THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 165/2018

In the matter between:

BENHAUS MINING (PROPRIETARY) LIMITED **APPELLANT**

and

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

Neutral citation: *Benhaus Mining v CSARS* (165/2018) [2019] ZASCA 17 (22 March 2019)

Coram: Lewis ADP and Mbha, Mocumie and Makgoka JJA and Davis AJA

Heard: 18 February 2019

Delivered: 22 March 2019

Summary: A company that excavates ground and digs up mineral-bearing ore for a fee on delivery to another entity that processes the ore, undertakes mining operations within the meaning of ss 1 and 15*(a)* of the Income Tax Act 58 of 1968. It is thus entitled to claim deductions of the full amount of capital expenditure on mining equipment in the tax year in which it is incurred, in terms of s 36(7C) of the Act.

ORDER

On appeal from: The Tax Court, Johannesburg (Weiner J, with B Mathibela and T Mashanda as assessors):

1 The appeal is upheld with the costs of two counsel.
2 The order of the Tax Court is replaced by:
'(a) The appeal is allowed.
(b) The additional assessments for the years 2005 to 2009 are referred back to the Commissioner so as to allow for the deduction of capital expenditure claimed in respect of mining equipment.'

JUDGMENT

Lewis ADP (Mbha, Mocumie and Makgoka JJA and Davis AJA concurring)

[1] The principal issue in this appeal is whether the appellant, Benhaus Mining (Pty) Ltd (Benhaus), derived income from mining operations in the tax years 2005 to 2009, such that it was entitled to claim deductions of capital expenditure in terms of s 15 read with s 36(7C) of the Income Tax Act 58 of 1968 (the Act) in the tax years from 2005 to 2009. The Commissioner for the South Africa Revenue Services had, since 1998, assessed Benhaus for income tax on the basis that it did fall within the ambit of s 15. But in September 2013, the Commissioner issued additional assessments for the years in question on the basis that Benhaus was not a mining company. Benhaus objected to these additional assessments, but the objection was not upheld. It appealed under the Tax Administration Act 28 of 2011. The Tax Court, Johannesburg, (per Weiner J) dismissed the appeal. With her leave, Benhaus has appealed to this court.

[2] There are some ancillary issues that arise should Benhaus's arguments on the principal issue not succeed: the quantum of recoupments in respect of the sales of

mining assets; the imposition of understatement penalties; the levying of s 89*quat* interest in respect of the underpayment of provisional tax, and the costs order made by the Tax Court against Benhaus.

[3] For many decades the income tax dispensation for miners (as well as for farmers) has been different from that governing other businesses. Miners are given privileged treatment, in order, we are told, to encourage the growth of the mining industry. As Conradie JA said in *Western Platinum Ltd v CSARS* [2004] All SA 611 (SCA) in para 1:

'The fiscus favours miners and farmers. Miners are permitted to deduct certain categories of capital expenditure from income derived from mining operations. . . . These are class privileges. In determining their extent, one adopts a strict construction of the empowering legislation.'

[4] The question that arises in this appeal is whether Benhaus carried on mining operations for the purpose of making those capital expenditure deductions in the years of assessment in which the capital expenditure was incurred. That depends on what is meant by 'mining' in the definitions of the Act (s 1) and in s 15*(a)*, read with s 36(7C).

[5] The Act defines 'mining operations' and 'mining' as including 'every method or process by which any mineral is won from the soil or from any substance or constituent thereof' (s 1). Section 15 states:

'Deductions from income derived from mining operations—There shall be allowed to be deducted from the income derived by the taxpayer from mining operations—

(a) an amount to be ascertained under the provisions of section 36, in lieu of the allowances in sections . . .' .

[6] Section 36(7C) states:

'Subject to the provisions of subsections (7E), (7F) and (7G), the amounts to be deducted under s 15*(a)* from income derived from the working of any producing mine shall be the amount of the capital expenditure incurred.'

[7] The reasons for affording miners the right to claim the amount of capital expenditure actually incurred, instead of the asset being depreciated over time (as

would be the case with other industries) are, in simple terms, to lessen the impact of deriving little or no income when a mine is being established, in some cases for years. It is notorious that a huge investment of capital is required for mining operations before any income can be earned. The accelerated depreciation regime provides incentives to miners to take on the risks of entering the mining industry which is volatile and inherently risky. In other industries, expenditure on capital assets is deducted over a number of years, depending on the expected life of the asset.

