REPORTABLE

IN THE INCOME TAX SPECIAL COURT

(HELD AT PORT ELIZABETH, 7 May 2002)

CASE NO. 10915

In the matter between:

ABC **First Appellant**

XYZ **Second Appellant**

and

COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE **Respondent**

JUDGMENT

14 May 2002

KROON, J:

[1] This joint appeal concerns the validity of an assessment to donations tax issued by the Commissioner in terms of ss 54 and 58 of the Income Tax Act, No. 58 of 1962 in respect of the disposition of shares in a company.

[2] S 54 provides for the payment of donation tax on the value of any property disposed of under any donation by a resident. S 58 provides as follows:

> "Where any property has been disposed of for a consideration which, in the opinion of the Commissioner, is not an adequate consideration that property shall for the purposes of this Part be deemed to have been disposed of under a donation: Provided that in the determination of the value of such property a reduction shall be made of an amount equal to the value of the said consideration."

S 62(1)(d) provides that in a case such as the present, the value of any property, for the purposes of donations tax, shall be deemed to be the fair market value thereof as at the date when the donation takes effect.

BACKGROUND:

[3] The appellants, two brothers, were equal shareholders of the total shareholding of a trading company styled VW (Pty) Ltd ("the company"), which conducted business in Transkei. Each appellant held 500 shares in the company.

[4] During 1996 the appellants, acting on advice, each established a family trust, viz. the ABC Family Trust and the XYZ Family Trust, respectively. In terms of oral agreements each appellant transferred his shareholding in the company to his family trust. The consideration payable in each case was fixed

in the sum of R190 000-00. The transfer of the shares was effected on 24 August 1996.

[5] In response to a request by the Commissioner, dated 6 July 2000, for details of the valuations of the shares for the purposes of the dispositions, the appellants' auditors, in a letter dated 20 July 2000, stated as follows:

> "The value of R190 000-00 for the sale on 24 August 1996 of the 500 shares of Messrs ABC and XYZ was based on the net asset value of the company as reflected in the most recent audited financial statements at that date, that is 31 August 1995, because neither Trust was purchasing a controlling interest in the company and no dividend pattern had been established by the company as at that date."

[6] The Commissioner, furnishing motivation, advised the auditors, however, that a valuation by reference to the net asset value of the company was not acceptable and that the valuation should have been determined by utilising the earning method.

[7] A persistence by the auditors in the stance adopted by them was rejected by the Commissioner. Accordingly, on 6 September 2000, he issued a donations tax assessment in terms of s 58 to each of the appellants. Therein he reflected that he had determined the market value of the 500 shares (sold by each appellant) in the sum of R1 630 500-00 and that, taking into account the consideration received, in the sum of R190 000-00, a donation of R1 440 500-

00 had been effected. The appropriate donations tax thereon, plus interest, was levied.

[8] In a notice of objection to the assessment on behalf of the first appellant, dated 27 November 2000, the auditors recorded, *inter alia*, the following:

> "The shares were valued by us on a net asset value basis, as the taxpayer and the family trust had agreed and intended to transfer the shares at a price equal to their market value as determined by an independent valuator… the parties accepted that the net asset valuation reflected the market value of the shares at the time, and on this basis proceeded with the transaction. If you are prepared to allow the objection contained in this letter, the taxpayer is prepared to accept your valuation of the shares".

The objection itself was couched as follows:

> "OBJECTION
>
> 13 The taxpayer intended to transfer the shares to the family trust at the market value of the shares. A valuation was obtained from professional advisors, and the shares were transferred at the value *bona fide* believed by the taxpayer to be the market value of the shares.
>
> 14 The taxpayer did not intend to transfer the shares at a price below their market value. The parties had no reason to misstate the value of the shares. The taxpayer did not intend to avoid estate duty or income tax – the main purpose for the introduction of donations tax.

