IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO.: A285/2019

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES — **Appellant**

and

SPUR GROUP (PTY) LTD — **Respondent**

CORAM: Ndita J, Salie-Hlophe J et Sher J

DELIVERED: 26 November 2019

JUDGMENT

NDITA, J:

Introduction

[1] The appellant, the Commissioner for the South African Revenue Service ("SARS"), appeals against the decision of the Tax Court of South Africa, Western Cape, (the Tax Court), upholding the appeal of the respondent, Spur Group (Pty) Ltd ("Spur"), against SARS's decision disallowing deductions in terms of section 11(*a*) of the Income Tax Act 58 of 1962 ("ITA"), claimed by the respondent in the 2005 to 2012 years of assessment, based on the latter's contribution of R48 471 714 ("R48 million") to a Trust, on the ground that it did not qualify as an expenditure in the production of income as envisaged in the section.

[2] The adjudication of this appeal turns on whether there is a sufficiently close connection between the contribution of R48 million paid by Spur to the Trust in respect of its employee management share incentive scheme, and its production of income during the 2005 to 2012 years of assessment. If this court finds that the connection is not sufficiently close, it will become necessary to determine whether the statutory periods for the assessment years 2005 to 2009 have prescribed, and as such, SARS is precluded from raising them. But, if this court finds, as the Tax Court did, that Spur has established that the contribution qualifies as expenditure in the production of income, and thus constitutes a deductible expense for the purposes of the ITA, no determination is required in respect of the prescription point.

Factual Background

[3] The factual background underpinning the determination of this appeal is largely undisputed. It is succinctly set out in the judgment of the Tax Court, and I find it convenient to repeat it in this judgment. In 2004, the Spur Group of Companies resolved to implement a Share Incentive Scheme ("the Scheme"), in terms of which eligible employees of Spur were afforded an opportunity to participate in it in order to promote the growth and profitability of the Spur Group of Companies. As earlier stated, Spur contributed an amount of R48 million to a Trust, in furtherance of this objective. The following facts are undisputed:

(a) the selected employees were all key managerial staff of the taxpayer;

(b) the contribution of R48 million paid by the taxpayer was for purposes of the scheme;

(c) the employees indeed benefited from the scheme;

(d) the contribution was not expenditure of a capital nature; and

(e) the scheme was legitimate and the transactions comprising it were neither simulated nor a sham. Put differently, SARS accepted that the conclusion of the various agreements forming part of the Scheme and its implementation were what they purported to be, and were not simulated transactions.

[4] The adoption of the Scheme was preceded by a series of agreements designed to regulate and give effect to it. It was structured and implemented by the establishment of the Spur Management Share Trust ("the Trust"), on 30 November 2004. This was a discretionary Trust, and Spur HoldCo was its sole capital and share and income beneficiary until 13 December 2010 when the Trust Deed was amended to include further beneficiaries. The Trust acquired a shelf company, NewCo, previously, Maxshell 72 Investments (Pty) Ltd. The Trust incorporated NewCo. The employees participating in the Scheme were offered ordinary shares in NewCo at par value in proportions determined by Spur HoldCo. Upon the issue of the shares on 15 December 2004, the participants duly paid the purchase price of the NewCo ordinary shares in cash. They, however, were not entitled to deal in them before at least a period of seven years had lapsed. Those employees who left Spur during this period forfeited

their shares which were then re-allocated to other eligible employees.

[5] On 7 December 2004, Spur concluded a contribution agreement with the Trust in terms of which the amount of R48 471 714 was paid to the Trust. The salient terms were as follows:

> '**2. RECITAL**
>
> 2.1 The Company [i.e. the taxpayer] is the employer of the Eligible Participants as defined in the ... Management Incentive Share Scheme Rules 2004 ("the Rules").
>
> 2.2 The Company wishes to maintain a happy and contented managerial team and, in particular, to incentivise and retain its senior managerial and executive staff who make a key contribution to the business of the ... Group. From a philosophical point of view the Company believes in the alignment of the interests of staff with the interests of shareholders and recognises the importance of long-term equity incentives over and above more traditional short-term forms of remuneration and accordingly wishes to implement a share scheme in the nature of the NewCo Scheme as defined in the Rules.
>
> 2.3 Due to certain company law and administrative constraints it has been necessary to establish the Trust in order to implement, where applicable, the provisions of the NewCo Scheme.
>
> 2.4 The Company accordingly wishes to appoint the Trust to provide a valuable incentive to the Eligible Participants in the form of an indirect interest in the listed shares of [HoldCo] by implementing the NewCo Scheme in accordance with the Rules.
>
> 2.5 In order to enable the Trust to fulfil the purpose set out in clause 4 to do what is required to implement the NewCo Scheme, the Company has agreed to contribute, as a non-refundable expense to the trustees for the time being of the Trust ("the Trustees"), an initial maximum amount of R60 million upon the terms and conditions set out in this agreement.
>
> …
>
> **4. PURPOSE**
>
> 4.1 The Trustees shall be obliged to apply the initial Contribution, as well as any income or property derived therefrom, to incentivise the Eligible Participants (being the [taxpayer's] employees) in accordance with the import and intent of the NewCo Scheme as more fully appears in the circular to ... Shareholders dated 30 November 2004 and the Rules and any subsequent schemes adopted by the [taxpayer] and the Trust from time to time.
>
> 4.2 In furtherance of the aforesaid objective, the parties agree that the Trustees shall be obliged to apply the entire Initial Contribution in subscribing for preference shares in Maxshell 72 Investments (Proprietary) Limited ("NewCo") as contemplated in the Rules.'

[6] On 20 December 2004, after NewCo's share capital was altered to create NewCo preference shares, the Trust subscribed for 1 000 NewCo preference shares by using the contribution of R48 471 714 made by Spur, NewCo in turn applied the aggregate of the subscription price received from the Trust (the proceeds of the R48 471 714) towards purchasing 8 274 043 Spur HoldCo chares, The preference shares issued to the Trust were

only redeemable after 5 years and carried an accumulated annual market-related coupon rate equal to 75% of the South African prime rate. NewCo paid no dividends during the 5-year period. Thus, the participants of the Scheme, as the shareholders of NewCo, became entitled to the incremental value created in NewCo, by virtue of NewCo's equity investment in Spur HoldCo.

[7] At the end of the Scheme period (five years) the Spur HoldCo shares had appreciated in value such that the investment (and hence the value of NewCo[1] significantly exceeded the preference share liability. The board of directors of NewCo passed a resolution on 18 December 2009, that the 1 000 preference shares be redeemed for a total consideration of R48 471 714. It was also resolved that dividends accruing on the preference shares from date of issue (18 December 2004) to date of redemption, amounting to R22 562 254, be paid to the Trust. This was done by transferring the equivalent value of Spur shares (6 688 698 shares) to the Trust. In terms of the same resolution, a dividend of R28 627 000 was declared by NewCo.

[8] Seeing that NewCo had discharged its preference share redemption obligation to the Trust in this manner, and given that the participants were then the only shareholders, NewCo was at liberty to deal freely with its remaining 1 585 345 HoldCo shares. It disposed of these shares for approximately R16.800 000 million cash in December 2009 and a dividend of approximately R28.627 million was declared and paid to the participants in the scheme. In April 2011, a further dividend of R635 000 was similarly declared and paid to them.

