IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No.: **A395/07**

In this matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES — Appellant

and

WOOLTRU PROPERTY HOLDINGS (PTY) LIMITED — Respondent

JUDGMENT DELIVERED ON 7 AUGUST 2008

YEKISO, J

[1] The crux issue which calls for determination in this appeal is whether a recoupment of certain tax allowances, which the appellant contends were granted to the respondent, can arise in the respondent's hands or whether such tax allowances were granted to and claimed by a different company other than the respondent. The court *a quo* accepted the respondent's contention that such tax allowances were granted to and claimed by a

different company and thus cannot arise in the respondent's hands or recoupable in the respondent's hands.

FACTUAL BACKGROUND TO THE DISPUTE

[2] The disputed recoupment arises from an agreement of lease concluded between the Municipality of Cape Town and the Wooltru group of companies on 23 March 1982. In terms of the lease agreement, one of the subsidiaries in the Wooltru group of companies, namely, Wooltru Properties (Pty) Ltd ("Wooltru Properties") which was subsequently renamed Wooltru Property Investments (Pty) Ltd ("Wooltru Property Investments"), acquired leasehold rights in respect of a site known as "the Mayor's Garden", the latter being a site on which the group's headquarters in Cape Town are situate. In terms of a further term of the lease agreement, Wooltru Properties or its successor-in-title, was required to effect certain leasehold improvements to the leased property. Once the lease agreement was concluded, Wooltru Properties paid a lease premium in respect of the lease and subsequently effected certain improvements to the leased property. Because of this expenditure, Wooltru Properties became entitled to claim and did claim deductions allowable in terms of sections 11(f) and 11(g) of the Income Tax Act, 58 of 1962 ("the Income Tax Act") in respect of the premium paid and the improvements so effected. For the period January 1983 upto 30 June 1991 Wooltru Properties and/or Wooltru Property Investments claimed and was granted deductions in respect of the lease premiums paid and improvements made in the total amount of R24,522,112.

[3] As pointed out in the preceding paragraph, on 30 June 1991 Wooltru Properties changed its name to Wooltru Property Investments (Pty) Ltd ("Wooltru Property Investments"). The change in name was pursuant to an application by Wooltru Limited, the holding company within the Wooltru group of companies, to rationalise its property-owning subsidiaries and property portfolio in terms of the provisions of section 48 of the Taxation Laws Amendment Act, 87 of 1988. The rationalisation application was approved on 26 November 1991. Amongst other changes in the Group's operations, pursuant to this application, was a transfer of leasehold rights in terms of the lease, from Wooltru Properties (subsequently changed to Wooltru Property Investments) to Wooltru House Properties (Pty) Ltd ("Wooltru House Properties"). For the period 30 June 1992 to 30 June 1997, Wooltru House Properties, as it was then the holder of leasehold rights in terms of the lease, claimed allowances in respect of further improvements effected on the leased property in the total amount of R26,405,969. The allowances were claimed as allowable deductions in terms of section 11(f) and 11(g) of the Income Tax Act.

[4] In 2001 Wooltru House Properties, into which the leasehold rights were transferred on 30 June 1991, went into voluntary liquidation. Once liquidated, its leasehold rights in terms of the lease were transferred to Wooltru Property Holdings (Pty) Ltd ("Wooltru Property Holdings") as a liquidation distribution *in specie* at a value of R82,505,092. The distribution *in specie* thus constituted income of a capital nature, as opposed to income

of a revenue nature, and thus not liable to taxation. Wooltru Property Holdings, in turn, disposed of the leasehold rights distributed to it, as disposal of a capital asset, to a third party at a consideration of R99,99m. The Commissioner treated the disposal of leasehold rights as recoupment by Wooltru Property Holdings of the expenditure in an amount of R50,928,081, being the total amount of deductions claimed for the period January 1983 upto June 1991 and further deductions claimed for the period 30 June 1992 upto 30 June 1997. The Commissioner thus included the amount of R50,928,078 in the gross income of Wooltru Property Holdings on the basis that it constituted a recoupment as contemplated in section 8(4)(a) of the Income Tax Act. Section 8(4)(a) of the Income Tax Act, as far as is relevant in these proceedings, provides as follows:

> "There shall be included, in the taxpayers income, all amounts allowed to be deducted or set off under the provisions of section 11 to 20 inclusive...... which have been recovered or recouped during the current year of assessment."