15 Based on the valuation obtained, the parties entered into the sale of share agreement in the mistaken believe (sic) that the shares were transferred at market value. The taxpayer did not dispose of the shares at a consideration that is not adequate. The parties entered into an agreement in the belief that the value of the transfer was market related, which contract is void as a result of common mistake.

16 The parties have therefore rectified their agreement to reflect a sale and transfer of the shares at the market value, as determined by you and paid the additional stamp duty. Annexed as "A" is a copy of the Deed of Rectification and the relevant stamp duty receipt.

17 Accordingly, it is our submission that the shares were not disposed of as envisaged in section 58, and that donations tax should therefore not be levied.

18 The acceptance of your valuation and the rectification of the agreement accordingly, have been done to confirm the intention of the parties to transfer the shares at their market value. Should this objection not be allowed the taxpayer reserves his right to challenge your valuation of the shares should this be deemed necessary in future."

[9] The notice of objection to the assessment on behalf of the second appellant, dated 4 December 2000, sought in the first place to assail the Commissioner's valuation of the shares (even on the basis of a valuation determined on the earnings method). As recorded below, however, this

objection has now been abandoned. The further objection, relating to the donation issue, proceeded as follows:

> DONATION
>
> 18 As indicated in 10 above, the agreement and intention was and remains to dispose of and transfer the shares for a consideration equal to their market value.
>
> 19 To the extent that the market value of the shares is established by agreement or the Court to be higher than R190 000, the agreement between, and the records of the taxpayer and the trust will be rectified to record the higher consideration.
>
> 20 The grounds of objection are: the taxpayer has not and did not dispose of the shares to the trust for an inadequate consideration, as contemplated by section 58 of the Act; on the contrary, the shares were disposed of for an adequate consideration, being an amount equal to their market value.
>
> 21 A duly signed deed of rectification for the transaction shall be furnished to you shortly.

[10] Under cover of a letter dated 19 January 2001 the auditors submitted a memorandum to the Commissioner, as well as a draft deed of rectification. The memorandum dealt somewhat extensively with a number of factual averments and legal arguments which, it was contended, substantiated the appellants' entitlement to a rectification of the agreements in terms of which the shares

were disposed of (as opposed to an *amendment* of the agreements, which, it was pertinently recorded, the parties did not intend) and the contention that in the circumstances the donations tax had not properly been levied.

[11] The respective deeds of rectification, signed in each case (on 22 February 2001) by, and on behalf of, the applicable appellant and trust, were in identical terms, and, after the identification of the parties thereto, read as follows:

"BACKGROUND

2 The trust was created and Letters of Authority were duly issued by the Master of the High Court, Grahamstown, on 18 January 1996 under reference number IT XXXX/95.

3 The seller was the owner of 50% of the issued shares in VW (Pty) Limited ('the shares").

4 During 1996 the seller was advised to sell and transfer the shares to the trust.

5 The parties orally agreed that the acquisition by, and the transfer of the share to the trust would be for a consideration equal to their market value.

6 The market value of the shares was determined by Coopers & Lybrand to be R190 000, based on the net asset value of VW (Pty) Limited.

7 On 24 August 1996 the shares were duly transferred to the trust for a consideration of R190 000, the parties accepting that this reflected the market value of the shares.

8 The Receiver of Revenue, East London, ("the Receiver") has not accepted this valuation and has determined a higher value, for donations tax purposes, of the shares, based on an earnings method.

9 The parties have challenged the Receiver's valuation and the matter is
10 currently the subject of negotiation and discussion between the parties and the Receiver.

10 The agreement and intention of the parties was and remains that the trust would acquire and take transfer of the shares for a consideration equal to their market value.

11 Accordingly, the parties wish to record and rectify their agreement, to the extent necessary, to record that the consideration for the shares was an amount equal to their market value.

