REPORTABLE

IN THE INCOME TAX SPECIAL COURT

HELD AT PORT ELIZABETH

Case No.: 10797

In the matter between:

A (PTY) LTD **Appellant**

and

COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE **Respondent**

Held in Port Elizabeth, 2 May 2002

JUDGMENT

10 May 2002

KROON, J:

INTRODUCTION:

At issue in this appeal is the interpretation of the phrase "connected person" in s 12C (6)(a)(i) of the Income Tax Act, No. 58 of 1962 ("the Act"), as that section read in 1992.

The relevant provisions of s 12C at that time were worded as follows:

(1) Subs. (1):

"In respect of any –

(a) machinery or plant… which was or is brought into use for the first time by the taxpayer for the purposes of his trade … and is used by him directly in a process of manufacture carried on by him…

a deduction equal to 20% of the cost of such machinery, plant … (hereinafter referred to as an asset) shall, subject to the provisions of subsection (4), be allowed in the year of assessment during which the asset is so brought into use and in each of the four succeeding years of assessment."

(2) Subs. (2):

"For the purposes of this section the cost to a taxpayer of any asset shall be deemed to be the lesser of the actual cost to the taxpayer or the cost which a person would, if he had acquired the said asset under a cash transaction concluded at arm's length on the date on which the transaction for the acquisition of the said asset was in fact concluded, have incurred in respect of the direct cost of acquisition of the asset, including the cost of the installation and erection thereof …"

(1) Subs. (4):

"Where –

(a) any asset was brought into use by any person as contemplated in subsection
(i) during any year of assessment;

(b) such asset was previously brought into use by any connected person in relation to such person; and

(c) a deduction under this section, section 12(1), section 12B or section 27(2)(d) was previously granted to such connected person, whether in the current of previous year of assessment,

the deduction in terms of this section shall be calculated on the lesser of the cost of such asset to such connected person or the market value thereof as determined on the date upon which the asset was brought into use by such person."

(3) Subs. (6):

"For the purposes of this section "connected person" means –

(a) in relation to a company –

(i) any other company if both such companies are controlled or owned directly or indirectly by the same persons;

… "

It may be recorded that the provisions of s 12C were subsequently amended in various respects; in particular, the definition of "connected person" in subs. (6)

was excised and in its place a new, far more comprehensive, definition of "connected person" was inserted in s 1 of the Act.

BACKGROUND:

Sometime after Wold War II A L (known as "P") emigrated to this country from Holland. He had three sons: A, J and P. A (who married Mrs A) in turn had three sons: A junior, R and M. J had two sons: T and C. Subsequently, for the purposes of the takeover agreement referred to on pages 5, 6, 7 & 8 below, a trust, styled the "AP Trust" ("the Trust"), was set up. The beneficiaries under the Trust are A, his wife, their children and their further descendants. P died in 1970.

P and A commenced what was referred to in the evidence as a family business, in the manufacturing field. The business prospered and over the years diversified its activities. As at 30 June 1991 the stable included the following companies: AS (Pty) Ltd ("AS"); AB (Pty) Ltd ("the appellant"); AC & P (Pty) Ltd and AK (Pty) Ltd. From time to time various family members were introduced into the business.

As at 30 June 1991 the shareholding in each of the four companies referred to was held as follows:

A:	30%
Mrs A (A's wife)	30%

J:	40%

The directors of the companies were: A, J, T, C, A Junior, R and two other persons, a Mr PT (who was also employed in the business) and a Mr LX. At an earlier stage A and Mrs AX held 66$\frac{2}{3}$% of the shareholding and J 33$\frac{1}{3}$%. However, 6$\frac{2}{3}$% of the shareholding was transferred by the former to the latter, with the eventual view to each of the younger generation (i.e. A's three sons, A junior, R and M and J's two sons, T and C) succeeding to 20% of the businesses.

The stage came when A and J wished to retire and pass the businesses of the four companies onto the younger generation. To that end a takeover agreement (the relevant provisions of which are set out below) was concluded between the parties involved. While the agreement was signed on 27 March 1992, the effective date thereof was 1 July 1991 and the terms of the agreement were in fact implemented with effect from the last mentioned date. (It had in fact been the intention that the agreement take effect a year earlier, i.e. on 1 July 1990, but the terms of the agreement could not be finalised in time).

The terms of the agreement included, *inter alia*, the following provisions:

(1) As at 1 July 1991 the appellant would purchase as going concerns the businesses of the other three companies. The purchase consideration was the net book value of the fixed and current

assets, save for the factory machinery, plant and equipment (of AS), which was “brought to account at R2 049 624-00.”

