THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 367/2015

In the matter between:

DR H C AVENANT **APPELLANT**

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral citation: *Avenant v CSARS* (367/2015) [2016] ZASCA 90 (1 June 2016)

Coram: Ponnan, Theron, Saldulker, Swain and Mbha JJA

Heard: 23 May 2016

Delivered: 1 June 2016

Summary: Paragraphs 2, 3(1), 4(1) and 9 of the First Schedule to the Income Tax Act 58 of 1962 – 'produce held and not disposed of' – grapes delivered by wine farmer to a co-operative – pressed into pulp and mixed with pulp of other members of co-operative – identity of natural product retained – resultant pulp 'produce' – ownership of pulp retained by members of co-operative – produce 'not disposed of'.

ORDER

On appeal from: Tax Court, Cape Town (Allie J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

Swain JA (Ponnan, Theron, Saldulker and Mbha JJA concurring):

[1] The issue in this appeal is whether harvested grapes delivered by a farmer to a co-operative winery, which is pressed into pulp and then mixed with the pulp of other members of the co-operative, for processing into wine, constitutes 'produce held and not disposed of' at the end of a tax year for the purposes of para 2 of the First Schedule to the Income Tax Act 58 of 1962 (the Act). The appellant, Dr H C Avenant, who conducts agricultural operations as contemplated in s 26(1) of the Act, contends that it does not. The view of the respondent, the Commissioner for the South African Revenue Service that it did, resulted in the appellant being assessed to tax in the 2009 tax year. As a result an amount of R789 338 was included as taxable income in respect of 'closing stock from farming operations' in terms of paras 2, 3(1) and 9 of the First Schedule to the Act.

[2] The appellant unsuccessfully objected to the assessment and thereafter appealed to the Tax Court, Cape Town (Allie J). The court a quo held that the grapes delivered to Namaqua Wines Ltd (the co-op) at the end of February 2009 was 'produce on hand that was not disposed of as at the end of the 2009 year of assessment that should have been included' as income being the value of wine

grapes. As regards the assessed amount of R789 338 the court a quo concluded that it was 'manifestly erroneous, unfair and unreasonable' set it aside and referred it for re-assessment to the Commissioner. Leave to appeal to this court was granted by the court a quo in terms of s 135(1) of the Tax Administration Act 28 of 2011.

[3] The relevant statutory provisions are as follows:

(a) Section 26(1) of the Act provides that:

'The taxable income of any person carrying on pastoral, agricultural or other farming operations shall, in so far as it is derived from such operations, be determined in accordance with the provisions of this Act but subject to the provisions of the First Schedule.'

(b) Para 2 of the First Schedule to the Act provides that:

'Every farmer shall include in his return rendered for income tax purposes the value of all livestock or produce held and not disposed of by him at the beginning and the end of each year of assessment.'

(c) Para 3(1) of the First Schedule to the Act provides that:

'Subject to the provisions of subparagraphs (2) and (3), the value of livestock or produce held and not disposed of at the end of the year of assessment shall be included in income for such year of assessment and there shall be allowed as a deduction from such income the value of livestock or produce, as determined in accordance with the provisions of paragraph 4, held and not disposed of at the beginning of the year of assessment.'

(d) Para 4(1)*(a)* of the First Schedule to the Act provides that:

'The values of livestock and produce held and not disposed of at the beginning of any year of assessment shall . . . be deemed to be –

> *(a)* in the case of a farmer who was carrying on farming operations on the last day of the year immediately preceding the year of assessment, the sum of –
>
> (i) the values of livestock and produce held and not disposed of by him at the end of the year of assessment. . .'

(e) Para 9 of the First Schedule to the Act provided at the time that:

'The value to be placed upon produce included in any return shall be such fair and reasonable value as the Commissioner may fix.'

(f) Section 3(4) of the Act provides inter alia that:

'Any decision of the Commissioner under . . . paragraphs . . . 9 . . . of the First Schedule . . . shall be subject to objection and appeal.'

