# *THE SUPREME COURT OF APPEAL OF SOUTH AFRICA*

Case number : 391/06
Reportable

In the matter between :

| | |
|---|---|
| THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE | APPELLANT |

and

| | |
|---|---|
| BRUMMERIA RENAISSANCE (PTY) LTD | FIRST RESPONDENT |
| PALMS RENAISSANCE (PTY) LTD | SECOND RESPONDENT |
| RANDPOORT RENAISSANCE (PTY) LTD | THIRD RESPONDENT |

CORAM : SCOTT, CLOETE, VAN HEERDEN JJA, KGOMO *et* MHLANTLA AJJA

HEARD : 24 AUGUST 2007

DELIVERED : 13 SEPTEMBER 2007

**Summary: Income tax ─ Act 58 of 1962 ─The right to use loans interest-free is 'gross income' which 'accrues' to a taxpayer; the effect of ss 79(1), 81(4) and 81(5) discussed.**

**Neutral citation: This judgment may be referred to as *Commissioner, SARS v Brummeria Renaissance (Pty) Ltd* [2007] SCA 99 (RSA).**

---

# *JUDGMENT*

---

**CLOETE JA/**

[1] The appellant is the Commissioner for the South African Revenue Service. The first to third respondents are respectively Brummeria Renaissance (Pty) Ltd, Palms Renaissance (Pty) Ltd and Randpoort Renaissance (Pty) Ltd ('the companies'). The companies have since 1988 developed retirement villages as contemplated in the Housing Development Schemes for Retired Persons Act.[1]

[2] The Commissioner issued assessments, then revised assessments and subsequently, further revised assessments to the companies as follows: Brummeria, for the years 1996 to 2000; Palms, for the years 1994 to 2000; and Randpoort, for the years 1995 to 2000. It is the further revised assessments which are in issue in these proceedings.

[3] During the relevant years the companies entered into written agreements with potential occupants of units still to be constructed in retirement villages. The salient features of these agreements were the following:

(a) each company obtained an interest-free loan from a potential occupant in order to finance the construction of a unit in a particular retirement village by the company in question;

(b) a debenture was issued to the lender acknowledging the loan, the title deeds of the property forming the subject matter of the development were endorsed and a covering bond was registered as further security in favour of the lenders;

(c) the lender was granted the right of lifelong occupation of the unit, whilst ownership remained with the company; and

(d) the company was obliged to repay the loan to the occupant upon cancellation of the agreement, or upon the occupant's death.

The standard agreement entered into with each occupier provided in terms that the interest-free loans constituted the consideration for the life rights: 'Lewensreg' was defined as

'Die reg van die okkupeerder om die eenheid te okkupeer en die fasiliteite te gebruik, onderworpe aan die reels vanaf datum van okkupasie tot datum van beëindiging, as teenprestasie vir die lening en

---

[1] 65 of 1988.

onderworpe aan die betaling van maandelikse heffings en spesiale heffings';

clause 6.4 provided:

'As teenprestasie vir die lening onderneem die maatskappy om aan die okkupeerder lewensreg van die eenheid te verleen . . . ';

and clause 8.1 provided:

'Die grondslag van hierdie ooreenkoms is lewensreg teen 'n lening met sekuriteit. . . '.

[4] Mr Pauw, who was called by the companies, testified that the interest-free loans were utilized solely as the source of financing by the companies for the development of the units; that nothing was invested in income-earning investments; that repayment of a loan was financed by the granting of a new loan (presumably by a new occupier of the relevant unit); and that the intention of the companies was ultimately to sell the units at a profit.