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RECTIFICATION

12 The parties record and, to the extent necessary, rectify their agreement as follows: the shares were acquired by and were transferred to the trust for a consideration equal to their market value, should the market value of shares, as agreed between the parties and the Receiver or, failing agreement, as determined by the Court, be greater than R190 000, the consideration payable by the trust to the seller for the shares shall be an

amount equal to that greater market value; the books and records of the respective parties shall be amended to reflect such increased consideration;

the trust shall be liable for any resultant additional stamp duty, interest and/or penalties that may become payable.

[12] On 13 February 2001 the Commissioner sought further information from the auditors. In response thereto the auditors, *per* letter dated 12 March 2001:

(1) advised the Commissioner:

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(a) that the contracts for the disposal of the shares had been entered into formally, albeit not in writing;

(b) that the shares were disposed of on loan account without any specific conditions attaching thereto;

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(c) that a Mr S was married to a daughter of the first appellant. (By way of explanation it may be recorded that in September 1997 the two trusts sold to S and a Mr SP, both of whom were

20 employed in the business as managers, 10% of the total shareholding in the company, i.e., 100 shares, for a purchase consideration of R350 000-00, i.e. R3 500-00 per share).

(2) favoured the Commissioner with two letters addressed by the auditors to the appellants, dated 23 September 1996 and 15 October 1996, respectively;

(3) again advanced a motivation for the appellants' entitlement to rectification of the agreements and the contention that in the light thereof the objections to the donations tax assessments were valid.

The letter of 23 September 1996 read in part as follows:

"DETAILS OF MEETING

With reference to our meeting on 22 August 1996, I have set out below my understanding of the decisions that were taken at this meeting and provided further clarification on issues over which you appear to be dissatisfied.

BUSINESS TRUST

You have agreed with my conclusion that, due to a substantial increase in tax, the conversion of your company to a business trust will not take place. You have, as suggested by myself, decided to transfer the shares of your company to your respective family trusts.

This decision will save you approximately R140 000 per annum and in addition will save you estate duty on any growth in the value of your shares in VW.
I believe that I can save you a significant amount of stamp duty payable on the transfer of your shares to the Trust as neither of you have a controlling interest in the company and therefore I could justifiably use net asset value of about R400 000 which is significantly below the value you were looking at of about R1 000 000 each, as I recall.

…….

I will in the meantime prepare the valuation to support the transfer price of the shares."

The letter of 15 October 1996 read as follows:

"VALUATION OF SHARES IN VW (PTY) LTD

You have requested us to perform a valuation of each of the following shareholdings in the abovementioned company:

ABC	50%
XYZ	50%

The purpose of the valuation is to establish the price at which the above shareholdings are to be transferred into your respective family trusts and accordingly the stamp duty payable on such transfer.

As neither of you have a controlling interest in the company and no normal dividend pattern has been established, in our opinion the net asset value method of valuation should be used in this case.

Accordingly, in our opinion the value of your respective shareholdings are as follows:

ABC	R190 000
XYZ	R190 000"

[13] In response to the auditors' letter of 12 March 2001 the Commissioner advised them that "it is obvious that the taxpayers had various tax saving objectives in mind when the transaction, in terms whereof the shares were transferred to the family trusts was implemented" and that he was therefore going to proceed in the collection of all taxes involved.

[14] On 25 September 2001 the Commissioner advised the appellants that their objections to the donations tax assessments had been disallowed; hence, this appeal.

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THE ISSUES:

[16] When the appeal was called, *Mr Lewis*, who appeared for the appellants, advised us that the Commissioner's valuations of the shares was accepted; the matter would proceed within a restricted ambit, viz., the validity of the appellants' contention that their entitlement to a rectification of the respective agreements rendered the Commissioner's assessments invalid.

[17] During argument at the end of the hearing *Mr Stevens*, for the
20 Commissioner, pointed out that two issues had arisen in this matter, viz.:

(1) The Commissioner's decision that there were donations made by the appellants to their respective family trusts within the meaning of s 58 of the Act;

(2) the values of those donations.