[9] On 13 December 2010, after early termination of the share incentive scheme, and pursuant to the amendment of the Trust Deed, the participants were included as beneficiaries of the Trust, but only to the extent of the dividends. Given the manner in which the scheme was structured and implemented, the taxpayer's contribution of R48 million was not repaid to it by the Trust. It vested in Spur HoldCo as the beneficiary of the Trust. Similarly, the preference share dividends of R22.5 million received by the Trust in December 2009 vested in Spur HoldCo as a sole beneficiary. After termination of the scheme, NewCo accruing on the preference shares from date of issue (18 December 2004) to date of redemption, amounting to R22 562 254, be paid to the Trust. This was done by transferring the equivalent value of Spur shares (6 688 698 shares) to the Trust. In terms of the same resolution, a dividend of R28 627 000 was declared by NewCo.

[10] Seeing that NewCo had discharged its preference share redemption obligation to the Trust in this manner, and given that the participants were then the only shareholders, NewCo was at liberty to deal freely with its remaining 1 585 345 HoldCo shares. It disposed of these shares for approximately R16.800 000 million cash in December 2009 and a dividend of approximately R28.627 million was declared and paid to the participants in the scheme. In April

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[1] The value of 8 274 043 Spur HoldCo shares increased from R48.5 million to R71 million, plus cash arising from dividends and interest of approximately R25 million.

2011, a further dividend of R635 000 was similarly declared and paid to them.

[11] On 13 December 2010, after early termination of the share incentive scheme, and pursuant to the amendment of the Trust Deed, the participants were included as beneficiaries of the Trust, but only to the extent of the dividends. Given the manner in which the scheme was structured and implemented, the taxpayer's contribution of R48 million was not repaid to it by the Trust. It vested in Spur HoldCo as the beneficiary of the Trust. Similarly, the preference share dividends of R22.5 million received by the Trust in December 2009 vested in Spur HoldCo as a sole beneficiary. After termination of the scheme, NewCo was deregistered on 10 December 2012. Although it was contemplated that the Trust would also have a fixed period of existence, it remains extant.

[12] Spur claimed the contribution of R48 471 714 million as a deduction against its taxable income in terms of s 11(*a*) of the ITA. The deductions were spread over a period of the anticipated benefit to be derived (7 tax years from 2005 to 2012) made up as follows:

20.01.2005	R3 462 265
29.02.2006	R6 924 531
20.03 2007	R6 924 531
20.04. 2008	R6 924 531
20.05.2009	R6 924 531
20.06.2010	R6 924 531
20.07.2011	R6 924 531
20.08.2012	R3 462 265

[13] It is this claim for deduction, which was initially allowed by SARS but subsequently, by way of additional assessments raised in 2014 and 2015, was disallowed, which is the subject matter of this appeal. The disallowance resulted in Spur HoldCo incurring an increased income tax liability for the years of assessment.

[14] I have already indicated that it is undisputed that the R48 million contribution was paid by Spur as part of its policy to incentivise its key managerial staff 'so as *to enable the Trust to subscribe for preference shares in NewCo*.[2] The essence of SARS's pleaded case before the Tax Court as set out in the grounds of assessment is as follows:

> "51. The Commissioner contends that were the contribution to have been made by the appellant solely to incentivize the participants, then the participants would have been the beneficiaries of the contribution (made to the Trust) and not Spur HoldCo (as is the case). This contribution would have necessitated the appellant parting with the contribution in favour of the

[2] Para 8.8, Dossier 1, p4.

participants as the beneficiaries thereof (which is not the case).

> 52. In addition, the participants do not have any connection to the Trust (to whom the contribution is made). The Share Scheme entails the participants becoming shareholders in NewCo.
>
> 53. The Commissioner accordingly contends that there is no direct causal link between the contribution and the production of the appellant's income. Consequently, the production was not incurred in the production of income."

[15] SARS, in the additional revised assessments disallowed the deductions claimed in terms of the provisions of section 11(*a*) of the Income Tax Act, and brought the deductions back into account as additional taxable income, on the basis that;

> '...the expenditure was not incurred in the production of [the taxpayer's] income in that there is no direct, causal link between the contribution and the production of income.'[3]

More specifically, SARS[4] stated that:

> 'The [taxpayer] made the contribution to the Trust of which Spur HoldCo was the sole beneficiary. Spur HoldCo was the only party to have benefited directly from the contribution made by the [taxpayer] to the Trust in that it would receive the investment in the NewCo preference shares (the contribution of R48 471 714 and the preference share dividends) at the time when NewCo redeemed the NewCo preference shares, and the Trust distributed the preference share capital and the preference share dividends to its beneficiary Spur HoldCo. The participants were thus not the beneficiaries of the contribution.'[5]

In a nutshell, the case for SARS was accordingly that unless the R48 million contribution was given directly to the participating employees, it did not, and could not constitute an expense incurred by Spur in the production of income. In disallowing the deductions, SARS relied solely on section 11(*a*) of the ITA. Section 11(*a*) of the ITA provides that:

> "**11. General deductions allowed in determination of taxable income**—For the purpose of determining the taxable income derived by any person from carrying on any trade within the Republic, there shall be allowed as deductions from the income of such person so derived—
>
> (*a*) expenditure and losses actually incurred in the Republic in the production of the income, provided such expenditure and income are not of a capital nature."

3 SARS' rule 31 statement, dossier 1, page 5, para 8.15. SARS abandoned any reliance on s 64C(2)(*a*) of the ITA.

4 Ibid

5 SARS' rule 31 statement, Dossier 1, page 5, para 8.16.

Thus, in order for a taxpayer to successfully claim a deduction for tax purposes, the expenditure must be incurred in the production of the taxpayer's income. SARS did not rely on the provisions of section 23(*g*), commonly referred to as the *"negative test".* For the sake of completeness, section 23(*g*) provides as follows:

> '**23. Deductions not allowed in determination of taxable income.**—No deductions shall in any case be made in respect of the following matters, namely—
>
> (*g*) any moneys, claimed as a deduction from income derived from trade, to the extent to which such moneys were not laid out or expended for the purpose of trade... .'

The Appellant therefore, was not required to show that the contribution was laid out or expended for the purposes of its trade.

The evidence

[16] Against this factual background, Spur tendered before the Tax Court, the evidence of Mr Alan Brett Field ("Field"), a tax partner at KPMG[6] who gave a brief background of how the latter became involved in the conceptualisation and implementation of the Scheme. He affirmed that the purpose of the Share Scheme was to incentivise employees to participate in the growth of the Spur Group of companies. He explained that generally, share schemes function to attract and retain highly qualified people to the company. Field expatiated thus:

> "Now, employees work to improve the profitability of the companies for which they are employed. These companies then produce the additional profits. These profits that are produced by employees that are attracted and retained then ultimately, because they have higher profits, influence the share price. The share price is determined effectively on a multiple in the group, and profits are higher. The share price/PE ratio, price earnings ratio affects the value of the share and employees who are attracted to the group work harder to generates more profits and ultimately the share price which given an interest to own those shares. In the longer term they then benefit because they are forced to stay in the company, work hard and generate the profits and in the five or seven years for which they stay with the company, they have an interest in getting that share price higher by generating higher profits."

