies" soos bedoel in art. 20(2) tot die mate wat die koste andersins belasbare inkomste uit boerdery te bowe gaan. Dit synde so, is die bepaling van so 'n oorskot in 'n IB48 vorm die vasstelling van 'n verlies wat in verrekening gebring kan word.

My probleem met h

ierdie betoog is dat dit die bepalings van paragraaf 12(3) van die Eerste Bylae links laat l, en dat paragraaf 12(1) juis onderhewig

16 aan die bepalings van onder andere eersgenoemde subparagraaf gestel is. Ten koste van herhaling moet weereens ges word dat paragraaf 12(3) in werking tree slegs indien die ontwikkelingskoste wat in 'n belastingjaar aangegaan s,

meer is as die boer se belasbare inkomste (sonder inagneming van sodanige koste) uit sy boerdery. Die koste moet in eerste instansie van daardie inkomste afgetrek word en die bedrag waarmee die koste die belasbare inkomste te bowe

gaan("die oorskot") moet dan weer bygetel word as deel van die boer se inkomste ten einde 'n nul resultaat te bereik (D and N Promotions, supra. op p305 E-F). Dit volg dus dat die onderstreepte woord nie dieselfde betekenis het as die belasbare inkomste wat inisieel in paragraaf 12(3) vermeld word nie. Na aftrekking van die ontwikkelingskoste is immers 'n minus posisie bereik en die oorskot moet dus by daardie syfer getel word.

Soos reeds genoem, word die oorskot dan oorgedra na die volgende

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belastingjaar en geag ontwikkelingskoste te wees wat die boer in daardie jaar aangegaan het. Die rede hiervoor is duidelik. Die wetgewer wou naamlik verseker dat die oorskot ook in die toekoms slegs teen inkomste uit boerdery in verrekening gebring kan word.

Streng volgens woordlui is paragraaf 12(3) nie van toepassing nie op die situasie waarin 'n boer sonder inagneming van ontwikkelingskoste 'n verlies uit sy boerdery gely het en wel sodanige koste aangegaan het. In so 'n geval is daar immers nie sprake van 'n bedrag waarmee die koste die boer se andersins belasbare inkomste te bowe gaan nie. Die wetgewer het egter klaarblyklik beoog dat die subparagraaf ook op sodanige posisie van toepassing moet wees, en die appellant se advokaat het tereg nie tot die teendeel betoog nie. Die ontwikkelingskoste moet dus eers ingevolge paragraaf 12(1) afgetrek word en die volle bedrag daarvan dan weer as inkomste beskou word. Die eindresultaat 18 is dat die verlies wat sonder inagneming van ontwikkelingskoste bereken is, steeds die verlies is wat die boer in die betrokke jaar vanwe sy boerdery gely

het. Die volle bedrag van die koste word dan soos voornoemd oorgedra.

Dit volg dus dat in die 1984, 1986 en 1987 belastingjare die appellant nie weens die aangaan van ontwikkelingskoste 'n "verlies wat in verrekening gebring kan word" gely het nie. Op die keper beskou, is sy verlies in daardie jare vasgestel, soos dit moes gewees het, sonder inagneming van sodanige koste. Weliswaar moes die koste na 'n volgende belastingjaar oorgedra word, maar slegs op die basis dat dit geag moes word in so 'n jaar aangegaan te gewees het. Die keersy van h

erdie fiksie was dat die koste wat in, s, die 1984 jaar aangegaan is, geag moes word nie in daardie jaar opgeloopt te gewees het nie.

Ontwikkelingskoste wat oorgedra moet word, kan dus nie tuisgebring

19 word nie onder 'n "vasgestelde verlies" vir die betrokke jaar binne die raamwerk van art. 20(2) van die Wet nie. Indien dit anders was, sou ingevolge art. 20(1) oorgedrae ontwikkelingskoste in 'n volgende belastingjaar as 'n vasgestelde verlies teen inkomste verkry deur die boer ook uit 'n ander bedryf as boerdery in verrekening gebring kon word. En, soos reeds geblyk het, is paragraaf 12(3) juis daarop gerig om onder meer so 'n gevolg te verhoed.

Bostaande bring egter nie mee dat die app

l noodwendig moet misluk nie. In elk van die tersaaklike drie belastingjare was daar wel 'n vasstelling van 'n verlies wat in verrekening gebring kon word. In abstracto kon daar dus beswaar teen die aanslag gemaak word. Die oorblywende vraag is of die beswaar slegs teen die uiteindelijke vasgestelde verlies, of ook teen die bepaling van 'n bedrag wat in die proses van die vasstelling gemaak is, gerig kon gewees het.