He submitted that the first mentioned issue was, by virtue of the phrase "in the opinion of the Commissioner" in s 58, one where the exercise of a discretion by the Commissioner was involved. Accordingly, and because the matter was not one to which s 63 of the Act referred (which makes certain specified decisions by the Commissioner in the exercise of his discretion, subject to objection and *appeal*), the decision in question was not subject to appeal, only to review. On the other hand, the Commissioner's *valuation* of the donations was properly the subject of appeal. He referred to the decisions in *KBI v Transvaalse Suikerkorporasie Bpk* 1985 (2) S A 688 (T); 47 SATC 34 (confirmed on appeal – 1987 (2) S A 123 (A); 49 SATC 11 – in which, however, the issue presently under discussion was not considered); ITC 1448 51 SATC 58; ITC 1599 58 SATC 88.

[18] Counsel's submissions are correct. However, as was stated in *Transvaalse Suikerkorporasie*, when a discretionary exercise of a power by the Commissioner is not expressly made subject to appeal (and is not expressly excluded from any appeal) the taxpayer is entitled to object and then appeal to the Special Court. The "appeal" then amounts to a review of the Commissioner's decision subject to the usual grounds for such review: the decision would have to have been so arbitrary and unreasonable that the reasonable inference is that the Commissioner failed properly to apply his mined to the matter or was inspired by ancillary motives or bad faith.

[19] The acceptance by the appellants of the valuation placed on the shares by the Commissioner constituted an abandonment of that part of the appeal.

[20] What remains is the appeal against, or more correctly, the review of, the Commissioner's decision that the transactions in question constituted donations. This issue would not be restricted to an inquiry into the Commissioner's approach to the valuation of the shares. It would embrace a consideration of his approach to any other aspects bearing on the question whether donations had taken place. As far as the first mentioned aspect is concerned, the abandonment of the appeal against the Commissioner's valuation of the shares has terminated that aspect of the matter. On the facts of this case the further relevant aspects would relate to the appellants' entitlement to the rectification contended for and the result thereof.

[21] The papers did not in terms raise a review attack on the Commissioner's decision, as opposed to the contention that the decision was wrong, which would be a basis of appeal. While *Mr Stevens* drew attention to this aspect during argument he had, no doubt in the interests of having the dispute between the parties ventilated, not earlier sought to take this technical point (and, it is to be assumed, it was impliedly accepted that a review attack was implicit in the appellants' case). Indeed, counsel further did not seek to contend that any review should be restricted to a consideration of the information that was before the Commissioner at the time the decision was taken and the objection thereto dismissed (in regard to which it may be commented that all the information referred to earlier in this judgment was before the Commissioner at the relevant time and it was not suggested that he had not properly applied his mind thereto), and counsel raised no objection to the leading of further evidence and

regard being had to same for the purpose of answering the question whether the Commissioner's decision should be set aside or upheld. In effect, therefore, by consent an appeal hearing was held.

THE ONUS:

[22] It is accepted, correctly, by *Mr Lewis* that in terms of s 82 of the Act the appellants bore the onus of persuading us, on a balance of probabilities, that the assessments objected to were wrong. A similar onus, persuasion on a balance of probabilities, is applicable to a review.

THE EVIDENCE:

[23] Three witnesses testified at the hearing on behalf of the appellants, viz., the appellants themselves and a Mr N, a partner in the auditors firm advising the appellants. No evidence was tendered on behalf of the Commissioner.

[24] Much of the evidence given by N may receive short shrift, viz., insofar as he attempted, still at this late stage, to justify his valuation of the shares at the time in the total sum of R380 000-00 as reflecting the fair market value thereof. Two comments will suffice. The acceptance by the appellants of the Commissioner's valuation put paid to that attempt. Secondly, the attempt, based in the main on the facts that neither trust was acquiring a controlling interest in the company, that the company did not have a proven consistent record in the matter of the declaration of dividends and that Transkei was at the

time going through troubled times, was in any event wholly unpersuasive – it is unnecessary to go into detail, save to cite as an example his concession that if, instead of the two trusts, two strangers had purchased the shares, a fair market value for them would have been in the region of the Commissioner's valuation, and his inability to explain why a different valuation should be applicable to the purchase of the shares by the trusts.

