THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 192/09

DEFY LIMITED Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Neutral citation: *Defy v SARS* (192/09) [2010] ZASCA 11 (12 MARCH 2010)

Coram: NAVSA, NUGENT, HEHER, BOSIELO and LEACH JJA

Heard: 19 FEBRUARY 2010

Delivered: 12 MARCH 2010

Summary: Secondary tax on companies – exemption of dividend falling under s 64B(5)(c)(ii) – whether moneys distributed constituted 'profit of a capital nature'.

ORDER

On appeal from: Tax Court (Murphy J and Messrs Crafford-Lazarus and Matlala) sitting as court of first instance.

The appeal is dismissed with costs that include the costs of two counsel.

JUDGMENT

NUGENT JA (NAVSA, HEHER, BOSIELO and LEACH JJA concurring)

[1] This appeal concerns the liability of the appellant (Defy) for the payment of secondary tax on companies (STC). The Commissioner assessed Defy for STC in the sum of R28 811 074 for the dividend cycle 16 May 2004 to 27 January 2005. Defy objected to the assessment but the Commissioner disallowed the objection. An appeal to the tax court (Murphy J and Messrs Crafford-Lazarus and Matlala) failed and thus the present appeal.

[2] STC is a tax on dividends declared by resident companies. It is imposed by s 64B (forming part of Part VII) of the Income Tax Act 58 of 1962. It is as well to set out the material provisions of that section and to outline their general effect before turning to their application to the facts of this case.

[3] Part VII was introduced into the Act in 1993[1] and has since been amended from time to time. At the time that is material to this appeal s 64B took the following form (omitting provisions that are not now relevant):

'(2) There shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the secondary tax on companies, which is calculated at the rate of 12,5 per cent of the net amount, as determined in terms of subsection (3), of any dividend declared on or after 14 March 1996 by any company which is a resident.

[1] By s 34(1) of Act 113 of 1993.

(3) Subject to subsection (3A), the net amount of any dividend referred to in subsection (2) shall be the amount by which such dividend declared by a company exceeds the sum of any dividends which have accrued to that company during the dividend cycle in relation to such firstmentioned dividend: Provided that –

(a) …

(b) in the determination of the net amount of any dividend distributed in the course or in anticipation of the liquidation or winding up or deregistration of a company, there shall be allowed as a deduction any dividend contemplated in subsection (5)(c) which has during the current or any previous dividend cycle accrued to the company.

(3A)[2] In determining the sum of the dividends which have accrued to a company as contemplated in subsection (3), no regard must be had to –

(a) any dividend contemplated in subsection (5)(b), (c) or (f).

(b) – (d) …

(4) …

(5) There shall be exempt from the secondary tax on companies –

(a) – (b) …

(c) so much of any dividend distributed in the course or in anticipation of the liquidation or winding up or deregistration of a company, as is shown by the company to be a –

(i) …

(ii) distribution of profits of a capital nature (other than capital profits attributable to the disposal of any asset on or after 1 October 2001 which capital profits must, in the case of an asset acquired before that date, be limited to the amount of profit determined as if that asset had been acquired on 1 October 2001 for a cost equal to the market value of that asset on that date determined in the manner contemplated in paragraph 29 of the Eighth Schedule): …

(iii) …

(d) – (e) …

(f) any dividend declared by a company which accrues to a shareholder (as defined in Part III) of that company if –

[2] Inserted by s 40(1)(b) of Act 32 of 2004 with effect from 24 January 2004.

> (i) - (iv) …
>
> (v) the company declaring the dividend elects the exemption under this paragraph to apply …'

[4] The word 'dividend' is generally used to describe a distribution of profits to shareholders but it has an extended meaning for purposes of the Act. The definition in the Act is lengthy and complex. It is sufficient for present purposes to say that it means, subject to its various qualifications, 'any amount distributed by a company to its shareholders'. One of the qualifications is that it does not include (subject to provisos that are not material) money that is given by a company to its shareholders 'to the extent that [it] represents a reduction of the ... share premium account of a company'.[3]

[5] It is important to bear in mind that STC is a withholding tax. The tax is levied upon a declared dividend and the burden of the tax will naturally be borne by the recipient of the dividend. The company merely withholds the tax at its source and pays it to the Commissioner.

