THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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The Commissioner for The South African Revenue Service v Spur Group (Pty) Ltd (Case no 320/20) [2021] ZASCA 145 (15 October 2021)

Today the Supreme Court of Appeal (SCA) handed down judgment upholding the Commissioner's appeal against the order of the Western Cape Division of the High Court, Cape Town (the high court).

The issue for determination by the SCA was whether the high court correctly held that there was a sufficiently close causal link that existed between the respondent's expenditure of a contribution of R48 million and its income producing operations so as to qualify for a deduction under s 11*(a)* of the Income Tax Act 58 of 1962 (the ITA), in respect of the respondent's 2005 to 2012 years of assessment. A further issue for determination, if it was found that the connection was not sufficiently close, was whether the statutory periods in terms of s 99(1) of the Tax Administration Act 28 of 2011 (the TAA), for the respondent's 2005 to 2009 years of assessment, had prescribed and whether the Commissioner was therefore precluded from raising additional assessments for those years.

The respondent, the main operating entity in the Spur Group of companies, is a wholly owned subsidiary of Spur Corporation Limited (Spur HoldCo). In 2004, the Spur Group including the respondent and Spur HoldCo, implemented a share incentive scheme (the scheme), in terms of which the respondent's eligible employees (the participants) would be afforded the opportunity of participating in that scheme. The purpose of the scheme was to promote the continued growth and profitability of the respondent. A discretionary trust was then established to implement and regulate the scheme. Spur HoldCo was the sole capital and income beneficiary. In furtherance of the scheme, the trust incorporated Maxshell 72 Investments (Pty) Ltd (NewCo). The participants were then offered the opportunity to acquire ordinary shares in NewCo in proportions determined by Spur HoldCo. The Trust Deed was amended, at a later stage, to permit the participants to benefit from dividends received by the trust. However, Spur HoldCo remained the sole capital beneficiary. In December 2004 the respondent contributed R48 million to the trust. In that same month, the trust subscribed for NewCo preference shares, amounting to approximately R48 million in aggregate, to be acquired by NewCo. The respondent then claimed the contribution of R48 million it made to the trust as a deduction against its income in terms of s 11*(a)* of Income Tax Act 58 of 1962 (the ITA).

Initially, the respondent allowed the claimed deduction. However, following an audit, the respondent disallowed the deductions, and brought the deductions back into account as additional taxable income. Before the SCA, the Commissioner submitted that the contribution was not expenditure incurred in the production of the respondent's income as required by s 11*(a)* of the ITA, and that there was only an indirect and insufficient link between the expenditure and any benefit arising from the incentivisation of the respondent's key staff.

The SCA found that the participants neither benefitted directly or indirectly from the making of the contribution. The chief financial officer and director of the respondent had testified that the fact that the scheme did not permit the participants to share in the R48 million contribution, was known to her as a participant. Furthermore, the respondent's tax practitioner confirmed that the purpose was always for the R48 million to remain within the Spur Group and not to transfer it to the participants. As a result, the SCA held that the contribution was not sufficiently closely connected to the business operations of the respondent such that it would be proper, natural and reasonable to regard the expense as part of the respondent's costs in performing such operations.

With regard to the issue of whether the Commissioner was precluded from raising additional assessments due to prescription, the SCA found that the respondent had not made truthful disclosures in its return for the 2005 to 2009 years of assessment. As a result, the Commissioner was not alerted to the existence of the contribution of R48 million. This persisted until the true position was picked up in the course of an audit, which was only in respect of the 2011 tax year, which then resulted in the additional assessments. The SCA held that the misrepresentations and non-disclosures by the respondent caused the Commissioner not to assess the respondent correctly within the three-year period after the original assessments. The SCA therefore made an order upholding the Commissioner's appeal with costs, including those of two counsel, and confirmed the Commissioner's assessments against the respondent in respect of the 2005 to 2012 years of assessment.

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