# THE SUPREME COURT OF APPEAL
# OF SOUTH AFRICA

Reportable

**CASE NO:** 108/2002

In the matter between :

**COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE** **Appellant**

and

**TIGER OATS LTD** **Respondent**

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**Coram:** **MARAIS, STREICHER, CAMERON, CLOETE *et* LEWIS JJA**

**Heard:** **27 FEBRUARY 2003**

**Delivered:** **15 MAY 2003**

**Regional establishment levy – Regional Services Council Act 109 of 1985 – investment holding company – liable to pay levy on dividends received.**

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## J U D G M E N T

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**MARAIS JA/**

MARAIS JA:

[1] The issue in this appeal is whether the respondent is liable for regional establishment levies in terms of the Regional Services Council Act 109 of 1985 ('the Act') on dividend income received by it from 1995 to 1997. The Special Income Tax Court (Swart J and two assessors) held that it is. On appeal to the Full Bench of the Transvaal Provincial Division (Spoelstra, Van der Westhuizen and De Vos JJ) it was held that it is not. The Full Bench granted leave to appeal to this court.

[2] The broad purpose of the Act, according to the preamble, is: 'To provide for the joint exercise and carrying out of powers and duties in relation to certain functions in certain areas by local bodies within such areas; and to that end to provide for the delimitation of regions; the establishment of regional services councils; and the constitution, functioning, functions powers, duties, assets, rights, employees and financing of such councils; and to provide for matters connected therewith.'

[3] It is the provisions of the Act which relate to the financing of councils with which we are primarily concerned. Two kinds of levy are created: a 'regional services levy' and a 'regional establishment levy'. Both are defined in s 1 of the Act. In terms of s 12 (1) (a) (ii) a council is obliged to 'levy and claim from – every person carrying on or deemed to be carrying on an enterprise within its region, a regional establishment levy'. The Minister of Finance is empowered by sub-secs (1) (b) and (1A), by notice in the Gazette, to determine

'(b) circumstances in which a person shall be deemed to be carrying on an enterprise within a region;

(c) how an amount upon which the regional establishment levy is payable shall be calculated.'

He may also 'exempt any employer or person from the regional services levy or the regional establishment levy in relation to any enterprise' in terms of s 12 (1A) (d). Section 12 (8) provides that both kinds of levy 'may be deducted

as an operating expense for the purposes of income tax by any employer or person'.

[4] The 'regional establishment levy' is defined in s 1. It 'means, in relation to any person carrying on or deemed to be carrying on an enterprise within a region, a levy calculated and payable in relation to such enterprise in the manner determined by the Minister of Finance under section 12 (1) (b), at a rate from time to time determined by the council established for that region with the concurrence of the said Minister and which the said Minister shall publish by notice in the Gazette: Provided that different rates may be so determined in respect of different categories of enterprise'.

[5] The word 'enterprise' is also defined in s 1. It 'means any trade, business, profession or other activity of a continuing nature, whether or not carried on for the purpose of deriving a profit, but excluding any religious, charitable or educational activity carried on by any religious, charitable or educational institution of a public character'.

[6] The Minister exercised the powers so conferred in Government Notice No R340 of 17 February 1987 (amended by Government Notice No R783 of 21 April 1989 and Government Notice No R1296 of 14 June 1991). In terms of para 5 the 'regional establishment levy shall be calculated and paid on the amount (in this schedule referred to as the leviable amount) determined under paragraph 6 in relation to leviable transactions'.

[7] Para 6 provides that 'the leviable amount in relation to leviable transactions in respect of any month shall be the sum of –

(a) all amounts of consideration in respect of leviable transactions received by or accrued to the levypayer during the month; and

(b) . . . . . .

less the sum of –

(i) . . . . . .

(ii) . . . . . .

(iii) . . . . . .'

[8] In para 1 the words ‘consideration’, ‘financial asset’, ‘financial enterprise’, ‘leviable transaction’ and ‘levypayer’ are defined:

‘consideration’ includes ‘(d) in the case of any leviable transaction concluded in the carrying on of a financial enterprise –

(ii) the gross amounts of interest or dividends receivable on any funds invested’.