[8] The explanations for the special dispensation for miners are discussed in detail in various committee reports provided over the years, including the Davis Tax Committee: Second and Final Report on Hard-Rock Mining December 2016. I refer to this simply as background and because the Commissioner has placed much emphasis on the difference between mine operations that take considerable time to earn income, and contract miners who earn a fee as soon as they produce the mineral bearing ore for the client which processes it. However, the report has no bearing on the issues on appeal although the Tax Court relied on the reasons advanced for accelerated depreciation in interpreting the Act, stating that they did not apply to contract miners. In my view, the explanations, which are not new, do not bear upon the question whether in fact Benhaus does undertake mining operations.

[9] The latest report of the Davis Tax Committee (above), in dealing with the taxation of miners, explains the rationale for the special incentives given to miners as follows (Chapter 2, para 2.1 and Chapter 4, para 2.1):

'**Life cycle of mines**

The nature of mining is such that mining operators are exposed to protracted lead times before the generation of revenue. This problem is exacerbated by the high upfront capital infrastructure costs associated with establishing a mine. Therefore, in the early period of operations, risks and expenditures are very high, while revenue inflows are delayed for a considerable time . . .'.

'Evolution of special mining tax incentives

Mining is a cyclical industry and investments in the different stages of the mining industry lifecycle (exploration, development, production and mine closure) tend to follow these cycles. In general . . . mining is a long-term activity requiring significant upfront capital investment and expertise to develop large ore-deposits to the mining production stage. The steps of moving from greenfields exploration through to the development of operating mines (when income is

finally generated) may involve multiple decades and many billion rands to bring a project to fruition. Over this period the project will be exposed to fluctuating commodity cycles, changing technology and risks on the geology and technical side of a project, as well as other extraneous potential risks. Mining is also a geographic location bound activity which is subject to significant risk from sudden changes . . . . Other industries are far more mobile and will relocate to different jurisdictions should the political or legislative environment change significantly.'

[10] The facts are largely common cause. Benhaus evolved from being a construction company to being what it called a contract miner. The Chief Executive Officer of the company, Mr B J Botha, who testified at the hearing in the Tax Court, explained that Benhaus entered into contracts with third parties that held mining rights to render various services to them for a predetermined fee. Benhaus did not itself trade in the mineral extracted from the ground.

[11] The services that Benhaus rendered included establishing sites for open cast mining, and fencing them off; constructing workshops; constructing and maintaining access roads, and primary and secondary haul roads; removing topsoil and stockpiling it in designated areas; excavating and stockpiling material extracted from the ground; removing waste; constructing storm water drainage; blasting mineral-bearing ore; delivering the ore to the client's premises for processing; and rehabilitating the mining area after extraction.

[12] The essence of the contracts between Benhaus and its clients was to extract the mineral-bearing ore (the mineral being chrome) on behalf of the client in return for a fee calculated at a rate per ton of chrome-bearing ore that was delivered to the client's processing plant. In its income tax returns, on the advice of its auditors, Benhaus claimed that it was mining the ore, and claimed deductions in each year of the capital expenditure on the machinery used in extracting the mineral-bearing ore. As I have said, the Commissioner issued additional assessments for the years in question, on the basis that Benhaus was not engaged in mining as it did not itself process the mineral bearing ore nor trade in it. It was not engaged in the entire process of mining chrome.

[13] Benhaus has not contended that it was responsible for the entire process, but it does maintain that it did extract the mineral-bearing ore from the ground and was thus mining for the purpose of the Act. Botha explained that there were three stages in chrome mining using the open cast method of mining. The first stage is the removal of topsoil and overburden (material overlying a mineral deposit), blasting the rocks to expose the mineral reef, extracting the ore, crushing and screening it, and delivering it to the processing plant of the client. Benhaus attended to that whole process.

[14] The second stage involves the milling of run of mine chromotite ore and subjecting it to a washing process. The third stage entails melting the higher concentrate ore in a furnace to separate waste from metal to produce ferrochrome. Benhaus was not involved in these two stages of the mining process. But it was penalized if the chrome-bearing ore delivered to its clients was not of the same quality as that of the sample agreed.