[4] The respondent submits that the provisions of paras 2, 3(1) and 4(1) of the First Schedule to the Act, perform a similar function to the provisions of s 22 of the Act, which pertains to the determination of the value of trading stock. Trading stock is defined in s 1 of the Act as follows:

'"Trading stock" includes anything produced, manufactured, constructed, assembled purchased or in any other manner acquired by a taxpayer for the purposes of manufacture, sale or exchange by the taxpayer or on behalf of the taxpayer.'

[5] The relevant portions of s 22 of the Act provide as follows:

'(1) The amount which shall, in the determination of the taxable income derived by any person during any year of assessment from carrying on any trade (other than farming), be taken into account in respect of the value of any trading stock *held and not disposed of* by him at the end of such year of assessment, shall be –

> *(a)* in the case of trading stock other than trading stock contemplated in paragraph *(b)*, the cost price to such person of such trading stock, less such amount as the Commissioner may think just and reasonable as representing the amount by which the value of such trading stock, not being, has been diminished by reason of damage, deterioration, change of fashion, decrease in the market value or for any other reason satisfactory to the Commissioner; . . . .

(2) The amounts which shall in the determination of the taxable income derived by any person during any year of assessment from carrying on any trade (other than farming), be taken into account in respect of the value of any trading stock *held and not disposed of* by him at the beginning of any year of assessment, shall –

> *(a)* if such trading stock formed part of the trading stock of such person at the end of the immediately preceding year of assessment be the amount which was, in the determination of the taxable income of such person for such preceding year of

assessment, taken into account in respect of the value of such trading stock at the end of such preceding year of assessment; or

(b) if such trading stock did not form part of the trading stock of such person at the end of the immediately preceding year of assessment, be the cost price to such person of such trading stock.' (Emphasis added).

[6] In *Richards Bay Iron & Titanium (Pty) Ltd & another v Commissioner for Inland Revenue* [1995] ZASCA 81; 1996 (1) SA 311 (A) at 316F-317D the rationale for provisions such as s 22 read with the extended definition of 'trading stock' in s 1 of the Act, was described in the following terms:

'The South African system of taxation of income entails determining what the taxpayer's gross income was, subtracting from it any income which is exempt from tax, subtracting from the resultant income any deductions allowed by the Act, and thereby arriving at the taxable income. It is on the latter income that tax is levied . . . Where a taxpayer is carrying on a trade, any expenditure incurred by him in the acquisition of trading stock is deductible in terms of s 11*(a)* of the Act because it is expenditure incurred in the production of income, and it is not of a capital nature. Income generated by the sale of such stock is of course part of the trader's gross income. Where in his first year of trading a trader has bought, and thereafter sold, all the stock which he acquired during that year, no problem arises. There will be a perfect correlation between the trading income earned and the expenditure incurred in that particular year in purchasing and selling the stocks sold, and the difference between the two sums will give a true picture of the result of the year's trading. There will be no stock on hand at the close of the year of which account need be taken. Contrast with that situation a situation in which the trader, having sold all the stock acquired earlier during that year at a substantial profit, purchases large quantities of stock just prior to the close of his tax and trading year. If he were permitted to deduct the cost of purchasing that stock from the income generated by his sales, without acknowledging the benefit of the stock acquired, he would be escaping taxation in that year on income which otherwise would have been taxable by the simple expedient of converting it into trading stock of the same value. That process could be repeated every year *ad infinitum*. It is true that there would ultimately have to be a day of reckoning when trading finally ceases, but the fact remains that the taxpayer will have been enabled to avoid liability for tax until that point is reached. Where the trader is an individual who is subject to rising marginal tax rates as his trading profit increases, he would

be enabled to so regulate his apparent profit that he immunised himself from them indefinitely.'