‘ “financial asset” means any marketable security, bill of exchange, currency or other paper ordinarily purchased and sold or otherwise traded in by a financial enterprise’.

‘ “financial enterprise” means any banking institution, building society, unit trust, long-term insurer, short-term insurer, pension fund, provident fund, retirement annuity fund, benefit fund, medical benefit fund, financier, buying association or similar institution, or any enterprise in the course of which financial assets are traded in or any company which carries on business as an investor of money’.

‘ “leviable transaction” means –

(a) . . . . . .

(b) in the case of a financial enterprise carried on within a region, or deemed to be carried on within a region –

(i) . . . . . .

(ii) the investment of funds by such enterprise;

(ii) . . . . . .

(iv) . . . . . .

(v) . . . . . ,

whensoever the relevant transaction was or is concluded’.

‘ “levypayer” means any person who is liable for the payment of the regional services levy or the regional establishment levy’.

[9] Some preliminary observations are appropriate. The ambit of liability for a regional establishment levy has been very widely cast in the Act. The breadth of the language used in the definition of ‘enterprise’ in s 1 is striking.

That it is intended to be given its full breadth of meaning is underscored by the power of exemption from liability conferred by s 12 (1A) (d). The expression 'financial enterprise' is not to be found in the Act as such; its author is the Minister of Finance. In coining and defining the expression in GNR 340 he did not purport to be exercising the deeming powers conferred upon him by s 12 (1A) (b) of the Act. Nor could he have done so. While that provision empowers him 'to determine circumstances in which a person shall be deemed to be carrying on an enterprise *within a region*' (emphasis supplied), it does not empower him to deem to be an enterprise that which is not in terms of the definition of 'enterprise' in s 1 of the Act. The Minister was aware of the distinction. In promulgating GNR 340 he provided in para 8, under the heading, 'circumstances in which a person is deemed to be carrying on an enterprise within a region', for a series of situations in which the geographical location of an enterprise would be deemed to be within a region.

[10] Nearly all of these provisions refer to an enterprise (as distinct from a financial enterprise). The former reference is plainly to an enterprise as defined in s 1 of the Act. The single reference to a 'financial enterprise' in those deeming provisions is in para 8 (3) (e). It reads: 'An enterprise . . . shall be deemed to be carried on by the person concerned, within a region, if, in the case of –

(e) a financial enterprise, the business operations of the enterprise are managed or controlled within the region'.

It is quite clear that the only reason why it was considered necessary to provide a definition in GNR 340 of a financial enterprise was because, without such a definition, para 8 (3) (e) (and some other provisions in which the expression occurs) would be too vague to be properly understood and applied. The purpose of the definition was not to assign a different meaning to the word 'enterprise' than that which s 1 of the Act required to be assigned to it, but to elucidate the word 'financial'. When the two definitions are compared it

is quite apparent that no attempt has been made by the Minister to provide a competing definition of the word ‘enterprise’. All of the entities listed in his definition of ‘financial enterprise’ fit comfortably within the definition of ‘enterprise’ in s 1 of the Act.

[11] The structure of the Act and GNR 340 is such that, logically, the enquiry into the respondent’s liability for a regional establishment levy should proceed as follows:

(a) Is the respondent a person carrying on or deemed to be carrying on an enterprise with a region? If not, *cadit quaestio*; there is no liability. If it is, the next question arises.

(b) Has the Minister determined how an amount upon which the levy is payable shall be calculated? If not, once again *cadit quaestio*. If there is no way of knowing how the amount on which the levy is payable is to be calculated, there can be no liability. *Lex non cogit ad impossibilia*. If he has

done so (and provided of course that a rate for the levy has been specified by the council for the region), one turns to what he has done.

(c) As has been seen, in GNR 340 the Minister promulgated provisions accompanied by explanatory definitions of certain expressions which occur in those provisions. I have quoted only those provisions and definitions (or parts thereof) which are or may be of relevance to the facts of the present case. They are potentially apt to impose liability upon the respondent for a regional establishment levy but whether the respondent is indeed hit by them turns on the proper construction of the Act and GNR 340 and the application of that construction to the respondent's activities. The latter are of course questions of fact. (*Morrison v CIR* 1950 (2) SA 449 (AD) at 455.) To those questions I now turn.