[5] In the further revised assessments amounts equal to the value of the rights of the companies to use the funds advanced to them as interest-free loans were included in the companies' gross income. Such amounts were determined by applying the weighted prime overdraft rate for banks to the average amount of the interest-free loans in the possession of the particular company in the relevant year of assessment. The statement of the grounds of assessment delivered by the Commissioner in terms of rule 10 of the tax rules (made in terms of s 107A of the Income Tax Act 58 of 1962)[2] reads as follows:

'11. In the case of a developer conducting a housing scheme for retired persons, the capital of the developer is the property units. The property units are employed in its business by either:

11.1 selling the units under sectional title to the purchasers; or

11.2 granting the use (occupation) of the units to the occupiers by way of selling life rights to the occupiers.

12. The *quid pro quo* which the developer received in return is, respectively:

12.1 the selling price obtained from the purchasers, in respect of the disposal of the units under sectional title; or

12.2 the benefit of the rights to interest free loans obtained from the occupiers, in respect of the disposal of the life rights to occupy the units.

---

[2] And contained in GN R467 published in *Government Gazette* 24639 of 1 April 2003.

13. The benefit received in exchange for the provision of occupation rights has an ascertainable money value and accordingly falls within the definition of "gross income" of the Act.

14. As income tax is calculated on an annual basis, an annual value is placed on the benefit referred to above. The value of the benefit is determined by applying the weighted prime overdraft rate of banks to the average loan capital over the period for which the developer had the use of the loan capital during that specific year of assessment.

15. The money value of the benefit of the interest free loans accrues to the developers, and as such fall within "gross income" as defined in section 1 of the Act.'

[6] The companies raised several grounds in their statement of grounds of appeal in terms of rule 11 of the tax rules. Two remain relevant:

(a) All of the companies contended that the interest-free loans did not result in any 'amounts' being 'received by' them, as contemplated in the definition of 'gross income' in s 1 of the Act, and accordingly that the amounts included in their gross income, calculated on the basis I have already set out, were wrongly so included; and

(b) Brummeria contended that s 79(1) of the Act precluded the Commissioner from raising the further revised assessments which the Commissioner had raised against it.

[7] The Johannesburg Tax Court, presided over by Goldblatt J, upheld the appeals by the companies on the first ground and accordingly found it unnecessary to consider the additional ground raised by Brummeria. Goldblatt J subsequently granted the Commissioner leave to appeal to this court in terms of s 86A(5) of the Act.

[8] The relevant part of the definition of 'gross income',[3] in relation to any year or period of assessment, was at the time:

'. . . the total amount, in cash or otherwise, received by or accrued to . . . [the taxpayer] during such year or period of assessment from a source within the Republic, excluding receipts or accruals of a

---

[3] In s 1 of the Act.

capital nature . . . '.

[9] It is important to emphasise that the Commissioner did not contend that the actual receipt of the loan capital resulted in the receipt of amounts for the purposes of the definition of gross income ─ and rightly so, as it has been decided in this court that a receipt of loan capital, as such, is not a receipt for the purposes of such definition: *Commissioner for Inland Revenue v Genn & Co (Pty) Ltd*;[4] *Commissioner for Inland Revenue v Felix Schuh (SA) (Pty) Ltd*.[5] The Commissioner's case is that it was the right to retain and use the loan capital, *interest-free*, for the relevant periods, which constituted the right which had an ascertainable money value and which accrued to the companies.

[10] Counsel for the companies sought to argue in this court that the right which the Commissioner sought to include in the companies' taxable incomes was of a capital nature. This question was not an issue before the tax court. Tax rule 10(1) provides that the Commissioner must deliver to the taxpayer a statement of the grounds of assessment and sub-rule (3) provides that the statement of the grounds of assessment must be in writing, be signed by the Commissioner or his or her representative and must be divided into paragraphs ─

'(a) setting out a clear and concise statement of the grounds upon which the taxpayer's objection is disallowed; and

(b) stating the material facts and legal grounds upon which the Commissioner relies for such disallowance.'