It will be recalled that Counsel for SARS had contended that Spur HoldCo chose the R48 million contribution method to facilitate the implementation of the Scheme, because it attracted tax consequences, whereas a loan would have achieved the same purpose but would not have qualified as a deductible expense. Field drew a line between incentivisation by way of a loan to employees to purchase shares and the Scheme in *casu.* According to his evidence, a loan may dis- incentivise rather than incentivise employees, and it is difficult to determine the share price volatility in the share market and sometimes it is not directly linked with the efforts

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[6] KPMG were the Spur Group's auditors and advised on the structure and implementation of the scheme.

of the employee. In his experience, where purchase agreements had been put in place, and employees were provided with loans to purchase their share, and the share price had dropped, but the loan together with interest, had gone above the value of the share which employees had purchased from the funding that had been provided, the employees would bear the brunt of the devalued shares. In his opinion, it is prudent to fund a company that the employees own with preference shares, because, firstly, it is cheaper, and secondly, as the company funds or provides the contribution to the Trust, the volatility is not at the employee's hands. The Trust, being a vehicle to fund the employees, had also to be placed in funds.

[17] Under cross-examination, Field was ceaselessly quizzed about the fact that the R48 million Spur HoldCo parted with, redounded to Spur. He acknowledged that the employee participants did not benefit directly from the Trust. He explained thus:

> "So the- I think need to look at this in two parts, M'Lady. The one is why did the company make the contribution, what was - by that I mean Spur Group in play - its purpose, and then to achieve its purpose there has to be a benefit to employees because, if there is no benefit ultimately, why would it make a contribution. So the participants benefitted through NewCo. There was no way that they could benefit directly from the Trust. There had to be funding that flowed through to NewCo, and they would then participate in NewCo."

According to Field's evidence, without the contribution, there never would have been a Share Scheme.

[18] The effectiveness of the Scheme's incentivisation ideals must, on a factual basis, be measured against its actual impact on the employees. Ms Ronel van Dijk ("Van Dijk"), a Chief Financial Officer at Spur Corporation is one of the employees who participated in the Scheme and acquired shares in NewCo at par value. She gave evidence to the effect that Spur is a very service oriented business and employees do not work the regular 8 to 5 hours. According to her evidence, in such an environment, it is important to give the employees the ability to earn an extra income that would enforce their commitment and keep them motivated and incentivised to work those irregular hours. Van Dijk explained that Spur is a very dividend rich company and in order to derive profits, the company needs an enthusiastic, committed and competent workforce. As a participant in the scheme, van Dijk affirmed that her participation contributed significantly to her desire to remain employed at Spur.

The Tax Court findings

[19] The Tax Court found, based on the evidence, as well the applicable legal principles, that Spur had established a sufficiently close causal connection between the expenditure, represented by the R48 million contribution, and its income earning operation on the following basis:

> 19.1 The purpose of the expenditure was to incentivise the key staff members of Spur through the share incentive scheme which facilitated the acquisition by the participants of an indirect investment in the shares of Spur HoldCo.
>
> 19.2 The expense, represented by the contribution effected the purpose of the scheme participants.
>
> 19.3 The fact that Spur foresaw that Spur HoldCo would also *'potentially'* benefit from the R48 million contribution by the redemption of the NewCo preference shares held by the Trust does not negate Spur's purpose and intention of incentivising its key personnel through the share incentive scheme.

The grounds of appeal

[20] The main basis for the appeal is simply that the Tax Court erred in finding that the expenditure (the R48 million contribution) served the purpose of incentivising the Scheme participants, and that a sufficiently close causal nexus exists between the expenditure and the production of income.

The applicable legal principles

[21] As earlier alluded to, the crucial issue in this appeal turns on whether the expenditure is sufficiently closely linked to the taxpayer's income earning operations so as to qualify for deduction under section 11(*a*) of the ITA. I now set out the legal principles that bear upon this issue. De Koker[7] comments on the provisions of section 11(*a*) as follows:

> "Most deductions are allowed by virtue of a so-called general deduction formula comprising section 11(*a*), which sets out what may be deducted, namely, the positive test, and section 23(*g*), which stipulates what may not be deducted, namely, the negative test.
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> …
>
> The courts have laid down that s 11(*a*) and s 23(*g*) must be read together when one considers whether an amount is capable of deduction. But it is important to note that, for a great many years, the negative test set by s23(*g*) was much more restrictive than it presently is, and there are many Court decisions that can be appreciated only in the context of the negative test

[7] De Koker in Silk e, South African Income Tax, volume 2 at§ 7.3

applying at the time…[8]

Section 11(*a*) provides for the deduction of expenditure and losses actually incurred in the production of income, provided, such expenditure and losses are not of a capital nature.

The current version of section 23(*g*) provides that *'no deductions shall in any case be made in respect of the following matters, namely, ... (g) any moneys claimed as deduction from income derived from trade , to the extent to which such moneys were not laid out or expended for the purposes of trade'.*

The current general deduction formula comprised by ss 11(*a*) and 23(*g*) may therefore be broken down into the following elements:

- what has been incurred must be an 'expenditure' or 'loss';
- it must have been actually incurred;
- during the year of assessment;
- in the production of income;
- it must not constitute an expenditure or loss of a capital nature; and
- if it is claimed as a deduction against income derived from trade, it must, either in part or in full, constitute moneys that were laid out or expended for the purposes of trade

  …

It is submitted that it is not a requirement of the general deduction formula that the taxpayer set out to achieve or achieved a 'profit' in an accounting economic sense."

[22] The meaning of the expression *"in the production of income"* was considered in *Porl Elizabeth Electric Tramway* Co *Ltd v CIR.*[9] The facts in that matter are briefly that the taxpayer carried on business as a tramway operator and claimed compensation paid to a driver for injuries sustained while on duty as a tax deduction. The Commissioner disallowed the deduction on several grounds, one of which was that the expenditure claimed was not incurred in the production of income. Watermeyer J had this to say about the production of income:

"Now, as pointed out above, income is produced by the performance of a series of acts, and attendant upon them are expenses. Such expenses are deductible expenses, provided they are so closely linked to such acts as to be regarded as part of the costs of performing them.

A little reflection will show that two questions arise, (a) whether the act, to which the expenditure is attached, is performed in the production of income and (b) whether the expenditure is linked to it closely enough. Now, at first sight, it would appear that only acts necessary to earn the income and expenditure necessarily attendant upon such acts should be deducted; but this is not so.

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8 Prior to its amendment as from the commencement of years of assessment ending after 1 January 1993, section 23(*g*) provided that deductions may not be made "which are not wholly exclusively laid out or expended for the purpose of the trade".

