Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: **12697**

In the matter between:

A LTD Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Respondent

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JUDGMENT: FRIDAY, 16 NOVEMBER 2012

DESAI J

[1] At issue in this appeal is whether Section 103 of the Income Tax Act 58 of 1962 ("the Act") applies to the purchase by A Ltd of its own shares from its subsidiary, A Ltd Sub ("ALS").

[2] It appears that on 29 August 2008, the Commissioner for the South African Revenue Service ("the Commissioner") issued an assessment in which Secondary Tax on Companies ("STC") of R213 911 343.91 was raised in

consequence of dividend declarations which took place on 18 June 2004, 22 June 2004, 24 June 2004 and 11 January 2006. The Commissioner, in effect, disallowed the exemptions from STC claimed by A Ltd in terms of Section 64B(5(f)) of the Act in respect of the dividends declared as such on the basis that the exemptions were claimed pursuant to a transaction, operation or scheme as contemplated in Section 103(1) of the Act. A Ltd's objection to the assessment was disallowed by the commissioner and this appeal followed.

[3] The Court heard the *viva voce* evidence of several witnesses, including Mr. X and Mrs Y who testified on behalf of A Ltd. Their expert was one Mrs. Z. Only Mr. T, also an expert, gave evidence on behalf of the Commissioner.

[4] Although not expressly stated in the Companies' Act, prior to 1 July 1999 a company was not permitted to buy shares in itself. Similarly, a subsidiary could not acquire shares in its holding company. The Companies' Amendment Act 37 of 1999 fundamentally changed the old capital maintenance rules . In terms of Section 85 to 90 thereof, a company may acquire shares in itself subject to certain requirements. *Inter alia*, the acquisition must be approved by a special resolution of members and its articles must make provision for such acquisition. The said Act also provides that a stock exchange may determine further requirements in respect of companies listed on that exchange (see Section 87(6)). This is relevant in that A Ltd was at all material times listed on the JSE. The Listings Requirements ("LR") of the JSE contain several rules which are applicable whether the shares are purchased by the company itself or by a subsidiary.

[5] Section 103 is the old anti-avoidance provision in the Act. It was repealed with effect from 2 November 2006 and replaced by sections 80A to 80L of the relevant Act. However, as the transactions which the Commissioner seeks to impeach in the present case occurred prior to 2 November 2006, the old Section 103 remains applicable.

[6] Section 103(1) may be invoked by the Commissioner if he is satisfied that a "transaction, operation or scheme" has certain characteristics. That decision is subject to objection and appeal (Section 103(4)). The question which confronts this Court is whether it is satisfied that the impugned transaction has the necessary characteristics.

[7] In order to succeed the Commissioner has to establish the following:

7.1 that A Ltd engaged in a transaction, operation or scheme;

7.2 that the transaction had the effect of avoiding or postponing liability for tax;

7.3 that the transaction was entered into or carried out in a manner which would not normally be employed for *bona fide* business purposes other than obtaining a tax benefit; or created rights or obligations that would not normally be created between persons dealing at arm's length under a transaction of the nature of the transaction in question; and

7.4 that the transaction was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit.

[8] Mr O Rogers SC, who appeared with Mr M Janisch on behalf of A Ltd, contended that for the appeal not to succeed the court must make a finding against A Ltd on all four requirements. Even if one is not established A Ltd's appeal must succeed. He argued that the Commissioner has not established any of the three Section 103 requirements in respect of which it bears the onus and even if these requirements are found to have been proved, A Ltd has not demonstrated that its sole or main purpose was not the obtaining of a tax benefit.

[9] The onus to establish the existence of a transaction complying with the effect and abnormality requirements is on the commissioner (see ITC 1636 (1997) 60 SATC 267 at 317 – 324). This judgment was upheld on appeal in CIR v Conhage (Pty) Ltd 1999 (4) SA 1149 (SCA). Although the incidence and onus was not expressly canvassed in the appeal judgment, the formulation of paragraph 16 thereof shows that the SCA agreed with the analysis of the *court a quo*.

[10] The onus in respect of the purpose requirement is on the tax payer Section 103 (4(a)) (see Conhage *supra* at para 12 – 13 and 16).

