**IN THE SUPREME COURT OF SOUTH AFRICA**

**(APPELLATE DIVISION)**

CASE NUMBER: 612/88

In the matter between:

**THE COMMISSIONER FOR INLAND REVENUE** APPELLANT

and

**NEIL BOWMAN N.O** RESPONDENT

**Coram:** CORBETT CJ, SMALBERGER *et* MILNE JJA, FRIEDMAN *et* GOLDSTONE AJJA.

Date heard: Monday 19 March 1990

Date delivered: Tuesday 27 March 1990

J U D G M E N T

GOLDSTONE AJA:

Texchange (Pty) Limited (the company) rendered income tax returns to the appellant which reflected fictitious income. This case concerns those returns rendered for the 1977 to 1982 years of assessment. The company received income tax assessments from the appellant based upon such returns. In respect of each of those years the company had no taxable income. The amounts, as assessed, were paid by the company. No objection to any of the assessments was ever made by the company.

The company was subsequently liquidated by order of the Witwatersrand Local Division of the Supreme Court. The respondent is the liquidator of the company. He claimed repayment from the appellant of each of the amounts paid by the company to him pursuant to the aforementioned assessments. He did so on the basis that the payments constituted dispositions not for value. He alleged in his summons that they are liable to be set aside in terms of section 26(1) of the Insolvency Act, No. 24 of 1936 (the Insolvency Act). It is there provided that:

> "26(1) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent -
>
> (a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;

(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities;

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess."

Section 26 of the Insolvency Act is made applicable to companies in liquidation by the provisions of section 340 of the Companies Act, No. 61 of 1973.

An exception that the summons was bad in law and lacked averments necessary to sustain an action was dismissed. With leave of the Court a quo (De Klerk J), an appeal against that decision is now before us. The judgment of the Court a quo has been reported in 1989 (4) SA 63 (W) as Bowman NO v Kommissaris van Binnelandse Inkomste.

The first ground of appeal argued by counsel for the appellant was that, having regard to the provisions of the Income Tax Act, No 58 of 1962 (the Act), the company did receive value for its payments, viz. its release from a lawful obligation to pay to the appellant the amounts assessed by him. In support of this ground of appeal we were referred to the judgment of Watermeyer CJ in Estate Jager v Whittaker and Another 1944 AD 246 where at 250/1 the learned Chief Justice said the following:

> " The words 'disposition not made for value' mean, in their ordinary signification, a disposition for which

no benefit or value is or has been received or promised as a quid pro quo. The most obvious example of such a disposition is a donation and if we call to mind the definition of a donation given in Digest (50.17.82) donari videtur quod nullo jure cogente conceditur, it would appear prima facie that any payment, purporting to be made solely in discharge of an existing obligation, is in effect a donation if no obligation to make such payment in fact exists. If a lawful obligation to pay the money in fact exists, then the obvious benefit which the payer receives in return for such payment is a discharge from his liability to pay. Such a payment decreases his assets but at the same time it diminishes his liabilities, and in transactions which are entered into in the ordinary course of business such a discharge from a liability would be value for the payment made. For the purposes of this case, it is unnecessary to consider what the legal position would be if the obligation which is discharged arises from a promise to donate or a promise made in return for an inadequate consideration."

I would immediately observe that in the present case the payments were made in circumstances where there was no underlying obligation to pay any amounts at all to the appellant. There was no income earned by the company and therefore no normal income tax was assessable or payable under the Act: section 5; and see the authorities referred to in Secretary for Finance v Esselmann 1988 (1) SA 594 (SWA) at 599 D - 600 D. The present is thus a situation similar to those expressly left out of consideration by Watermeyer CJ.

In Goode, Durrant and Murray Ltd v Hewitt and Cornell NNO 1961 (4) SA 286 (N) Fannin J said at 291 F that:

" Whether an insolvent has received 'value' for a disposition must be decided by reference to all the circumstances under which the transaction was made."

The passage in which that _dictum_ appears was cited with approval in this Court in _Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Company Ltd_ 1965 (2) SA 597 (A) at 604 B - D; and _Umbogintwini Land and Investment Co (Pty) Ltd (In Liquidation) v Barclays National Bank Ltd and Another_ 1987 (4) SA 894 (A) at 912 H - 913 B; and see _Swanee's Boerdery (Edms) Bpk (In Liquidation) v Trust Bank of Africa Ltd_ 1986 (2) SA 850 (A) at 859 F - I.