[15] In the years of assessment in question, Benhaus had worked on seven mines, in terms of eight different agreements with clients. In its income tax returns, it did not separate out the income earned in respect of each mine under each contract: it reflected the income earned as a composite sum, a factor that the Commissioner relies on and to which I shall return. The only other income that Benhaus earned, according to its auditor, Mr J Malan, who gave evidence at the hearing, was from hiring equipment. This was a small fraction of its income – below what Malan termed ‘our materiality figure’.

[16] The proceeds from the disposal of equipment, which occurred before the useful life had been exceeded, was declared as unredeemed capital expenditure and was thus recouped by Benhaus for mining tax purposes.

[17] The Tax Court found that Benhaus was not engaged in mining within the meaning of ss 1 and 15*(a)* of the Act, and had thus not been entitled to deduct the capital expenditure in respect of the equipment it used for extracting mineral-bearing ore from the ground. Its other findings all flow from this. Thus the essential question is whether the first stage of the process of mining for chrome constitutes mining under the Act.

Was Benhaus engaged in mining chrome?

[18] Marius van Blerk *Mining Tax in South Africa,*[1] on which Benhaus relies, considers that mining contracts for the type of work involved in open-cast mining constitutes mining operations. He points out that since the right to mine precious stones and precious metals vests in the State, the holder of a mining lease who conducts the business of extracting them from the earth mines on a contract basis. By analogy, where a contractor extracts mineral-bearing ore in open-cast mining, even if it does not share in the proceeds of the sale of the mineral, must be said to 'win' it from the earth.

[19] Benhaus relies also on *Gloucester Manganese Mines (Postmasburg) Ltd v Commissioner for Inland Revenue* 1943 TPD 232 (12 SATC 229) where Murray J (Greenberg JP concurring) said that moneys accruing under a mineral lease in respect of manganese to a lessee from the exploitation of the manganese would be 'income derived by it from mining operations'.

[20] And in *Commissioner for Inland Revenue v B P Southern Africa (Pty) Ltd* 1997 (1) SA 375 (C) (59 SATC 97) a full court (per Friedman JP) said that prima facie, 'income derived from mining operations' means 'income derived from the process by which minerals are extracted from the soil'. But that was too narrow a construction, Friedman JP said. 'Properly construed, in the context of the Act and the Schedule, the phrase "income derived from mining operations" means income derived from the business of extracting minerals from the soil.' This passage was approved by Conradie JA in *Western Platinum* (above) para 6.

[21] The Tax Court, while referring to these passages, followed the reasoning of Sutherland J, also in the Tax Court, Johannesburg, in a judgment that dealt with the same question concerning contract mining: *Classic Challenge Trading v CSARS*, ITC 1907 (2017), 80 SATC 271. Weiner J in this matter, following the decision in *Classic Challenge*, found that the work that Benhaus did to extract mineral bearing ore for the earth did not amount to 'mining operations'. Sutherland J held that a contractor such

[1] Regrettably the Library of the Supreme Court of Appeal does not have a copy of the book and I have not been able to get access to it. The extracts that I quote below are taken from the two judgments of the Tax Court, Johannesburg, referred to below.

as Benhaus was not in the 'trade' of mining. It was rather 'in the trade of servicing a miner's requirement by the extraction of material' (para 26).

[22] Sutherland J rejected the view of Van Blerck that contract mining does constitute mining for the purpose of s 15*(a)* of the Act, and said that the analogy with a mining lease for precious stones or metals was not helpful. Van Blerck said, after dealing with the analogy:

'Can it be said that the same principles apply when the contractor operates on the basis of a charge which relates to his inputs and efforts rather than receiving a share of profits? To put it differently, is a contractor undertaking mining operations where he effectively conducts such operations for the benefit of another, and receives no share in the resultant profits other than a negotiated fee related to his efforts and costs? It is considered that this must be so as the contractor is conducting a process by which a mineral is won from the earth; as a consequence the income which he derives will be taxed in accordance with mining tax rates and the expenditures will be deductible in accordance the special mining tax provisions.'

[23] Sutherland J, rejecting this view, said (para 26) it was 'unsustainable':

'Mere extraction is not enough to render a contractor who earns a fee for extraction as a person eligible to fall into the class of persons who are engaged in "mining operations" as defined. The contractor is not in the 'trade' of mining; rather it is in the trade of servicing a miner's requirements by the extraction of material.'