[25] The evidence in chief of the second appellant, who testified first, was, *inter alia*, as follows: On the advice of N, and with the view to limiting the eventual liability of their estates for estate duty, he and the first appellant decided to transfer their respective shareholding in the company to family trusts. The valuation of the shares, in each case in the sum of R190 000-00, was determined by N. Because N was a member of a professional firm and they had no reason to doubt the correctness of the valuation, it was accepted, notwithstanding that he, the second appellant, had no understanding of the valuation process. Subsequently, after it became known that the Commissioner held a different view on the value of the shares, the advice of the auditors to accept the Commissioner's valuation was acted upon. Under cross-examination the second appellant stated that N must have explained how he arrived at the valuation and that he and the first appellant had understood the explanation. The aspect of the stamp duty payable featured in the explanation, including the statement that the lower the valuation the lower the stamp duty payable. Initially, he said that if a competitor had wished to acquire the company he would have sold at the same price, if so advised. The value of the company was then canvassed with him by *Mr Stevens*. When it was put to him

that the company was a very successful enterprise and had a turnover in excess of R40 million *per annum* he sought refuge in the comment that at the time Transkei was an unsettled place with many businesses being liquidated and many people leaving to go elsewhere. He professed an inability to remember what his director's remuneration was at the time or to confirm that it was of the order of R300 000-00 to R400 000-00 *per annum*. When asked if he would have sold the shareholding to someone else for R380 000-00, he at first could not proffer any answer. When pressed that the answer must be in the negative, he conceded the proposition and agreed that the company was worth very much more to him. During questioning by me he confirmed that, as already recorded in this judgement, a year later the trusts sold 10% of the shareholding to SP and S for R350 000-00 (which, if the figure was representative of the fair market value, would mean that the total shareholding would have had a value of R3½ million). He further testified that the price of the shares sold to the two persons mentioned had in fact been fixed at least eight months prior to the signature of the deed of sale (i.e. within a matter of months of the acquisition of the shares by the trusts). In explanation of the price paid by the trusts for the shareholding, he merely stated that the parties had acted on the advice of the auditors, and therefore he had no cause to question the validity of the consideration at which the trusts had acquired the shares. He only had occasion to reflect thereon when the Commissioner signified his interest in the transaction, i.e. in the year 2000. He conceded the following: that the Commissioner's valuation in a figure of some R1,6 million in respect of each half of the shareholding was no accepted on the advice of the auditors, they having explained that it was a more realistic figure and he, in his own mind,

being content that that was the position; that when he and the first appellant had initially approached N in the matter they had suggested a figure of R1 million for each half-share of the shareholding, because that figure was realistic, but that the tenor of the discussions with N was the desirability of reducing the valuation to contain the liability for stamp duty. Under further cross-examination he stated that if the trust had, immediately after acquiring the shares, wished to resell the, he would not have entertained an offer of R400 000-00, because, by virtue of the turnover of the business, that figure would not have been enough, and that the figure that would have been looked at would have been in the order of a total of R2 million.

[26] The evidence in chief of the first appellant proceeded as follows; the purpose of the sale of shares to SP and S was to involve them in the business (i.e. as part owners). He and the second appellant were not assisted by anyone in the negotiations concerning this transaction and the terms thereof were decided amongst themselves. The fixing of the price of R350 000-00 acknowledged to be (proportionally) a great deal more than the price paid by the trusts for the shares, was the result thereof that it was decided, as an easier course, to take 10% of the turnover of the company, whereas the earlier price had come from the auditors. He, however, had had no idea of what factors the auditors had taken into account and he had merely accepted that they had performed the task required of the, to value the shares. Under cross-examination he testified, *inter alia*, as follows: He has been in business for thirty-eight years and involved with the company for some eleven to twelve years. During 1996 it was a very successful business with a turnover in excess