[5] Prior to 1989, and up to and including the year of assessment ending 30 June 1991, the income and expenditure of the operating companies comprising the Wooltru property-owning sub-group within the Wooltru group of companies, rendered a consolidated income tax return to the appellant in the name of Wooltru Properties. This was an extra statutory arrangement negotiated with and approved by the appellant. This practice was resorted to as a practical method of reducing the tax compliance burden upon the sub-group of property owning companies. The respondent contends that the effect of this arrangement was nothing more than to permit the reporting of the income and expenditure of the relevant

companies in a single tax return. The respondent contends further that the income and expenditure of the relevant companies remained their income and expenditure, that the tax liability of the relevant companies remained their tax liability and that the practice resorted to was a mere administrative convenience to ease the burden of having to file separate tax returns in respect of each individual property owning company.

[6] On 31 August 1991 Wooltru Limited, the respondent's holding company within the Wooltru group and associated companies, applied to the appellant for a rationalisation exemption in terms of the provisions of section 48 of the Taxation Laws Amendment Act, 87 of 1988, as amended by section 26 of the Taxation Laws Amendment Act, 1989 (the Taxation Laws Amendment Act). The intention and the effect of the proposed rationalisation was to rationalise the Wooltru property sub-group which, at that time, consisted of numerous property-owning companies. Wooltru Properties was the holding property-owning company in the group, either through direct ownership of property or indirectly through its shareholding in its subsidiaries. The rationalisation application was approved by the appellant.

[7] The following changes were effected in the rationalisation process:

[7.1] The respondent's name was changed from Woolworths (Strand Street) Properties (Pty) Ltd and thenceforth became known as Wooltru Property Holdings (Pty) Ltd. This latter company is the respondent in this appeal;

[7.2] Wooltru Properties transferred the Wooltru House lease and the leasehold improvements to Wooltru House Properties. Thus, the parties to this transaction were Wooltru Properties and Wooltru House Properties. For purposes of this transaction Wooltru Properties and Wooltru House Properties were, in terms of section 48(5) of the Taxation Laws Amendment Act, deemed to be one and the same company to obviate potential payment of transfer and stamp duty. The right to claim deductions in terms of sections 11(f) and 11(g) of the Income Tax Act, which initially accrued to Wooltru Properties had, as a result of this rationalisation process, accrued to Wooltru House Properties. As pointed out in paragraph [3] of this judgment, for the period 30 June 1992 to 30 June 1997, Wooltru House Properties claimed and there was allowed from the gross income of Wooltru House Properties deductions in an amount of R26,405,969 in respect of further improvements effected on the leased property.

[8] The approval of the rationalisation application by the appellant was conveyed to Wooltru Limited by way of the appellant's letter dated 26 November 1991. In paragraph 6 of the appellant's letter, the pre-existing practice of returning income was approved as follows:

> "The current method of returning the income and expenditure of the subsidiary property owning companies of Wooltru Properties (Pty) Limited may continue and all the income and expenditure of the subsidiaries of Wooltru Property Holdings may be accounted for in the tax return of Wooltru Property Holdings (Pty) Limited, provided that for every year of assessment, a balance sheet is

nevertheless submitted for each of the affected subsidiaries." (The emphasis are mine.)