9 Port Elizabeth Electric Tramway c CIR 1936 CPD 241, 8 SATC 13

The purpose of the act entailing expenditure must be looked to. If it is performed for the purpose of earning an income, then the expenditure attendant upon it, is deductible."[10]

The learned judge went on to say that:

> "The other question is, what attendant expenses can be deducted? How closely must they be linked to the business operation? Here, in my opinion, all expenses attached to the performance of a business operation *bona fide* performed for the purpose of earning income are deductible whether such expenses are necessary for its performance or attached to it by chance or are bona fide incurred for the more efficient performance of such operation."

This judgment was cited with approval in *CIR v Genn &Co (Pty) Ltd*[11] where the court held thus:

> "If I am right in understanding the words *"they may be regarded"* as connoting that it would be proper, natural or reasonable to regard the expenses as part of the cost of performing the operation this passage seems to state the approach to such questions correctly. Whether the closeness of the connection would properly, naturally or reasonably lead to such treatment of the expenses must remain dependent on the court's view of the circumstances of the case before it."

And:

> "In deciding how the expenditure should be properly regarded the court clearly has to assess the closeness of the connection between the expenditure and the income earning operations, having regard to both the purpose of the expenditure and to what it actually affects."

[23] Accordingly, for the expenditure to meet the *"in the production of income"* test and satisfy the requirements of section 11(*a*) of the Act, there must be a sufficiently close connection or link between it and the income earning operations of the taxpayer. The degree of closeness required for the expenditure to be deductible is determined on the particular facts and circumstances of each taxpayer. It does not need to be shown that expenditure produced any part of the income in a particular year of assessment for it to be deductible for tax purposes. The critical enquiry is whether the expenditure was incurred for the purpose of earning income as defined in section 1 of the ITA, whether in the current or future year of assessment.

[24] More aptly, in *CIR v Pick'n Pay Employee Share Purchase Trust,*[12] the Appellate Division (as it then was) held that *'in* a *tax case one is not concerned with what possibilities, apart from his actual purpose, the taxpayer foresaw and with which he reconciled himself. One is concerned with his object, his aim, his actual purpose'.* The aforegoing extract was quoted with approval by the Supreme Court of Appeal in *Warner Lambert SA (Pty) Ltd v CSARS*[13]

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[10] Ibid 16
[11] 20 SATC 113
[12] *CIR v Pick'n Pay Employee Share Purchase Trust* 1992 (4) SA 39 (A), 54 SATC 271
[13] *Warner Lambert SA (Pty) Ltd v CSARS* 2003 (5) 344 (SCA}, 65 SATC 346

where it was held that even an expense as remote from the taxpayer's commercial operations as social responsibility expenditure formed part of the cost of performing the income producing operations, on the basis that maintaining a US subsidiary status was crucial to the taxpayer's commercial success and profitability.

[25] The Tax Court, in its judgment placed much reliance on the *Warner Lambert* judgment. I deem it expedient to outline the factual matrix therein. In that matter, the Respondent, a South African subsidiary of an American company had, in order to conform to the United States Sullivan Code (the Sullivan Code provided for racial integration in the workplace, equal and fair employment, equal pay, training programmes and affirmative action) and attendant legislation launched a social responsibility programme that cost it a substantial amount of money. The company then claimed the expenses as deductions from income in respect of the years 1990 to 1993 under section 11(*a*) read with section 23(*g*) of the Income Tax Act. The expenses claimed were those incurred in the furtherance of the Respondent's social responsibility programme. Put differently, the expenses were incurred in the process of working towards the elimination of laws and custom that impede social, economic and political justice. The Respondent's case was that it had been instructed by its parent company to incur the expenses that went with the performance of its obligations under the Sullivan Code, and that it stood to lose its income if it did not exert itself sufficiently in this field. The deductions were initially permitted by the Commissioner but in a subsequent assessment, they were disallowed on the basis that the expenditure had not been incurred in the production of income. The Company objected to the revised assessment, but its objection was overruled. It appealed to the Cape Income Tax Special Court, which dismissed the appeal based on a finding to the effect that the expenditure had been capital in nature. On appeal to the Supreme Court of Appeal, the Commissioner was ordered to issue revised assessments allowing the expenditure in question as a deduction. The Court said the following:

> "[12] As have said earlier, it is uncontested that of the Sullivan Code expenditure - wage improvements and expenses of that kind - was incurred in the production of income. This expenditure was incurred with the same motives and produced exactly the same results as the social responsibility expenditure: it reduced the risk that the Respondent might lose its privileged subsidiary status, it benefitted the underprivileged and it pleased the American parent. If the Appellant's argument is to be accepted it would mean that this admittedly deductible expenditure was also incurred for mixed purposes and should therefore not have been allowed. For, although the doctrine of dominant purpose may swing the verdict one way or the other in the capital versus the revenue context, it is inapplicable in any contest between the expenditure for trade or for other purposes. . . .
>
> [13] It is quite easy to mistake the purpose of an act for consequence. This may have been what happened in income tax case 1706 63 SATC 334 but it is difficult to tell since the evidence was, of course, different . . . .

[14] The consequences of an act often proclaim its purposes. After all, a person is presumed to have intended the natural consequences of his acts. Nevertheless, a court must look carefully at the evidence. If there is credible evidence about a taxpayer's purpose it is not open to the court to turn what is in reality a consequence into a purpose and ascribe that to the taxpayer. 'In a tax case', says Smallberger JA in Commissioner for Inland Revenue versus Pick n' Pay Share Purchase Trust 1992 (4) SA 39 (A) at 58F-H, 'one is not concerned with his object, his aim, apart from his actual purpose. As Lord Brightman explains in a passage from Mallalieu's case supra (at 1100a):

'An expenditure may be made exclusively to serve the purposes of the business, but it may have a private advantage.'

[15] The evidence for the Respondent is to the effect that the purpose of the Sullivan Code expenditure – all the Sullivan Code expenditure, not merely the social responsibility expenditure – was to insure against the risk of losing its treasured subsidiary status, if, therefore, the purpose of the admittedly deductible expenditure and that of the contested expenditure was the same, the tax treatment should also be the same. Both were expended in the production of income or neither was.

[16] It is true that the link between the Respondent's trade and the social responsibility expenditure is not as close and obvious in the second category as in the first, but that does not mean that the connection is too remote. To qualify as moneys expended in the course of the trade, an outlay does not itself have to produce a profit.

'It is true, as I have already indicated, that the absence of a profit does not necessarily exclude a transaction from being part of the taxpayer's trade, and correspondingly moneys laid out in a non-profitable transaction may nevertheless be wholly or exclusively expended for the purposes of trade within the terms of section 23(*g*). Such moneys may well be disbursed on grounds of commercial expediency or in order indirectly to facilitate the carrying on of the taxpayer's trade. . . .'

(Per Corbett JA in *De Beers Holdings (Pty) Ltd Commissioner for Inland Revenue* 1986 (1) SA 8 (A) 36 1-J).