[6] Once a dividend has been taxed, and the remaining amount of the dividend has been paid to a company shareholder, the recipient company may wish to pass the benefit of the dividend to its own shareholders. It will do so by declaring a dividend of its own in the amount of the moneys that it received. If that dividend were itself to be taxed then the beneficiary of the original dividend (the recipient of the second dividend) would be burdened by double taxation.

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[3] Subsection (f) of the definition of a 'dividend'.

[7] To avoid that occurring, STC is levied on only the 'net amount' of a dividend that is declared. Under subsection (3) (leaving aside for the moment the qualification in subsection (3A)) the 'net amount' of a declared dividend is the amount of the dividend (the outgoing dividend) less the sum of all dividends that have accrued to the company (the incoming dividends) during the same dividend cycle.

[8] Thus if a company pays R100 to its holding company in settlement of a declared dividend (after withholding STC), and the holding company distributes that income to its own shareholders by declaring a dividend of R100, the 'net amount' of the holding company's dividend will be nil. The ultimate beneficiary of the original dividend will bear the burden only of the tax that was withheld at its source.

[9] Subsection (5) exempts certain dividends from STC. The effect of the various exemptions will differ according to their purpose. I confine myself in this judgment to the exemption under subsection (5)(c)(ii).

[10] A dividend qualifies for exemption under subsection 5(c)(ii) if it is distributed 'in the course or in anticipation of the liquidation or winding up or deregistration of a company' and if it is shown by the company to be a 'distribution of profits of a capital nature' (subject to a qualification that is not directly material[4]).

[11] I deal later in this judgment with what is meant by 'profits of a capital nature'. For the moment I deal with the effect that is brought about

[4] The qualification is designed to take account of capital gains tax, which was introduced by the Eighth Schedule to the Act with effect from 1 October 2001.

by exempting a profit of that kind. (For convenience I will abbreviate the phrase ‘profit of a capital nature’ to ‘capital profit’.)

[12] If a shareholder (assuming it to be a company) were to receive a dividend that has been exempted from STC, and it were to pass the benefit of that dividend to its own shareholder, then on the ordinary application of the mechanism of subsection (3), that shareholder would enjoy the benefit of the dividend free from tax. The qualification in subsection (3) prevents that occurring by bringing subsection (3A) into play. That subsection provides that ‘no regard must be had’ to a dividend that was exempt under subsection (5)(c) when ‘determining the sum of the [incoming] dividends which have accrued to a company’ for the purpose of calculating the ‘net amount’ of its dividend.

[13] Thus if a capital profit of R100 is distributed by a company in anticipation of its winding up it will be exempt from tax. But if the recipient company were to distribute that receipt (and no more) to its own shareholder by declaring a dividend of R100, the ‘net amount’ of its dividend will be R100 (the dividend, less incoming dividends, but leaving out of account the exempt incoming dividend) and will attract tax. The effect is to allow a subsidiary to distribute its capital profits to its holding company in anticipation of its winding up, but to levy the tax on a further distribution of the money by the holding company.

[14] However, a holding company that has received such a capital profit from its subsidiary might itself be wound up. Naturally, any moneys that are earned by it as a capital profit in anticipation of its winding up may be distributed to its shareholder free of tax (because it is exempt under subsection 5(c)(ii)). But the proviso to subsection (3)(b)

enables it also to pass on to its shareholder the benefit of the capital profit that was made by the subsidiary. It does so by allowing the holding company to deduct the dividend received from the subsidiary from the 'net amount' of the dividend that the holding company declares.