[9] I have already been pointed out in paragraph [4] of this judgment, Wooltru House Properties was liquidated during the course of 2001. Once liquidated, the leasehold rights in respect of the leased property were transferred from Wooltru House Properties (in liquidation) to Wooltru Property Holdings as a liquidation distribution. Wooltru Property Holdings, in turn, disposed of the leasehold rights to a third party for a consideration of R99,99m. Once Wooltru Property Holdings had disposed of the leasehold rights to a third party, the appellant became of the view that the allowances previously granted to Wooltru Properties and, later, to Wooltru Property Investments and, ultimately, Wooltru House Properties, were recovered through a sale of the leasehold rights to a third party and thus recoupable in the hands of the respondent, Wooltru Property Holdings. It is on the basis of this disposition that the appellant contends that the allowances, since recovered according to the appellant's contention, are recoupable in the hands of the respondent. On the other hand, the respondent contends that no recoupment in its hand is possible as it neither claimed, on its own behalf, nor has it ever been granted, in its own right, the allowances in question which the appellant contends were deducted by it. The Court *a quo* accepted the respondent's contention that the allowances are not recoupable in its hands, set aside the assessment and referred the matter back to the appellant for re-assessment.

[10] And finally, by way of background material, in its annual financial statement for the year of assessment ending 30 June 2000, Wooltru Property Holdings, the respondent in this appeal, provided for a deferred tax liability in an amount of R15,278,424, but the respondent contends that this did not represent a tax liability claimed by it in previous years. The respondent contends that the fact that this potential tax liability was raised in its annual financial statements, did not in any way detract the fact that the tax allowances concerned were not claimed by it on its own behalf.

[11] What I have stated in the preceding paragraphs constitutes background material to the litigation between the parties which culminated in the adjudication of the issues in dispute in the Tax Court. In the Tax Court, apart from the *viva voce* evidence of Prof Alexandra Watson, an associate professor in the accounting department at the University of Cape Town, whose evidence was intended to show that provision for the deferred tax liability should not have been included in the balance sheet of Wooltru Property Holdings because of the absence of the underlying asset from which the recoupment would be sourced, and also the fact that deferred tax is an accounting concept which has no cash flow implication, the matter was otherwise argued in the Tax Court on the basis of a statement of agreed facts drawn and agreed to by the parties. The statement of agreed facts is rather a lengthy document which has been cited in full in the judgment of the Court *a quo*. I do not propose to cite the relevant agreed statement of facts in full in this judgment except to refer to portions thereof,

in the course of this judgment, which are relevant for purposes of determination of issues in dispute.

[12] It is on the basis of the background set out in the preceding paragraphs, much of which is included in the statement of agreed facts, and the *viva voce* evidence of Prof Alexandra Watson, that the Tax Court found in favour of the respondent by setting aside the appellant's assessment for the year of assessment ending 30 June 2001, simultaneously ordering the remission of the matter to the appellant for re-assessment.

[13] It is against the finding of the Tax Court referred to in the preceding paragraph that the appellant noted an appeal to the Full Bench of this Court on the basis that:

[13.1] The Tax Court erred in finding that, despite the agreement that the respondent would annually render a single tax return, in its own name, reflecting all the income and expenditure in respect of properties held by itself and by its subsidiaries, such income had accrued to each such subsidiary and that such expenditure, as may have been incurred, had been incurred by each such subsidiary;

[13.2] The Tax Court erred in finding that the section 11(g) allowance claimed by Wooltru Property Holdings, totalling R26,405,969, had not been

claimed and granted to Wooltru Property Holdings, but rather claimed and granted to its subsidiary, Wooltru House Properties;

[13.3] That the Tax Court should have held, that upon the sale by Wooltru Property Holdings of the leasehold rights during the year of assessment ending 30 June 2001, there was a recoupment, by Wooltru Property Holdings, of the section 11(g) allowances in an amount of R26,405,969 which it had claimed and been granted in respect of the leased property.

[13.4] That by virtue of the provisions of section 48(5) of the Taxation Laws Amendment Act, read with the Commissioner's letter of approval dated 26 November 1991, the Tax Court should have found that, upon disposal by Wooltru Property Holdings of the leasehold rights to a third party, Wooltru Property Holdings was required to include in its gross income for the year of assessment ending June 2001, section 11(g) allowances in an amount of R24,522,112 previously claimed by and granted to its predecessor, Wooltru Property Investments.