In having regard to all the circumstances under which the transaction was made, I am of the view that one must seek the substance rather than the form thereof. In the case before us, on the facts alleged in the summons, in substance no income tax was payable by the company to the appellant. The payments, therefore, did constitute dispositions of property not made for value. To use the words of Watermeyer CJ in the passage from Jager's case, cited above, "no benefit or value is or has been received or promised as a quid pro quo". The first ground of appeal advanced by counsel must be rejected.

It was then submitted on behalf of the appellant that the provisions of the Act are such as to make assessments of income tax final and conclusive, not only as against the taxpayer but also, on insolvency, as against a liquidator or trustee. In this regard we were referred to the following provisions of the Act:

section 77(1) which provides that all assessments required to be made under the Act shall be made by the Commissioner or under his direction;

section 78(1) which enables the Commissioner to estimate a person's taxable income where such person is in default in furnishing any return or information or the Commissioner is not satisfied with the return or information furnished by any person;

section 81(1) which provides for objections to be made to assessments and section 81(5) which provides that where no objection is made to any assessment, subject to the right of appeal, it becomes final and conclusive;

section 83 which provides for appeals against decisions of the Commissioner to a special court for hearing income tax appeals;

section 88 which provides that pending an appeal the obligation to pay income tax shall not, unless the Commissioner so directs, be suspended;

section 89(1) in terms of which the Commissioner determines the date upon which income tax chargeable shall be paid;

and section 89(2) in terms of which interest becomes payable on overdue payments;

section 91(1)(a) which deems income tax payable to be a debt due to the State; and section 91(1)(b) which empowers the Commissioner, where income tax or interest has not been paid, to file with the clerk or registrar of any competent court a certified statement setting forth the amount of income tax or interest due and provides that such statement thereupon has the effect of a civil judgment;

section 92 which makes it incompetent for any person in any proceedings in connection with any statement filed in terms of section 91(1)(b) to question the correctness of any assessment on which such statement is based, notwithstanding that objection and appeal may have been lodged thereto;

section 94 which provides that the production of any document under the hand of the Commissioner purporting to be a copy of an extract from any notice of assessment shall be conclusive evidence of the making of such assessment and, except in the case of appeal proceedings, shall be conclusive evidence that the particulars of such assessment are correct;

section 102(1) providing for repayment of income tax proved to the satisfaction of the Commissioner to have been overpaid; and section 102(2) which provides that the Commissioner may not authorize such repayment unless the claim therefor is made within three years after the date of the assessment in question.

It would be strange, submitted the appellant's counsel, if against the background of all these provisions, it was open to a liquidator or trustee to reopen assessments to which there never has been an objection. Indeed, so the submission ran, if a liquidator or trustee could do so, it would have the result of enabling an assessment to be reopened ten or even twenty years after it had become final and conclusive under the provisions of the Act. It was further submitted that the provisions of the Act must be deemed to have overridden the provisions of section 26(1) of the Insolvency Act.

That submission, although an attractive one, in my judgment cannot be upheld. All of the provisions of the Act mentioned by counsel clearly refer to the Commissioner and the taxpayer. As between them an assessment becomes final and conclusive in the absence of objection. That is the effect of section 81(5) of the Act: Irvin and Johnson (SA) Ltd v Commissioner for Inland Revenue 1946 AD 483 at 499/500; Miller v Commissioner for Inland Revenue (SWA) 1952 (1) SA 474 (A) at 483 A - F; Turnbull v Commissioner for Inland Revenue 1953 (2) SA 573 (A) at 582 G - H.

An assessment to which no objection has been made would undoubtedly become final and conclusive also against persons privy to the taxpayer, eg. his executor. However, the liquidator of a company is not privy to the company in liquidation. He is a third party. Thus, for example, where a company has acted unlawfully, the in pari delicto rule cannot be relied upon against a liquidator in answer to a statutory claim such as that created by section 26 of the Insolvency Act: Visser en 'n Ander v Rousseau en Andere NNO 1990 (1) SA 139 (A) at 159 E - H. So, too, he is not bound by a judgment against the company to which he is not a party: a plea of res judicata cannot be raised against him: Swadif (Pty) Ltd v Dyke NO 1978 (1) SA 928 (A) at 945 B - E. An assessment, after all, is "a mental act in the nature of a decision" per Schreiner JA in Irvin and Johnson (SA) Ltd v Commissioner of Inland Revenue (supra) at 494, and becomes binding upon the taxpayer as a statutory obligation. A liquidator is not a party thereto and it follows, in my opinion, that it is not binding upon him. There is nothing in the Act which, in any way, is inconsistent with the provisions of section 26(1) of the Insolvency Act and there is consequently no basis upon which the latter can be said to have been overridden by the former.