[15] Thus, if the subsidiary has earned and distributed to its holding company a capital profit of R100 (free of tax), and the holding company has itself earned a separate capital profit of R200 in anticipation of its winding up, and it distributes all those moneys (and no more) to its shareholder, the net amount of its R300 dividend will be nil,[5] and the dividend will be received by the shareholder free of tax. If that shareholder were to distribute those moneys further by declaring its own dividend then that dividend will attract the tax.

[16] I think the examples demonstrate that, when a series of companies in a hierarchy are to be wound up, the exemption and its related provisions operate to enable the ultimate shareholder in the series to receive, free of tax, the capital profits made by all of them in anticipation of their winding up. But any further distribution of the moneys is treated as a taxable dividend and will be taxed upon that distribution occurring.

[17] In this case we are concerned with a subsidiary and a holding company that have both made distributions in anticipation of their winding up, which is the example in paragraph 15 above.

[18] It will be apparent from that example that if the capital profit of R100 that was earned by the subsidiary and distributed to the holding

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[5] The R200 capital profit of the holding company is exempt from tax. The remaining R100 is a taxable dividend, from which the R100 dividend declared by the subsidiary is to be deducted under subsection (3)(b).

company is, upon receipt by the holding company, equally a capital profit earned by the holding company (assuming that is capable of occurring), then upon distribution of that R100 by the holding company (without more) the 'net amount' of its dividend will be minus R100.[6] The shareholder will thus receive the dividend not only free of tax, but together with what I might call a 'tax credit'.

[19] If that is the only distribution that the shareholder receives then the existence of the 'tax credit' will not be significant. But if the holding company were simultaneously to distribute a taxable amount of R100 then the shareholder will receive both portions of the dividend free of tax. In effect, the tax that is payable on the taxable portion will be set off against what I have called the 'tax credit'.

[20] It would be curious indeed if a shareholder who receives R100 that is taxable were to be relieved of that tax on account of simultaneously receiving R100 that is not taxable. Needless to say, that will occur only if the capital profit that it receives from the subsidiary were equally to be a capital profit earned by the holding company. The Commissioner says that is not possible. Defy says that it is possible, and that it has occurred in this case. The tax court agreed with Defy (but nonetheless found for the Commissioner, which is another curiosity in this case).

[21] That is what this case is about. Defy received from its subsidiary a distribution, in anticipation of the winding up of its subsidiary, amounting to R343 811 457 (excluding an amount that it received in repayment of a loan). Included in that amount was R206 080 509 that was earned by the

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[6] The outgoing dividend will be a capital profit of the holding company that is exempt from tax under subsection (5)(c)(ii), and from the declared dividend of nil the incoming dividend of R100 falls to be deducted under subsection (3)(b) leaving a negative balance of R100.

subsidiary as a capital profit. Defy distributed that sum of R343 811 457 to its shareholders, together with other money that was taxable. It says that the R343 811 457 that it received from its subsidiary, after deduction of the cost of acquiring the subsidiary, was a capital profit that it earned (and thus exempt from tax[7]). If that is so then, naturally, the deduction from that amount, under subsection (3)(b), of the capital profit that it received from its subsidiary yields a negative sum of R206 080 509, and that produces what I have called a 'tax credit'. That 'tax credit' sets off the tax that is payable on the taxable moneys that were distributed, and that is why no tax is payable on the dividend.

[22] If that sounds internally contradictory it is nonetheless the case that is advanced by Defy. But let me say immediately that I do not suggest that Defy has acted improperly in any way. It says that if the statute, upon its proper construction, has that effect, then the Commissioner can have no proper cause for complaint, and that must be correct. The question in this case is whether it has properly construed the statute.

[23] The dispute arises from a decision by the shareholders of Defy to dispose of its business to Clidet No 553 (Pty) Ltd and then to wind up the company. Defy was an investment company. Its assets comprised all the shares in a number of subsidiaries and it can be accepted that those shares were capital assets. One of the subsidiaries was Defy Appliances (Pty) Ltd, which was the main operating company in the group. (I will refer to that company as Appliances.) The identity of the other subsidiaries is not material.