THE PARTIES' SUBMISSIONS

[14] The submissions by *Mr Rogers* SC, for the appellant, supplemented by oral argument in court during the hearing of this appeal, boils down to this:

The arrangement in terms of which Wooltru Property Investments, and after it Wooltru Property Holdings (the respondent), declared all the income and

expenditure of its subsidiaries as its own, must have been one in which Wooltru Property Holdings and the then Commissioner of Inland Revenue (now South African Revenue Service) acknowledged that all income and expenditure reflected in Wooltru Property Holdings' (the respondent) returns had accrued to and had been incurred by Wooltru Property Holdings; that the effect of the approval for rendition of a consolidated income tax return is, as between the Wooltru group of companies and the South African Revenue Service, that the subsidiaries, whose income and expenditure was included in the consolidated income tax return, meant that the subsidiaries were regarded as conducting business as nominees or agents for Wooltru Property Investments, and after it, Wooltru Property Holdings, with all the income and expenditure of such subsidiaries being attributable to Wooltru Property Investments and, after it, Wooltru Property Holdings.

[15] On the other hand the submissions by *Mr Emslie* SC, for the respondent, similarly supplemented by oral argument in court during the hearing of this appeal, are that the allowances which are the subject of the proposed recoupment, were in law granted, claimed and deducted by Wooltru House Properties and, before it, Wooltru Properties and/or Wooltru Property Investments; that the leasehold rights of Wooltru House Properties under the relevant lease were subsequently distributed by Wooltru House Properties to Wooltru Property Holdings, for no consideration, as a liquidation distribution *in specie* and that when the said rights under the relevant lease were sold by Wooltru Property Holdings (the

respondent) to a third party, no recoupment was possible in the hands of Wooltru Property Holdings as it had neither claimed, on its own behalf, nor had it ever been granted, in its own right, the allowances in question, which were, as a matter of fact, claimed by and granted to Wooltru House Properties and before it, Wooltru Properties and/or Wooltru Property Investments.

EFFECT OF CONSOLIDATION OF INCOME

[16] For some time prior to 1989, as has already been pointed out elsewhere in this judgment, the operating companies comprising the Wooltru properties sub-group in the Wooltru group of companies, rendered a consolidated income tax return to the then Receiver of Revenue in the name of Wooltru Properties. It appears that the concession was negotiated with and was approved by the then Commissioner of Inland Revenue. It further appears that the then Commissioner approved this concession as a practical method of reducing the tax compliance burden upon the property group within the Wooltru group of companies. Neither the original nor a copy of this concession could be found at both the offices of the appellant or at the offices of the respondent, but it appears to be accepted by the parties that the practice had been in existence for quite some time prior to the application for a rationalisation exemption in terms of the provisions of section 48 of the Taxation Laws Amendment Act. The appellant was requested to confirm this practice, which had existed for quite sometime prior to 1989, in its response to the rationalisation

application in terms of section 48 of the Taxation Laws Amendment Act lodged with the appellant under cover of a letter dated 31 August 1991.

[17] Paragraph 6 of the appellant's letter of 26 November 1991 cited in paragraph [8] of this judgment, is worth repeating. In its letter of approval of the rationalisation scheme dated 26 November 1991, the appellant made the following ruling as regards this pre-existing practice:

> "The current method of returning income and expenditure of the subsidiary property-owning companies of Wooltru Properties (Pty) Ltd may continue and all the income and expenditure of the subsidiaries of Wooltru Property Holdings may be accounted for in the tax return of Wooltru Property Holdings (Pty) Ltd, provided that for every year of assessment, a balance sheet is nevertheless submitted for each of the affected subsidiaries." (Further emphasis added are mine)