[24] He contrasted the contract miner's position with that of the miner in *Gloucester*, where the contract conferred a right to share in the profits from the sale of minerals on the contractor in exchange for the extraction of the minerals. The trade of that contractor, Sutherland J said, was not mere extraction, and its income depended on the dynamics of the market for the sale of the minerals: it was not 'an independent contractor insulated from the trade of extracting and selling minerals. The distinction is manifest; ie the contract miner is, in effect, an outsourced service, remunerated by the risk-taker, whereas in a joint venture the "non-owner" of the mining right shares the risk in the whole venture.'

[25] Benhaus argues that there are two fundamental flaws in this approach: that the trade of mining should entail commercial risk; and that the taxpayer must be involved in the process of separating the mineral from the rock.

Risk

[26] Sutherland J, Benhaus contends, has introduced a requirement of risk in trade that is not consonant with decisions of this court. It relies in this regard on *Burgess v Commissioner of Inland Revenue* 1993 (4) SA 161 (A), 55 SATC 185, where Grosskopf JA, in dealing with the question whether a certain form of investment amounted to trade, said that although an element of risk is included in the concept of a 'venture' in its ordinary meaning, an investment scheme could nonetheless constitute trade even if it were not risky.

[27] Sutherland J pointed out, in the passage quoted above (para 27 of his judgment), that the taxpayer in *Gloucester* had taken risks because it would share in the profits of the mining operations being undertaken by the mineral lessee. That may be so – but the court did not refer to risk as an element in determining whether the lessor conducted mining operations. And it is not evident to me why the question whether an entity is conducting mining operations is dependent on the miner bearing risk.

[28] In any event, as Benhaus points out, it did bear commercial risk. It bought mining equipment at considerable cost (some R391 million over the relevant years of assessment), had to incur labour costs and losses caused if there were strikes, the costs of equipment breakages, and to be paid a lesser fee if the quality of the chrome-bearing ore was below that of the sample agreed.

Separation of the mineral

[29] Sutherland J in *Classic Challenge* rejected the proposition that any part of the process of winning minerals from the earth could constitute mining operations. The definition of mining and mining operations refers to a process 'by which any mineral is won from the soil *or* from any substance or constituent thereof'. This could be construed in such a way that both the entity that dug the mineral bearing ore from the earth, and the entity that operated the process of separating the mineral from the ore or rock, would be involved in mining the same mineral. That construction, he held, was incorrect. He said (para 23):

'Accordingly, in the chain of activity which constitutes "mining operations" it seems plain that the mere activity of extraction is a necessary but not sufficient attribute for the taxpayer to fall

into the class of persons involved in “mining operations” and at the other end of the process spectrum, once the mineral is “isolated” any further activity to convert the mineral into a substance that does not exist in a natural state, cannot be “mining operations” as defined.’

[30] Sutherland J thus concluded that there had to be a direct connection between the activity (the mining source) and the income earned as a result. He said (para 29):
‘Accordingly, the critical enquiry is into the “connection” between “income” and “source” and whether the connection between mining operations and the income is broken by an intervening happening. This is the reason why it is not appropriate to try to disaggregate bits and pieces of overall mining operations, as if they could constitute self-standing trades or businesses of “mining operations”.
He found, therefore, that the contract miner in that case was not involved in mining operations.

[31] Benhaus argues that this approach disregards decisions of this and other courts. In ITC 1455 (Transvaal Special Court: judgment handed down 3 February 1989) Harms J, dealing not with s 15*(a)*, but with sales tax, said the following about the processes of extraction and production, after noting the distinction between diamond and gold mining, on the one hand, and iron oxide on the other (at 120):
‘The gold and diamond [are] already in the earth. One merely isolates it. In the case of iron production the iron is not in the ore. Iron oxide is. The iron is produced by an industrial process and not a mining process. A similar conclusion was reached by the High Court of Australia sitting on appeal in *Federal Commission of Taxation v Broken Hill Proprietary Co Ltd* 1 ATR 40. The operative paragraph of the judgment deserves quoting: . . .
“This expression [mining operations] is wider than the working of a mining property. . . .Thus it comprehends more than mining in the narrow sense which imports the detaching of lumps of material from the position in which in a state of nature they form part of the soil. It extends to any work done on a mineral-bearing property in preparation for or as ancillary to the actual winning of the mineral (as distinguished from work for the purpose of ascertaining whether it is worth while to undertake mining at all): . . . Likewise, it extends to any work done on the property subsequently to the winning of the mineral (eg transporting, crushing, sluicing and screening) for the purpose of completing the recovery of the desired end product of the whole activity. We agree entirely with [the] view that “mining operations” covers “work done on a mineral-bearing property in preparation for, or as ancillary to, the actual winning of the mineral” . . . .”’