[12] A prior appreciation of what the opposing standpoints of the appellant and the respondent are will sharpen one's focus on these questions. In broad, those standpoints are these. The appellant contends that the respondent

conducts a ‘business’, alternatively, another ‘activity of a continuing nature’ and is therefore a person ‘carrying on an enterprise’ within the relevant region. As such, it is liable for the levy. As to the manner in, and the rate at, which it is to be paid, in as much as the respondent carries on business as an investor of money, the respondent falls to be classified as a ‘financial enterprise’. The ‘leviable transactions’ to which it is a party are the transactions whereby it invested its funds in acquiring shareholdings in the various companies in which it has either a controlling interest or, at least, a substantial minority interest. The ‘leviable amount’ is the sum of ‘all amounts of consideration . . . received by or accrued to’ the respondent in respect of those transactions. The ‘consideration’ is ‘the gross amounts of . . . dividends receivable on any funds invested’. The rate is that promulgated in Government Notice R340.

[13] The respondent contends that a person is only liable for the levy ‘in relation to an enterprise carried on by that person’ so that even if certain lending and borrowing activities of the respondent (as to which more later)

constituted an enterprise, the respondent would only be liable for the levy in relation to the dividend income it receives if, viewed in isolation, the making of the investments which yielded the dividends constituted the carrying on of an enterprise within the meaning of s 1 of the Act. Even if the making of those investments did constitute the carrying on of an enterprise, it was submitted that it did not constitute the carrying on of a ‘financial enterprise’ as defined in GNR 340 because the respondent did not ‘carr[y] on business as an investor of money’. Accordingly, the dividends were not ‘consideration’ as defined in GNR 340 and were therefore not subject to the levy.

[14] The factual foundation upon which this argument rests is the respondent’s *raison d’etre*. That is stated in its memorandum and articles of association to be to ‘carry on the business of an investment holding company’. The respondent is said to be, in essence, no different from any other person who acquires shares on the stock exchange to hold as a long term investment. Such a person, so it is said, is not carrying on a ‘financial enterprise’ and, by

parity of reasoning, neither is the respondent, at least in so far as its shareholdings are concerned.

[15] The facts

These were placed before the Special Income Tax Court by way of an agreed statement of facts and a number of documentary appendices. I shall not repeat them all. I shall confine myself to those which seem to me to be of particular significance to the questions under consideration. The respondent is a public company listed on both the Johannesburg (under the 'Food' category) and the London Stock Exchanges. It is an investment holding company in the sense that it holds long-term equity investments in subsidiary and associated companies and lends money to those companies. Its memorandum and articles of association contain the following provisions:

'2. PURPOSE DESCRIBING THE MAIN BUSINESS

The main business which the company is to carry on: The business of a holder of investments.

3. The main object of the company is: To carry on the business of an investment holding company.'

[16] The investments of the respondent comprise long-term equity investments in subsidiary and associated companies, other investments in listed and unlisted shares which are not equity accounted and the income from which is accounted for as and when dividends are receivable, and interest-free and interest-bearing loans to subsidiaries and associated companies.

[17] As at 30 September 1995 the respondent had seven directly-held subsidiary companies, excluding other miscellaneous property, investment and dormant companies; the cost to the respondent of these subsidiaries (less amounts written off) was R423,4 million; the above directly-held subsidiaries, directly or indirectly, held the investments in the subsidiaries listed in Annexure A to the consolidated financial statements of the respondent for the financial year ended 30 September 1995; the respondent had made loans to its subsidiaries in an amount of R307 million.

[18] As at 30 September 1996, the respondent's investments had remained the same save that the cost of shares held by it in Langeberg Holdings Limited had increased from R118,5 million to R119,1 million; the cost of shares held by it in Adcock Ingram Limited had increased from R84 million to R85,2 million; and the respondent's loans to its subsidiaries had increased from R307 million to R984,2 million.

[19] As at 30 September 1997, the only changes in the respondent's investments were that the cost of shares held by it in Langeberg Holdings Limited had increased from R119,1 million to R121,3 million; the cost of shares held by it in miscellaneous property, investment and dormant companies had increased from R80,3 million to R81,1 million; the cost of shares held by it in Adcock Ingram Limited had increased from R85,2 million to R85,4 million; and the respondent's loans to its subsidiaries had increased from R984,2 million to R1 054,1 million.