[7] As pointed out by *Silke*, if the trading stock is not sold in the same year it was acquired, a taxpayer who only deducts the costs of acquiring the stock without taking into account the value of the stock, will not include a 'balancing' amount in gross income. Section 22(1) of the Act therefore requires 'the value of the trading stock held and not disposed of' at the end of the year of assessment, to be taken into account in the calculation of taxable income. The value of the closing stock is added to taxable income to 'balance' the tax calculation.[1]

[8] In *Richards Bay* at 319D Marais JA referred to Australian tax law and the decision in *Federal Commissioner of Taxation v St Huberts Island (Pty) Ltd (in liquidation)* (1978) 78 Australian Tax Reports 452 where Mason J stated that:

'The recognition by accountants and commercial men that raw material used for the purpose of manufacture in a manufacturing business and partly manufactured goods form part of the trading stock of the business was an almost inevitable development. *It enabled the value of raw materials and partly manufactured goods to be included in the value of trading stock at the beginning and end of an accounting period* and by this means it led to the making of a more accurate calculation of the profit earned or the loss sustained in that period. *It is not easy to see how an accurate calculation of profit or loss could be made unless the value of raw materials and partly manufactured goods was taken into account.* Of course the value might be taken into account, even though by different means. Partly manufactured goods may be dealt with as "work in progress", as indeed they are sometimes, but this expression is no more than an alternative description except in so far as it is intended to introduce different methods of valuation.

In this respect I agree with Aickin J that the House of Lords in *Ostime (Insp of Taxes) v Duple Motor Bodies Ltd* [1961] 1 WLR 739 did not treat work in progress as being essentially different from trading stock. *Their Lordships used the expression "work in progress" as an*

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[1] A P De Koker & R C Williams *Silke on South African Income Tax* (Service 57, 2016) para 21.2.

alternative description for partly manufactured goods which, like raw materials and completed goods, form part of the trading stock of a business and which, as that case illustrates, give rise to special problems of valuation. At 751, Lord Reid, with whose judgment Lord Tucker and Lord Hodson agreed, said:

"Suppose that the manufacture of an article was completed near the end of an accounting period. If completed the day before that date the article, if not already sold, has become stock-in-trade, if completed the day after that date it was still work in progress on that date."' (Emphasis added).

[9] Consequently, in *CSARS v Foskor* [2010] ZASCA 45; [2010] 3 All SA 594 (SCA) para 21 it was stated that:

'Historically, trading stock denoted goods acquired by a trader or dealer and held for sale. Both in Australia and South Africa the narrower view of what constituted trading stock gave way to the wider view to include raw materials acquired for purposes of manufacture, components and partly manufactured goods.'

[10] Trading stock for the purposes of s 22(1) of the Act therefore includes partly manufactured goods, also referred to as 'work-in-progress'. In addition, as pointed out in *Richards Bay* at 325 B-F the definition of trading stock which includes:

'. . . anything produced, manufactured, purchased or in any other manner acquired by a taxpayer for purposes of manufacture . . . by him or on his behalf'

means that:

'. . . in order to fall within the definition, what the taxpayer produces, manufactures, purchases or otherwise acquires *need not be intended to be disposed of in the state in which it then is.* It suffices that it is intended to be used for the purposes of manufacturing something. *Nor does it matter whether or not that which is intended to be used is capable of realisation or sale in the state in which it then is. Whether it is so realisable or not, there will be no contemplation of receiving any quid pro quo for it in the state in which it then is.* The fact that it may be saleable in its then state and have an ascertainable market value is not what brings it into the first part of the definition, because it was not produced, manufactured, purchased or in any other manner acquired for sale or exchange. What brings it into the definition notwithstanding that its sale or exchange was not contemplated is its intended use for purposes of manufacture.' (Emphasis added).

[11] Although s 22 of the Act excludes from its ambit taxable income derived by a taxpayer from the activity of 'farming', s 26 provides that the taxable income of any person carrying on 'pastoral, agricultural or other farming operations' shall be determined in accordance with the Act, but 'subject to the provisions of the First Schedule'. Paragraphs 2, 3(1), 4(1) and 9 of the First Schedule, which have as their object the valuation of 'livestock and produce held and not disposed of' by a taxpayer at the end of the year, accordingly form part of the Act. It would be anomalous if the meaning attributed to 'trading stock held and not disposed of' in terms of s 22 of the Act differed from the meaning to be attributed to 'livestock and produce held and not disposed of' in terms of paras 2, 3(1), 4(1) and 9 of the First Schedule to the Act.[2] 'Trading stock' has been construed for the purposes of s 22 as work-in-progress and stock which need not be in a saleable form.