[18] What is explicit in this letter of approval is the confirmation of the then existing "current method" of "returning the income and expenditure of the subsidiary property-owning companies of Wooltru Properties (Pty) Ltd" that was to continue after the approval of the property rationalisation scheme within the Wooltru group of companies. What is further explicit in this part of the appellant's ruling is that the relevant property-owning subsidiaries would continue to carry on trade except that, instead of rendering their individual tax return in respect of income, received or accrued, and expenditure incurred, such income, received or accrued, and expenditure incurred, would be transferred to the holding company, Wooltru Property Holdings, in order that it be accounted for in the consolidated income tax return to be returned

by Wooltru Property Holdings. Neither the income, nor the expenditure, ceased to be that of the subsidiary property-owning companies merely because it was being returned by the holding company. The income, received or accrued, and any expenditure which may have been incurred, remained that of the individual subsidiaries. What is further explicit in terms of this "current method" of returning income is that, in the first instance, the income should first have been received or accrued and the expenditure should have been incurred, before such income, and any expenditure which may have been incurred, before transfer thereof to the holding company in order to be accounted for and be returned. Income and expenditure was merely being transferred to the holding company in order that it be accounted for, by the holding company, in the consolidated tax return. The tax liability remained that of the individual property-owning subsidiaries. It was only after such income was received or had accrued, and the expenditure had been incurred, that it was transferred to the holding company in order to be accounted for in the consolidated tax return. How income and expenditure from each subsidiary was accounted for in the consolidated return does not detract from the fact that such income and expenditure was initially received and accrued to each such subsidiary before being transferred to the holding company in order that it be accounted for in the consolidated tax return.

[19] It is trite that the taxpayer is taxed on the income he or she receives or which accrues to him or her during the year of assessment. The same principle applies in as far as expenditure and allowable deductions are

concerned. Section 11(a) of the Income Tax Act permits a deduction of expenditure and losses actually incurred by the tax payer during the year of assessment provided that such expenditure was incurred in the course of production of income, not being of a capital nature.

[20] The effect of the appellant's ruling in terms of paragraph 6 of its letter dated 26 November 1991 clearly did not mean that the property-owning subsidiaries ceased to carry on trade. This is implicit in the appellant's ruling in its letter dated 26 November 1991 that "all the income and expenditure of the subsidiaries of Wooltru Property Holdings may be accounted for in the tax return of Wooltru Property Holdings", the proviso being that "for every year of assessment, a balance sheet is nevertheless submitted for each affected subsidiary". This therefore means that the affected subsidiaries continued to carry on trade, either receiving income or sustaining losses, as the case may be, and incurred expenses in the process of carrying on such trade. Section 5(1)(d) of the Income Tax Act provides:

> "Subject to the provisions of the Fourth Schedule, there shall be paid annually for the benefit of the National Revenue Fund an income tax ... ... in respect of the taxable income received or accrued to or in favour of –
>
> (a) ....
>
> (b) ....
>
> (c) ....
>
> (d) Any company during every financial year of such company."

Thus, despite the appellant's ruling contained in paragraph 6 of its letter dated 26 November 1991, the affected subsidiaries continued to carry on

trade, received income in the process and thus became liable to taxation in terms of section 5(1)(d) of the Income Tax Act.

[21] It is contended in the appellant's submissions that the effect of the approved arrangement amounted to, as between the Wooltru group and the appellant (SARS), that the subsidiaries would be regarded as conducting business as nominees or agents for, initially, Wooltru Properties and/or Wooltru Property Investments and, thereafter, Wooltru Property Holdings. There is no merit in this contention. The affected subsidiaries did not become dormant because of the arrangement nor were they de-registered. They continued carrying on trade in their own right except that their income, either after receipt or accrual thereof, and any expenditure which may have been incurred, was transferred to the holding company in order that it be accounted for, on their behalf, in the consolidated tax return.

[22] The recordals at pp 308, 322 and 335 of the record to the effect that "(n)o income statement has been prepared as all the income and expenses of the company have been borne by the holding company, Wooltru Property Holdings (Proprietary) Limited" cannot be correct as such income, as may have been received or accrued, was transferred to the holding company after receipt or accrual thereof. In such circumstances, the provisions of section 5(1)(d) of the Income Tax Act do apply in the absence of any clear evidence that the affected subsidiaries antecedently divested themselves of any income on basis of which they would be liable to taxation. Such clear evidence, at the very least, would be by way of a resolution of the board of directors,

that the company antecedently divests itself of any income, not being of a capital nature, from whatever source, in the course of trade.