[20] The disclosed accounting policy of the respondent on consolidation is to reflect in its consolidated annual financial statements the financial results of the respondent and those entities in which it holds a controlling long term equity interest.

[21] The respondent also holds investments in associated companies. Associated companies are those which are not subsidiaries but in which the respondent exercises a significant influence and holds a long term equity interest.

[22] As at 30 September 1995, 30 September 1996 and 30 September 1997, the only material investment directly held by the respondent in an associated company was 125 000 shares in Lesotho Milling Company (Proprietary) Limited, representing 50% of the issued shares in the capital of that company.

[23] As at 30 September 1996 the other investments in associated companies were the following:

| NAME OF COMPANY | NET BOOK VALUE R1000 |
|---|---|
| Diamond Henkel (Pty) Ltd | 742 |
| Leselbary Investments (Pty) Ltd | 887 |
| Ridgeton Bakeries (Pty) Ltd | 10 |
| Ulundi Bakery (Pty) Ltd | 474 |

[24] During the period relevant to this appeal the respondent received the following income (the interest income was received on loans to subsidiaries and associates and on cash balances with banks):

| 30 September | Dividends (R) | Interest (R) | Management Fees (R) |
|---|---|---|---|
| 1995 | 157 687 266 | 75 169 962 | 97 083 |
| 1996 | 493 700 000 | 127 300 261 | 85 000 |
| 1997 | 431 400 000 | 197 917 078 | 102 750 |

The following table reflects a breakdown of the sources of the interest income for each of the above financial years

| 30 Sept | Banks | Subsidiaries and Associates | Other | Total (R) |
|---|---|---|---|---|
| 1995 | 62 537 619 | 11 223 101 | 1 419 242 | 75 169 962 |
| 1996 | 93 046 495 | 32 835 149 | 1 418 617 | 127 300 261 |
| 1997 | 104 875 684 | 91 644 240 | 1 397 154 | 197 917 078 |

[25] The respondent has no employees and no fixed assets. Management services provided to the respondent's operating subsidiaries and associated companies are provided by Tiger Management Services, a division of Tiger Food Industries Limited. The management fees paid to Tiger Management Services by the respondent are reflected in the Detailed Income Statements for the years in question.

[26] The management fees reflected above are derived by the respondent from directors' fees paid to certain of its non-executive directors by subsidiary or associated companies of which certain of the respondent's non-executive directors are also directors. (It is the policy of the respondent that its non-executive directors who are also directors of subsidiary or associated companies must account to the respondent for all directors' fees paid to them).

[27] The loans made by the respondent are loans made to subsidiary and associated companies. No loans are made to anybody else. These loans are managed by Tiger Management Services. In making loans to subsidiaries and

associates the respondent applies the following policies: All loans are funded by share capital and reserves and loans from subsidiary companies with surplus cash. As at 30 September 1995 share capital and reserves stood at R1 158,4 million and as at 30 September 1997 stood at R1 908,1 million. Loans to subsidiaries are shareholders' loans which typically do not bear interest. Loans to associated companies are only made in proportion to shareholding and to loans made by outside shareholders. Where interest is charged, the rate of interest is invariably lower than the rate at which the subsidiary is able to borrow from outside sources. The following tables reflect the number of loans made by the respondent during the relevant years and the value of those loans.

| | 30 Sept 1995 | 30 Sept 1996 | 30 Sept 1997 |
|---|---|---|---|
| | Number | Number | Number |
| Interest free | 27 (90%) | 23 (77%) | 23 (79%) |
| Interest bearing | 3 (10%) | 7 (23%) | 6 (21%) |
| | Rand | Rand | Rand |
| Interest free | 73 160 million (87%) | 771 674 million (58%) | 910 933 million (62%) |
| Interest bearing | 73 785 million (13%) | 564 437 million (42%) | 564 354 million (38%) |

[28] Loans to subsidiaries are intended to fund long-term working capital or capital expenditure requirements of subsidiaries with the purpose of facilitating the efficient deployment of the capital and reserves of the respondent. All loans are unsecured and no term for repayment is fixed.