[12] The following facts are common cause, or not in dispute:

(a) The appellant carried on 'pastoral, agricultural or other farming operations' in terms of s 26(1) of the Act and filed tax returns which showed a portion of his overall taxable income, being derived from his farming operations, which were described as 'wingerd boerdery'. The farming income consisted mainly of what was described in his personal financial statements as 'Verkope Produkte'.

(b) The farming income consisted of payments that the appellant received from the co-op, of which he was a member, in respect of grapes that he delivered to the co-op for the purpose of being made into wine.

(c) On delivery, the grapes of the appellant were pressed into a pulp and mixed with the pulp from pressing grapes of the same cultivar and class delivered by other

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[2] 'There is at least a reasonable supposition, if not a presumption, that the legislature, in using a particular term. . .intended it to bear the same meaning throughout. . .' a particular enactment. *Durban City Council v Shell and B.P. Southern Africa Petroleum Refineries (Pty.) Ltd.* 1971 (4) SA 446 (A) at 457A-B.

farmers, who were also members of the co-op. These common pools consisting of individual cultivars and classes of grapes such as Sauvignon Blanc, Chenin Blanc, Merlot and Chiraz were operated by the co-op on behalf of its members.

(d) As at midnight on 28 February 2009, (the end of the appellant's 2009 year of assessment) all of the appellant's harvested grapes had been delivered to the co-op and had been pressed into pulp to begin the process of wine making. The co-op thereafter bottled or packaged the wine and marketed and sold it.

(e) Each farmer who participated in a pool received payment from the co-op of his or her pro rata share of the net proceeds of the sale of the wine, after the deduction of the co-op expenditure incurred in making and marketing the wine. The pro rata share was calculated by reference to the ratios in which each individual farmer delivered grapes to the pool.

(f) Three payments were made to the appellant by the co-op. A 'voorskot' was paid in July (after each February to April harvest), a 'middelskot' and an 'agterskot' was paid respectively in March and November of the following year. The 'voorskot' was paid by the co-op out of borrowed money before any income was earned from the sale of wine and the 'middelskot' was based upon ongoing estimates. The final amount owed to the appellant was only calculated when the 'agterskot' was paid.

(g) The members of the co-op did not sell their produce, or transfer ownership to the co-op accordingly the co-op did not become the owner of the produce.

[13] Regard being had to the statutory context and the factual background, the following issues arise for determination:

(a) Whether the income received by the appellant, which is generated by the sale of wine, constitutes income 'derived from such operations' for the purposes of s 26(1) of the Act?

(b) Whether the pressing of the grapes delivered by the appellant to the co-op results in the pulp no longer constituting 'produce' as contemplated by para 2 of the First Schedule to the Act?

(c) Whether the pressing into a pulp of the appellant's grapes and its subsequent mixing with the pulp of other members of the co-op, results in what was delivered by him no longer being 'produce held and not disposed of by him', in terms of para 2 of the First Schedule to the Act?

[14] With regard to the first issue, the transformation of the grapes into wine, does not result in the income earned from the sale of wine, being removed from the ambit of income derived from the appellant's agricultural operation. As stated in *Ko-Operatiewe Wynbouers Vereniging van Zuid-Afrika Bpk v Industrial Council for the Building Industry* 1949 (2) SA 600 (A) at 614:

'Wine farming consists of a number of different operations, such as cultivation of vineyards, pruning of the grape vines, rendering the vines free from disease, gathering the crop, pressing the grapes into wine and probably delivering the finished product to the "first buyer".'

[15] As regards the second issue, the essence of the appellant's argument was as follows: After the grapes were pressed they no longer existed at midnight on 28 February 2009 and once the resultant pulp was mixed with the pulp from other farmers' grapes, the mixture was work-in-progress in a process of manufacture, namely the manufacture of wine by the co-op and therefore not the appellant's produce at all. It was submitted that the appellant's harvested grapes, being a natural product, constituted his produce, whereas the mixed pulp, treated with chemicals to aid the fermentation process, did not.