[23] Liability for taxation, once income has either been received or accrued, is best illustrated in *CIR v The Witwatersrand Association of Racing Clubs* 1960(3) SA 291(A), 23 SATC 380. In this case the taxpayer held a horse race with a view to donating the profit to a charitable organisation. From the start it had been the intention to donate the profit to charity. The court held that the moral duty to hand over the profits to charity did not alter the fact that the benefit had first accrued to the taxpayer before it was given to charity. The same principle applies in the instance of this matter. The income which was transferred to the holding company in order that it be accounted for in the consolidated tax return, first accrued to the affected subsidiaries before transfer thereof to the holding company. Once such income had been received or accrued to each one of such subsidiaries, each one of them became liable to be taxed thereon.

[24] By way of contrast, in *ITC 1415, 48 SATC 179*, a minister of religion managed to successfully antecedently divest himself of his monthly salary which was paid on the 17th of each month. To augment his congregation's funds, the minister periodically renounced part of his salary. Such renunciation was effected by written instruction given to the cashier before the 17th of each month. Revenue agreed that the minister had not received the renounced part of his salary. However, Revenue argued that

the entire amount, which included the renounced portion of his salary, had accrued to him. The court, per Kriegler J, held that the minister had no right to claim his salary before the 17th. His remuneration always took place before that date and, consequently, no accrual had arisen.

[25] At pages 198 and 217 of the record, and in respect of the 1994 and 1995 income tax returns of the affected subsidiary, there is recorded in respect of the affected subsidiaries "the income and expenditure in relation to which has been ceded to Wooltru Property Holdings (Pty) Ltd in terms of a moratorium agreement with Inland Revenue". Similarly, this recordal cannot be correct. There is absolutely no suggestion of a cession of income of the affected subsidiaries in the appellant's ruling contained in paragraph 6 of the letter dated 26 November 1991. All that paragraph 6 of the 26 November 1991 letter says is that "... all the income and expenditure of the subsidiaries of Wooltru Property Holdings may be accounted for in the tax return of Wooltru Property Holdings (Pty) Ltd, provided that for every year of assessment a balance sheet is nevertheless submitted for each of the affected subsidiaries". As I have already pointed out, there is absolutely no suggestion of a cession in this ruling. It cannot be accepted that the income of the affected subsidiaries was ceded to the holding company purely on the *ipse dixit* of the officials of the affected subsidiaries. The inclusion of the income of the affected subsidiaries in the consolidated tax return did not alter the fact that each such subsidiary did receive income, in its own right, and incurred expenses, in their own right, which expenses obviously would include such expenditure as may have been incurred in effecting improvements in the leased property.

[26] It therefore follows, in my view, that in the absence of clear evidence that each of the affected subsidiaries, had antecedently divested themselves of whatever income they may have received or may have accrued to them, they are liable to be taxed on such income from which, in the nature of things, would be deducted all allowable expenditure, including expenditure arising from the improvements effected.

THE RATIONALISATION OF PROPERTY PORTFOLIO

[27] Mention has already been made elsewhere in this judgment that in terms of the lease agreement concluded between the Municipality of Cape Town and the Wooltru group on 23 March 1982, Wooltru Properties acquired leasehold rights in respect of the leased property. In the rationalisation of the property portfolio within the Wooltru group of property-owning subsidiaries applied for in terms of section 48 of the Taxation Laws Amendment Act, the lease with the Municipality of Cape Town was transferred from Wooltru Properties (which was then known as Wooltru Property Investments) to Wooltru House Properties so that these two companies, in terms of section 48(5) of the Taxation Laws Amendment Act and per agreement with the then Commissioner for Inland Revenue, were deemed to be one and the same company. The allowances granted in terms of section 11(g) of the Income Tax Act, which were initially granted to and claimed by Wooltru Properties and/or Wooltru Property Investments, were thenceforth granted to and were subsequently claimed by Wooltru House Properties. In terms of the rationalisation scheme, Wooltru House Properties became a subsidiary of Wooltru Property Holdings. Wooltru

Property Holdings was not a party to the transfer of the lease from Wooltru Properties and/or Wooltru Property Investments to Wooltru House Properties.