It was argued further that, in terms of the Act, the only manner in which an assessment can be questioned is by way of objection under section 81 and appeal under section 83. For that submission counsel relied on the judgment of Steyn JA in Whitfield v Phillips and Another 1957 (3) SA 318 (A) at 345 F - H. The issue there under consideration was whether damages awarded by the court would constitute a capital accrual or income. The learned Judge of Appeal said this:

> "In dealing with the question whether the award is for income tax purposes to be regarded as a capital accrual or as income, the very first difficulty which would be

encountered would be that by Act of Parliament the determination of the merits of that question, as distinct from a question of law, has been entrusted entirely to the Commissioner for Inland Revenue and, on appeal from his decision, to the Special Court for hearing income tax appeals. Another court cannot usurp that function. No other court can interfere with the decision of the Commissioner, except on appeal from the Special Court, nor will any court interfere with the decision of the Special Court except where, on the facts, no reasonable person could have arrived at the finding of the Special Court. (Commissioner for Inland Revenue v Paul, 1956 (3) SA 335 (AD) at p 340; Durban North Traders Ltd v Commissioner for Inland Revenue, 1956 (4) SA 594 (AD) at p 599). A court other than the Special Court cannot, therefore, give any definite answer to this question without substituting its own decision for that of the only competent authorities."

The present case is distinguishable. Here the respondent has not sought to have anyone other than the Commissioner make an assessment. The amounts of the assessments are not attacked. The respondent concedes that on the returns made by the company, it was correctly assessed by the appellant. The issue here relates to the question as to whether the payment of those assessments amount to dispositions not made for value. That is not a question which lies within the competence of the Commissioner or the Special Court to determine. The decision of the full bench of the Eastern Cape Division in Van Zyl NO v The Master and Another 49 SATC 165 is distinguishable on a similar basis. It is unnecessary in this appeal to consider the question which could arise if a liquidator sought, under section 26(1) of the Insolvency Act, to have a portion and not the whole of an assessment set aside as a disposition not made for value.

Counsel's fear of a liquidator or trustee seeking to reopen an assessment some ten or more years after it was made is based upon a remote and unlikely event. In the first place, a disposition can only be set aside as one not for value where at the time it was made the insolvent's liabilities exceeded his assets. It would be most unusual for a person or company to carry on business in insolvent circumstances for so long a period of time. Secondly, there is the further consideration that the Legislature, in enacting section 26(1) of the Insolvency Act, appears to have contemplated that a lengthy period of time might elapse between the date of the disposition and the date on which a trustee might seek to set it aside. I refer here to the provision in section 26(1) for a shifting of the onus of proof of insolvency from the person who benefited from the disposition to the trustee (or liquidator) where the disposition took place more than two years prior to sequestration (or liquidation).

It follows, in my judgment, that the second ground of appeal argued by counsel for the appellant also cannot be upheld.

It remains to consider the suggestion made by De Klerk J that a payment of income tax can never be the subject-matter of a claim made under section 26(1) of the Insolvency Act. The approach of the learned Judge was the following. The obligation to pay income tax is created by legislation in order to provide the State with the necessary funds to administer the country and to provide services for its citizens. At least some of those services are of value to every taxpayer. As was stated in Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Co Ltd (supra), the word "value" in section 26 of the Insolvency Act is not confined to a monetary or tangible consideration. In consequence of the aforegoing, the Legislature could not have intended that the payment of income tax could form the subject of an enquiry under section 26 as to whether the payment of assessed income tax was or was not for value.

I do not agree with this approach. The benefit which a taxpayer may enjoy from the manner in which the State spends revenue collected by the Commissioner appears to me to be too speculative and tenuous to be regarded as "value" within the meaning of section 26(1) of the Insolvency Act. There is no reason why the provisions of the section should not apply to the payment of income tax which in fact was not assessable or payable.

The appeal is dismissed with costs. Such costs are to include those occasioned by the employment of two counsel.

R.J. Goldstone

GOLDSTONE AJA

CORBETT CJ )
)
SMALBERGER AJ )
) CONCUR
MILNE AJ )
)
FRIEDMAN AJA )