[11] A taxpayer is entitled to arrange his affairs so as to pay the least tax. In other words if the same commercial result can be achieved in different ways, the taxpayer may choose the way which does not attract tax. The subjective purpose of those who entered into the transaction is a question of fact. To fall under the category "mainly", the said purpose must be the dominant purpose in the sense

of being dominant over any other purposes (see CIR v Bobat (2003 67 SATC 47 (N) at 60 to 62.

[12] The test is objective with regard to the abnormality requirement. The evidence of other similarly placed persons engaging in transactions of the kind in question is permissible evidential material in determining whether a particular transaction was entered into in a manner not normally used for *bona fide* business purposes. However, rights and obligations which may be abnormal as between strangers may not be abnormal as between parties with a pre-existing special relationship (see CIR v Louw 1983 (3 SA 551 (A) at 574 A – F)), such as in this instance where ALS was a wholly owned subsidiary of A Ltd.

[13] Briefly stated, the oral evidence and documents disclose the following with regard to the history of this matter.

[14] It appears that in September 2000 the AB Group Ltd was renamed A Ltd. The latter retained AB's technology investments which included a 15% shareholding in AVA. A Ltd was at all material times listed on the JSE and held a non-strategic holding in PTS which its management viewed as a cash resource.

[15] Following the statutory amendment in this regard, A Ltd (then still the AB Group Ltd) on 24 August 1999 resolved to amend its articles to permit the acquisition of its own shares and to give a general authority to the directors to make such acquisitions up to a maximum of 10%. At its next AGM on 21 September 2000 the general authority of the directors was renewed. The

resolutions authorised A Ltd or any subsidiary of A Ltd to acquire shares in A Ltd. A share incentive scheme for employees was also approved.

[16] Mr. X was appointed CFO of A Ltd at about this time.

[17] The share incentive scheme was established and shares were to be delivered to employees at future dates. If A Ltd shares increased in value the cost to the company of procuring shares for delivery would increase in due course. Mr. X, in consultation with the CEO, decided that it would be prudent to acquire shares to hedge A Ltd's liability. A shelf company, ALS, was procured as a wholly owned subsidiary and it eventually acquired 7.4 million A Ltd shares. The idea was to buy and hold the shares. It made no sense to acquire the shares and cancel them.

[18] ALS's acquisition of these and later shares was funded following the pattern of funding in general within the A Ltd Group. The treasury company in the group was DFK – a subsidiary of A Ltd – and ALS received interest free loan funding from DFK to acquire the shares in A Ltd.

[19] It was put to Mr. X in cross-examination that his evidence that the 8.15 million A Ltd shares acquired by ALS had been for the purposes of the share incentive scheme, was false.

[20] This attack upon Mr. X's veracity was unfortunate. It was premised upon statements in the 2002 annual report where the shares purchased by ALS were

described as “treasury shares” and it was stated that the unissued ordinary and B shares were reserved for the scheme.

[21] The term “treasury shares” is entirely neutral as to what may be done with the shares and the fact that unissued shares have been reserved for use in a share incentive scheme does not mean that unissued shares have to be so used and that treasury shares cannot be used for that purpose.

[22] Mr. X in fact testified, and his evidence in this regard was not challenged that ALS in fact sold and transferred its treasury shares to the share incentive trust. This is also reflected in the relevant financial statements and tax schedules. Pursuant to this challenge to Mr. X’s credibility, minutes were located of a meeting of A Ltd’s remuneration committee which expressly recorded a request from the committee for proposals with regard to the repurchase of A Ltd shares to hedge the group’s position in respect of the share incentive scheme.

[23] In May 2001 the financial manager, one Mr. C, had done some calculations as to the effect of a 10% repurchase of A Ltd shares on A Ltd’s headline earnings and headline earnings per share (“HEPS”). The calculations suggested that a repurchase of 10% of A Ltd’s shares would be advantageous for HEPS if funded by selling PTS shares but not if funded using cash.

[24] Mr. X revisited his investment strategy in the second half of 2002. One Mr. D re-did Mr. C’S calculation but added a third scenario, that is the use of

borrowed share funds to acquire the A Ltd shares. This scenario was even less favourable than using cash on hand.

[25] In July 2002, Mr. C updated his earlier calculations. These calculations continued to show that using PTS's shares to fund the repurchase would have an immediately favourable impact on HEPS while using cash would not.