[7] Subject to an adjustment that was required to be made in accordance with the qualification to subsection (5)(c)(ii).

[24] The objective of winding up Defy might ordinarily have been achieved by causing Defy to sell to Clidet the shares in all the subsidiaries and to distribute the proceeds of the sale to the shareholders, and then winding up the remaining shell. Indeed, that was the approach that was adopted in relation to the subsidiaries other than Appliances.[8] But so far as Appliances was concerned the shareholders chose instead that Appliances should sell the whole of its business to Clidet as a going concern, that Appliances should then distribute the proceeds to Defy (after paying liabilities), leaving Appliances as a shell. Upon receipt of the proceeds Defy would in turn distribute them to its shareholders and Defy would be wound up (presumably after dissolving Appliances).

[25] To achieve those objectives an indivisible agreement of sale was concluded between the relevant parties. In terms of that agreement Defy sold to Clidet all its shares in the subsidiaries other than Appliances for R550 298 138, and Appliances sold to Clidet the whole of its business as a going concern. After settling its liabilities Appliances then paid to Defy the balance of the proceeds of the sale of its business amounting to R426 152 780 thereby denuding itself of all its assets.

[26] Of that amount R82 341 323 was paid in settlement of Defy's loan account, R68 811 457 was paid in reduction of Appliance's share premium account, and the balance was a distribution to Defy of profits made by Appliances – revenue profits of R68 919 490 and capital profits of R206 080 510.

[27] It is not in dispute that the distribution by Appliances, which was made in anticipation of its winding up, did not attract STC. Of the

[8] Except for certain dormant subsidiaries.

moneys that were paid by Appliances to Defy R82 341 was the repayment of a loan (which is not a dividend), R68 811 457 was paid in reduction of its share premium account (which is not a dividend), the revenue profit of R68 919 490 was exempt from STC under subsection 5(f) (why that was so is not material), and the capital profit of R206 080 510 was exempt from STC under subsection 5(c)(ii).

[28] Defy then distributed to its shareholders the sum of R498 000 000 as a dividend. The Commissioner takes the view that R230 488 595 of that dividend was subject to STC and he assessed Defy for tax on that amount in the sum of R28 811 074.

[29] The Commissioner accepts that the sale by Defy of its shares in the subsidiaries yielded an exempt capital profit of R61 430 895. He also accepts that the amount of R206 080 510 that was exempt from STC when distributed by Appliances is deductible from the dividend under subsection (3)(b). Thus his calculation of the 'net amount' of the dividend can be tabulated as follows:

Distribution	R498 000 000
Capital profit on sale of shares exempt under subsection (5)(c)(ii)	(61 430 895)
Taxable Dividend	R436 569 105
Incoming exempt dividend deductable under subsection (3)(b)	(206 080 510)
Net Amount of Dividend	R230 488 595

[30] Defy naturally agrees with the Commissioner that its profit on the sale of the subsidiaries is exempt under subsection (5)(c)(ii) though

initially it calculated the profit to be R59 824 897. The difference between Defy and the Commissioner on that score is not significant. Defy accepts the figure calculated by Commissioner. In what follows I will nonetheless use Defy's figure of R59 824 897 to avoid introducing confusion. Defy and the Commissioner are also at one that the exempt dividend received from Appliances (R206 080 510) is deductible under subsection (3)(b). But Defy says that R305 311 541[9] of its dividend was a distribution of a capital profit that it earned and is therefore exempt from tax under subsection (5)(c)(ii). Thus it tabulates the calculation of the 'net amount' of its dividend as follows (I have simplified the language that it used):

Distribution	R498 000 000
Capital profit on sale of shares exempt under subsection (5)(c)(ii)	(59 824 897)
Capital profit on investment in Appliances exempt under Subsection (5)(c)(ii)	(305 311 541)
Taxable Dividend	R132 863 562
Incoming exempt dividend deductable under subsection (3)(b)	(206 080 510)
Net Amount (negative)	(R73 216 948)