(2) By reason of the sale of the plant, machinery and equipment of all the businesses to the appellant, reflected as having been effected by A and J, they would be credited with “Special Loan Accounts”, and provision was made for the repayment thereof (in a total sum of R2 4000 000-00) by the appellant by way of escalating monthly payments over a ten year period, in the ratio of 60 (A): 40 (J).

(3) With effect from 1 July 1991 the shareholding in the appellant would be as follows:

T	:	20%
C	:	20%
A junior	:	20%
R	:	20%
The Trust	:	20%

(By way of explanation it may be recorded that the evidence was that the 20% held by the Trust would in due course be allocated to A’s youngest son, M, who, it was anticipated, would later join the business – he did in fact do so, and the shares were allocated to him).

(4) The appellant would pass a general notarial covering bond over its plant, machinery, equipment and movable assets generally in favour of A and J to secure the special loan accounts.

(5) For as long as the appellant remained indebted to A and/or J under the special loan accounts it would favour them with its quarterly management accounts and audited year end financial statements (within specified periods) and would allow them unrestricted access to the books, records, properties, assets and machinery of the company and permit them to take extracts or copies of any of the documents referred to.

(6) The board of the appellant would comprise five directors, each of the 20% shareholders being entitled to appoint one director.

(7) The chairman of the board and the managing director would be the nominee of the Trust and the chairman would have a casting as well as a deliberative vote.

(8) While the special loan accounts or part thereof, remained unpaid, a resolution affecting a variety of stated matters could only be passed at a meeting of members of the appellant if a majority of 81% present voted in favour thereof or at a meeting of directors if all directors appointed to the board voted in favour thereof.

(9) For as long as the appellant remained indebted to A and/or J in respect of their special loan accounts the appellant would be precluded from doing any of the various acts set out in the schedule to the agreement, without the prior written approval of A and J jointly, the giving of which consent could not be unreasonably withheld, regard being had to their interest in the loan accounts.

With effect from 1 July 1991 the directors of the appellant were the following: A, T, C, A junior and R.

The machinery and plant purchased by the appellant from AS had previously been brought into use by the latter and a deduction, as envisaged in s 12C (4)(c), had previously been granted to it. The cost of the assets to AS had been in the sum of R451 930-00.

In its income tax return for the year ending 30 June 1992 the appellant (which had changed its name to A (Pty) Ltd invoked the provisions of s 12C (1) and claimed a deduction of 20% on the amount of R2 049 624-00, the consideration for which it had purchased the machinery and plant of AS.

In the initial tax assessment issued by the Commissioner to the appellant in respect of the tax year referred to, the deduction claimed was allowed. The result was that the appellant's trading profit for the year was assessed in the sum of R16 313-00 and after deduction of an assessed loss in the sum of

R5 986-00, its taxable income was assessed in the sum of R10 327-00. That taxable income attracted a tax liability in the sum of R4 956-96. The appellant paid that amount.

Thereafter, however, the Commissioner (while still accepting that the assets in question were machinery and plant as envisaged in s 12C (1), queried the validity of the deduction of 20% of the sum of R2 094 624-00. The query he raised was two-fold in nature. First, he raised the contention that AS was a "connected person" in relation to the appellant, as envisaged in s 12C (6) and accordingly, in terms of s 12C (4), the deduction to which the appellant was entitled in respect of the machinery and plant required to be calculated on the sum of R451 930-00, referred to on page 8 above, i.e. the cost of the assets to AS (which, it is to be implied, was accepted as being less than the market value of the assets). In the alternative, the Commissioner contended that the figure of R2 094 624-00 constituted an overvaluation of the assets in the sense that it substantially exceeded the cost at which the assets would have been acquired in a cash transaction at arm's length, as envisaged in s 12C (2) of the Act and accordingly, the deduction should have been calculated on a substantially lesser sum.

Correspondence passed between the appellant (and /or its auditors) and the Commissioner in which the validity of the latter's stance on the two issues referred to was the subject of debate. The Commissioner remained unpersuaded that his contentions were unsound.