Ingevolge art. 81(1) van die Wet kan 'n beswaar teen " 'n aanslag"

20 gemaak word. 'n Mens is dus weer terug by die omskrywing van die begrip in

art. 1 van die Wet. Normaalweg sal die vasstelling van 'n verkeerde syfer as 'n verrekenbare verlies te wyte wees aan die bepaling van 'n eweneens verkeerde bedrag wat in die proses van aanslag gemaak is. Daardie verkeerde syfer sou egter slegs die rede wees waarom die aanslag as sulks foutief is en daar derhalwe suksesvol beswaar daarteen gemaak kon word.

In die onderhawige geval bereik 'n mens egter nie eens bogenoemde posisie nie. Ek beklemtoon weereens dat in elk van die 1984, 1986 en 1987 belastingjare die ontwikkelingskoste geen rol gespeel het by die uiteindelijke vasstelling van die appellant se verrekenbare verlies nie. Trouens, die omvang daarvan was vir doeleindes van die vasstelling irrelevant. Ek vind dit dus moeilik om in te sien hoe 'n beswaar teen die bepaling van die omvang van die ontwikkelingskoste tuisgebring kon word onder 'n beswaar teen die vasstelling 21 van 'n verrekenbare verlies.

Hierdie beskouing word tot 'n mate onderskraag deur die bepalings van art. 81(4). Daarvolgens kan die respondent na ontvangs van 'n kennisgewing van beswaar die aanslag verminder of wysig of die beswaar van die hand wys. 'n Vermindering kom ter sprake indien 'n bedrag soos vermeld in paragrafe (a) en (b) van die woordskrywing van "aanslag" te hoog vasgestel is. 'n Wysiging is aangewese indien die werklike verlies meer as die vasgestelde verlies was. Die respondent is dus nie geroepe om " 'n beswaar" te oorweeg wat nie die juistheid van een van bogenoemde vasstellings aanveg nie.

Dit baat ook nie die appellant om aan te voer dat 'n IB48 vorm 'n integrale deel van die betrokke kennisgewing van aanslag is nie. Selfs al is dit so, verhef dit nie die bepaling van die omvang van ontwikkelingskoste tot deel van die aangeslane verlies nie.

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Ek is gedagtig daaraan dat my bevinding tot 'n ietwat eienaardige resultaat aanleiding kan gee. Veronderstel dat 'n boer in 'n belastingjaar sonder inagneming van ontwikkelingskoste 'n verlies vanwe sy boerdery gely het; wel sodanige koste ten bedrae van R10 000 aangegaan het, maar die omvang daarvan in 'n IB48 vorm op slegs R7 000 bepaal is; byvoorbeeld omdat die respondent nie die egtheid van al die boer se syfers aanvaar het nie. In so 'n geval sal die koste wat na die volgende jaar oorgedra word dus ook net R7 000 beloop. Omdat die bepaling nie aan 'n beswaar onderhewig is nie, sal die boer dan moet wag totdat die onjuiste oorgedrae bedrag 'n effek op 'n toekomstige aanslag het alvorens hy die bepaling kan aanveg. Teen daardie tyd mag bewysstukke en getuienis wat voorheen beskikbaar was dit nie meer wees nie. Indien die bepalings van art. 81(1) van die Wet, saamgelees met die omskrywing van 'n aangeslane verlies, vatbaar was vir 'n ander betekenis as wat 23 ek reeds daaraan geheg het, sou bostaande gewig gedra het. Soos geblyk het, meen ek egter nie dat dit aldus vatbaar is nie.

Die app

l word met koste afgewys.

HJO VAN HEERDEN ADJUNK HOOFREGTER

Stem saam: Melunsky Wnd AR

REPUBLIEK VAN SUID-AFRIKA

DIE HOOGSTE HOF VAN APP

L VAN SUID-AFRIKA

Saak nommer: 193/96 (SIH) Insake die app

l van

H J ODENDAAL

Appellant

en

DIE KOMMISSARIS VAN BINNELANDSE INKOMSTE Respondent

Coram: VAN HEERDEN AHR, HEFER, MARAIS, SCHUTZ ARR en MELUNSKY Wnd AR

Datum van verhoor: 19 Februarie 1998 Datum gelewer:

13 Maart 1998

UITSPRAAK

HEFER AR

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HEFER AR

Ek het tot dieselfde slotsom as die Adjunk Hoofregter gekom.

Om die redes in sy uitspraak genoem, stem ek saam dat geeneen van die relevante IB48 vorms "die vasstelling ... van 'n bedrag waarop 'n ingevolge hierdie Wet hefbare belasting opgel

kan word", behels nie.