Tax rule 11(1) provides that the taxpayer must deliver to the Commissioner a statement of the grounds of appeal. Sub-rule (2) provides that the statement must be in writing and be signed by the appellant or his or her representative and must be divided into paragraphs ─

'(a) setting out a clear and concise statement of the grounds upon which the appellant appeals;

(b) stating the material facts and legal grounds upon which the appellant relies for such appeal; and

(c) stating which of the facts and legal grounds alleged in the statement of the grounds of

---

[4] 1955 (3) SA 293 (A) at 301B-G.

[5] 1994 (2) SA 801 (A) at 812D-G.

assessment are admitted and which of those facts and legal grounds are denied.'

Tax rule 12 provides that the issues in any appeal to the court 'will be those defined in the statement of the grounds of assessment read with the statement of the grounds of appeal'. Tax rule 13 provides:

'(1) The Commissioner and the appellant may agree in writing to the amendment of the statement of the grounds of assessment or the statement of grounds of appeal or both.

(2) The Court, consisting of the President sitting alone, may, on application on notice grant leave to amend the statement of the grounds of assessment or the statement of grounds of appeal, subject to such orders as to postponement and costs as the Court deems appropriate.'

The companies did not, in their statement of grounds of appeal in terms of rule 11 of the tax rules, raise as an issue the question whether the rights which the Commissioner sought to include in their taxable incomes was of a capital nature and neither procedure contemplated in tax rule 13 was followed. The issue cannot accordingly be pursued before this court.

[11] I turn to consider the first ground of appeal, ie whether the rights to use the loans interest free constituted 'amounts' which 'accrued to' the companies. The word 'amount' and the phrase 'accrued to' were interpreted by Watermeyer J writing for the full court of the Cape Provincial Division in *Lategan v Commissioner for Inland Revenue*[6] and both interpretations were approved by this court in *Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd*.[7] The law was restated by this court in *Cactus Investments (Pty) Ltd v Commissioner for Inland Revenue*.[8] Hefer JA, who wrote both judgments in this court, summed up the law in *Cactus Investments* by saying that the definition of gross income

'includes, as explained in *Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A), not only income actually received, but also rights of a non-capital nature which accrued during the relevant year and are capable of being valued in money'[9]

and that

'The judgment in the *People's Stores* case tells us that no more is required for an accrual than that

[6] 1926 CPD 203.
[7] 1990 (2) SA 353 (A).
[8] 1999 (1) SA 315 (SCA).
[9] At 319G-H.

the person concerned has become entitled to the right in question.'[10]

[12] The Commissioner's counsel submitted on the authority of the decisions to which I have just referred that the right to retain and use the borrowed funds without paying interest had a money value, and accordingly that the value of such right must be included in the companies' gross incomes for the years in which such rights accrued to the companies. I agree. This court has held that the making of an interest-free loan constitutes a continuing donation to the borrower which confers a benefit upon such borrower: *Commissioner for Inland Revenue v Berold*.[11] Indeed, it can hardly be doubted that, in the modern commercial world, a right to retain and use loan capital for a period of time, interest-free, is a valuable right. The basis upon which the Commissioner valued that right in each particular year of assessment in the further revised assessments, was not challenged on appeal.

[13] It was submitted on behalf of the companies that the rights so valued by the Commissioner could not be turned into money by the companies and therefore did not fall within the ambit of the decision of this court in the *People's Stores* case. For this proposition, counsel for the companies relied on the decision of the full court of the Cape Provincial Division in *Stander v Commissioner for Inland Revenue*[12] and the decision of the House of Lords to which it refers,[13] namely, *Tennant v Smith (Surveyor of Taxes)*.[14]

[14] In *Stander's* case the taxpayer received an overseas trip as a prize and the Commissioner sought to include the value of the prize in his taxable income. The prize was awarded by Delta Motor Corporation (Pty) Ltd, which was not Stander's employer. Friedman JP writing for the full court held:[15]

'The question, then, is whether the prize of an overseas trip constitutes "property", ie did Stander, by

---

[10] At 320H.
[11] 1962 (3) SA 748 (A) at 753F-G and cf *Commissioner, South African Revenue Service v Woulidge* 2002 (1) SA 68 (SCA) para 10.
[12] 1997 (3) SA 617 (C).
[13] At 621E-I.
[14] [1892] AC 150 (HL).
[15] At 622D-H.

being given this trip, acquire a right which had a monetary value in his hands.

