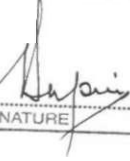


10/12/2009

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA) **REPORTABLE**

Case No: A206/06
~~DELETE WHICHEVER IS NOT APPLICABLE~~
(1) REPORTABLE: YES/NO. ☒ YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES
(3) REVISED.
8.12.09 DATE  SIGNATURE

In the matter between

THE COMMISSIONER FOR SOUTH AFRICAN

REVENUE SERVICE

Appellant

and

LABAT AFRICA LIMITED

Respondent

APPEAL FROM DECISION OF JOOSTE A J

CORAM: WEBSTER, LOUW, JJ ET SAPIRE, AJ

JUDGMENT

SAPIRE, A J

This is an appeal from a judgment of the Special Income Tax Court comprising a Judge of this division and two assessors. Although the judgment touches on a number of matters the only question before this court is whether the issue by a company of its own authorised capital in exchange for a trademark represents real consideration given by the company for the purposes of Section 11 (gA).

It is the contention of the Appellant that no expenditure was actually incurred by the Respondent in acquiring the trade mark as required by Section 11 (gA).

Before examining this question it is interesting to note that subsequent to the events giving rise to this appeal the Act has been altered to provide in Section 84 that such an issue of shares is deemed to be expenditure. This lead counsel for the Appellant to argue that the use of the word “deemed” used in the amendment was an indication that but for the deeming section such issue of shares would not constitute expenditure. This argument is not convincing and does not help us either way in deciding the issue before us.

The judgment of the court a quo is fulsome and deals with the issue with reference to a number of previous decisions. One of such decisions was that of Goldblatt, J in the Johannesburg Tax Court, on the 20th November 2003 (Case Number 10999). In that matter the taxpayer, a company had bought the business of another company, and settled the purchase price by issuing some of its unissued share capital. A Licence Agreement was one of the assets of the business which had been acquired. The taxpayer claimed a deduction in terms of Section 11 (gA) of the Act in respect of the expenditure incurred in purchasing the business. As in this case the Commissioner contended that the taxpayer had not incurred any expenditure as contemplated in Section 11 (gA) because the consideration given consisted of shares issued by the Appellant. In that case the Commissioner’s argument was upheld. In upholding the Commissioner’s contentions Goldblatt, J held that expenditure in this connection should be given its ordinary dictionary meaning. That is the spending of money or its

equivalent, time or labour for example and the resultant diminution of the assets of the company making the expenditure. The Judge held that as an issue of shares did not in any way reduce the assets of a company it was not an expenditure incurred.

The Judge a quo observed that Goldblatt, J found support for his views in paragraph 7.4 of Silke, South African Income Tax "Memorial Edition". What appears there, was quoted in the Judgment of Goldblatt, J. The Judge a quo observed that a perusal of the passage in question reveals that the writer cited no authority for the statements made therein.

The Judge a quo accepted the argument advanced to the contrary that the interpretation accepted in the Judgement of Goldblatt, J ignores the fact that the requirement of the section is that the company should have incurred an unconditional legal obligation and that if it has done so the deductibility requirement is met and that the concept of "expenditure actually incurred" is not dependant upon the making of payment as was clearly stated in *Edgars Stores Limited v CIR*, 1988 (3) SA 876 A.

The correctness of the view taken by the judge a quo is confirmed, on analysis made even on the criteria of Goldblatt J that the word "expenditure" must be given its ordinary meaning. If the agreement for the acquisition of the asset had been that the seller would purchase an agreed number of the unissued shares of the purchaser at an agreed price, and that the proceeds of such sale would be applied to payment of the purchase consideration of the asset, there could be no doubt that the transaction would constitute or involve an expenditure by the company of a portion of its share capital.

It is difficult to see any distinction between this construction of the transaction and that provided for in the agreement with which we are concerned.

It follows that the conclusion to which the judge a quo came is correct and that the issue of shares by a company for the acquisition of an asset constitutes expenditure for the purposes of section 11(gA) of the Income Tax Act.

The appeal should therefore be dismissed with costs.

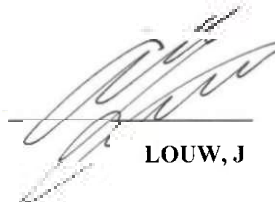


SAPIRE, A J

We agree and it is so ordered.



WEBSTER, J



LOUW, J