The upshot was the issue of a revised assessment by the Commissioner as envisaged in s 79 (1) of the Act (which provides for additional assessments to be raised where the Commissioner is satisfied, *inter alia*, that any amount which was subject to tax and should have been assessed to tax under the Act, has not been assessed to tax). The basis of the revised assessment was that the ruling by the Commissioner that the first contention recorded on page 9 above was correct. (The Commissioner, however, reiterated his alternative contention that in any event the value of the assets should be reduced for write-off purposes in accordance with the provisions of s 12C (2) of the Act). The amount on which the 20% deduction in respect of the assets was to be calculated was accordingly fixed in the sum of R451 930-00. The result was that the appellant's trading profit for the tax year in question was assessed in the sum of R335 852-00, its taxable income (after deduction of the assessed loss of R5 986-00) in the sum of R329 866-00, its tax liability for the year in question in the sum of R158 335-68 and the balance accordingly payable by it in the sum of R153 378-72, to which interest in the sum of R80 821-12 in terms of s 89 quat of the Act was added, resulting in the total amount due by the appellant being the figure of R234 199-84.

The objection of the appellant to the revised assessment was dismissed by the Commissioner; hence, the present appeal.

Prior to the hearing the parties agreed that the sole issue to be decided at this stage was the question whether AS was a "connected person" in relation to the appellant as envisaged in s 12C (4) and (6) of the Act. Should that question be decided in favour of the Commissioner, the appeal would be dismissed and the assessment confirmed (subject to the resolution of a possible further dispute concerning an alleged subsequent undertaking by the Commissioner that interest on the outstanding tax would only be charged with effect from 1 May 1996). Should the question be decided in favour of the appellant, a declaration to that effect would be issued and the appeal proceedings postponed for a further hearing, if necessary, to decide the appeal against the Commissioner's alternative ruling that in terms of s 12C (2) the value of the assets should be reduced for write-off purposes to what he contends would have been the price payable therefore in terms of a cash transaction at arm's length.

THE ONUS:

It was accepted, correctly, by *Mr Beyleveld*, who appeared for the appellant that in terms of s 82 of the Act the appellant bore the onus of persuading us, on a balance of probabilities, that the assessment objected to is wrong.

THE CONCEPT OF CONTROL:

S 12C (6) (a) (i) envisaged either substantially common ownership of the two companies in question or substantially common control thereof. Counsel were, correctly, *ad idem* that on the facts of the present matter there was no talk of *ownership* of the two companies by substantially the same persons. The question to be decided is therefore whether there was the requisite *control* thereof by substantially the same persons.

Mr Jorge, for the Commissioner, contended that "control" as envisaged in the section meant *legal control*, (or, perhaps more accurately, the *potential for legal control*). Such control in the case of a company, so the argument proceeded, reposed in its board of directors (subject to any control that may be exercised by a general meeting of shareholders); accordingly, because there was a substantial and sufficient coincidence between the members of the boards of the two companies in question (as to which, see pages 5 and 8 above, the test posed by the subsection was satisfied.

I interpose here to record that during argument counsel were in agreement that *vis-à-vis* the appellant what required to be looked at was the situation after implementation of the agreement was in place and not the situation prior thereto. That approach was correct: the intention of the contracting parties, which was in fact given effect to was that the acquirer of the assets in question was to be the appellant as constituted with the agreement in place, not the appellant as constituted prior to the agreement taking effect.

Mr Beyleveld, on the other hand, argued that the "control" referred to in the section was *de facto control*; accordingly, because on the evidence, the *de facto* control of the two companies was in fact not in the hands of substantially the same persons, the requisite connection between the two companies was absent.

For the reasons that follow *Mr Beyleveld's* contention that the legislation's intention was to refer to *de facto* control, must be upheld:

(1) The case of *S v Pouroulis and Others* 1993 (4) S A 575 (W) concerned the prohibition contained in s 226 (1)(b) of the Companies Act, No 61 of 1973 against, *inter alia*, a company making a loan, directly or indirectly, to any other company controlled by one or more directors or managers of the first mentioned company. Subsec. (1A)(b) provided that such control would be deemed to be present only if certain prerequisites were present. At 602-3 *Stegmann* J considered the purport of the last mentioned provision. He pointed out that it was capable of being understood in narrower or wider senses, i.e. either that the only forms of control to be taken into account are those specified in the subsection or that every form of actual control is to be taken into account and, in addition, control is to be deemed to exist (irrespective of whether it actually does or not) if the stated prerequisites were present. He concluded that the legislature intended that the only forms of control to be taken into account are those specified in the subsection, with which he contrasted "control" in its ordinary meaning and in the absence of a statutory definition, viz., *de facto* control.

S 12C (6)(a)(i) (of the Act) contained no statutory definition of "control", and, in the absence of any other contrary indicators, the above decision is indirect authority for the proposition that the ordinary meaning of "control", viz., *de facto* control, was the intended meaning.