The promise by Delta to give Stander an overseas trip amounted to an executory donation. At common law the promise by Delta gave Stander, on acceptance by him of the promise, a personal right to compel performance by Delta. However, by virtue of s 5 of the General Law Amendment Act 50 of 1956

"no executory contract of donation . . . shall be valid unless the terms thereof are embodied in a written document signed by the donor".

The terms of the donation were not embodied in a written document signed by Delta. Consequently Delta's offer of an overseas trip did not give rise to a valid contract of donation which was enforceable by Stander and Stander cannot be said to have acquired a "right" even if a monetary value could be placed on the the trip he received. However, once he had embarked upon the trip, the donation was no longer executory and the question then is whether a value could be placed on what Stander received by going on the trip. The answer to this question is, in my view, in the negative. Having gone on the trip he had not received any "property" on which a monetary value could be placed in his hands. He was no more able to turn it into money or money's worth after accepting the award, than he was at the time when the donation was still at the executory stage.'

The learned Judge President then went on to deal with ITC 701,[16] decided by Conradie J in the Special Court, and said the following:[17]

'Conradie J, in delivering the judgment of the Special Court, accepted the principle that in order to fall within the tax net, receipts or accruals other than money had to have a money's worth. However Conradie J rejected the argument that only benefits which a taxpayer can turn into money can be said to have a money's worth. He stated that there was no warrant for such a restricted form of valuation and held that a service which is available in the market place has a value attached to it by the market. That, he stated, was the value of the benefit which anyone who availed himself of the service, enjoys. In other words, one simply looks at what the consumer of the service would have had to pay for it if he had not been given it for nothing.

With respect to the learned Judge, this approach fails to take account of the impact of Watermeyer J's judgment in *Lategan's* case *supra*, as approved by the Appellate Division in the *People's Stores* case *supra*. Having regard to the conditions applicable to the enjoyment of the award, the overseas trip had no "value" in Stander's hand which brought it within the terms of para (*c*) of the definition of "gross income".

I did not understand Mr *De Haan*, who appeared for the Commissioner, to contend that in order to

---

[16] (1950) 17 SATC 108.

[17] At 623C-I.

qualify as an "amount" for the purposes of para (*c*),[18] it was not necessary for the award to consist of "money's worth". He submitted that in order to determine "money's worth" an objective value had to be placed on the award. By "objective value", he argued, was meant "market value".

I do not agree. If the award cannot be said to consist of "money's worth" it does not qualify for inclusion in terms of para (*c*). Nor, in my judgment, is there any basis upon which, on the facts of this case, "money's worth" can be attributed to Stander's prize by seeking to place an "objective" or "market value" on it. Whatever it cost Delta, or whatever a person who wished to go on such a trip would have had to pay for it, does not constitute an amount which can be said to have money's worth in Stander's hands.'

[15] The views of the learned Judge President are contrary to what this court had previously held in the *People's Stores* case, restated in *Cactus Investments*. The passage in *Cactus Investments* has already been quoted in para [11] above: according to that decision, all that is required is that rights of a non-capital nature 'are capable of being valued in money'. The relevant passage in the *People's Stores* case[19] is the following:

'It must be emphasised that income in a form other than money must, in order to qualify for inclusion in the "gross income", be of such a nature that a value can be attached to it in money. As Wessels CJ said in the *Delfos* case[20] *supra* at 251:

"The tax is to be assessed in money on all receipts or accruals having a money value. If it is something which is not money's worth or cannot be turned into money, it is not to be regarded as income."