[29] The deployment of the respondent's capital and reserves to its subsidiaries is managed by Tiger Management Services in accordance with annual budgets and strategic plans that take into account the respondent's available resources, the capital structure of the subsidiary concerned, the nature of its business and the sector in which the subsidiary operates, its own cashflow and its own projected requirements.

[30] The respondent does not trade in financial assets. Loans are recorded in the respondent's accounting records but they are not otherwise documented. The major banker to the respondent and its subsidiaries is Nedbank Limited. The group of which the respondent is part participates in a computerised cash

management facility operated by Nedbank. The purpose of this facility, which is provided by all the major banks, is to ‘net-off’ the overnight credit and debit balances of the various participating companies so that the bank levies interest only on the net overnight debit balance of the group. The resulting network of loans is managed by Tiger Management Services, a division of one of the respondent’s subsidiaries. To the extent that the cash management facility requires any decision to be made, it is made by Tiger Management Services.

[31] In respect of the period 1 August 1995 to 30 June 1997 the respondent paid establishment levies in the amount of R1 228 755,86 on dividends received by it. It also paid establishment levies on interest received by it from subsidiaries but the levies thus paid are not in issue in this appeal.

[32] In my view the respondent’s contention that, in deciding whether it is carrying on a financial enterprise, its activities require compartmentalisation and that its acquisition of interests in other companies via shareholding must be viewed in isolation and equated with that of a citizen who merely passively

holds a portfolio of shares as an investment and is not a share-jobber, cannot be upheld. It is conceded, and rightly so, that at least in so far as the respondent acts as banker for the group and makes interest bearing loans to its subsidiary and associated companies it is carrying on an enterprise. But, so it is argued, that is an enterprise ‘separate from the long-term equity investments in the six (later corrected to seven) subsidiaries’ and in as much as the making of such latter investments is not an ‘activity of a continuing nature’ it cannot be regarded as an enterprise within the meaning of s 1 of the Act.

[33] To my mind there is an air of commercial unreality which pervades this argument. I shall assume, without deciding, that it is notionally possible if, say, a trading company happened to invest in a portfolio of shares listed on the stock exchange in the same way as any citizen who is not a share-jobber might do, that it would not thereby necessarily become liable for the levy in respect of the dividends it receives. But that would be because it does not ‘carry on business’ as an investor of money and is therefore not a financial enterprise.

(Compare *ITC 512* SATC 246 where the taxpayer was an auctioneer and also invested money in mortgages, loans and the like and the issue was whether the money so invested should be regarded as capital employed in the taxpayer's business as an auctioneer. The Special Income Tax Court held that it should not. It said that it was clear that the money so invested represented 'savings in the ordinary way which are being put out on investment' and no different from the case of 'every person who is thrifty enough to save money from his ordinary daily activities and invest it in the savings bank or on fixed deposit or in shares for that matter, or in numerous forms of investment'. It considered it to be 'going too far to say that these savings or investments form part of the (taxpayer's) trade capital'.)

[34] By no stretch of the imagination can the respondent be equated with the company I have postulated in the preceding paragraph. The respondent is a public company listed on the stock exchange and it proclaims its main object to be "to carry on the business of an investment holding company". That

immediately negates any suggestion that the making of investments by it, if it occurs at all, will be purely collateral and unrelated to other business activities. It is to be its very *raison d'etre*. (Indeed, if that is not the business which it is carrying on, what, one may ask, is that business? No other is described in the memorandum and articles of association as being its main business and main object.) That, in turn, also negates the suggestion that the making of investments by it was not intended to be an 'activity of a continuing nature'. Any member of the public subscribing for shares in such a company would be entitled to expect, and it would be the duty of the company's board of directors to ensure, constant monitoring of the investments which the company chose to make, and appropriate action by way of new investment, further investment or disinvestment as the need arose. Moreover, as was said in *Smith v Anderson* (1880) 15 Ch 247 (CA) at 260-261 and *Platt v CIR* 1922 AD 42 at 51, where the question is whether a company is in fact carrying on a business, the fact that it was formed for the purpose of doing so indicates

*prima facie* the presence of the element of continuity of activity which is said to be a characteristic feature of carrying on a business.