[31] The various tabulations that have been presented by or on behalf of Defy from time to time reflect the 'net amount' of its dividend to be nil. No doubt that was because only R132 863 562 of the deduction has practical significance for the purpose of calculating STC. But I have presented the true outcome to illustrate the point that I made earlier, which is that the effect of both exempting its distribution of R206 080 590 and deducting the equivalent amount that was received

[9] I deal later with how that amount has been calculated.

from Appliances, results in what I have called a 'tax credit'. Portion of the 'tax credit' offsets the tax that would ordinary have been payable on the taxable portion of the dividend.

[32] In its grounds of appeal to the tax court Defy tabulated the calculation of its alleged capital profit as follows (once more I have simplified the language):

Dividend received from Appliances	R275 000 000
Share Premium received from Appliances	68 811 457
Total Distribution from Appliances	R343 811 457
Less: Original cost of [Defy's] investment in Appliances	(28 451 459)
Total Capital Profit Realised by Defy	R315 359 998

It went on to attribute the earning of that profit to the periods before and after 1 October 2001 (as envisaged by the qualification in subsection v(5)(c)(ii)) and attributed R305 311 541 to the latter period. We need not concern ourselves with that part of its calculation. The real dispute is whether it earned a capital profit of R315 359 998 in the first place.

[33] It will be seen that the case advanced by Defy is relatively straightforward. Put simply, Defy says that it paid R28 451 459 to acquire the shares of Appliances, and has received R343 811 457 in return, thus it has profited on its capital investment in the amount of R315 359 998.

[34] It might indeed be said, in general terms, that Defy has profited on its investment, but that is not what we are concerned with in this case. Moneys are not exempt from STC merely because an arithmetic profit was made by the company in an equivalent amount. The subsection identifies money that is exempt from STC with reference to the character of the moneys concerned. The moneys are exempt from tax if they have been yielded to the company as a capital profit, and it is as well to have clarity on what that means.

[35] The word 'profit' is capable of being used in various ways to describe a gain, or advantage, or benefit of some kind,[10] which is how Defy uses it. But like all language that is used in a statute, it must be construed in its particular context. Subsection (5)(c)(ii) is concerned with companies that divest themselves of their residual assets in preparation for the dissolution of the company. They do that by converting the assets into cash (or other distributable form), so far as that is necessary, and then distributing the cash to their shareholders. In that context I think it is clear that the word 'profit' has meaning 5. assigned to it by the Shorter Oxford Dictionary – 'the pecuniary gain in any transaction' – and that the transactions to which it relates are the disposal of assets. It goes without saying that the profit so earned will be 'of a capital nature' if the asset that yielded the profit was a capital asset.[11] In short, the subsection exempts from taxation the pecuniary gain that is earned upon disposal by the company of a capital asset.

[10] *Shorter Oxford Dictionary*: 1. The advantage or benefit (of a person, community, or thing); use, interest; the gain, good, well-being. 2. The advantage or benefit of or resulting from something ; 3 … 4. That which is derived from or produced by some source of revenue; proceeds, returns. 5. The pecuniary gain in any transaction; the excess of returns over the outlay of capital.'

[11] '[An] asset acquired with a view to holding it either in a non-productive state or to derive income from the productive use thereof, and in fact so held.' Per Corbett JA in *Elandsheuwel Farming (Edms) Bpk v SBI* 1978 (1) SA 101 (A) at 118D.

[36] While offering no alternative meaning of the phrase counsel for Defy nonetheless submitted that the disposal by the company of an asset is not a prerequisite for the earning of a capital profit. In support of that construction much was made in the heads of argument of the reference to the 'disposal of any asset' in the parenthesised qualification in subsection (5)(c)(ii) (the qualification relating to the disposal of assets after 1 October 2001) in contradistinction to the absence of any such reference in the preceding words. The argument, as I understand it, was that the inference to be drawn from the absence of a reference to assets in those preceding words is that the subsection contemplates that a 'profit of a capital nature' might be earned without disposing of assets. It is only if assets are disposed of, so the argument went, that the qualification comes into play.