of R40 million. He and the second appellant had acquired the shareholding therein during 1992 for a consideration of R2 million (in fact, it appears that the figure might well have been R3 million). He had had no qualms about accepting the auditors' figure of R380 000-00 for the sale of the share to the trusts. The purpose behind that transaction was a saving in estate duty. He could not remember that N had said that it was for stamp duty purposes that the price should be fixed at R380 000-00 (although he did later admit that the contents of the paragraph in the auditors' letter to him and the second appellant of 23 September 1996 beginning with the word "I believe… "had been discussed with N). He was clear in his own mind that he had accepted the valuation of R380 000-00. He could not say what was the content of the rectification which the deed of rectifications effected. He recalled that in 1995 he and the second appellant had been paid a dividend by the company in excess of R5 million and that the dividend paid to shareholders in the years 1997 and 1998 was of the order of R2 million and R1,8 million, respectively. He had no recollection that in 1996 N had said anything about the market value of the shares, what a willing buyer and willing seller would have agreed upon. In answer to questions put by me his testimony included the following: He had no idea what the selling price of R190 000-00 of his shares to his family trust was intended to reflect or represent. When asked whether it was the intention that the selling price should reflect the net asset value or the market value or whether it was arrived at on some other basis, his answer was that he did not know how it was arrived at. When he was again asked whether it was his intention that the selling price would reflect the net asset value, he said that he could not answer that question. Immediately thereafter, however, he answered in the affirmative the

question whether his intention was that the selling price should reflect the fair market value, and the further questions whether he had conveyed that intention to N and instructed him accordingly. He then concede, however, that he had no idea whether N in fact ever arrived at that figure, an answer he immediately qualified by adding that N had intimated that the figure he arrived at was the market value, although he could not remember when N did so, save that it was before the share transfer forms were signed. He claimed that the figure of R190 000-00 would have represented a fair price if he had sold his shareholding to a stranger and he and the second appellant would have sold to a stranger for a total price of R380 000-00. Asked to comment on the Commissioner's valuation of some R1,6 million in respect of his shareholding, his first response was that he did not know. He thereafter added, however, that it was a gross over-valuation and that at the time of the sale he and the second appellant were satisfied that the figure of R380 000-00 represented the true market value of the shares. Under further cross-examination he motivated his averment that the Commissioner's figure was a gross over-valuation by a simple reference to the fact that the auditors had adopted a valuation of R190 000-00. He also sought refuge in the allegation that Transkei was experiencing troubled times, details of which he furnished under further re-examination. Finally, in answer to me he stated that he had no idea what the turnover of the company was in the years 1995, 1996 and 1997, but he did say that it was "virtually on a par" in each of those years.

[27] It has already been recorded that N's attempts, valiant at times, to persuade us that the selling price of R380 000-00 reflected the fair market value

of the shares, were unsuccessful. He claimed that he was in fact instructed by the appellants to arrive at a figure representing the fair market value. He sought to justify the recourse to a rectification of the agreement by referring to the fact that different valuers could arrive at different figures and, in order to expedite the finalisation of the matter it was decided to accept the Commissioner's valuation rather than to argue the matter.

[28] For the sake of completeness, it may be recorded that N did tender possible explanations why his two letters to the appellants, referred to in para. [12] above, were couched in the form they were notwithstanding that they were written, respectively, a month and two months after the terms of the sale of the shares to the trusts had been settled and implemented. It is, however, unnecessary to record the details of those explanations.