[16] The appellant relies upon the decision in *R v Giesken and Giesken* 1947 (4) SA 561 (A) at 567, in relation to dairy farming where the following, was stated:

'The exemption does not exclude farmers or their employees, but farming operations. If *Bryant's* case is correctly decided, it would be part of such operations if the milk sold and distributed were milk produced by the appellant's own farming operations. . . Once they are

engaged in respect of milk which is not the product of the appellant's farming operations, whether it be mixed with such product or not, the exemption no longer applies. The sale or distribution of milk obtained from other sources by purchase is not a farming operation, even if milk produced by the seller is added. The position is that, though they are engaged in farming operations, the sale and distribution of the milk is not a farming operation, and this is the case whether what is being delivered consists of 70 per cent of milk purchased and 30 per cent of milk produced by their farming operations, or *vice versa*.'

The appellant submits that whilst it may be accepted that it is a part of dairy farming to pasteurise, sell and distribute a dairy farmer's milk, the moment the farmer's milk is mixed with milk from other sources ie other farmers, what is done thereafter ceases to be part of a 'farming operation'. On parity of reasoning, once the pulp resulting from the appellant's grapes was mixed with the pulp from other farmer's grapes, no part of the resultant mixture was 'produce'.

[17] *Giesken* is not authority for this proposition. In issue was a statutory exemption from regulations pertaining to the 'dairy trade' if the activity was part of a 'farming operation'. The appellant conducted a dairy farming operation, but also bought milk from other producers which was sold and distributed with the appellant's own milk. It was held that the sale and distribution of milk from other sources was not a farming operation. Once purchased milk from other sources was introduced to the appellant farmer's distribution business it lost the character of farming operations, whether the milk was mixed or not. The ratio of the case therefore concerned the introduction of purchased goods into a sale and distribution chain and not the mixing of produce.

[18] In further support of the appellant's contention that the growing of grapes was not a farming activity giving rise to 'produce', but that the process of taking the grapes and making wine from them was a 'process of manufacture', reliance was placed upon the decision in *Secretary for Inland Revenue v Safranmark (Pty) Ltd* 1982 (1) SA 113 (A) at 122B where it was held that the transformation of raw chicken into Kentucky Fried Chicken was a 'process of manufacture'. The hallmark of manufacturing was that 'there must have been a "substantial or essential change of the character of the materials" out of which the "manufactured" article was made'. In

the present case it was argued that there was a 'substantial or essential change of the character of the materials' out of which the wine was made. The grapes and chemicals, the material used and processed by it to make wine were very different from bottled wine. Harvested grapes are to wine what livestock in the form of chickens were to Kentucky Fried Chicken. There was accordingly a major qualitative difference between the raw materials that went into making wine and the finished product, which suggests a process of manufacture rather than a farming operation.

[19] *Safranmark* is not authority for this proposition. The court had to decide whether what the taxpayer was engaged in was a 'process of manufacture' being the language of the statute in issue. It was not called upon to decide whether the fried chicken constituted 'produce' of a farming operation. The taxpayer was never a farmer and purchased the raw chicken pieces from a supplier. The respondent submits that the outcome of the process in *Safranmark* was a new compound substance, the ingredients of which were chicken, milk, egg mixture and breading mixture, which had ceased to retain their individual qualities. What is left after the wine making process is fermented grape juice, not compounded with any other ingredients to create a compound substance. The harvested grapes are not to wine, what livestock in the form of chickens were to Kentucky Fried Chicken. At the end of the day wine is grape juice albeit in a fermented form.

[20] The respondent correctly submits that the concept of 'wine in process' falls comfortably within the concept of the 'produce' of a wine grape farmer as envisaged by the First Schedule to the Act. The fact that the grapes have been pressed into a pulp and the process of fermentation begun, does not mean that the appellant's produce has disappeared. It is still there albeit in a different form.

