CAPE INCOME TAX SPECIAL COURT

BEFORE :

The Honourable Justice JHM Traverso : President
Mr A Gamerov : Accountant Member
Mr TM Pasiwe : Commercial Member

CASE OF

NO: 11372

(Heard in Cape Town on 23 August 2004)

J U D G M E N T

[1] This is an appeal against the Respondent's decision to levy donations tax on the so-called *bare dominium* of four donations of R5 000 000,00 to each of the deceased's four children.

[2] The Appellant contends that these donations were exempt from donations tax in terms of Section 56(1)(d) of the Income Tax Act, No. 58 of 1962 as amended ("the Act").

[3] These donations were made in terms of a written Deed of Donation which provides:

"1. Donation

The donor donates (irrevocably) to the donees, as a donation inter vivos, the sum of R5,000,000.00 (Five Million Rand) each to the donees.

2. Delivery

The donees, shall be entitled on signature of this deed to a vested right in the aforementioned asset but shall not receive any benefit until the death of the donor.

3. Acceptance

The donees gratefully accept the donation."

[4] Section 56(1)(d) of the Act provides:

> ***"Donations tax shall not be payable in respect of the value of any property which is disposed of under a donation - …***
>
> ***(d) In terms of which the donee will not obtain any benefit thereunder until the death of the donor;"***

[5] The Respondent levied donations tax on the aforesaid donations using a value calculated in accordance with the provisions of Section 62(1)(c) and (2) of the Act. These sections deal with the value of property for purposes of donations tax which, *inter alia*, is subject to a *usufructuary* or other like interest. This value was determined by calculating the value of the "*usufructuary*" interest which was then subtracted from the amount donated in order to arrive at a *bare dominium* value.

[6] The donations under consideration were *"executory donations"* in the sense that the delivery of the subject matter of the donation was to take place at a future date.

[7] The validity of executory donations is governed by Section 5 of the General Law Amendment Act, No. 50 of 1956, which provides:

> ***"No donation concluded after the commencement of this Act shall be invalid merely by reason of the fact that it is not registered or notarially executed: provided that no executory contract of donation entered into after the commencement of this Act shall be valid unless the terms thereof are embodied in a written document signed by the donor or by a person acting on his written authority granted by him in the presence of two witnesses."***

[8] Mr. Emslie, for the Appellant, argued that the type of donation envisaged by Section 56(1)(d) was one in terms whereof the performance under the donation (ie. the delivery of the property donated) would only be due after the death of the donor.

[9] The interpretation of this Section was considered in ITC 1192, Vol. 35 (1973) 213 at 219, where Trollip, J stated as follows:

> ***"In this regard in Commissioner for Inland Revenue v Estate Merensky (supra) at 616 Schreiner JA pointed out that 'donations may be looked at from the angle of the recipient of the benefit and also from the angle of the donor who divests himself of something',***

and that statutes taxing donations might concentrate on the receiving rather than the divestment aspect, or vice versa, and have to be construed accordingly. Now it may be that s 56(1)(d) is primarily concerned with the former aspect, but it is clear that the divestment aspect was not lost sight of; that is proved by the deliberate use of 'donee' instead of 'beneficiary' in the paragraph so as to render the exemption inapplicable where the donor divests himself of his assets to a trustee pending his death.

It may be asked in what cases then, other than donations mortis causa (for they are specially exempted under the preceding paragraph of s 56(1)), was it intended that the exemption should apply.

The kind of case to which it would apply seems to be those in which the donor contracts to donate irrevocably property to a beneficiary, or to a trustee for the benefit of a beneficiary, in terms of which its whole operation is suspended until his death or thereafter; that is, no delivery or transfer of the property or of any pecuniary advantage, profit or gain therefrom is to take place until then.

As stated above, the mere contractual right thereby vested in the 'donee' is not a 'benefit obtained by the donee thereunder' so as to preclude the exemption from operating, and the donation would not be a donatio mortis causa, because it would not be revocable, which are both essential characteristics of the latter kind of donation (Meyer & Others v Rudolph's Executors 1918 AD 70 at 83, 88)."

[10] I agree with this interpretation. As a matter of law the donees did not on the conclusion of the agreement acquire a vested right to the subject matter of the donation. The only vested right which they received was the right to claim payment of the sum of R5 000 000,00 each on the death of the donor. It is however important to bear in mind that the donor did not

donate to them the right to claim the R5 000 000,00. He in fact donated the money to them. The donees' rights to claim payment on the death of the donor arose from their acceptance of the donation of R5 000 000,00. Whatever right the donees acquired was not immediately enforceable. They were obliged to wait until the death of the donor before their claims became enforceable.

[11] On behalf of the Respondent much was made of the fact that the Deed of Donation provided that the donees would, upon signature of the Deed of Donation, acquired a vested right. I am of the view that their reliance on these few words in arriving at the conclusion that the donation under consideration does not fall within the ambit of Section 56(1)(d), is misplaced. If these words were to be excised from the Deed of Donation, the legal effect thereof would be no different. The donees would in any event, upon signature of the Deed of Donation, have acquired a vested right to claim payment of the R5 000 000,00 upon the death of the donor. This is no different from the vested right acquired in terms of the Deed of Donation. That being so, the donations presently under consideration fall squarely with the provisions of Section 56(1)(d).

[12] It is also important to remember that what was donated was money and that as a matter of law the donees cannot acquire ownership of the money donated to them before it was paid to them. Accordingly they acquired no ownership at the time of the conclusion of the agreement, and for this reason alone it is jurisprudentially impossible for the donees to have acquired the so-called *bare dominium* of the money that was the subject matter of the donation. I am therefore satisfied that the appeal on the merits must succeed.

[13] It was urged on behalf of the Appellant to award costs in favour of the Appellant in terms of Section 83(17)(a) of the Act which provides:

> ***"(17) Where -***
> ***(a) the claim of the Commissioner is held to be unreasonable;***
> ***…***
> ***the tax court may, on application by the aggrieved party, grant an order for costs in favour of that aggrieved party, which costs shall be determined in accordance with the fees prescribed by the rules of the High Court."***

[14] In my view it cannot be said that the Respondent was unreasonable in holding the view that it did. The Respondent was *bona fide* in its contentions and was, particularly in view of the dearth of authority about a proper interpretation of the aforesaid section, entitled to have it tested by the Court.

[15] In the circumstances the following order is made:

(a) The appeal is allowed;

(b) The assessment is set aside and the Respondent is ordered to issue a revised assessment.

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TRAVERSO, DJP

13 OCTOBER 2004