[37] I do not think that inference is warranted. The qualification describes the basis upon which a capital profit is to be attributed to the periods before and after 1 October 2001. The basis that has been chosen for that attribution could not have been described without reference to the assets that yielded the profit. And if a capital profit is, by definition, yielded only by the disposal of an asset, then a reference to the disposal of assets in the language that precedes the qualification would be superfluous.

[38] Far from supporting Defy, the qualification seems to me to operate against it. For if a capital profit as envisaged by the subsection is capable of being earned without disposing of an asset, then I think it is remarkable that the drafter did not provide for how the profit was to be attributed if it was earned over a period before and after 1 October 2001, bearing in mind the purpose of the qualification.

[39] We were also referred to *Bailey v Commissioner for Inland Revenue*,[12] *New Mines Limited v Commissioner for Inland Revenue*,[13] and *Income Tax Case No. 101*,[14] which were said to support the proposition that a profit of a capital nature might be earned other than by the disposal of an asset. The courts were concerned in those cases with the question whether the moneys concerned were revenue – and not profits – of a capital nature, for purposes of normal income tax. In the present context those words are not interchangeable, though they were treated as such in some of the submissions that were made before us. We are not concerned with whether the moneys that were received by Defy constitute revenue of a capital nature for purposes of normal income tax. We are concerned with whether they were earned as a capital profit for purposes of STC.

[40] I have already said that counsel for Defy offered no alternative meaning of the phrase. Nor was he able to proffer an example of a capital profit that is earned other than by the disposal of a capital asset (leaving out of account this case). In my view that is because there is none. I think it is clear that the term is used in the subsection to mean, as I expressed it earlier, the pecuniary gain from the disposal of a capital asset (the proceeds after deduction of the cost of acquiring the capital asset).

[41] In this case the money was not a gain from the disposal by Defy of an asset. Defy retained the shares that it held in Appliances. The court below said that Defy 'realised the value in the shares by selling the business as a going concern' and that 'as such the profits from the realization of that value were profits of a capital nature'. It was, of course,

[12] 1933 AD 204.
[13] 1938 AD 455.
[14] 3 SATC 324.

Appliances, and not Defy, that sold the business, but that is by the way. So far is it was suggested that Defy disposed of the 'value' of its asset that is not correct. The 'value' of an asset is not property that is capable of being bought and sold. It is an attribute that is inherent in the asset. Its value might rise or fall, depending upon the market for the asset, and its value might even be nil if the asset has no market at all, but an asset and its value are inseparable. It is true that the money compensated for the fall in value of the shares but that is another matter.

[42] No doubt it was because Defy could not be said to have earned a profit, in the proper sense of the word, that the moneys were described variously by counsel for Defy, and by the court below, as having the 'effect' of a capital profit, or 'amounting to' a capital profit. The court below said that the approach taken by the Commissioner was 'too formalistic'. It said that there was 'in effect a disposal of the assets underpinning the value of the shares' and 'there was in substance a disposal of the shares'. But none of that is good enough. The subsection exempts moneys that are a capital profit. It does not exempt, in addition, moneys that are not a capital profit, but have the effect of being one.

[43] Those attempts to liken the moneys to a profit seem to me only to draw attention to an insurmountable hurdle for Defy. I have pointed out that the subsection identifies money that is exempt from taxation with reference to the character of the money, and that is determined by the nature of the transaction that yielded it. The subsection does not have one meaning on one occasion and a different meaning on another occasion. Moneys cannot be exempt when received by one company, and also exempt when received by another company, unless the nature of the transaction that yielded it on each occasion is the same. The

insurmountable difficulty for Defy is that it received its money in payment of a dividend, and Appliances did not. It follows inexorably that the moneys received by each cannot both be exempt.