[21] The extent to which the identity of a natural product may be transformed by some form of treatment until it no longer exists as produce, must depend upon the product as well as the nature and extent of the processing, or treatment, to which it is subjected. Each case must be decided upon its own facts, but an important consideration is that:

'. . . the raw product may conceivably in certain instances be subjected to extensive processing and be mixed up with numerous other commodities, to such an extent that it loses its identity by confusion and survives only as an inseparable portion of a factory product.'[3]

[22] The physical processing that the appellant's grapes had undergone by being pressed into a pulp and the natural fermentation process that had begun (even if chemicals had been added at that stage) by midnight on 28 February 2009, did not make them essentially different from the produce of the harvest. They could not be said to have lost their identity by being 'mixed up with numerous other commodities' and to 'survive' only as an inseparable portion of a 'factory product'.

[23] The word 'produce' in para 2 of the First Schedule must be interpreted in the context in which it appears, as well as the apparent purpose to which it is directed.[4] Because 'produce' as in the case of 'trading stock' includes work-in-progress and does not need to be in a saleable form to qualify as such, it is clear that the pulp produced by pressing the grapes falls within the definition of 'produce'. If this were not so, the purpose of including 'produce' as part of the closing stock of a farmer at the end of the tax year, would not be achieved. The deduction by the appellant of the costs of producing the grapes will not be 'balanced' unless the value of the grapes (albeit in the form of pulp) is added to 'balance' the tax calculation for that tax year. Because of the delay between the harvesting of grapes and the sale of the wine, and the consequent delay between when expenses are incurred in producing trading stock and realising the proceeds thereof, no balancing can take place unless the existence of the pulp is taken into account in that tax year.

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[3] *R v Bade* 1951 (3) SA 218 (T) at 221D-F. See also *Variawa v R* 1936 NPD 540; *R v Sarang* 1947 (3) SA 620 (N).

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[24] I turn to the third issue, namely, what was delivered no longer being classified as 'produce held and not disposed of by him'.

[25] According to *Silke*[5] 'held' encompasses ownership or dominium although it is wide enough to include 'possession without legal ownership'. Trading stock is 'held and not disposed of' if the taxpayer has dominium in it, that is if he is the owner of it.[6] The respondent accordingly submits that 'disposed of' connotes conduct by which a trader has parted with ownership of the goods. Meyerowitz is of the view that 'hold' is not synonymous with owned and is wide enough to include occupation or possession without legal ownership,[7] but that a disposal occurs when goods are sold unconditionally but not yet delivered. In the present case where ownership is retained by the appellant but possession is not, the produce is clearly 'held' for the purposes of para 2 of the First Schedule.

[26] Faced with the problem of ownership of the produce delivered to the co-op, the appellant advanced an argument which sought to diminish the nature and extent of the ownership held by him in the pulp. Because the pulp of the grapes delivered by the appellant was immediately mixed with the pulp from grapes delivered by other farmers, it was impossible, so the argument went, to identify who had contributed which pulp as a result of confusio, with the result that all of the farmers were co-owners in undivided shares of the pulp. The appellant accordingly only retained fractional ownership of the pulp resulting from the grapes delivered by him. This was drastically curtailed ownership. In addition, the resultant fractional ownership retained by the appellant had as a consequence that the mixture did not qualify as the appellant's produce. Furthermore, because the appellant had 'authorised' the co-op to sell the wine once it had been manufactured from the mixture of pulp and was

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[5] Paras 8.111 and 15.10.

[6] Silke at 8.111.

[7] D Meyerowitz *Meyerowitz on Income Tax* (2007 – 2008) paras 20.24 and 20.26.

entitled to nothing more than a pro rata share of the proceeds of the sale of wine, he had 'disposed of the pulp'. The pulp was not in the appellant's possession, nor was it held by the co-op for him, but was held by the co-op 'for the purpose of sale by itself'.