(See also *Mooi v Secretary for Inland Revenue*[21] (*supra* at 683A-F).) On the other hand, the fact that the valuation may sometimes be a matter of considerable complexity (cf the *Lace Proprietary Mines* case[22] *supra* at 279-81) does not detract from the principle that all income having a money value must be included.'

It is clear from the passage quoted from the judgment of Hefer JA, as well as the passage quoted by him from the judgment of the Chief Justice in the *Delfos* case, that the question whether a receipt or accrual in a form other than money has a

---

[18] Of the definition of gross income which includes 'any amount, including any voluntary award, received or accrued in respect of services rendered . . . or any amount (other than an amount referred to in s 8(1)) received or accrued in respect of or by virtue of any employment or the holding of any office . . .'.

[19] At 364G-J.

[20] *Commissioner for Inland Revenue v Delfos* 1933 AD 242.

[21] 1972 (1) SA 675 (A).

[22] *Lace Proprietary Mines Ltd v Commissioner for Inland Revenue* 1938 AD 267.

money value is the primary question and the question whether such receipt or accrual can be turned into money is but one of the ways in which it can be determined whether or not this is the case; in other words, it does not follow that if a receipt or accrual cannot be turned into money, it has no money value. The test is objective, not subjective. It is for that reason that the passages quoted from the *Stander* case incorrectly reflect the law and the reasoning of Conradie J in ITC 701 was correct. The question cannot be whether an individual taxpayer is in a position to turn a receipt or accrual into money. If that were the law, the right to live in a house rent-free, or to drive a motor vehicle without paying for it, for example, could be rendered tax-free by the simple expedient of limiting the right to exercise such benefit to the recipient ─ which manifestly is not the case.

[16] Nor is the decision of the House of Lords in the *Tennant* case authority for the companies' argument. That case turned on the provisions of the income tax legislation applicable in England at the time, which were very different from the meaning which this court has held must be given to the definition of gross income in the South African statute. The position as it was in England appears from the following passage in the speech of Halsbury LC:[23]

'Now, Mr. Tennant occupies this house without paying any rent for it. It may be conceded that if he did not occupy it under his contract with the bank rent free, he would be obliged to hire a house elsewhere, pay rent for it, and pro tanto diminish his income. And if any words could be found in the statute which provided that besides paying income tax on income, people should pay for advantages or emoluments in its widest sense (such as I think the word "emoluments" here has not, for reasons to be presently given), there is no doubt of Mr. Tennant's possession of a material advantage, which makes his salary of higher value to him than if he did not possess it, and upon the hypothesis which I have just indicated would be taxable accordingly.'

The law in South Africa appears from the following passage in the *People's Stores* case:[24]

'The first and basic proposition [in *Lategan's* case[25]] is that income, although expressed as an *amount*[26] in the definition, need not be an actual amount of money but may be

---

[23] At 155.
[24] At 363I-364C.
[25] Above, n 6.
[26] Emphasis in the original.

"every form of property earned by the taxpayer, whether corporeal or incorporeal, which has a money value . . . including debts and rights of action"
(*per* Watermeyer J at 209).
This proposition is obviously correct so that very little need be added to what Watermeyer J himself said in support thereof. It is hardly conceivable that the Legislature could not have been aware of, or would have turned a blind eye to, the handsome profits often reaped from commercial transactions in which money is not the medium of exchange. Consider, for example, the many instances of valuable property changing hands, not for money, but for shares in public or private companies; or share-cropping agreements, dividends in the form of bonus shares, or *remuneration for services in the form of free or subsidised housing*[27] and the use of motor vehicles. These are only a few of the many possible illustrations that readily come to mind and which, as we know, have not been overlooked by the Legislature.'