[28] *Mr Rogers* makes a point in his submissions, correctly in my view, that if Wooltru House Properties had been the party which had sold the leasehold rights, it would have been a party which would have been liable to taxation or for the full recoupment of R50,928,081. This is so because Wooltru House Property is the party to whom leasehold rights were transferred under the section 48 rationalisation scheme and to whom the right to claim allowances in terms of section 11(g) was conferred. As the holder of leasehold rights and the party which would have effected any improvement on the leased property, it is only logical that it would have been the party liable to taxation in the event of recoupment.

[29] But *Mr Rogers* goes a step further by making a submission that since Wooltru Property Holdings is a party which had disposed of the leasehold rights and since paragraph 6 of the appellant's letter of 26 November 1991 was contained in the same letter which confirmed the applicability of section 48(5)(b) of the Taxation Laws Amendment Act to the transfer of the lease and the accompanying leasehold rights from Wooltru Properties and/or Wooltru Property Investments to Wooltru House Properties, the combined effect of paragraph 6 of the letter of 26 November 1991 and the rationalisation scheme was that Wooltru House Properties, which was deemed to be the same entity as Wooltru Property Investments, was

simultaneously accepted by the appellant as being the nominee of the real returner of income, Wooltru Property Holdings in this instance, and that Wooltru Property Holdings, as the principal of Wooltru House Properties, was implicitly deemed, for the purposes of section 11(g) allowances and recoupment, to be the same entity as Wooltru Property Investments. There is also no merit in this submission. This is because paragraph 6 of the appellant's letter of 26 November 1991 did not create a new concession in favour of Wooltru Property Holdings. It was a mere confirmation of the existing practice. In the second instance, Wooltru Property Holdings was neither a transferor or a transferee as contemplated in section 48(5)(b) of the Taxation Laws Amendment Act in regard to the transfer of the leasehold rights. Section 48(5)(b) of the Taxation Laws Amendment Act provide as follows:

> "For the purposes of the taxation levied under the Income Tax Act and notwithstanding anything to the contrary in that Act –
>
> ...
>
> (b) where any property sold or disposed of under an agreement contemplated in subsection (2) includes any building in respect of which any allowance has been granted to the transferor company under the said Act, the transferor company shall, for the purposes of calculating any allowance under the said act granted to the transferee company in respect of that building or for the purpose of determining whether any amount has been recouped in respect of the allowances granted to the two companies in respect of such building, be deemed to be one and the same company and any amount so recouped shall be deemed to be income derived by the company in the course of a trade carried on by it separately from any other trade carried on by it."

Wooltru House Properties was a subsidiary of Wooltru Property Holdings and the latter company was a single shareholder in Wooltru House Properties, no more, no less. Such an implication, as suggested by *Mr Rogers,* in my view, is neither a necessary one in the light of the facts pertaining to this matter nor is it consistent with the fundamental principle of tax liability set out in section 5(1)(b) of the Income Tax Act.

[30] For the reasons stated in the preceding paragraph, there similarly is no merit in the appellant's conclusion, in paragraph 20 of its submissions, that as between the Wooltru group of companies and the appellant, it was agreed that the property-owning subsidiaries would be regarded as "conducting business as nominees or agents for Wooltru Property Investments, and after it, Wooltru Property Holdings, with all income and expenditure being attributable directly to Wooltru Property Investments, and thereafter, Wooltru Property Holdings". As correctly pointed out by *Mr Emslie* in his submissions, supplemented by oral argument in the hearing of the appeal, the direct opposite is the case: Wooltru Property Holdings, as far as the returning of income and expenditure was concerned, was acting as the "agent" or "nominee" of Wooltru House Properties and other property-owning subsidiaries, to the extent that it accounted for their income and expenditure in its own income statement and in its own tax returns. This is so because this is what was agreed to by the appellant in paragraph 6 of its letter dated 26 November 1991. To the extent that the appellant suggests in its submissions, that the income and the expenditure of the subsidiaries had been ceded to Wooltru Property Holdings, it is difficult to conceive of a cession by an agent to its

