IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
CASE NO 353/04

In the matter between

LIBERTY INVESTORS LIMITED (IN MEMBERS' VOLUNTARY LIQUIDATION) **Appellant**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE
Respondent

CORAM: **HOWIE P, STREICHER, BRAND, LEWIS et PONNAN JJA**

Date Heard: 22 August 2005

Delivered: 30 August 2005

Summary: Dividends from a subsidiary transferred to company's share capital and share premium account and capitalisation shares issued – later liquidation of the company – sums transferred deemed by proviso (i) of definition of 'dividend' to be profits of revenue nature and thus not exempted from secondary tax on companies.

J U D G M E N T

HOWIE P

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[1] Between March 1995 to August 1996 the appellant company received dividends in the amount of R156 831 000 from its wholly owned subsidiary, DGI Holdings (Pty) Ltd. This amount was capitalised in due course by transferring some of it to the appellant's share capital and the rest to its share premium account. Pursuant to these transfers the appellant utilised the amount in issuing capitalization shares to its shareholders.

[2] On 5 July 1999, during the 2000 tax year, the appellant was, in terms of a special resolution of its members, placed in voluntary liquidation. On the same date the appellant declared, in the course of the liquidation, a dividend to shareholders of some R5 565 million.

[3] In terms of subsection (2) of s 64B of the Income Tax Act 58 of 1962, as amended, a tax known as the secondary tax on companies must, subject to certain exemptions, be levied on any dividend declared by a company on or after 14 March 1996.

[4] One of the exemptions is provided for in subsection (5)(c). The material terms of that provision exempt

'so much of any dividend distributed in the course of the liquidation … of a company, as is shown by the company to be a distribution of … profits of a capital nature.'

[5] In calculating this tax in the present matter the respondent regarded the amount of R156 831 000 as a distribution from revenue reserves and, calculating the relevant net portion of that amount as R148 370 619, levied the tax, at the prescribed rate, on the latter sum. The appellant's resultant secondary tax liability thus calculated was R18 546 327,38.

[6] The appellant appealed to the Transvaal Tax Court, contending for the absence of any such tax liability. Essentially, the appellant's case was that the amount of R156 831 000 comprised 'profits of a capital nature'. That court dismissed the appeal but granted leave to appeal to this court. The crux of its reasoning in dismissing the appeal was that the dividends the appellant received from its subsidiary were profits of a revenue nature and never lost that character. In the Tax Court's view

'the mere fact that the amount was capitalised to the company's share capital and share premium account did not change its nature nor can it render a subsequent distribution a distribution of profits of a capital nature …'.

[7] Counsel for the appellant relied principally on the case of *Commissioner for Inland Revenue v Collins*[1] for the proposition that the amount of R156 831 000 (the amount in issue) had been transferred from revenue profits to capital. Accordingly, so the argument went, when the amount in issue

[1] 1923 AD 347

came to be included in what was distributed on liquidation it could not have constituted anything other than ‘profits of a capital nature’.

[8] Although *Collins’s* case demonstrates the flaw in the reasoning of the Tax Court cited above, what that Court, the parties before it and counsel have in any event overlooked are the terms of paragraph (i) of the proviso to the definition of ‘dividend’ in s 1 of the Act.

[9] In the 2000 tax year the relevant wording of the definition and the proviso was as follows:

‘ “dividend” means any amount distributed by a company to its shareholders … and in this definition the expression “amount distributed” includes –

(a) in relation to a company that is being … liquidated, … any profits distributed … other than those of a capital nature, earned before … the liquidation … ;

(b) …

(c) …

(d) …

but does not include –

(e) the nominal value of any capitalization shares awarded to a shareholder to the extent to which such shares have been paid up by means of the application of the whole or any portion of the share premium account of a company; or

(f) …

(g) …

(h) the nominal value of any capitalization shares awarded to shareholders as part of the equity share capital of a company;

(i) …

Provided that, for the purposes of this definition –

(i) where a company has on or after 1 January 1974 transferred any amount from reserves (excluding any share premium account) or undistributed profits to the share capital or the share premium account of the company without applying the amount in paying up capitalization shares or has applied the amount in paying up capitalization shares the nominal value of which did not in whole or in part constitute an amount distributed as contemplated in the foregoing provisions of this definition, the amount so transferred (reduced by so much thereof as constitutes such an amount distributed) shall be deemed –

(aa) to the extent that such amount (as so reduced) is shown to consist of profits of a capital nature, to be a profit of a capital nature available for distribution by the company to shareholders who, in the event of a distribution by the company at any time (whether before or during the winding-up or liquidation of the company) of profits of a capital nature would be entitled to participate in such a distribution; and

(bb) to the extent that subparagraph (aa) does not apply, to be a profit which is not of a capital nature and is available for distribution by the company to shareholders who, in the event of a distribution by the company at any time (whether before or during the winding-up or liquidation of the company) of profits which are not of a capital nature would be entitled to participate in such a distribution, regardless of whether in either case the company in fact has or has not any profits available for distribution;'

[10] Quite apart from whether the amount in question, having been capitalised, could correctly be called profits, the terms of sub-paragraph (bb) of the proviso are destructive of the appellant's case. Plainly, that amount when received from the subsidiary comprised profits of a revenue nature and, despite capitalization thereafter, must nevertheless be deemed to be profits of a revenue nature available for distribution to shareholders. It follows that the amount in question cannot be shown to comprise profits of a capital nature as required to establish the s 64B(5)(c) exemption.

[11] The appeal is dismissed with costs including the costs of two counsel.

CT HOWIE
PRESIDENT

CONCURRED:
Streicher JA
Brand JA
Lewis JA
Ponnan JA