[35] The respondent is not a mere passive investor. It is an investor which is the holding company of the subsidiaries in which it holds shares. It is in a position to control the appointment of the directors of those subsidiaries. Its own executive directors are drawn from the boards of the subsidiaries. So intimately is it involved in the affairs of the subsidiaries that it is their banker. The very appellation given to the group of companies (The Tiger Group) is reflective of its dominance. Its fortunes, and those of its shareholders are dependent upon the performance of the companies in which it has invested. Their performance is enhanced by the active participation of the respondent in their affairs by acting as their banker and providing loans which are either interest-free or bear rates of interest more favourable than could be bargained for in the market. As it is put in the agreed statement of facts, ‘Where interest is charged, the rate of interest is invariably lower than the rate at which the

subsidiary is able to borrow from outside sources. . . . . Loans to subsidiaries are intended to fund long-term working capital or capital expenditure with the purpose of facilitating the efficient deployment of the capital and reserves of the (respondent) for the benefit of the group as a whole. All loans are unsecured and no term for repayment is fixed.' Even in those companies which are not subsidiaries but what the respondent calls 'associated' companies, the respondent, to use its own words, 'exercises a significant influence and holds a long term equity interest'. In a very real commercial sense the respondent is thus actively involved in the business of its subsidiaries and associated companies and it is its making of investments in those companies which enables it to be actively involved.

[36] Although the respondent has no employees and no fixed assets, it pays for the management services provided to its operating subsidiaries and associated companies by Tiger Management Services, a division of Tiger Food Industries Limited. That company is wholly owned by Tiger Foods

Limited which is in turn wholly owned by the respondent. The wherewithal to pay those management fees is derived by the respondent from directors' fees paid to certain of its non-executive directors by subsidiary or associated companies of which those directors are also directors. It is the policy of the respondent that its non-executive directors who are also directors of its subsidiary or associated companies must account to the respondent for all directors' fees paid to them. Again this shows that the respondent is actively involved in the operations of the subsidiaries and associated companies and is not simply a passive investor in them, equatable with a member of the public who invests in listed shares on the stock exchange.

[37] It is perhaps necessary to note that we are not concerned here with income tax legislation and such questions as whether receipts or expenditure fall to be classified as capital or revenue. Our concern is with the meaning of the language employed in an Act which has been enacted to generate revenue to finance regional councils. We were referred to various judicial expositions

of the meaning of expressions such as carrying on business and the like but there is little point in reviewing them. As always, context is everything when the meaning of language needs to be ascertained. As Mason CJ, Gaudron and McHugh JJ said in *Re Australian Industrial Relations Commission Ex parte Australian Transport Officers Federation* (1990) 171 CLR 216 at 226, 'of all words, the word "business" is notorious for taking its colour and its content from its surroundings . . . '. And, as Lord Diplock said in *American Leaf Blending Co v Director-General of Inland Revenue* [1978] 3 All ER 1185 at 1189, 'The carrying on of "business", no doubt, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between'.

[38] The obvious broad thrust of the establishment levy charging provisions is that those engaged in continuing commercial activity within the area of a regional council should contribute towards the cost of its

establishment. Holding companies are familiar figures on the landscape of South African commerce and are usually so engaged. Indeed, that may well be the very reason why, in the definition of ‘financial enterprise’ in GNR 340, the word ‘company’ (as opposed to ‘person’) is used in the concluding words: ‘or any company which carries on business as an investor of money’.

[39] For these reasons I am satisfied that the decision of the Special Income Tax Court was correct and that of the Full Bench erroneous. It is ordered:

(a) that the appeal be upheld with costs, such costs to include the costs of two counsel;

(b) that the orders of the Full Bench be set aside;

(c) that the order of the Special Income Tax Court dismissing the appeal to it of the respondent be reinstated;

(d) that it be, and hereby is, declared that the respondent is not entitled to a refund of the regional establishment levies paid by it on the dividend income earned by it during the years 1995, 1996 and 1997.

**R M MARAIS**
**JUDGE OF APPEAL**

**STREICHER JA )**
**CAMERON JA )**
**CLOETE JA )**
**LEWIS JA ) CONCUR**