"A loss of the Respondent's subsidiary status might have directly brought about the loss of all kinds of trade advantages. It was unthinkable that the Respondent should not comply with the Sullivan Code at all. It was not certain what would become of it if it complied but failed to do so adequately; but the Respondent was not obliged, and if truth be told would not be permitted, to take the risk of finding out;; The Sullivan Code expenses were *bona fide* incurred for the performance of the Respondent's income producing operation and formed part of the cost of performing it. The Social Responsibility expenditure was therefore incurred for the purposes of trade and for no other

…

…

> [17] The Respondent's income earning structure had been erected long ago. It was now a question of protecting its earnings. Periodic payments were require to preserve it from harm, or at least to avert the risk of harm. I regard these payments as similar to insurance premiums. If they are anything like that, they were payments of a revenue nature . . ."

In *Commissioner of Inland Revenue v Pick 'n Pay Wholesalers (Pty) Ltd* 1987 (3) SA 453 A, Nestadt JA, in a minority judgment quoted with approval the dictum of Lord Summer in *Usher's Wiltshire Brewery v Bruce* 1915 AC 433 at 469-79 as follows:

> "Where the whole and exclusive purpose of the expenditure is the purpose of the expenditure's trade, and the object which the expenditure serves is the same, the mere fact that to some extent the expenditure enures to a third party's benefit . . . cannot in law defeat the effect of the finding as to the whole and exclusive purpose."

[26] In *Ticktin Timbers* CC *v Commissioner for Inland Revenue* 1999 (4) SA 939 (SCA), the court held that in deciding whether expenditure is deductible from taxable income:

> "the inquiry must accordingly proceed by examining, on the facts of each case, firstly, whether the expenditure in question can be classified as expenditure actually incurred in the production of income and, secondly, whether its deduction is prohibited by s 23(*g*). . .. The purpose for which the expenditure was incurred is the decisive consideration in the application of s 23(*g*). As far as s 11(*a*) is concerned, Corbett JA said in *Commissioner for Inland Revenue v Standard Bank of SA Ltd* 1985 (4) (A) at 500 H -J:
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>> 'In the light of the aforegoing established principles, I now turn to consider their application to the facts of the present matter.' "

Discussion

[27] SARS raised two issues unrelated to the application of section 11(*a*). The first one is that the witnesses who gave evidence in support of Spur's claim that the expense was deductible did not include witnesses who were involved in the conceptualization and implementation of the Share Scheme. Counsel for Spur, on the other hand, submitted that the objective or intention of the parties to the various agreements, those being the Trust Deed, the Contribution Agreement, the Preference Share Agreement and the Share Scheme falls to be determined by an interpretation of the related agreements in accordance with the principles laid down *in Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA. According to the argument, SARS's concern is unfounded because the relevant and material facts relating tothe establishment and implementation of the Scheme as set out in the report by Alan Field were not placed in dispute in any material respect. Furthermore, it would, in any event, have been impermissible or ineffectual for Spur to present evidence from its directors of its intentions and objectives in entering into the related agreements. I agree with the latter contention made by Counsel for the Respondent as it is a correct rendition of the law. To this end, in *KPMG Chartered Accountants* SA *v Securefin Limited and Another* 2009 (4)

SA 399 SCA, the court restated and reaffirmed the long standing principle to the effect that interpretation is a matter of law and not of fact, in this manner:

> "[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning *(Johnson v Leal* **1980 (3) SA 927** (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) para 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent *(Johnson* & *Johnson (Pty) Ltd v Kimberly-Clark Corp* **[1985] ZASCA 132** (at **www.saflii.org.za**), 1985 Burrell Patent Cases 126 (A)). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' *(Delmas Milling* Co *Ltd v du Plessis* **1955 (3) SA 447** (A) at 4558-C). The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See *Van der Westhuizen v Arnold* **2002 (6) SA 453** (SCA) paras 22 and 23 and *Masstores (Pty) Ltd v Murray* & *Roberts (Pty) Ltd* **[20081 ZASCA 94**; **2008 (6) SA 654** (SCA) para 7.)

It follows therefore that SARS's concern has no merit.

[28] The second issue is that the expenditure is not deductible because Spur was a wholly owned subsidiary of a listed company, which was also the holding company of a large group. SARS relied for this contention on the judgment in *Solaglass Finance Co (Pty) Ltd v CIR* SARS.[14] In *Solaglass,* the taxpayer was a subsidiary company within a group of companies which was set up with the object of loaning money to the other companies within the group. The taxpayer contended that as a money-lender, the losses incurred by it were of a revenue nature and therefore, constituted deductible expenditure. After considering the *"the nature of the expenditure and the closeness (or remoteness) of the connection and the benefit derived therefrom by the group",*[15] Botha JA held that the taxpayer had a dual purpose in making loans, namely, to make a profit and to further the interests of the group of companies. In response to the contention by the taxpayer to the effect that it is an everyday occurrence for the affairs of a subsidiary company within the group of companies to be so arranged as to serve the interests of a group, the learned judge stated as follows:

> "That is so. of course. But I do not see how it can avail the appellant. In every case where that occurs, and the question arises whether a particular expenditure is hit by s 23(*g*), the answer

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14 *Solaglass Finance Co (Pty) Ltd v CIR* 1991 (2) SA 257 AD.

15 Ibid, 284 C-D

will have to be found by analysing the particular facts of the case. Inter alia one would have to examine the nature of the activities carried on, the nature of the expenditure, and the closeness (or remoteness) of the connection between the expenditure and the benefit derived therefrom by the group. For example: in the present case, the appellant presumably incurs ordinary day-to-day expenses in the running of its business, such as paying salaries to its employees, perhaps paying rental for the premises occupied by it, and so forth. There is no doubt that the deduction of such expenses from the appellant's income is not precluded by s 23(*g*). The reason for this is that the connection between such expenditure and the benefit to the group flowing from the appellant's activities is too remote for the latter to qualify as a 'purpose' in terms of the section. But the appellant's expenditure in the form of loans advanced to subsidiaries in the group stands on quite a different footing. Such expenditure is part and parcel, the essential substance, in fact, of the very activities which were designed and carried out in order to benefit the group, through the subsidiaries concerned. The connection between this expenditure and the benefit is both direct and immediate. In these circumstances, the benefit falls within the ambit of the word 'purposes' in the section."

[29] Drawing parallels with the factual matrix alluded to above, Counsel for SARS argued that the matter at hand is on all fours with *Solaglass*, and the expenditure claimed by the Spur Group, represented by the contribution to the Trust in the sum of R48 million, is such that the very amount, benefits the Spur Group as Spur HoldCo is the sole beneficiary of the Trust. Moreover, the connection between the expenditure and the benefit to the Spur Group is both direct and immediate. SARS further relied on *Warner Lambert,*[16] where it was stated that:

'The consequences of an act often proclaim its purpose. After all, a person is presumed to have intended the natural consequences of his acts."

[30] The taxpayer's argument in *Solaglass* was accepted by the Appellate Division but it dismissed the appeal on the ground that the losses incurred were hit by the prohibition at the time in section 23(g), because the taxpayer's trading activities were geared towards achieving a dual purpose – to further the interests of the group's subsidiaries and thus of the group itself, and also to make a profit. At that stage, section 23(*g*) precluded the deduction of income *'not wholly or exclusively laid out or expended for purposes of trade'.*[17]

This contention was raised in the Tax Court and was dismissed on the following basis:

"[43] However in the present matter it is not SARS' case that the purpose of the contribution paid by the taxpayer was to further the interests of the S group. On the contrary there is no suggestion of this in the rule 31 statement, where it is clearly alleged that the taxpayer paid the contribution to incentivise and compensate key members of its own staff. Accordingly, the principle established in *Solaglass,* confirmed in *Warner Lambert,* and relied upon by SARS during argument, does not assist it."