[26] Mr. X then decided to take the repurchase proposal to the A Ltd board. The proposal is contained in the paper headed "Employment of Surplus Cash (the "ESC" document). It was apparent that A Ltd had surplus cash totalling 614 million rand and this amount could exceed one billion rand upon the sale of PTS shares. The pros and cons of the repurchase option are set out in the ESC document. So are the tax implications. Mr. X emphasised that the repurchase of the A Ltd shares should be considered in the same way as any other investment opportunity. He argued that it was not a return of capital but a rational investment decision. In the circumstances he recommended that the board approve acquisitions in A Ltd shares up to 750 million rand over the next three year period provided that no other more lucrative investments could be identified and further provided that the discount to NAV was at least 20%.

[27] The board discussion focused on the commercial and investment rationale for the proposed repurchase programme. This is clear from the ESC document. There was no intention of securing any tax benefit.

[28] There was no debate about whether the shares should be bought by A Ltd or ALS and, it seems, Mr. X took it for granted that A Ltd would continue using ALS to buy and hold A Ltd shares.

[29] The board eventually decided that the surplus cash would not at that stage be used to buy A Ltd shares. According to Mr. X the board was not against the repurchase programme. However, its chairman and the CEO of PTS was at that stage privy to price-sensitive information and a decision to fund the repurchase programme may have been viewed as improper.

[30] The sensitivity regarding PTS had ceased by 6 March 2003 and the board then gave the go-ahead for ALS to repurchase shares in A Ltd. Its motivation for the said decision was as set out in the ESC document.

[31] On 20 October 2003 its auditors sent Mr. X a letter with tax advice with regard to the repurchase of A Ltd shares. According to Mr. X the advice was sought because ALS was approaching the 10% limit. It was in fact 4.43%. On this basis, his explanation for seeking advice was said in cross-examination to be false. Mr. X explained that large lines of shares could become available at short notice. The fact that this did not occur does not make his explanation implausible. He quite clearly wanted to know the tax position if ALS's 10% limit was reached and shares were sold back to A Ltd for cancellation.

[32] Although Mr. X had been advised – as per its auditors – that the (f) exemption was likely to cease to be available in December 2003, he took no

steps to cause A Ltd to take advantage of this by buying back shares from ALS in the closing months of 2003.

[33] In or about June 2004 Mr. X asked its auditors to update its advice in anticipation of ALS selling some shares to A Ltd in order to enable ALS to continue buying shares without infringing the 10% limit. Mr. X learnt from the letter dated 15 June 2004 that the (f) exemption had not been negatively amended in December 2003.

[34] Mr. X organised the sale of 3.5 million shares by ALS to A Ltd in order to clear the way for the acquisition by ALS of the new parcel of 3 211 902 shares which were acquired on 18 June 2004. The sale was at market value.

[35] Shortly after setting in motion the purchase by A Ltd of the aforementioned shares, Mr. X was offered further parcels of shares exceeding 12 million. He thus arranged to buy back from ALS and cancel 15 million shares. It was also agreed that some additional capacity should be created by selling to A Ltd and cancelling a further 20 million shares. ALS would then be in the position to re-enter the market swiftly once the closed period ended. The purchase by A Ltd of the 15 million and 20 million shares was effected on .22 and 24 June 2004 at market value. The two repurchases were combined in a single CM 14A and in a single delisting application.

[36] As at 30 June 2004 ALS held 5.62% of A Ltd shares. The net effect of the transactions in the latter half of June 2004 was only to decrease ALS's holding of A Ltd shares from 9.97% to 5.64%.

[37] In its annual report for the year ended 30 June 2004 the chairman reported that A Ltd screened many potential investment opportunities but deals offering superior returns and meeting A Ltd's criteria were not always readily available. As a result it had used a significant part of its South African cash to purchase A Ltd shares.

[38] Mr. X testified that in his presentation of A Ltd's results to analysts the repurchase programme and the way it had enhanced shareholder value were emphasised. The view expressed by some institutional investors was to query why the group had not repurchased more A Ltd shares.

[39] In its financial statements for the year ended 30 June 2004 ALS reflected its A Ltd shares as an investment with a market value of R502 340 901 million. It noted that all the transactions were on market related terms and Mr. X confirmed that the shares had been bought by ALS as a long-term investment.