(2) It is trite that since it is an artificial legal entity, a company can only function through human agency. The human agency is the company's "directing mind or minds". See, e.g. *Levy v Central Mining & Investment Corporation Ltd* 1955 (1) S A 141 (A) at 149-150; *Tesco Supermarkets Ltd v Nattrass* [1971] 2 All ER 127 (HL) at 132 (where reference was made to *"those (persons) who 'represent the directing mind and will of the company, and control what it does*'"); *Secretary For Inland Revenue v Trust Bank of Africa Ltd* 1975 (2) S A 652 (A) at 669 (where reference was made to the entitlement of the persons who are in *effective control* of a company to testify as to the intention of the company in relation to any matter at any given time).

The words "directing", "controlling" and "effectively controlling" are interchangeable and refer to *de facto* control. Again, in the absence of a statutory definition or any other contrary indicators, that is the meaning to be ascribed to the word "controlled" in s 12C (6)(a)(i).

(3) The above interpretation is in keeping with the purpose of the legislative provisions in question. Ss 12C (4) and (6) are anti-avoidance provisions. They are designed to preclude persons (*in casu* representing companies) from manipulating assets under their control so as to claim additional write-off deductions while the assets continue to remain under their control. The achievement of that purpose would not be frustrated by leaving out of consideration persons who, despite being entitled in law to do so, do not in fact control the assets; conversely, the achievement of the purpose would not be

enhanced by taking such persons into consideration. As was stated in LAWSA, vol 4 (1) (First Reissue) (para. 35, page 55), control in the context of the question "who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation, [i.e.] who is (or who are) in actual control of the operations of the company [*Tesco Supermarkets* at 146a) and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under the other's order [*Tesco Supermarkets* at 146b]", does not mean having the power to control the company in the sense of holding the levers of power in the company; it connotes the *de facto* control of what the company does, of its day to day activities, exercised by the persons through whom it acts.

It remains to be added that, by reason of some delegation of powers, whether formal or informal in the form of a course of dealing, the delegate(s) may be the human agency directing the mind of, or controlling, a company, whether *pro hac vice* or generally. *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 217-218; *Tesco Supermarkets* at 132, 135. Thus, while the board of directors of a company are, *prima facie*, likely to be regarded as its directing mind and will, the directing mind in regard to a particular matter (and there is no reason why the general management and control of a company should be subject to a different approach) may be found in a subcommittee of the board (or for that matter a single member thereof). LAWSA, *op cit* page 56. See in this regard *Dickson v Acrow Engineers (Pty) Ltd* 1954 (2) SA 63 (W). The manner in which the director in question in that case imposed his will on the other directors on the board is echoed in the facts of the present case – as to which, see below. It was held that, as a result of a course of dealing, the other directors had given that director an implied mandate, *carte blanche*, as it were, to run the company. As a fact therefore, it may be said, that director was in *de facto* control of the company.

Sight has not been lost of the *dicta* in certain decided cases to the effect that our law does not recognise the concept of the puppet director, that it is unhelpful and even misleading to classify directors as “executive” or “non-executive” and that on his or her appointment as a director of a company every person assumes the fiduciary duty owed by a director to the company. See e.g. *Sage Holdings Ltd v The Unisec Group Ltd And Others* 1982 (1) SA 337 (W) at 354 A-C; *Philotex (Pty) Ltd and Others v Snyman And Others* 1998 (2) SA 138 (SCA) at 145 B-F.

Those *dicta* are, however, not of assistance in the instant matter. They refer to a different context, viz., a director’s liability for non-compliance with his or her fiduciary duty to a company; they do not relate to the issue of the meaning to be ascribed to the word *“controlled”* in the legislation presently under discussion.

THE EVIDENCE:

Only three witnesses testified at the hearing, all on behalf of the appellant, viz., Mr HM (a partner in the firm that acted as auditors to the appellant), Mrs SM (the company group accountant), and C L . In the nature of things *Mr Jorge*, who tendered no countering evidence, was not in a position effectively to challenge the factual averments made by the witnesses. That, of course, does not necessarily mean that the evidence must be accepted. The evidence still requires to be critically examined by us with a view to determining the acceptability or otherwise of the averments contained therein.