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[16] Supra at 352 paragraph 14

[17] Section 23(*g*) was amended by s 20(*b*) of Act 141 of 1992 with effect from 15 July 1992 to its current form.

The above reasoning cannot be faulted and the conclusion seems to me clearly right. Accordingly, I consider SARS's contention to this end to be likewise, unmeritorious.

[31] Before analysing the facts and the applicable law, I find it sensible to first recap the following common cause facts:

> 31.1 It is common cause that the contribution to the Trust in the sum of R48 million was for purposes of the share incentive scheme. It also is common cause that the purpose of the share incentive scheme was to motivate and incentivize Spur's employees. It was also placed on record that it was not SARS's case that the scheme should have been a different scheme, but that Spur should not have claimed a deduction in respect of a contribution to the Trust.
>
> 31.2 It is also common cause that the contribution constitutes *"expenditure"* by Spur. SARS has not contended that the contribution should not have been spread over a seven-year period, and accordingly, it is also *"expenditure actually incurred'* in each of the tax years in issue, in the amounts as set out in paragraph 13 of the grounds of assessment. It is also common cause that the expenditure of R48 000 000 is not *"of* a *capital nature".*
>
> 31.3 SARS disallowed the deductions only on the basis of section 11(*a*) of the Act, not on the basis that the deduction is precluded by the provisions of section 23(*g*) of the Act. SARS did not place any reliance on the negative test in section 23(*g*).

[32] As I have previously stated, what this court must determine, as the Tax Court did, is whether the expenditure was incurred in the production of income (derived from by the taxpayer from carrying on with its business), as contemplated in section 11(*a*) of the ITA. Counsel for SARS contended that the contribution was merely a method chosen by the Spur Group to facilitate the implementation of the Scheme. According to the argument, this could have been achieved through a loan to employees, but the Scheme method was chosen because it attracted tax consequences, whereas a loan would not have qualified as a deductible expense. This, according to the SARS is so because the participants to the Scheme were not incentivised by the contribution itself, but by the Scheme that the contribution funded. Furthermore, a clear distinction must be drawn between the Scheme (which the parties accept was designed to incentivise the employees to grow the share price of Spur HoldCo) and the R48 million contribution, which the participants did not benefit from. According to the argument, the benefit to the participants of the Sct,eme wa$ that they would enjoy the growth in the value of the shares held by them without the potential risk of a decrease in the share value (due to share volatility), as NewCo (the entity in respect of which the participants held ordinary shares) would bear the risk of a decrease in share price.

[33] Against this backdrop, the first question that must be answered is whether the evidence establishes that the expenditure (the R48 million contribution) served its stated purpose of incentivising the Scheme participants. The answer to this question lies in the evidence tendered at the trial, the objective facts, as well as the various agreements pertaining to the establishment of the Scheme. I have already indicated that it is admitted by SARS that the contribution facilitated the implementation of the Scheme. The case pleaded by SARS was expressly that the object and purpose of the Scheme was to provide an incentive to participants and to promote the continued growth of Spur. Field and Van Dijk gave evidence in regard to the genesis, purpose, implementation and effect of the Scheme. Their evidence in this regard was neither objected to, nor was it challenged by SARS in any material respect under cross-examination. Consequently, it was accepted by the Tax Court. Field and van Dijk's uncontroverted evidence unequivocally establishes that it achieved its intended purpose. To my mind, it matters not that the actual motivation stems from the growth of Spur HoldCo shares, for, as Field testified, without the contribution, there would not have been a Scheme. I find it difficult to draw a line between the contribution and the Scheme because that in essence defeats the very purpose for which the contribution was, according to the evidence, created. Stated differently, one cannot look at the contribution apart from its intended purpose and effect. Counsel for SARS argued that the Tax Court failed to consider that the purpose of the contribution could just as easily have been to retain the money within the Spur Group. There is no basis for this criticism. The Tax Court analysed the evidence, and having applied the legal principles in *Warner Lambert,* found that:

> "[45] It is trite that a taxpayer may organise its financial affairs in such a way as to pay the least tax permissible, provided that the transaction does not disguise its true purpose of tax evasion or the law. In the present matter SARS has not contended that any of the transactions comprising the scheme were simulated or a sham, or that the parties did not intend that each transaction would have effect according to its tenor. It was also not contended by SARS, either in its rule 31 statement or in cross-examination of the taxpayer's witnesses, that the contribution of R48 million which the taxpayer made to the Trust was made with the primary object or purpose of vesting that money in HoldCo. It was also never suggested that this was a scheme to place a dividend in the hands of HoldCo without paying tax, and in any event, as far as the "deemed dividend" argument advanced by SARS in its rule 31 statement is concerned, it expressly abandoned any reliance on s 64C(2)(*a*) of the ITA.
>
> [46] On the evidence, the dominant purpose in the establishment and implementation of the scheme was to protect and enhance the business of the taxpayer and its income, by motivating its key staff to be efficient and productive and remain in the taxpayer's employ. The fact that the incentive offered to, and in fact received by, the employees was the financial benefit that would flow from the success of the taxpayer's business and the growth in the value of the shares in HoldCo, cannot detract, in my view, from a finding that the expenditure was incurred by the taxpayer for the purpose of earning income.

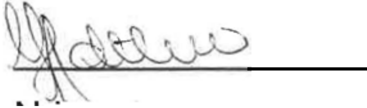
> [47] Put somewhat differently, the purpose of the expenditure was to incentivise the taxpayer's key staff through a scheme which facilitated the acquisition of an indirect investment in the shares of HoldCo for scheme participants. The purpose of such incentivisation, in turn, was: (a) to encourage these employees to grow or increase the value of their indirect investment in HoldCo by contributing to the success and profitability of the taxpayer's business; (b) to encourage employees with the required skills, knowledge and experience to remain in the taxpayer's employ; (c) to facilitate, for the taxpayer, the retention of staff members with the skills and experience to maximise the profitability of its business and prevent crucial knowledge and experience being lost to the taxpayer through staff turnover; and (d) thereby to preserve and enhance the income earning capacity of the taxpayer's business."

[34] I fully align myself with the above remarks. In addition, it must be acknowledged that indeed the bulk of the benefit inures to the Spur Group, but that, in my view, does not detract from the actual purpose of the expenditure as affirmed in Field's evidence, and corroborated by Van Dijk. As rightly found by the Tax Court, it has not been suggested in these proceedings that the Spur Group, by making the R48 million contribution was shamming or that the transaction was dressed or disguised to make it appear to be something that it was not, especially, with the purpose of evading tax or avoiding a peremptory rule of law. It, in fact, is quite clear that maintaining a content and motivated workforce forms part of the costs of performing the income producing operations and is crucial to the Spur Group's commercial success and profitability. Stated differently, the money was disbursed in order indirectly to facilitate the carrying on of the taxpayer's trade. Even if the contribution did not directly benefit the employees, the overwhelming evidence supports the fact that it incentivised and motivated the participating employees, as I have said, albeit indirectly. I also do not understand it to be a requirement that employees benefit directly from the contribution. What seems to be paramount, at least in my view, is the purpose of the expenditure and what it affects. In line with the test propounded in *PE Tramways,* I am satisfied that the Spur Group discharged the onus of proving that the expenditure was incurred in the production of income and that there is a sufficiently close nexus between the expenditure in question and the production of income as found by the Tax Court.