Ten einde 'n antwoord te vind op die vraag of dit die vasstelling behels van " 'n verlies wat in vergelyking gebring kan word", vind ek dit nie nodig om my uit te laat oor, of betrokke te

raak by, die berekenings wat die voorskrifte van par 12(3) verg nie. Die eenvoudige vraag in hierdie verband is of die ontwikkelingskoste wat oorgedra moet word 'n verlies is wat in vergelyking gebring kan word; en die antwoord is dat dit nie die geval is nie omdat die betrokke koste geag word onkoste te wees wat in die eersvolgende jaar aangegaan is. Hierdie fiksie geld volgens die uitdruklike woorde van par 12(3) "by die toepassing

van subparagraaf (1)" -die subparagraaf wat ontwikkelingskoste in eerste instansie as aftrekking toelaat. Die effek is dat daardie koste

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hoognaamd nie aftrekbaar is gedurende die betrokke belastingjaar nie. Daar kan dus geen sprake wees van 'n verlies wat in vergelyking gebring kan word nie. Soos aangedui in die D & N Promotions saak waarna my kollega verwys, kan die toepassing van par 12(3) 'n

nul resultaat wat inkomste betref tot gevolg h

. 'n Minus resultaat word egter nie toegelaat nie.

Ek stem ook saam dat die bepaling van die bedrag wat ten opsigte van ontwikkelingskoste oorgedra word nie 'n integrale deel vorm van die vasstelling van 'n verlies wat in berekening gebring kan word nie. Soos my kollega aangedui het, het die appellant elke jaar, sonder inagneming van die ontwikkelingskoste, 'n bedryfsverlies gehad wat telkens in die IB48 bereken en in die ooreenstemmende IB34 gereflekteer is. Soos hy ook aangedui het, het die saldo wat ten opsigte van ontwikkelingskoste oorgedra is, geen rol gespeel by die vasstelling van die bedryfsverlies nie. (Trouens, dit moes juis weens die voorskrifte van par 12(3) buite rekening gelaat word.) Indien gesuggereer word dat elke IB48 waarin 'n bedryfsverlies bepaal is onder par (3) van die

4 definisie as aanslag kwalifiseer, en dat die bepaling van die

oordragsaldo ten opsigte van ontwikkelingskoste in dieselfde dokument

deel van die aanslag  
vorm, bly die antwoord  
myns insiens dieselfde:

hoewel dit fisies deel van dieselfde dokument is, vorm dit hier ook nie  
deel van die daadwerklike vasstelling van die bedryfsverlies nie.

Ek stem saam dat die app  
l afgewys moet word met koste.

J J F HEFER AR

Marais AR: Stem saam

REPUBLIC OF SOUTH AFRICA

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Case No: 193/96

In the matter between

H J ODENDAAL

Appellant

and

COMMISSIONER FOR INLAND REVENUE

Respondent

CORAM: VAN HEERDEN DCJ, HEFER, MARAIS, SCHUTZ JJA et

MELUNSKY AJA

DATE HEARD: 19 February 1998 DELIVERED: 13 March 1998

## JUDGMENT

MARAIS JA 2 MARAIS JA I have had the advantage of reading the judgments of my brothers Van Heerden, Hefer and Schutz. I agree with the two former for the reasons given by them. The reasons for my respectful inability to agree with the latter are these. The IT 48 form is referred to by him as a prescribed form. If it is indeed such, I do not think it takes the enquiry any further. There are many forms in use in the office of the Commissioner and they are not necessarily part of the assessments to which they relate nor of course are they all assessments in their own right. It is not entirely clear to me what the significance is of the observation that the initial error was not "adopted" by the taxpayer until 1991. Perhaps it is to allay any suspicion of fraud or misrepresentation. Be that as it may, the error certainly was "adopted" ("exploited" would more accurately convey what was done) as soon as it could be turned to account in any meaningful sense, i.e. in the year when a farming profit on current account eventuated. 3 I find nothing in the Act which lends any support to the idea that "parts" of an assessment of the kind here under consideration are to be regarded as if they are assessments in their own right, amenable to the objection and appeal procedures and therefore subject to the finality provisions contained in the Act. Errors of calculation made by an assessor may cancel one another out so that neither the amount upon which tax is chargeable nor the amount of such tax nor the loss ranking for set-off is wrong. The effect of the wrongful refusal by the Commissioner of a deduction of a particular character might be neutralised by an erroneous calculation by him elsewhere. In a certain sense these errors are no doubt "parts" of the assessment. However, even if errors such as these were to be ascertainable ex facie an assessment what is the taxpayer intended to be able to do about them? The taxable income attributed to him or the loss ranking for set-off is correct and so is the amount of tax payable. Against what then is he intended to be able to object? He will be unable to ask the courts to alter either of the 4 determinations. At best he could ask the court to provide