ASSESSMENT OF THE APPELLANT'S CASE

[29] Not unexpectedly, *Mr Lewis* found himself in difficulty in dealing with two questions: whether there could in the first place be any talk of a rectification of the oral agreement, and what it was in the oral agreement that was wrong and required to be rectified. He adopted with alacrity an affirmative answer to the query by me whether in fact the case that should be pursued on behalf of the appellants, instead of a recourse to rectification, was not the contention that the agreement between each appellant and his family trust was one where the intention was that the consideration to be paid would be the fair market value of the shares and that although at the time the figure of R190 000-00 was fixed as

the price, that figure was liable to be changed should it transpire that in fact the fair market value was another figure; in other words, the contracting parties intended the fixing of the sale price to be flexible, and liable to alteration, dependent on what actually and finally proved to be the fair market value of the shares, and that all that it was being sought to effect was the implementation of that agreement.

[30] However, this latter case, too, faces insurmountable difficulties:

(1) We reject the allegation that it was the intention of the parties to the contracts to sell and buy at a fair market value or that N was so instructed. No such intention or instruction featured in the evidence of the second appellant. Nor, in the light of his other evidence, would it have lain in his moth to claim such intention and instruction: in short, on his own showing, as appears from the resumé of his evidence set out earlier, he was fully aware at the time that the figure of R190 000-00 was nowhere nearly representative of the fair market value of his shareholding, and at no stage did he query that figure on this score. It is true that both the first appellant and N claimed that the intention of the contracting parties and that the instructions to N, which he carried out, embraced a sale at fair market value. That evidence cannot be accepted. The resumé of the first appellant's evidence, set out earlier, cogently demonstrates the lamentable showing that he made in this regard. His claim, made belatedly, that he

considered that the figure of R380 000-00 did indeed reflect the fair market value of the total shareholding, and that he would have been prepared to sell at that price to a stranger, is one to which the evidence of the second appellant gives the lie and it flies in the face of the overwhelming evidence that there was no comparison between that figure and the fair market value. In the light of the fact that N's valuation was patently not reflective of the fair market value, of which fact, we find, despite his protestations to the contrary, he could not but have been aware, his claim that he was instructed to determine the fair market value, and in fact did so, simply does not wash. We find that, as *Mr Stevens* put to him under cross-examination, he resorted (for obvious reasons) to the lowest possible valuation that he thought would pass muster.

(2) In any event, even if there might have been some talk of selling at the fair market value, the motive constituted thereby should not be confused with the parties' intention as demonstrated by what they actually decided, viz., to fix in each case the selling price in the sum of R190 000-00. We reject the contention that there was any flexibility in the price that in the final result, and even though initially fixed, would be payable by the trusts for the shares. Any such agreement would offend against ordinary business common sense and practice. The parties at no stage took any steps to verify whether the price fixed should be revisited (i.e., until sometime after the Commissioner had intervened), not even when

the subsequent sale of 10% of the shareholding at a proportionately considerably higher price was effected, which price was fixed within a short period of the sale to the trusts. No flexibility in the price as alleged (or for that matter any talk of rectification) featured in the early correspondence addressed on the appellants' behalf to the Commissioner, or in the auditors' letters to the appellants, but, even more importantly, there was no suggestion thereof in the evidence, the result of which rendered the case fatally defective.

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[31] One last aspect requires mention. It was claimed that the appellants had had no intention at any stage to make donations to the trusts. The claim is one we view with a jaundiced eye: there is much to be said for the view that they must have been aware that the effect of what they were doing was a donation, and therefore they must be taken to have intended that effect. Be that as it may, even if the question of a donation was not present to their minds, that is of no assistance to them if in fact a donation was effected. That was in fact the position.

20 FINDING:

[32] We find accordingly that the appellants have not discharged the onus of showing that the Commissioner's decision and assessment fail to be struck down.

ORDER:

[33] The appeal is dismissed and the assessment is confirmed.

___Signed_____

F KROON
JUDGE OF THE HIGH COURT
PRESIDENT OF THE INCOME TAX SPECIAL COURT

___Signed_____

A C MINKLEY
ACCOUNTANT MEMBER OF THE INCOME TAX SPECIAL COURT

____Signed_____

F H FERREIRA
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