[40] Further shares were purchased on 5 October 2004 and 30 June 2005 bringing ALS's shareholding in A Ltd to 8.64%. The latter was the last purchase of treasury shares. There was a lack of repurchase activity after 5 October 2004 which according to Mr. X was probably on account of the fact that the discount was narrowing and there was less liquidity in the market.

[41] During August and September 2004 some of the treasury shares held by ALS were disposed to third parties in connection with two external transactions. The first external transaction involved S Co. and a wholly owned subsidiary of A Ltd called DT Co. A Ltd acquired a majority stake in a technology company called S Co. The result of the elections made by S Co. minorities was that A Ltd had to procure delivery of 99 458 A Ltd shares to S Co. This was done by a sale of the A Ltd shares by ALS to DT Co. at market value which DT Co. then delivered to S Co. The other transaction involved KL Co., a software company in which A Ltd's subsidiary had been building up a strategic stake. One million shares became available in KL Co. and 500 000 of these shares were paid for with 104 762 A Ltd shares as agreed with the seller.

[42] At its AGM held on 27 October 2004, A Ltd shareholders again conferred on the directors a general authority to repurchase shares but a resolution to authorise the directors to issue shares for cash did not muster the required majority. Mr. X testified that the institutional shareholders were resistant to any general authority for directors to issue shares for cash.

[43] All ALS's shares in A Ltd were sold back to A Ltd in January 2006 and cancelled. The reason for this was the RST transaction. A Ltd held 100% of A Ltd Techno which in turn held 15% of AVA. BC had signalled an interest in acquiring the 15% AVA stake (BC already held 50%). Wanting to maximise the price of its AVA stake A Ltd decided to do this by structuring the transaction as a sale not of A Ltd Techno or of the AVA stake but as a sale of the shares in A Ltd itself. This

meant that all the assets held by A Ltd other than A Ltd's 15% shareholding of AVA through A Ltd Techno had to be removed from A Ltd. This was done by selling these other assets to OP A Ltd for R5 billion. RST, not BC, was eventually the successful bidder for the shares in A Ltd, offering R47.25 p.s.

[44] If ALS had continued to hold its approximately 38.7 million A Ltd shares, RST would have been left with less than 100% of A Ltd and would thus not have achieved its objective. It was intended that A Ltd should buy back the 38.7 million shares from ALS and cancel them. This repurchase by A Ltd from ALS was approved by special resolution at the A Ltd general meeting on 11 June 2006.

[45] According to Mr. X ALS would have continued to hold the A Ltd shares but for the RST transaction. His evidence in this regard was not disputed by the Commissioner's counsel. The shares were sold to A Ltd in June 2006 solely in order to accommodate the RST transaction.

[46] Furthermore, as at January 2006 the (f) exemption still applied to exempt from STC A Ltd's repurchase and cancellation of the 38.7 million shares.

[47] When asked by the Court whether it was necessary to make any credibility findings in this matter, Mr DM Fine SC who appeared with Mr GD Goldman and Ms A Lapan on behalf of the Commissioner, conceded that it would not be necessary to do so. He contended, however, that by analysing the probabilities the Court could refuse to accept Mr. X's *ipse dixit.* It seems to me that in order to find against A Ltd the court would have to conclude that Mr. X's key evidence as

to the purpose of the repurchase programme, its link with the eventual sales and the reason for the said sales was false. We are unable to do so. Mr. X's evidence was clear, fair and consistent. It was also consistent with all the objective facts relating to the share repurchase programme and all the contemporaneous documents, especially the ESC document. There was nothing inherently improbable in anything Mr. X had to say.

[48] Mr Fine also persisted in his contention that some adverse inference should be drawn against A Ltd because Mr. V as public officer was not called to testify. The overwhelming strength of appellant's case based on Mr. X's evidence, supported by the probabilities and the surrounding circumstances made it unnecessary to do so. Furthermore he was not employed at any of the relevant times and he could not have elucidated the facts regarding A Ltd's purposes at the time of the share repurchase programme or the repurchases.

[49] This scheme as pleaded. The Commissioner's pleaded case – as set out in its Rule 10 statement of grounds of assessment – is that A Ltd entered into a unitary scheme or series of transactions, commencing in March 2002, to avoid its having to pay STC on the repurchase of the shares. These comprised the establishment of ALS as a subsidiary, its funding through interest-free intra-group loans, the acquisition by ALS of A Ltd shares on the market (transactions which did not attract STC), and the eventual sale by ALS of the shares to A Ltd and their cancellation, the latter being transactions which were exempt from STC.