more accurate reasons for reaching the same result. But in the main our law has long set its face against any such thing. Appeals and objections in our jurisprudence ordinarily lie against results and not against the reasons for reaching them. The provisions of sec 77 (2) and (3) seem to me to hinder and not help the taxpayer. When read with the definition of "assessment" in sec 1 they show that, subject to the right to issue additional assessments, only one assessment of taxable income and the tax payable thereon per taxpayer per year is contemplated. No provision is made for separately and independently existing assessments of income from different sources and for the tax payable upon each such income to be separately and independently assessed. Provision is made for the separate calculation of income from various sources only as steps in the determination of a taxpayer's total taxable income and the tax payable is only capable of being calculated upon that total amount. It cannot be calculated piecemeal where income 5 has been derived from more than one income-generating activity. It would result in the same taxpayer having differing marginal rates of tax in the same tax year depending upon which income from which activity was being taxed. That would be of course tax heresy. In any event, even if it be assumed that the expression "particulars of any assessment" includes the calculations made and other steps taken by the Commissioner in making the assessment, it would not follow that each of those "particulars" is amenable to objection and appeal when the assessment of what the taxpayer's obligations in that tax year are, is not being challenged. I do not read my brother Van Heerden's judgment as confining the words "alter" and "amend" in subsections 81 (4) and 83 (13) to the case where there is an objection to an assessed loss being set too low. I read it merely as an example given to counter the suggestion that there is nothing other than the sort of error under consideration here to which the word "alter" or "amend" could apply. 6 I have difficulty in understanding the example given by my brother Schutz of the taxpayer who might wish to challenge a closing stock figure decided upon by the Commissioner. My learned brother acknowledges that he can attack the figure by objecting to the assessed taxable income and tax payable figures but objects that he can do so only "by the unnatural means of seeking their increase". To my mind the taxpayer cannot have it both ways. He cannot demand that the stock figure be increased but in the same breath insist upon being taxed as if it had not been increased. Moreover, I find it difficult to comprehend how it would be possible for the taxpayer to achieve an alteration of the closing stock figure without that having a consequential effect upon his taxable income for the tax year in question and the tax payable by him for that year. I consider that the law does indeed cater for both the fat and the lean years. In a year so fat that there will be a farming profit even if all the capital expenditure claimed has been deducted, but the taxpayer considers that some capital 7 expenditure has been wrongly disallowed, he will be able to object because the assessment of his taxable income and the tax payable for that year will be affected, by the disallowance. If, in a year fat enough to entitle capital expenditure to be brought to account but not fat enough to exhaust it, there is disagreement about the balance to be carried forward, that disagreement can be placed formally on record by the taxpayer by writing to the Commissioner and, if and when, in a subsequent year the correctness of that figure is material to the end result of the assessment of the taxable income and the tax payable, the opportunity of objecting to the figure carried forward by the Commissioner will arise because the end result will be open to objection. In the lean year, where no capital expenditure at all is allowed as a

deduction and there is disagreement as to what amount should be carried forward, again the taxpayer's protest can be placed on record and, as in the previous example, when the correctness of the figure does materially affect the taxpayer's liability for tax in a particular year, he will be able to challenge it.

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The difficulties of proof do not strike me as formidable. Suggestions by the

Commissioner that capital expenditure claims arising in years gone by are bogus should not be difficult to dispel. All a taxpayer need do is reflect the expenditure in his tax return for the year in which it was incurred (thus avoiding any later suggestion of subsequent fabrication) and ensure that he preserves such confirmatory documentation as he may have until that particular expenditure can be set-off against profit from farming. If he so wishes, he can also record photographically what he has done. I do not regard this as startling or unduly burdensome for the taxpayer.

I do not find the observation that this approach involves regarding the IT 48 as part of the assessment in some years but not in others helpful. It begs the question whether or not the quantification of capital expenditure in a particular tax year in which its quantification is entirely academic for the purposes of assessing the taxpayer's taxable income or the tax payable by him or any loss ranking for set-

9 off, is or is not capable of being objected to or appealed against. One may also ask, if the IT 48 and IT 34 forms are not issued simultaneously, from what date the time prescribed by sec 81 (1) for the lodging of objections commences to run? (See the definition of the "date of assessment" in sec 1.) Does it run from the date specified in the IT 34 form as the due date (or the date of the notice if no due date is specified) if the capital expenditure has affected the taxpayer's liability for that year but from the date of the IT 48 form if it has not? The manner in which the period of 30 days must be determined seems to me to predicate that there will be only one assessment and one date of issue (apart of course from additional assessments which the Commissioner may be empowered to make). Moreover, the definition of the "date of assessment" in sec 1 postulates the existence of a "notice of assessment" as contemplated in the definition of "assessment" in the same section of the Act. The IT 48 form does not purport to be a notice of assessment nor does it reflect a due date. It was not shown to have given the taxpayer notice, as sec 77 10 (5) requires a notice of assessment to do, that any objection must be sent within 30 days. All this points strongly, in my view, to the conclusion that the mere sending to the taxpayer of an IT 48 form cannot trigger the running of time against him in terms of sec 81 (1). That, to my mind, shows that no objection to or appeal against the calculations which may appear in that document lies unless and until they have a material bearing upon the notice of assessment contained in the IT 34 form, in which event the running of time against the taxpayer will be triggered by receipt of the IT 34 form and not by receipt of an IT 48 form. It is inherent in the conclusion that a taxpayer may object to a step in the Commissioner's process of assessment even although it has not resulted in any erroneous determination of his taxable income, or the tax payable by him, or the