[27] A complete answer to the submissions of the appellant lies in the fact that the appellant retained joint ownership, in an undivided share, of the pooled pulp and at a later stage the pooled wine, pro rata to the extent of his contribution of grapes to the pool. This is the effect of mixing or the mingling of the pulp with the pulp of other members without the intention of transferring ownership, where identification of the pulp contributed is not possible.[8] That ownership was retained by the appellant means that the pulp could never have been held by the co-op for the purpose of sale by itself. The pulp had to have been held by the co-op for the appellant. As regards the appellant's contention that the resulting mixture of pulp could not be regarded as 'own produce derived from his or her farming operations,' *Silke* points out that para 2 of the First Schedule requires a farmer to include 'all . . . produce held and not disposed of "at the end of the tax year"'. The reference to 'all produce' suggests that the Schedule:

'is concerned not only with a farmer's own produce but also with produce acquired from others for farming purposes. If the legislature intended that "produce" be restricted to that grown or produced by the farmer, it would have used appropriate language to convey this intention'.[9]

I agree. The fact that the appellant owned an undivided share in the resultant pulp, would not absolve the appellant from having to account for this produce. If this were not so, farmers could mix their produce together before the year end to avoid having to account for closing stock.

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[8] *Andrews v Rosenbaum & Co* 1908 22 EDC 419 at 425; P J Badenhorst, Juanita M Pienaar and Hanri Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) para 8.5.

[9] *Silke* Para 15-9.

[28] An interpretation of clauses 2 and 3(1) of the First Schedule that includes fractional ownership of pooled produce, gives effect to the purpose of the legislation, is in accordance with the language used and achieves sensible and business-like results. The appellant therefore had 'produce on hand and not disposed of' in the form of an undivided share in the pulp.

[29] I turn to the issue of whether the pulp had a value as at midnight on 28 February 2009 and if so, how that value should be calculated? The appellant submits that based on the provisions of s 22(1) of the Act, for the purposes of paras 2, 3(1), 4(1) and 9 of the First Schedule, 'value' means market value and the pulp had no market value. However, para 9 of the First Schedule does not prescribe the method of fixing a value for the purposes of para 2 and simply provides that the value must be 'fair and reasonable'. The respondent is not bound to apply a market value to the pulp, but may adopt another method, provided that it is fair and reasonable.

[30] The appellant submits that the costs incurred by the co-op for which the appellant and other members were liable once they had delivered their grapes, had to be taken into account in arriving at a value for the pulp. Because some 50 per cent of the fixed and variable costs of the co-op had been incurred before the first grapes had been delivered by any farmer, the pulp had a negative value at the end of February 2009. The costs already incurred exceeded the value, if any of the pulp at that date.

[31] The cross-examination of the appellant's witnesses before the court a quo focussed on two potential ways of valuing the pulp:

(a) The application of the distilling wine price; and

(b) A determination of the cost of production.

The respondent submits that on either basis, the value of the pulp was greater than zero.

[32] As regards the issue of whether the pulp had any value, Messrs Van den Heever (the manager of the co-op) and Niewoudt (the owner and winemaker of Cederberg Wines) testified before the court a quo. They expressed the view that the pulp that existed at the end of February 2009 was without value and there was no market for it. They conceded in cross-examination that although the pulp may have had a theoretical value to the winemaker, there was no market for it which would have a negative value once the co-op's costs, which were already incurred, were taken into account. They were also of the view that even theoretically the pulp could never have been dealt with commercially, as no winemaker would tamper with it before the fermentation process had been completed. They both acknowledged, however, that they would not have allowed somebody to take away the pulp for free. The co-op insured the pulp up to the full value of the wine it was expected to produce. Mr Van den Heever agreed that it would be possible to determine a value of the pulp, by reference to the future price expected to be achieved by making wine from it, taking into account the risks and costs required to get it to that point.