Broken Hill did not, however, find that the final treatment of the mineral for its better utilization, was part of a mining operation, just as the cutting of a diamond or the pouring of gold would not constitute a mining operation. Harms J in ITC 1455 held that the treatment of iron oxide to produce iron did not constitute mining. Mining was the process of extraction.

[32] See too *Richards Bay Iron and Titanium (Pty) Ltd v CIR* 1996 (1) SA 311 (A) and *CSARS v Foskor* [2010] ZASCA 45; [2010] 3 All SA 594 (SCA), both of which dealt with the question whether ore extracted by one entity and delivered to another for processing, constituted trading stock in the hands of the latter for the purposes of ss 1 and 22 of the Act. This court found that the entity that extracted the ore was the miner and that the entity that processed it into an entirely different state was not. In *Foskor* Navsa JA pointed out that in ITC 1455 Harms J had distinguished between mining and manufacturing operations. The taxpayer in *Foskor* was not regarded as a miner because it did not participate in the digging of the ore, but only in isolating the mineral from ore that had been stockpiled. Similarly in *CSARS v Marula Platinum Mine* [2016] ZASCA 121; 2017 (2) SA 398 (SCA) this court held that the processing of ore was a manufacturing activity. In *Foskor* Navsa JA said (para 43) 'it is true that when a mining house extracts gold ore and then subjects it to processes including refinement one would be hard-pressed not to concede that the mining house in question has mined the gold'. This dictum should be equally applicable when entity A extracts the mineral from the earth, and entity B engages in other processes including refinement.

[33] The Commissioner contends that *Richards Bay*, *Foskor* and *Marula* are distinguishable from this matter in that they deal with a different legal question. That is true. But their importance lies in the fact that this court has long recognized that the process of extraction amounts on its own to a mining operation and the processing of the ore is a different one.

Income from a producing mine

[34] It is not clear to me that the Tax Court in this matter made any finding on whether Benhaus qualified for a deduction in terms of s 15*(a)* read with s 36(7C). Benhaus argues in any event that it did so qualify in that its income was derived from a producing mine. The Commissioner of course argues otherwise.

[35] Section 36(7C) provided in the relevant years of assessment that, subject to other subsections, the amounts to be deducted under s 15*(a)* from income derived 'from the working of any *producing mine* shall be the amount of capital expenditure incurred'. The word producing was inserted by an amendment to the Act in 1993. The explanatory memorandum on the Income Tax Bill of 1993 states that the amendment 'places it beyond doubt that the deduction of capital expenditure may only be allowed against income derived from the exploitation of a producing mine'. Discussing this subsection in *Western Platinum*, Conradie JA said (para 6): 'this expression (arguably more focused than the expressions "mining" and "mining operations") leaves no doubt that to be mining income its source must be minerals taken from the earth'.

[36] The Commissioner argues that because the income earned by Benhaus was derived from fees for services provided and not from the sale of minerals, the income is not from mining operations at a producing mine. He further contends that Benhaus incurred expenditure on activities such as establishing the site and road construction before there was a producing mine extant. Benhaus, on the other hand points to the passage in *Broken Hill* referred to by Harms J in ITC 1455 quoted above, that work done on mineral bearing property in preparation for winning of the mineral, is covered by the expression 'mining operations'. That must be so, or miners would not be able to recover expenditure on capital assets laid out before, even long before, a mine started producing. This argument thus takes the matter no further.