loss ranking for set-off, or any of the other matters to which reference is made in the definition of "assessment" in sec 1, that the Special Income Tax Court and, on appeal, another court must entertain objections which may never have any practical

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consequence whatsoever for the objecting taxpayer. Take the instant case. From 1984 to 1991 the errors made had no effect whatsoever upon the taxpayer's taxable income or the tax payable by him. Had he ceased to farm during that period and before he had begun to profit, the errors made would have been of academic interest only. In the absence of a clearly expressed contrary intention I am unable to accept that parliament intended to burden the Special Income Tax Court and this court with resolving a dispute entirely irrelevant to the ascertainment of a taxpayer's liability for tax for the year in respect of which the dispute arose, when there is no more than a spes that its resolution will have any bearing at all upon the taxpayer's liability for tax in future years. It would be foreign to the fundamental tenets upon which the exercise of jurisdiction by South African courts has rested for generations and would therefore require to be expressed in plain and unambiguous language. It is true that such an intention has been so expressed in relation to a claimed "loss ranking for set-off" within the meaning of the definition

12 of "assessment" in sec 1 but there it ends. I can find no language in the Act which would render other potentially entirely academic disputes amenable to the objection and appeal procedure for which the Act provides. I too would dismiss the appeal with costs. R M MARAIS

REPUBLIC OF SOUTH AFRICA IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 193/96

In the matter between H J ODENDAAL APPELLANT AND COMMISSIONER FOR INLAND REVENUE RESPONDENT BEFORE: VAN HEERDEN DCJ, HEFER, MARAIS, SCHUTZ JJA and MELUNSKY AJA HEARD: 19 FEBRUARY 1998 DELIVERED: 13 MARCH 1998

SCHUTZ JA

2 JUDGMENT SCHUTZ JA:

The issue on which I differ from the majority is whether certain matter forms part of the "assessment". I consider that it does form a part. The majority considers that it does not. The significance of the issue stems from s 81 (5) of the Income Tax Act 58 of 1962 ("the Act"), which provides that when the objection and appeal procedures have become exhausted an assessment becomes final and binding. The matter which either does or does not form part of the assessment is the summation of certain types of development expenditure of a capital nature incurred by the taxpayer, who is a farmer. For brevity I shall describe it as "development expenditure". Such expenditure on irrigation schemes, boreholes, fences, non-domestic farm buildings, roads for farming,

3 electricity supply, and so forth, to take some examples, is deductible from income in circumstances defined by sections 11 (x) and 26 (1) and paragraphs 12 (1) and 12 (3) of the First Schedule. This is a concession to the farming community as the general, if not invariable, policy of the Act is not to allow the deduction of expenditure of a capital nature. In the days when a farming loss (I use the expressions "profit" and "loss" in a loose sense for the sake of simplicity) could be set off without restriction against profits from other activities, the concession intended to benefit farmers came to be utilized by prospering professional and other enterprising men with good tax advisers to avoid payment of tax. They did this by pouring unconsumed income into the development of their farms. The result was legislation which permits the deduction of development expenditure only from income derived from farming operations and 4 prohibits its deduction from other forms of income, either in the year in which the development expenditure is incurred or in any subsequent year. However, if there is no farming profit in a year, or insufficient to consume development expenditure available for set-off, the balance of such expenditure may be carried forward from year to year until it has been so consumed. That is the broad import of the legislation, as explained in *CIR v D & N Promotions (Pty) Ltd* [1994] ZASCA 176; 1995 (2) SA 296 (A) at 305. Corbett CJ described the hinge provision, para 12 (3) of the First Schedule, as "somewhat convoluted". To my mind that is, with respect, a generously euphemistic description. Para 12 (3) is practically incomprehensible. However, for the purposes of this case the complexities of para 12 (3) may be by-passed. The purport of the legislation, as I have explained it, is not in dispute.

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It becomes necessary to be more exact about the matter which is or

is not part of the assessment. It appears in the middle of a prescribed form IT 48. Under the heading "Verbeterings" there is set out in the form relating to the first tax year in issue, 1984, an opening balance at 28 February 1983, development expenditure during the 1984 year, the amount allowed as a deduction during the 1984 year (nil) and the balance carried forward to the 1985 year. The reason why no deduction was allowed in 1984 was that on current account there was an assessed loss from farming operations. If a deduction for development expenditure had been allowed it would have reduced taxable income from other sources, and this, as has been explained, is what is not allowed.