[44] The moneys earned by Appliances were exempt because they were the gain that was yielded from the disposal of capital assets. The moneys received by Defy were not yielded in the same way. Defy received its moneys in extinction of its claim to be paid a declared dividend in an equivalent amount. It might be said that the claim was an asset that was disposed of in return for the money but Defy made no gain on the exchange and the claim was in any event not a capital asset.

[45] There is a matter that I need deal with only briefly before I conclude. The court below found that the money received by Defy as a distribution of the revenue and capital profits of Appliances, after deduction of the cost of the investment, had the effect of being a capital profit and was therefore exempt. (It found that the money received in reduction of the share premium was not.) One might have thought that in those circumstances it would have found against the Commissioner. But it was concerned at the result that its conclusions had led it to, which was what it called 'double favourable treatment' of the exemption. The grounds upon which it found for the Commissioner instead were expressed as follows (in para 41):

'The problem of double favourable treatment was not adequately canvassed by counsel for the Commissioner during argument, even though we invited submission on the question. To us the matter is of critical importance. It strikes us that the provisions of section 64B read contextually and purposively as a whole disclose a policy consistent with the Commissioner's submission that double favourable treatment of the same amount is intended only to the limited extent of a deduction as opposed to a second exemption, whenever the holding company that has received an exempt liquidation dividend in turn chooses to go into liquidation.'

[46] I have some difficulty with the idea that a construction of the parts of a statute can produce one result but a construction of the sum of its parts can produce another. It needs to be born in mind that a statute is not a statement of policy by the legislature that leaves the detail to be filled in by a court. It is policy that has been translated into law. If it has not been adequately translated I do not think that it is for courts to rewrite the statute. That would seem to me to strike at the heart of the rule of law.

[47] It seems to me that the error of the court below was to treat the subsection as if it exempted moneys that were yielded to a company as a capital profit (the moneys yielded to Appliances) as well as moneys that had an equivalent effect (the moneys received from Appliances), whereas the subsection does not exempt both. It was by overlooking the distinction – formalistic though the distinction might be thought to be – that the court was driven to the result at which it rightly baulked.

[48] I agree with the submission by counsel for Defy that the reasons given by the court below for its order do not withstand scrutiny. But an appeal lies against the order made by a court rather than its reasons for doing so. For the reasons I have given I do not think that any of the moneys that are now in issue were yielded to Defy as a capital profit and they were thus not exempt from STC. That they had the effect of earning it a profit is immaterial. The subsection exempts capital profits and not also moneys that are not capital profits but look much the same. In those circumstances the order of the court below was correct, albeit for the wrong reasons.

[49] Counsel for Defy reminded us that the tax court (and by extension this court) is confined by Rule 12 to the issues defined in the statement of the assessment read with the grounds of appeal. He submitted that the grounds upon which I have reached my conclusion, which were the subject of debate in argument before us, were not the grounds upon which the Commissioner disallowed the objection. I find that submission to be astonishing. His own heads of argument were directed substantially to the matters that I have dealt with in this judgment, as were those that were filed on behalf of the respondent. So was Defy's notice of appeal to the tax court, and the judgment of that court.

[50] As for the ground upon which the Commissioner disallowed the objection, he said that a dividend is, by its nature, not a capital profit. It needs to be borne that the case might have been dealt with in either of two ways. If apples are exempt from tax, but pears are not, and a pear is presented for exemption, one might examine the characteristics of an apple to see whether those characteristics are possessed by a pear, which is the approach that I have adopted. The Commissioner approached the matter more directly. He said that if what has been presented is a pear, then it is certainly not an apple, whatever characteristics an apple might have. But the two approaches come to the same thing.

[51] The appeal is dismissed with costs that include the costs of two counsel.

R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant:	A R Bhana SC J Boltar Instructed by: Webber Wentzel, Johannesburg McIntyre & Van der Post, Bloemfontein
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