Conclusion

[35] In the light of the findings I have made, it follows that the appeal from the judgment of the Tax Court has no merit. In the result, the following order is issued:

The appeal is dismissed with costs.



Ndita: J

I concur.

Sher; J

MINORITY JUDGMENT: 12 NOVEMBER 2019

SALIE-HLOPHE, J:

[1] I have read the judgment of my learned sister Ndita. I however respectfully differ on her findings. I am of the view that the appeal should succeed on the ground that the contribution by Spur to the Trust in the sum of R48 471 714 does not qualify in my view as expenditure in the production of income for the purposes of section 11(*a*) of the Income Tax Act 58 of 1962 ("the IT Act"). Furthermore, I am also of the view that the Commissioner is not precluded from raising the additional assessment in respect of the 2005 and 2009 years of assessment ('the prescription issue') as the original assessments had not prescribed.[1] My reasons for my views follow.

[2] The factual background had been summarized in the judgment of Ndita, J. I shall proceed to draw emphasis on certain facts only.

[3] Spur Corporation Limited ('Spur HoldCo') is the holding company and 100% shareholder of Spur. Spur is a wholly owned subsidiary of Spur HoldCo. Spur Group of Companies (including *inter alia* Spur and Spur HoldCo) resolved in 2004 to implement the share incentive scheme in terms of which eligible employees of Spur were afforded the opportunity of participating in the share incentive scheme so as to promote the growth and profitability of the Spur Group of Companies. The object and purpose of the share incentive scheme was to provide an incentive to participants to promote the continued growth of Spur.[2] It is common cause that the scheme came about after 18 months of planning. The tax implications were of concern.

[4] On 30 November 2004 Spur HoldCo (the holding company) established the Trust. Spur HoldCo was at that stage the sole capital and income beneficiary of the Trust.[3] Spur made the contribution of R48 471 714 ('the contribution') to the Spur Management Share Trust ('the Trust') in the 2005 year of assessment, having agreed to contribute a non-refundable

[1] The prescription issue in terms of Section 99(1) of the Tax Administration Act 28 of 2011 ('the TAA') only became necessary for determination only in the event the appeal succeeded. The aspect was not therefore decided Ndita, J.

[2] Record page 749 — Volume 8 — paragraph 18.4.5: Minutes of Directors Meeting on 18 February 2003.

[3] The trust deed was amended on 10 December 2010 however, Spur HoldCo remained the sole capital beneficiary of the contribution.

expense to the trustees in the amount of R60 000 000, in order for the trust to fulfil its purpose. Participants added in December 2010 as beneficiaries of the Trust, would only benefit of the dividends only, not the capital. It is significant that Spur HoldCo was and remained the sole capital beneficiary of the Trust.

[5] The purpose of the contribution is to oblige the trustees to apply the contribution (and any income derived from it) by subscribing for preference shares in NewCo, which in turn, shall apply the aggregate subscription price received towards the acquisition of Spur HoldCo shares. In short, the contribution by Spur to the Trust of R48 471 714 was used by the Trust to purchase the NewCo shares, which were secured by the shares purchased by NewCo in Spur HoldCo (in the same amount) and of which Spur HoldCo was the ultimate beneficiary by virtue of it being the sole beneficiary of the Trust's assets with a value of R48 471 714.

[6] Spur claimed the contribution as a deduction against its taxable income in terms of the provisions of section 11(*a*). The claimed deduction was spread over the period of the anticipated benefit to be derived, that being, over a period of seven (7) years, spanning from and including 2005 to 2012 in amounts R3 462 265 in 2005, R6 924 531 for the years 2006 — 2001 and against R3 462 265 in 2012. SARS initially allowed the deductions, however, subsequently disallowed it by way of additional assessments.

[7] The Tax Court found that the purpose of the expenditure was to incentivise the key staff members of Spur through a share incentive scheme. It reasoned that as the contribution effected the scheme. In the result it found that there was a sufficiently close clausal connection between the contribution of R48 471 714 paid by Spur to the Trust and its production of income. Whilst in my view, the scheme, albeit indirectly, could be said to incentivise employees, the contribution does not amount to an expenditure as contemplated by section 11(*a*) as it was in fact not expended as contemplated by the section. The contribution by Spur to the Trust acted as a `funding mechanism'. The contribution had always been contemplated and engineered to return to the Spur family. A loan would have achieved the same purpose but this would have attracted tax consequences and would not have qualified as a deductive expense. Though the contribution had been spent by the taxpayer, it is however controlled in such a manner that it would revert to Spur's parent company. The R48m was never destined for the pockets of the participants, it stayed in the pocket of the taxpayer's family.

[8] The control exercised by Spur HoldCo over the Trust is not without significance. The 2010 Spur HoldCo annual report reads:[4]

> "1.2.1 **Investment in subsidiaries**
>
> As the group controls the Spur Management Incentive Share Trust and Maxshell 72 Investments (Proprietary) Limited, these special purpose entities have been consolidated into the group financial statements."

[9] The control is further is also evident from the resolution passed by the directors of Spur HoldCo on 29 April 2009, instructing the trustees to offer NewCo shares to the participants. This was effected in accordance with documents prepared by Spur HoldCo and forwarded to the trustees with instructions as to their further conduct.[5]

[10] The share scheme was designed in such a manner that Spur HoldCo would be the ultimate recipient of the investment in the NewCo preference shares resulting from Spur's contribution. The participants (employees) are not the beneficiaries of the contribution. That Spur had thus not parted with the contribution, cannot be viewed as an expenditure in order to qualify having been **spent** in the production of income. The argument by Mr. Maritz for the Respondent that as long as there is an expenditure, the determination only lies against whether there exists a sufficiently close connection between the expenditure and the production of income cannot be correct. This respectfully would be a myopic view to adopt as it seeks to divide the question in two legs, *viz,* expenditure on the one hand and the connection on the other. The question is answered not by separating the two. It falls in one determination and is not divisible. The expenditure must be one that had been spent, not held in trust for the taxpayer, for it to be seen to be expended in the production of income.

[11] The accounting treatment of the contribution as per the KPMG Accounting Report dated 6 December 2004 supports my view.[6] The contribution made by the Spur to the Trust was from a group perspective, recognised as not representing an expense to the group. The trustees had no independent discretion and was dominantly controlled by the parent company. The contribution was therefore exclusively for the benefit of the group. Its dividends was for utilisation by the incentive scheme, however, the R48m remained in the Spur Group. The distance created by the various legal instruments in the formation of the trust, the contribution, the incentive scheme *et al* is a masquerade to appear as a section 11(*a*) expenditure.