The reason for the present dispute is that the assessor made a mistake in carrying forward the balance of development expenditure which 6 would rank for deduction in later years. The assessor's error inflated the balance carried forward, which would be to the benefit of the taxpayer if there were a subsequent farming profit. This error was in no wise caused by the taxpayer. Nor was it adopted by him. In succeeding years, until 1991, he continued to show correct figures. The 1984 error was carried forward by the Commissioner. Errors of the same nature as those made in that year were made again in 1986 and 1987, and also carried forward. During all these years there was a farming loss. When a profit was made in 1991, and a set-off of development expenditure became competent, the Commissioner purported to correct the previous errors in the reflection of the balance of development expenditure. By then the

incorrect balance had risen to R5 222 246. Devoid of error the balance would have been R2 094 511. The taxpayer's objection to an assessment based on the 7 corrected figure was rejected and his appeal to the Special Income Tax Court (Johannesburg) failed. By leave of that Court the matter is before us. As I have said, the part of the form IT 48 giving rise to the dispute is the middle part. There is also an upper and a lower part. The form is on one page and is headed "Berekening van Belasbare Inkomste uit Boerderybedrywighe". In the upper part of the 1984 form the sum of current farming expenditure and opening stock are deducted from the sum of gross farming income and closing stock, leading to a net loss of R675 269. After certain further adjustments which need not be set out, against the description "Belasbare inkomste / Aangeslane verlies" there appears a loss of R626 895. No deduction is made for development expenditure because there is a farming loss. Then follows the middle 8 portion already described, under the heading "Verbeterings". The lower part is headed "Berekening Van Tariefbedrag" (calculation of rating amount). In the 1984 form this section was only partly completed, no doubt because it is directed towards a calculation of tax payable and, there being no taxable income from farming, there was to be no such calculation involving farming income. The 1991 form shows what happens when there is taxable income from farming. An average farming income over the last five years is calculated, and after amounts for director's fees and interest are added a sum of R929 816 is reached. The complexities of the matter need not be pursued. Suffice it to say that the calculation is concerned with the application of s 5 (10) of the Act to a farmer's normal tax once he has made an election in terms of para 19 of the First Schedule. Apart from the IT 48 there was also issued to the taxpayer in respect 9 of the 1984 year the familiar form IT 34, which is headed "Tax Assessment". Under the heading "Income Assessed" the assessed loss from farming figure of R626 895, which was calculated in the IT 48 form, is inserted. After the insertion of two other figures an overall assessed loss of R880 860 is reached. Accordingly the tax payable for the year is given as nil.

The composition of the IT 34 and 48 forms for the years 1986 and 1987 (the years in which further new errors were made) is similar to that of the 1984 forms, although, of course, the figures differ. It could not be established during argument whether over the years the two forms were sent out together. If they were not then the dispatch of the IT 48 did not precede that of the IT 34 by more than a few weeks.

Before dealing with the issue whether the middle part of the IT 48 10 forms part of the "assessment", it is necessary to refer to the definition of that term in s 1. "Assessment" means

"the determination by the Commissioner, by way of a notice of assessment served... (a)

of an amount upon which any tax leviable under this Act is chargeable; or (b) of the amount of any such tax; or (c) of any loss ranking for set-off,

and for the purposes of Part III of Chapter III [headed 'Objections and Appeals'] includes any determination by the Commissioner in respect of any of the rebates referred to in section 6 and any decision of the Commissioner which is in terms of this Act subject to objection and appeal." (Emphasis supplied.)

Much as one has become familiar with the IT 34, one should not approach the definition with any pre-conceptions as to what it defines. The appropriate description of the word "determination" in the context used appears to me to be the fifth meaning given in the Shorter OED, namely "The action of definitely ascertaining the position, nature, amount,

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etc. (of anything). . . ; the result of this ..." The IT 48 was a "notice . . . served" by the Commissioner. The upper part of it appears to be part of a "determination ... of an amount upon which any tax ... is chargeable." The lower part appears to be part of a "determination... of the amount of any such tax." Should these parts be regarded otherwise merely because they do not stand on the page which constitutes the IT 34? Mr Venter, for the Commissioner conceded, quite correctly I think, that an assessment could as well be on ten pages as on one; and that if the IT 34 had been enlarged and the matter contained in the upper and lower parts of the IT 48 shown on it, that matter would have formed part of the "assessment."