[17] Counsel for the companies submitted that the phrase relating to free or subsidised housing that I have emphasised in the passage just quoted from the *People's Stores* case and the further statement that such a benefit has 'not been overlooked by the Legislature' must be taken as a reference to paragraph (i) of the definition of gross income[28] and to the Seventh Schedule to the Act; and that unless a benefit of the nature contemplated falls within those provisions, it is not taxable. I cannot agree. Those provisions were inserted into the Act not because such benefits are not otherwise taxable, but to put beyond doubt what benefits are taxable and, equally importantly, to determine how their value is to be assessed for the purpose of calculating the tax to be deducted by an employer from an employee's remuneration.[29] It is clear from the *People's Stores* and *Cactus Investments* cases that the word 'amount' in the definition of gross income is to be interpreted widely.

[18] The Tax Court held that the companies received no monies on loan which were used to produce any income, and that the Commissioner had therefore assessed the companies on notional income. It is true that had the companies

---

[27] Emphasis supplied.
[28] '(i) [T]he cash equivalent, as determined under the provisions of the Seventh Schedule, of the value during the year of assessment of any benefit or advantage granted in respect of employment or to the holder of any office, being a taxable benefit as defined in the said Schedule, and any amount required to be included in the taxpayer's income under section 8A.'
[29] In terms of the Fourth Schedule to the Act.

invested the amounts lent, the income so derived would also have formed part of their gross incomes. But that is beside the point. The Commissioner did not seek to tax the companies on this basis. Nor is the fact that the companies were unable to make such investments but were obliged to use the loans for the purposes of developing the units relevant, as submitted on behalf of the companies. The Commissioner taxed the companies on the basis of the benefit consisting in the right to use the loans without having to pay interest on them. That benefit remained, whatever the companies did or did not do with the loans. Furthermore, no question of double taxation would arise, as suggested on behalf of the companies, if the amounts lent were to have been invested so as to produce interest ─ in such a case there would be two separate and distinct receipts or accruals, each of which would fall to be included in the companies' gross incomes.

[19] The Tax Court also held that the benefit included by the Commissioner in the companies' gross incomes had no existence independent from the liability to repay the monies borrowed; that it could not be transferred or ceded; and that it 'clearly has no money value'. This reasoning loses sight of the fact that if a right has a money value ─ as the right in question did, for the reasons I have given ─ the fact that it cannot be alienated does not negate such value. The contrary view articulated in *Stander's* case is wrong.

[20] I therefore conclude that the first ground of appeal raised by the companies should have been dismissed by the Tax Court. The second ground of appeal, that the Commissioner was precluded by s 79(1) from issuing the further revised assessments, concerns Brummeria only and is limited to the tax years 1996 to 1999.[30] The chronology relevant to this question is the following:

(a) On 13 March 2000 the Commissioner issued original assessments to Brummeria for the 1996, 1997, 1998 and 1999 years of assessment.

(b) On 3 March 2002 the Commissioner issued revised assessments. The basis

[30] Although the notice of appeal refers also to the 2000 year of assessment, counsel for Brummeria did not pursue the argument in regard to this year.

of these revised assessments was that the interest-free loans received in exchange for the granting of occupation rights constituted 'gross income'.

(c) In terms of a letter dated 19 April 2002 Brummeria objected to the revised assessments inter alia on the ground that the amounts borrowed by it were not received by and did not accrue to it for the purposes of the definition of gross income.

(d) On 1 July 2004 and consequent upon the objection the Commissioner issued further revised assessments ─ the assessments with which this appeal is concerned. The basis of these assessments, as I have already said, was that the value of the benefit of the right to utilise the amounts lent without paying interest, constituted gross income.