principal, as the appellant contends that the property-owning subsidiaries, in carrying on trade, acted as the agents or nominees of Wooltru Property Holdings. The agent, in the course of execution of the mandate of its principal, does not establish rights within its mandate, which it can cede to its principal.

[31] It thus follows in my view that, Wooltru Properties, subsequently renamed Wooltru Property Investments, and after it, Wooltru House Properties, as the entities which were granted a right to claim allowances in terms of section 11(f) and 11(g) of the Income Tax Act, and subsequently did claim such allowances, are the entities in whose hands such allowances are recoupable.

DEFERRED TAXATION

[32] In paragraph [11] of this judgment I refer to the *viva voce* evidence of Prof Alexandra Watson, an associate professor in the accounting department at the University of Cape Town. I have already stated in the said paragraph that her evidence was intended to show, on basis of her knowledge and expertise, that provision for the deferred tax liability should not have been included in the balance sheet of Wooltru Property Holdings because of the absence of the underlying asset from which the recoupment would be sourced. This, she says, is because the asset to which the deferred tax liability relates is not reflected in the balance sheet of Wooltru Property Holdings. She goes on to say that deferred tax is an accounting concept which has no cash flow implication so that the raising of this item in

the respondent's balance sheet, erroneous as it could have been, is not necessarily indicative of deferred tax liability on the part of Wooltru Property Holdings.

[33] I have no reason to doubt the correctness of Prof Watson's evidence, particularly the evidence relating to the entry of the deferred tax item in the respondent's balance sheet without a corresponding entry, in the balance sheet, of the asset from which any recoupment could be sourced. What the professor should have said and did not say is that the principle of double entry is the basic principle of accounting: you debit the receiver and you credit the giver; you credit all assets and you debit all liabilities; you credit receipts and you credit payment, and so on it goes. It therefore follows that the entry of the deferred tax item in the balance sheet of the respondent is not necessarily indicative of tax liability on the part of the respondent and, thus, does not advance the appellant's claim.

[34] It is thus clear on basis of the evidence that the allowances in question, which constitute the basis for the proposed recoupment, were never in law or in fact granted by the appellant to the respondent, Wooltru Property Holdings. Such allowances, as a matter of fact, were granted to and claimed, initially, by Wooltru Properties and/or Wooltru Property Investments and, after it, Wooltru House Properties. Wooltru Property Holdings was never granted, in its own right and claimed, in its own right, the allowable deductions in terms of sections 11(g) and 11(f) of the Income Tax Act. As is correctly pointed out by *Mr Emslie* in his submissions, one

cannot recoup in terms of section 8(4)(a) of the Income Tax Act what one has not previously deducted. What the respondent disposed of were leasehold rights which it received as a liquidation distribution *in specie*. The respondent, not having been granted, in its own right, a right to claim allowable deductions in terms of sections 11(f) and 11(g) of the Income Tax Act and the respondent, not having claimed, in its own right, any such allowance, cannot be held liable for the recoupment thereof. It therefore follows that the allowances in question are not recoupable in the respondent's hand.

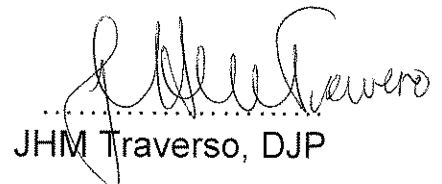
[35] For the reasons stated in the preceding paragraph and elsewhere in this judgment I would dismiss the appeal with costs and confirm the remission of the matter to the appellant for re-assessment.

....
NJ Yekiso, J

I agree.

....
S Desai, J

I agree and it is so ordered.



....
JHM Traverso, DJP