That the upper and lower parts may form part of the assessment is further suggested by s 77 (2) and (3) which reads in part:

"(2) The particulars of every assessment and the amount of tax

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payable thereon shall be recorded or filed and kept in the office of the Commissioner . . . (3) Upon recording or filing the particulars of any assessment the Commissioner shall give notice of the assessment to the taxpayer . . . "Particulars" is a word of wide import. On the face of it it would include not only the three results (a), (b) and (c) mentioned in the definition of assessment (taxable income, tax payable and assessed loss) but also the constituents and calculations going to the making up of these amounts. The judgment of my brother Van Heerden holds that an objection can be lodged only against the three results. The constituents and calculations, so it is held, are merely the reasons for the results and are thus not open to objection. I can see no reason for such a conclusion. It gives a narrow meaning to the word "particulars." Moreover it overlooks the significance of the word "determination" in the definition. That word 13 seems to indicate that an assessment consists not only of the three results, but also the process by which they are reached. Another reason why I consider the majority view to be too confined is based on subsections 81 (4) and 83 (13). They make it clear that an objection or appeal can lead not only to a reduction but also to an "alteration." That also is word of wide import. According to the majority view it seems that the operation of the alteration provision is to be confined to the case where there is an objection to an assessed loss being set too low. There is no reason that I can see why the word should be subjected to such an artificial containment. Such a restriction would apply to the following case. The Commissioner inserts a figure for closing stock in the upper part of the IT 48. Suppose that the taxpayer is of the view that tax rates will rise in the following year so that it is in his interest to 14 have a higher taxable income in year one whilst having a correspondingly lower one in year two. He may then wish to object that the figure for closing stock in year one is too small. If he is entitled to do so and succeeds in his objection the opening stock in the next

year will be larger and the taxable income from farming and tax payable smaller. Because of the increase in the tax rate this may suit him, even though the tax payable in year one (at the lower rate) will be increased. Yet on the majority view he would be precluded from proving a higher closing stock, even though that figure would have a direct effect on tax payable in both years. It is no sufficient answer to say that he can attack the figure indirectly by objecting to the taxable income and tax payable figures in year one. He could do so only by the unnatural means of seeking their increase. What he really wishes to attack is the closing stock figure, in order that he may obtain a 15 determination which will bind the Commissioner to an opening stock figure in year two. Yet according to the majority view, whatever he does and whatever he achieves in respect of year one will not avail him in year two. He will have to wait and take his chance in year two only when an assessment for that year is issued. That is because the closing stock figure is said not to be one of the particulars of the assessment and thus to be devoid of nascent finality. To my mind that is a startling result which can be avoided by giving words their natural meanings. I have so far sought to demonstrate that the upper and lower parts of the IT 48 are capable of forming part of the assessment. The next question is whether in fact they do. The IT 34 can stand on its own. It is, after all, all that non-farmers receive. But it is certainly elucidated and made more comprehensible by reference to the IT 48. As far as the IT 48 itself is 16 concerned, the lower part (rating amount) is designed for a calculation which is to be utilized in the IT 34. The upper part (farming profit or loss) could stand on its own, but it does not lead to anywhere in particular. It also is designed to produce a figure to be carried forward into the IT 34, on which will be calculated the overall taxable income or assessed loss and the amount of tax payable. Mr Venter conceded, again quite correctly, that the two documents are intended to be read together. To arrive at the true effect of the Commissioner's actions they should, in my view, be read together. This is indeed a case where *ex antecedentibus et consequentibus est optima interpretatio*. My conclusion so far is that at least the upper and lower parts of the IT 48 form part of the IT 34. Is the middle part, or part of the middle part to be excepted from such inclusion? I do not think so. A reason why the middle part has an 17 existence separate from the upper may be that in some years there can be no deduction of development expenses, even though they have been incurred. If they could be deducted in full in all years I can see no reason why they should not have been provided to be entered as a deduction in the first part, like current expenses. But as deductibility depends both upon whether there is a profit and the amount of the profit when compared with the amount of the development expenditure, it may well have appeared convenient to have a separated calculation. However that may be, and leaving the calculation placed where it is, the fact is that the calculation of such expenditure in the middle part will be used in the upper part as a deduction or part deduction in a profit year. To that extent the effects of that calculation will also be carried forward into the IT 34 via the assessed farming profit or the nil balance of farming income. A difficulty 18 that I have with the majority view, to the effect that the calculation in the middle part has no effect on the IT 34 in a loss year such as 1984 (so far I agree), so that the calculation may be ignored entirely, is that that view produces no general theory which can be applied also in a year of profit. Surely the law must cater for the fat years as well as the lean. The IT 48 is not part of the assessment in some years but not in others. To my mind the middle part where it sets out the opening balance and the costs incurred during the

year constitutes a part of the IT 34, albeit a limping part. It has the potential of making a direct contribution to the IT 34, but in some years it will and in others it will not. In years of current profit development expenditure is as much deductible as is current expenditure. The figure in issue in this case is the closing balance of development expenditure, but as it is no more than the sum of the opening

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balance and expenditure during the year, it seems to me that if they form

part of the IT 34, it can hardly be treated as standing in isolated detachment. In my opinion also the incorrect closing balances of development expenditure did form part of the assessments for 1984, 1986 and 1987.