[21] The relevant provisions of ss 79(1), 81(4) and (5) of the Act read at the time as follows:

'79(1) If at any time the Commissioner is satisfied ─

(a) that any amount which was subject to tax and should have been assessed to tax under this Act has not been assessed to tax; or

(b) that any amount of tax which was chargeable and should have been assessed under this Act has not been assessed; or

(c) . . .

he shall raise an assessment or assessments in respect of the said amount or amounts, notwithstanding that an assessment or assessments may have been made upon the person concerned in respect of the year or years of assessment in respect of which the amount or amounts in question is or are assessable, and notwithstanding the provisions of sections 81(5) and 83(18): Provided that the Commissioner shall not raise an assessment under this subsection ─

(i) after the expiration of three years from the date of the assessment (if any) in terms of which any amount which should have been assessed to tax under such assessment was not so assessed or in terms of which the amount of tax assessed was less than the amount of such tax which was properly chargeable, unless the Commissioner is satisfied that the fact that the amount which should have been assessed to tax was not so assessed or the fact that the full amount of tax chargeable was not assessed, was due to fraud or misrepresentation or non-disclosure of material facts. . .'.

'81(4) The Commissioner may on receipt of a notice of objection to an assessment alter the assessment or may disallow the objection and shall send to the taxpayer or his or her representative notice of such alteration or disallowance, and record therein any alteration or disallowance made in

the assessment.

(5) Where no objections are made to any assessment or where objections have been allowed in full or withdrawn, such assessment or altered assessment, as the case may be, shall be final and conclusive.'

[22] Section 81(5) deals with three situations:

(a) Where no objections are made to any assessment; the assessment then becomes final and conclusive.

(b) Where objections are made but have been withdrawn; the assessment then similarly becomes final and conclusive.

(c) Where objections are made and have been allowed in full; the altered assessment then becomes final and conclusive.

[23] Broadly stated, the effect of s 79(1) read with s 81(5) is as follows. In the circumstances contemplated in paragraphs (a), (b) and (c) of the former section, the Commissioner is obliged to raise an assessment:

(a) even if previous assessments have been made and

(b) even if

(i) no objections are made to any assessment

(ii) objections have been allowed in full or

(iii) objections have been withdrawn;

but the Commissioner may not do so if the defined three year period has elapsed, unless he is satisfied that there was fraud, misrepresentation or non-disclosure. In other words, if (inter alia) an objection is allowed in full and the three year period has elapsed, the Commissioner cannot raise an assessment (absent fraud or one of the specified irregularities).

[24] Counsel for Brummeria submitted that the Commissioner, in changing the basis of assessment in the first revised assessments pursuant to its objection, allowed its objection in full as contemplated in s 81(5); that the further revised assessments, to the extent that they set aside the revised assessments, had the effect of reinstating the original assessments; that because three years had elapsed

since the original assessments had been issued, those assessments had become final and conclusive as contemplated in s 81(5); and that s 79(1) accordingly precluded the Commissioner from raising the assessments which he did in the further revised assessments.

[25] The Commissioner's counsel submitted that the Commissioner was entitled to alter the revised assessments by issuing the further revised assessments as this was done after receipt of an objection and s 81(4) in terms permits him 'on receipt of a notice of objection to an assessment' to 'alter the assessment'; and further, that the three year period contemplated in s 79(1) ran not from the date of the original assessments, but from the date of the revised assessments (which was less than three years before the further revised assessments were issued).

[26] It seems to me that these competing contentions must be resolved by having regard to the purpose underlying ss 79(1) and 81(5), which is obviously to achieve finality. To uphold either of the Commissioner's contentions would undermine that purpose. It is obviously in the public interest that the Commissioner should collect tax that is payable by a taxpayer. But it is also in the public interest that disputes should come to an end ─ *interest reipublicae ut sit finis litium*; and it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to change the basis upon which the taxpayer were assessed until the Commissioner got it right ─ memories fade; witnesses become unavailable; documents are lost. That is why s 79(1) seeks to achieve a balance: it allows the Commissioner three years to collect the tax, which the legislature regarded as a fair period of time; but it does not protect a taxpayer guilty of fraud, misrepresentation or non-disclosure. If either of the Commissioner's arguments were to be upheld, this balance would be unfairly tilted against the honest taxpayer.