Ring fencing for the purposes of s 36(7E) and s 36(7F)

[37] Weiner J in the Tax Court in this matter found that even if Benhaus had shown that it derived its income from mining operations, it had not complied with s 36(7E) and (7F) of the Act. Section 36(7E) limits the aggregate of the amounts of capital expenditure deductible under (7C), and provides that it shall not exceed the taxable income in any year in relation to any mine or mines. Subsection (7F) similarly limits the deduction to the taxable income 'from mining on that mine'. The inclusion of these subsections in the Act is discussed in *Armgold/Harmony Freegold Joint Venture (Pty) Ltd v Commissioner, South African Revenue Service* [2012] ZASCA 152; 2013 (1) SA 353 (SCA) paras 8 to 15. Benhaus, in its returns for the relevant years, did not separate

out, or ringfence, its income earned in respect of any mine, and claimed for all capital outlays in one sum, not distinguishing between equipment used on different mines.

[38] The Commissioner thus argues that Benhaus did not comply with the provisions of s 36(7E) and (7F), and for that reason too should not be entitled to deductions. However, this ground of assessment was not pleaded by the Commissioner, who pleaded only that the business carried out by Benhaus did not constitute mining, or mining operations, as defined in s 1, and that it did not earn any income from mining operations as contemplated in s 15*(a)* of the Act. It therefore did not qualify for deductions of capital expenditure in terms of s 15*(a)* read with s 36(7C).

[39] The Commissioner cannot raise new grounds of assessment without pleading them in express terms. Rule 31(2) issued under the Tax Administration Act requires that the statement of grounds for opposing the taxpayer's appeal must set out a clear and concise statement of the consolidated grounds of the disputed assessment, and the material facts and legal grounds upon which he relies in opposing the appeal. The Commissioner did not raise non-compliance with ss 36(7E) or (7F) in opposing Benhaus's appeal. The argument on non-compliance with s 36(7E) and (7F) must thus fail.

Conclusion

[40] In *Commissioner for Inland Revenue v Lever Bros* 1946 AD 441 Watermeyer JA at 450 said that 'the source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income, and . . . this originating cause is the work which the taxpayer does to earn them, the quid pro quo which he gives in return for which he receives them'.

[41] Benhaus submits that it does the mining work – extracting the mineral-bearing ore from the ground – and that it is entitled to deduct the capital expenditure on mining machinery from income earned from doing so. I consider that to be correct. The client is not required to spend funds on any equipment for the purpose of mining. Any possibility that both client and miner would be entitled to the special deductions given for miners is remote. The mining operations commence when Benhaus moves on to site and starts the preparation for digging the mineral-bearing ore out of the earth.

It matters not that it is paid a fee for delivering the chrome bearing ore to the client: that is the work from which it earns its income. It is of no relevance that the contract miner immediately begins to earn an income from mining, and does not have to wait for the mine to produce over many years. It is conducting mining operations and is entitled to the benefits conferred by s 15*(a)* and s 36(7C). This conclusion follows the approach adopted by this court in *Western Platinum* and gives effect to the clear meaning of mining as defined in s 1 of the Act – 'every method or process by which any mineral is won from the soil'. That is precisely what Benhaus did by conducting the first stage in chrome mining using the open-cast system as described above.

[42] In the circumstances the appeal must be upheld. The question of recoupment falls away, and Benhaus should not have been ordered to pay penalties and interest. Nor should it have been ordered to pay the costs of the appeal in the Tax Court.

[43] The appeal is upheld with the costs of two counsel.
The order of the Tax Court is replaced by:
'1 The appeal is allowed.
2 The additional assessments for the years 2005 to 2009 are referred back to the Commissioner so as to allow for the deduction of capital expenditure claimed in respect of mining equipment.'

_____

C H Lewis
Acting Deputy President

Mocumie JA (concurring)

[44] I have read the judgment of Lewis JA. I agree with the judgment and order but am of the view that the following point must be made. Existing case law is clear regarding the beneficiaries of the CAPEX scheme: contract miners and miners are equally entitled to benefit from the accelerated depreciation scheme subject to their

participation in significant phases of the mining process. However, in my view, the scheme was designed to incentivise mining as opposed to components thereof which is what contract miners do.

[45] To the extent that there is no clear and unambiguous definition of mining, the class not intended to benefit from the dispensation will continue to benefit and be entitled to the accelerated tax deductions which clearly is to the detriment of the fiscus coffers.

[46] In my view this calls for the amendment of the ITA as the courts cannot promote this objective without invading the terrain of the legislature. This is evidently a case where we must defer to the legislature to ensure the requisite change.

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B C Mocumie

Judge of Appeal

APPEARANCES

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