The relevant evidence on the pre-agreement and pre-takeover situation in the group of companies proceeded as follows: Originally P and A were each 50% owners of the then businesses. After P's death A, in fulfilment of a promise he made to his mother, introduced his two younger brothers, J and P, into the business and gave them equal shareholding. A resented the development and that led to friction. A was the dominant member and he "basically' ran the businesses, while the two younger brothers were involved in the building activities of the businesses. P later withdrew from the business after a fallout with A and the latter purchased his one-third shareholding. The shareholding thereafter changed as already recorded on page 5 above. A's two elder sons and J's two sons joined the businesses and worked therein. At various stages they were made directors of the separate businesses including AS. The circumstances under which this occurred were not elucidated during the evidence (save that when asked to explain how it came about that PT, who was a cabinet maker employed in the business, was made a director, HM stated that A would decide to appoint an employee as a director rather than to offer him a rise in remuneration). Be that as it may, the evidence was unequivocal that the group of companies was in fact managed by A. It was stated that his management style was autocratic, he was a dictator, exceptionally aggressive and stubborn, he had a quick temper, which he often lost, and his way was the only way the companies operated. Any questioning of his views was subject to his having the final say, and this caused friction within the group and the atmosphere in the offices was generally tense. Certainly, there was never, and could not have been, any situation where A was overruled. As it was put, he would never have allowed it. Any opposing view would be met by his stating that he was in control and if the others did not like it, “there was the door”; the threat of dismissal was there. In fact, on one occasion one of the other directors, who had voiced disagreement with a decision of his, was physically manhandled by him out of the office and advised that he had been sacked. (The director did, however, subsequently return). There were no true board meetings, but rather management meetings where A would advise the others of what was to happen and set them tasks. He was, as it was put, not a discusser of things, but was the person in control. He would not entertain the advice of his children and certainly not that of his brother’s children. He might discuss an issue with PT which involved the practical side of things, but no more than that. There would be no discussions with J, unless a guarantee to a creditor of the group was to be furnished. Major decisions such as those involving the acquisition of plant and equipment would be made by A after he had discussed the tax implications and methods of finance with HM. The finalisation of the accounts and financial statements would depend on discussions HM held with A. In the words of HM, he would not have dared to discuss same with anyone else in the companies. Insurance matters were dealt with by A. Staff decisions such as promotions and increase in remuneration were his sole domain. Instructions to staff were the prerogative of A. While initially, the cheques of the companies were signed by A and J, after Mrs SM was given signing powers it was she and A who did so. While C, T and R formally had signing powers on cheques, they did not sign cheques, save that, if Mrs SM was not available, A would require C to sign a cheque but would not proffer any explanation therefore to him.

The circumstances leading up to the conclusion of the agreement and the takeover was sketched as follows: A and J decided that the time to retire and to hand over to the following generation had come. In particular, A, who was already in his sixties and whose health was not what it used to be, decided that he wished to engage in more travelling (which was a passion of his) and to spend more time with his daughter who lived in Cape Town. The purpose of the agreement was to permit the younger generation to take over the effective control of the businesses and at the same time to make provision for a flow of income to A and J. The inclusion of the provisions in the agreement referred to on pages 7 and 8, paragraphs (5), (8) and (9) above and the retention of A as a director of the new consolidated company were intended to serve as a protection for the interests of A and J in the appellant's indebtedness to them. In addition, A's directorship was seen as a courtesy to him and a recognition of the contribution he had made to the business, and it was also considered that the new controllers of the appellant would be able to call on his expertise.

As to the manner in which the new consolidated company was run after the takeover the evidence was as follows: A radically new *modus operandi* was adopted. Whereas previously the control of the companies was a one-man show (i.e. A), the control was now in the hands of the new board of directors (with the exception of A; as to which, see below). Control by consultation and consensus or, if need be, by voting, was instituted. C, who emerged as the natural leader of the younger generation, was appointed as the managing director, originally for the first year, whereafter the position was to rotate amongst the other directors, but in fact he remained on in that position. All the decisions that had previously been the domain of A, as detailed on pages 18, 19 and 20 above, were now taken by the board (but excluding A). Specifically, in regard to the role played by A: The only board meetings that he attended, possibly four in all (until his resignation as a director in approximately 1994/1995), were meetings where quarterly financial reports were tabled and he was favoured with copies of same. The management of appellant was not discussed at these meetings. Unlike the other directors, he received no salary nor director's emoluments. He played no part in the day to day running of the affairs of the appellant and was not part of any decision making process. He did in fact spend much of his time travelling or with his daughter in Cape Town. His advice on certain aspects was sought from time to time, but it was up to the new controllers to make the decision whether that advice was to be accepted or rejected. On the takeover the existing banking account was closed, A and J withdrew as sureties and a new banking account was opened. Suppliers and creditors were advised in writing of the change in the appellant and that it now had new owners. Certain of them required new credit applications to be completed. A did continue for a period to sign certain documents as representative of the appellant, e.g. the 1992 income tax return and the annual financial statement for that year. However, he did so as he remained the designated public officer of the appellant. On an occasion, shortly after the takeover, a dispute arose between A and C as to who should sign the cheques in payment of the appellant's indebtedness to A. A wished to sign the cheques himself, but he was advised that he had no signing powers and that C would sign, and that is what happened. In short A had no control over the appellant whatsoever. For the sake of completeness, it should be recorded that the Trust at no stage played any part in the management and running of the appellant.