[33] I agree with the respondent that when regard is had to the fact that the pulp represents the accumulated work and cost of a year of farming activities, the wine to be produced is intended to be sold at a profit and in each year the appellant had received positive returns from the pool, to say the pulp is entirely valueless is unrealistic. In *Richards Bay Iron & Titanium (Pty) Ltd & another v Commissioner for Inland Revenue* [1995] ZASCA 81; 1996 (1) SA 311 (A) at 326A-B the following was said concerning the difficulty of valuing an unfinished product:

'The suggested difficulty in identifying and ascribing a value to things in the process of being manufactured on the last day of the tax year does not entitle the Court to disregard the plain language of the definition. Moreover, the difficulty strikes me as being more apparent than real. Certainly in other tax jurisdictions the legislators and the courts have not baulked at the concept of valuing work-in-progress and there is no reason to suppose that the South African Parliament was daunted by the prospect. As has been noted, appellants themselves encountered no great difficulty in doing so when required by respondent to do so.'

[34] The appellant submits that either method of valuing the pulp involves inexact conjecture rather than a fair and reasonable value, because the pulp was unlikely to

have finished the process of fermentation by the end of February. The evidence, however, established that the distilling wine price was an ascertainable value, reflected in wine statistics and publications and a known concept in the industry. This method was employed by the appellant's accountant, Mr Vos, when he completed the appellant's 2007 and 2008 income tax returns. The calculation used the volume of grapes harvested and delivered by the appellant to the co-op before the year end, converted into litres (using an estimated juice yield) multiplied by that year's distilling wine price. He had used this method of valuation, because it was reflected as an alternative permissible method in the draft guideline issued by the respondent at the time. The guideline was based upon paras 2 and 3 of the First Schedule. In 2009 a similar calculation was initially included in the return to reflect produce held and not disposed of, but these accounting entries were then reversed by Mr Vos to reflect the value of produce on hand as zero. An error, however, was made by the respondent in assessing the appellant, because an 'estimated distilling wine price per litre' of R1.52 was used when the correct distilling wine price for 2009 was 97.84 cents per litre. The respondent submits that although the amount was incorrect, it was clear to the appellant what methodology was used by the assessor and what the correct amount should have been.

[35] The use of the distilling wine price as a minimum price operates to the advantage of the taxpayer, as most of the wines destined to become wine are of far superior quality than distilling wine. Because distilling wine attracts no real costs save for transport, the danger that it will return a negative value after cellar costs have been deducted, is not real. The evidence showed that in 2008-2009 'D' quality grapes used for distilling wine realised a positive return for the farmer of R450 per ton. This method is practical, workable and realises a positive value for the stock. It places a fair and reasonable value upon the stock.

[36] As regards the method based upon production costs, Mr Vos had advised the respondent that the appellant's average production costs were R580 per ton. Although this was an industry average, from his evidence the appellant's costs in

relation to his wine farming activities were objectively ascertainable and this exercise could be carried out by the respondent.

[37] An issue initially advanced by the appellant was that the court a quo erred in referring the matter back to the respondent for further consideration and re-assessment. At the hearing the appellant, however, properly conceded that if the appeal failed on the merits the court a quo correctly referred the re-assessment to the respondent. It follows that the Commissioner would be entitled to re-assess the appellant to tax in accordance with the principles set out in this judgment.

[38] The appellant also submits that if the appeal fails, he should not be liable for the payment of interest on the amount as originally assessed by the respondent. It is clear, however, that the court a quo found that the respondent was not entitled to levy interest on the assessed amount until it was revised.

[39] The court a quo made no order as to costs. The appellant requests an award of costs in the tax court in his favour, on the basis that the respondent's grounds of assessment were unreasonable. However, the appellant did not include a prayer for costs in his grounds of appeal, to the court a quo. To seek this order after the proceedings before the court a quo have been finalised, is impermissible. The respondent was never alerted to the fact that the appellant would seek an order of costs and may have approached the matter differently if forewarned. There is no basis to interfere with the exercise by the court a quo of its discretion in this regard.

[40] It is ordered that

The appeal is dismissed with costs.

K G B Swain
Judge of Appeal

Appearances:

For the Appellant:	T S Emslie SC
	Instructed by:
	Spamer Triebel Incorporated, Bellville
	Symington & De Kok, Bloemfontein
For the Respondents:	M W Janisch SC
	Instructed by:
	The State Attorney, Cape Town
	The State Attorney, Bloemfontein