There is another, I hope simpler, reason why I think that the middle part of the IT 48 and particularly the closing balance forms part of the assessment. That middle part is clearly designed to cater for paras 12(1) and (3) of the First Schedule. Those paragraphs may also explain why the middle part is set out separately. Para 12 (3) speaks of "the amount by which" the development expenditure "exceeds" taxable income from farming before such expenditure is deducted. It also speaks of that excess being "carried forward" and being deemed to be expenditure in the next

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succeeding year of assessment. How can one know what the excess is if

you do not know the figure from which a deduction is to made? How do you carry forward a balance if you do not know what that balance is? And how does one comply with para 12 (3)'s injunction that the amount carried forward is deemed to be expenditure incurred in the next year? To my mind the only conceivable answer that the Commissioner can give to these questions is that the figures contemplated in para 12 (3) are not figures determined between the parties and written down in the IT 48 or anywhere else, but unsettled magnitudes which may be subjected to the lens in years to come . For practical and linguistic reasons such an outcome is to be avoided and it can and should be avoided.

The importance of the conclusion I have reached (apart from the effect it would have on the appeal) is that the figures that the 21 Commissioner records regarding development expenditure involve a determination by him. It is not just a calculation without legal significance, as is the Commissioner's argument. He argues that the determination of such expenditure takes place only if and when a profit is earned. That may be many years after the event. On the other hand, if he is wrong, then the determination will, after objections and appeals are a matter of the past, become final under s 81 (5). And he will not be entitled to issue an additional assessment in the absence of fraud, misrepresentation or non-disclosure by the taxpayer : s 79(1). That there should be finality (in terms of the authorities finality would operate in favour of both the Commissioner and the taxpayer) seems to me highly desirable. If there will indeed be indefinite uncertainty the following examples could arise. In the year in which expenditure is

incurred (being a loss year) the taxpayer keeps careful records and retains

his documents. Thereafter he and his accountant render a full account of his development expenditure. The Commissioner then seems, but only seems, to place his stamp of approval on the figures. The years pass. After eight years the taxpayer destroys his books and records. (In terms of s 75 (1) (f) he would have committed a criminal offence only if he did not keep them for five years). More years pass. Twelve years after the expenditure was incurred, when the first farming profit is made, the Commissioner says now please prove your expenditure of a dozen years ago. The matter ends in the Special Income Tax Court, where the taxpayer bears the onus. And so on.

Or take the opposite case. In the year that the expenditure is incurred, because there is a farming loss the taxpayer says nothing to the Commissioner. Consequently the Commissioner says nothing to the taxpayer. But the taxpayer sedulously preserves records. Fourteen years later he makes a profit. Now for the first time he presents his claim. The Commissioner sends out his inspector to view the developments. The inspector casts his eyes across the face of the land and that which stands upon it. He asks, "But where are the irrigation works of 14 years ago," to be told "Oh! They have long been ploughed over." He asks, "But where is the fence that was erected 14 years ago", to be told "Oh! The wire and the standards were stolen five years back." In the Special Court the taxpayer proves to be an impressive witness. He has documents typed on paper at least 14 years old. And so on. Examples like these do not determine the appeal. But it is a comfort that the interpretation of events that I consider to be the correct one would 24 avoid their arising.

I agree with the majority that the balance of development

expenditure in the IT 48 forms is not in itself an assessment by virtue of

reflecting an assessed loss in terms of para (c) of the definition of "assessment". In so doing I do not necessarily agree with all of the reasoning by which the majority has reached its conclusion, but I find it

unnecessary to pursue the matter further, as I consider that the taxpayer

should succeed on its other main ground of appeal for the reasons explained.

I have read the judgment of my brother Marais. My sole response is to list some things that I have not said, lest silence may let it be thought that they originate from me.

1. That a prescribed form issued by the Commissioner is, by 25 reason of its being prescribed, an assessment or part of an assessment. 2. That an IT 48, standing alone, is an assessment.
- 3.

That the IT 34 and IT 48 constitute separate assessments, with possibly different dates from which the time for objecting begins to run. 4.

That in the example involving a challenge to the closing stock (eg cattle) the taxpayer can or should have it both ways. Indeed the example involves that the taxpayer accepts that he be taxed in full, but in the correct year and thus at the rate appropriate to the difference between his stock figure and that of the Commissioner.

For the rest I am content to stand by what I have said.

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I would allow the appeal and grant appropriate relief to the appellant.

W P SCHUTZ JUDGE OF APPEAL

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