ASSESSMENT:

On a critical evaluation of the witnesses and their evidence we are persuaded, subject to what follows below, that as regards both the impression created by them in the witness box and the content of their evidence, we find no reason for any disquiet as to the acceptability thereof; we find the witnesses to have been credible and we accept that evidence. However, in view of the provision in the agreement (referred to on page 7, paragraph (6) above) that the board of the appellant consist of five directors and that each of the five 20% shareholders would entitled to appoint one director, it cannot be excluded that A was appointed as a director by the Trust, and that the reference in the evidence to his having been appointed as a director as a show of courtesy to him, was a reference to a consent that the agreement contain the provision in question. That appointment does not, however, touch on the question where the *de facto* control of the company was reposed.

On the evidence accepted the conclusion is inescapable that the control, in the sense of *de facto* control, of AS and of the appellant was not at any relevant stage in the hands, whether directly or indirectly, of substantially the same persons; on the contrary, we find that the control of each was in the hands of different persons: AS was controlled by A and the appellant by the members of its board of directors, excluding A. As to the circumstance that the other directors of AS were invested with the power to manage the company (clause 71 of its articles of association contained the usual provision that the company would be managed by its board of directors), the present is a case where those directors, through a course of dealing, delegated the management of the company to A (which, in terms of clause 73 of the articles, they were empowered to do).

The provisions contained in the takeover agreement, referred to in paragraphs (5), (7), (8) and (9) on pages 7 and 8 above require discussion.

Mr Jorge's reliance thereon was overstated. They did not, for practical purposes, vest any *de facto* control of the appellant in A, not even indirectly, as suggested by *Mr Jorge*. As regards the provision referred to in subpara. (5), the circumstances that A was entitled to receive copies of quarterly management reports and annual financial statements and had access to the appellant's books and assets, is neither here nor there. The provision referred to in subpara. (7), that the chairman of the board would be the nominee of the Trust was either implemented in the form of C being such nominee or was not sought to be implemented by the Trust. The contingent control accorded to A in the provision referred to in subpara. (8) (i.e. in his capacity as one of three trustees of the Trust, who, in law, were required to act jointly) and the provision referred to in subpara. (9), related to matters that would not in the ordinary course arise in the management of the appellant – it is unnecessary to set out the details – and, provided that the management of the appellant proceeded in the ordinary course of business and without irregularity or illegality, the room for the operation of the provisions was limited and unlikely to arise; in fact, it did not arise. *De facto* control of the appellant was intended to be, and was in fact, in the hands of the board members (excluding A).

FINDING:

We accordingly find that AS was not a connected person in relation to the appellant.

ORDER:

The following order will accordingly issue:

(1) It is declared:

(a) that AS (Pty) Ltd was not a connected person in relation to the appellant;

(b) the deduction provided for in s 12C (4) of Act 58 of 1962 (as it read in 1992) is not applicable to the assets in question.

(2) The remaining proceedings in the appeal are postponed to a date to be arranged.

_____Signed________

F KROON

JUDGE OF THE HIGH COURT

PRESIDENT OF THE INCOME TAX SPECIAL COURT

______Signed________

A J SAAYMAN

ACCOUNTANT MEMBER OF INCOME TAX SPECIAL COURT

______Signed_________

A M BAGE

COMMERCIAL MEMBER OF THE INCOME TAX SPECIAL COURT

In terms of s 83(19)(a) Act 58 of 1962 I hereby indicate that I consider that this judgment ought to be published for general information.

______Signed_______

F KROON

JUDGE OF THE HIGH COURT

PRESIDENT OF THE INCOME TAX SPECIAL COURT

Mr M Jorge represented the Commissioner, South African Revenue Services

Dr Byleveldt instructed by Smith Tabata Loon & Connellan Inc of Centrahil appeared on behalf of the Appellant