[27] In my view, once the Commissioner changed the entire basis of the assessment in the further revised assessments, he allowed Brummeria's objection to the revised assessments in full as contemplated in s 81(5) and, as no fraud,

misrepresentation or non-disclosure is relied upon, that is the end of the matter. I therefore consider that the Commissioner was precluded by the provisions of s 79(1) read with s 81(5) of the Act from raising the assessments against Brummeria for the tax years 1996, 1997, 1998 and 1999 which he did in the further revised assessments.

[28] Counsel representing the companies sought to raise a further issue, namely, that the Commissioner's refusal to direct that interest should not be paid by the companies on the tax attributable to the inclusion of the value of the right to use the amounts of the loans without paying interest (as he has the power to do in terms of s 89 *quat*) should be set aside (in terms of s 89 *quat* (5)). This issue can be disposed of relatively briefly and on the same basis as the argument put forward on behalf of the companies that the right included in their taxable incomes was of a capital nature. To repeat: the point was not raised in the grounds of appeal; neither of the procedures contemplated in tax rule 13 was followed; and the point cannot be raised now.

[29] Finally, there is the question of costs. Although there was one composite record and although the companies were each represented by the same counsel, there were in reality three appeals. There were four discrete issues, three relating to all three companies and one just to Brummeria. Palms and Randpoort lost on all of the issues relating to them and in those appeals, costs must follow the result. Brummeria on the other hand lost on three issues but succeeded on one, the s 79(1) issue. Less time was spent on that issue than on the other issues, but the effect of its success on that issue is that the assessments for four of the five years of assessment raised against it will be set aside with a consequent reduction in liability for tax from R6,47m to R900 000. In *Protea Assurance Co Ltd v Matinise*[31] the appellant raised four distinct issues on appeal.[32] It succeeded on only one issue.[33]

---

[31] 1978 (1) SA 963 (A).
[32] Tabulated at 970H-*in fine*.
[33] The respondent was deprived of one third of his trial costs: 977G-*in fine*.

Instead of making cross-orders as to costs, this court made a partial order in favour of the litigant who had enjoyed the greater measure of success on appeal — it ordered the appellant to pay two-thirds of the appeal costs of the respondent.[34] A similar course was followed in *Community Development Board v Mahomed & Others NNO*[35] where a provisional order was made requiring the partially successful appellant to pay one half of the respondent's appeal costs.[36] In the present matter it seems to me that justice would be served if the Commissioner were to be ordered to pay two-thirds of Brummeria's costs of appeal. Two counsel were briefed by the Commissioner and the companies and this was in my view justified.

[30] The following order is made:

1.1 The appeal succeeds against the first respondent to the limited extent that the order of the Tax Court is altered to read:

'Save in respect of the 2000 year of assessment, the appeal is allowed and the further revised assessments of 3 March 2002 for the years 1996, 1997, 1998 and 1999 are set aside. The appeal against the 2000 year of assessment is dismissed.'

1.2 The Commissioner is ordered to pay two-thirds of the first respondent's costs of appeal in this court including the costs of two counsel.

2.1 The appeal succeeds against the second respondent and the order of the Tax Court is altered to read:

'The second appellant's appeal is dismissed.'

2.2 The second respondent is ordered to pay the appellant's costs of appeal in this court which related to the appeal against it, including the costs of two counsel.

3.1 The appeal succeeds against the third respondent and the order of the Tax Court is altered to read:

'The third appellant's appeal is dismissed.'

---

[34] At 978A-C.

[35] 1987 (2) SA 899 (A) at 919F-920B. See also *Hollywood Curl (Pty) Ltd v Twins Products (Pty) Ltd (1)* 1989 (1) SA 236 (A) at 253I-254G.

[36] This order was subsequently made final: See the *Hollywood Curl* case above, n 35 at 254F.

3.2 The third respondent is ordered to pay the appellant's costs of appeal in this court which relate to the appeal against it, including the costs of two counsel.

T D CLOETE
JUDGE OF APPEAL

Concur: Scott JA
Van Heerden JA
Kgomo AJA
Mhlantla AJA