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4 Record page 977 — 978 — Volume 10
5 Record page 1320 — 1321 — Volume 13
6 Record page 583 — 585 — Volume 6

[12] The relationship between the taxpayer (Spur Group) and where the contribution is engineered to go and controlled so as to ensure its guaranteed destination, that is to Spur HoldCo, is pivotal and cannot be ignored. In *Warner Lambert SA (Pty) Ltd v CSARS* the Court held:

> "Money spent by a taxpayer in order to advance the interests of the group of companies to which it belongs is not regarded as expenditure in the production of income. The link between the expenditure and the production of income is too tenuous. This has been firmly established in *Solaglass*..."

[13] The argument for the Respondent is that it matters not that the R48m contribution ends up in the hands of holding company of the Spur Group. It matters only that it had been spent by Spur Group. This argument infringes on the principle of legality. Spur effectively took money out of one pocket and placed in in another. The end result is illustrative of the true intention of the expenditure. The orchestration of the transfer of monies must be seen in that light and the flippant contention that as it need only to show the amount was spent to be seen as expended cannot in my view allowed to pass the test. In *Warner Lambert* the Court held that:[7]

> "The consequences of an act often proclaim its purpose. After all, the person is presumed to have intended the natural consequences of his acts."

[14] Spur had ring fenced this money for itself. That it is the *sine qua non* for the incentive scheme cannot be sufficient to pass the test whether the R48m had been spent it in terms of the provisions of section 11(*a*). The payment was a vehicle through which to create the dividends, which in turn is the incentive. The payment, *per se,* never left the pockets of the family. The relationship between subsidiary and its holding company were dealt with in *Solaglass.* At paragraph 27 the Court held:

> "The appellant is itself a member of the Group. It does not function independently. It is controlled, and its activities directed, as in the case of all subsidiaries, by the holding company of the Group. The appellant and the subsidiaries with which it does business are knit together as members of one and the same family, and they deal with each other as such. The confines of the family are precisely defined with reference to the individual companies within the Group...."

[15] The Spur Group in my view did not discharge, on a balance of probabilities, the onus which rested upon it. I am not persuaded that the expense by the taxpayer was an expense in the production of income and accordingly the additional assessment raised by SARS ought in my view to be upheld.

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[7] Paragraph 14, page 352

PRESCRIPTION:

[16] SARS is obliged by section 99 of the TAA to raise an additional assessment where an amount, which was subject to tax and which should have been assessed to tax, was not so assessed. The argument for the Respondent is that even if the additional assessment is upheld, it would be necessary to adjudicate whether the assessment had become prescribed. SARS bore the onus of proof to establish that the limitation imposed by section 99(1) did not apply. Section 99(2)(*a*) provides that the time limitation does not apply where the full amount of tax chargeable was not assessed due to fraud, misrepresentation or non-disclosure of material facts.

[17] The issue of prescription arises in relation to the 2005 to 2009 years of assessments, where the additional assessments were raised on 28 July 2015. This is outside of the three year period. The question is thus whether the non-assessment was due to non-disclosure of material facts and/or misrepresentation made by Spur.

[18] In its 2005 income tax return Spur answered *'no'* to the following questions, which were incorrect. It is argued by SARS that as a result of the misrepresentations and non-disclosures in the tax returns, SARS was unable to make a full and proper consideration of the tax consequences of the contribution and the share incentive scheme. It is the result of these misrepresentations and non-disclosures which caused SARS to assess the taxpayer on a different basis to what it would have assessed had the facts been properly disclosed in the tax returns.[8]

[19] At the hearing of this appeal, Counsel for the respondent, argued that causation had not been proven by SARS, who bears the onus to prove that it had, as a result of the incorrect declarations on the taxpayer's return, not properly considered and assessed the tax consequences aforesaid. His argument followed that although the return declared the incorrect information, it was submitted along with the financial documents of the taxpayer, which meant that the non-disclosure was thus not entirely undisclosed or misrepresented. Thus, when SARS accepted their so-called partial non-disclosure, it acted to its detriment. It cannot therefore, after three (3) years had lapsed, raise additional assessments. I cannot agree with these submissions.

[20] The three (3) year limitation can only logically apply in circumstances where the information had been properly disclosed. The provision would be self-destructive, if it meant the consequences of submitting fraudulent, misrepresented or non-disclosed return could only be acted upon by SARS if detected within the three year period. This contention would be *contra bones mores* as it would amount to excusing a taxpayer in circumstances where it had

[8] Record page 866 — Volume 9

not properly disclosed its own information on the tax return. Differently stated, it would exonerate a taxpayer who had made improper disclosures in his return by allowing him to rely on other documents furnished to SARS, however, ex facie his return he had clearly misrepresented the true facts. It would offend the statutory imperative of having to make full and proper disclosures in a tax return but would also allow taxpayers to omit its true affairs and subsequently claim that the onus was on SARS to have uncovered it and acted upon it in good time. Furthermore it would be to impose too high a standard of care or diligence on the SARS assessing officials.

[21] Spur failed to make the necessary disclosures in its tax return. It is fair and reasonable to infer that the incorrect disclosures caused the original assessments by SARS. The corollary is, that had the correct information been disclosed in the return, the correct assessments would have been issued by SARS. The contention by Mr. Maritz that it is arguable whether Spur had misrepresented or non-disclosed its true affairs, as the financial statements had been attached, suggests that Spur had told a half-truth, is untenable. Completion of the tax returns is on *par* with a statement under oath. The taxpayer effectively vouches that it contains the truth, the whole truth and nothing but the truth. Though the onus is on SARS to discharge on a balance of probabilities that they acted upon the return in circumstances where it contains misrepresentations and non-disclosure (whether fraudulent or innocent), Spur did not call as their employee, Ms. Vivianne Novos, to testify as to how the wrong information had been inserted in the tax returns. This is further perpetuated by the fact that the misrepresentations and non-disclosures in the 2005 was repeated in the succeeding years of 2006, 2007 and 2008. Factors such as the returns having been incorrectly declared, that it was done over four (4) successive years, where Ms. Van Dijk as Chief Financial Officer of the Board of Spur Corporation Limited, had attested to its correctness, lends *prima facie* proof that it had been done in circumstances as contemplated in section 99. Spur's failure to call Ms. Novos to controvert this evidence or inference, crystallised into proof on a balance of probabilities that indeed the full amount of tax chargeable was not assessed, due to *'fraud, misrepresentation or non-disclosure of material facts'.* It is not required of SARS, in these circumstances, to show the basis on which it had uncovered the incorrect information and the circumstances which brought about raising the additional assessments.

[22] In the premise, Spur's incorrect answers to the questions in the tax returns constitute misrepresentations and non-disclosures of material facts which caused the full amount of tax chargeable in the 2005 to 2009 years of assessment not to be assessed to tax by the Commissioner.

[23] For the reasons set out above, I would uphold the appeal with costs, including the costs consequent upon the employment of two counsel and substitute the order of the Tax Court to read that the appeal is dismissed and the additional assessments raised by SARS for the 2005 to 2012 years of assessment are confirmed.