[50] Each purchase by ALS of sales on the market was a "transaction" in the ordinary contractual sense. Each sale of shares by ALS to A Ltd was likewise a "transaction". What the Commissioner needed to establish on a balance of probabilities was that each of these individual steps formed part of a single scheme of transactions. Even though the ultimate steps in a scheme need not be in contemplation from the very outset, there must be, as Mr Rogers argued, sufficient unity between the ultimate steps and the earlier steps so that, having regard to the ultimate objective, they can be regarded together as part of a single scheme or transaction.

[51] The evidence simply did not establish any such unitary scheme and there are several reasons why the said scheme does not exist.

[52] ALS was established to acquire A Ltd shares to hedge the group's obligations under its share incentive scheme. This predated by some months the commencement of the investment-driven repurchase programme. There was no intention that shares so acquired should be on-sold to A Ltd and cancelled, nor were they in fact on-sold to A Ltd and cancelled. In July and August 2003 they were sold by ALS to the share incentive trust.

[53] The repurchase programme, when conceived and implemented, did not envisage the eventual sale of treasury shares to A Ltd and their cancellation. The possibility of cancellations only arose as ALS's holdings neared the statutory 10% limit. When that occurred, A Ltd repurchased some of its shares held by ALS to create space for ALS to purchase more shares on the market. The

outstanding treasury shares were finally resold and cancelled in circumstances that were clearly not foreseen when the programme commenced, i.e. RST's purchase of the 15% AVA stake.

[54] The presentation to the board in November 2002 did not mention, as an element of the proposed programme, the onward sale of shares by a subsidiary to A Ltd for cancellation. According to Mr. X a cancellation of A Ltd shares was not considered when he approved the repurchase programme. His evidence in this regard is consistent with the board paper.

[55] That there was no overriding "scheme" for shares to be acquired by ALS for onward sale to A Ltd and cancellation is borne out by the objective facts. The only occasion when shares were sold by ALS to A Ltd – other than in the RST context – was in late June 2004 when ALS was just under the 10% limit and wished to buy more A Ltd shares. When this situation arose ALS initially sold back two tranches of A Ltd shares to enable anticipated acquisitions of similar amounts to be made.

[56] At no stage from March 2002 until late June 2004 (when the 10% limit was reached) did A Ltd and ALS act in accordance with a scheme of acquiring shares through a subsidiary for onward sale to A Ltd. From June 2004 until January 2006 A Ltd and ALS did not act as the terms of the scheme alleged by the Commissioner would have entailed. During that period ALS's holding of A Ltd shares grew from 5.49% to 8.64% without any voluntary sales by ALS to A Ltd. The only disposals during this period were those made possible by the fact that

ALS had uncancelled treasury shares on hand, namely the disposals in respect of the S Co. and KL Co. acquisitions.

[57] After October 2004 there was very little purchase activity by ALS. The share price had run up and favourable repurchase opportunities were not available. According to Mr. X, the shares would have continued to be held by ALS but for the RST transaction. Quite clearly the RST transaction was not something the group had in mind when ALS started to buy A Ltd shares. There can be little doubt that the 38.7 million shares which ALS held as at 11 January 2006 were sold back to A Ltd and cancelled solely to facilitate the RST transaction. Even if there had been a “scheme” in terms whereof ALS was to acquire A Ltd shares and on-sell some of them to A Ltd for cancellation, the sale of the 38.7 million shares to A Ltd in January 2006 was not an act done in the implementation of that scheme but was prompted by extraneous circumstances which arose in 2005 and were unrelated to the purposes of any scheme, if such existed.

[58] In the light of the above we are compelled to conclude that the sale of shares by ALS to A Ltd was not under any circumstances part of a “scheme” which started with the purchase by ALS of shares in A Ltd. The questions relating to effect, abnormality and purpose need not be considered, since the premise of the Commissioner’s pleaded case disappears. I shall, however refer briefly to these aspects in due course.

[59] Identifying the Commissioner's true case is important because of the nature of Section 103. It involves the exercise of an extraordinary administrative power enabling the Commissioner to overturn the express and ordinary consequences of applying the Act. The exercise of that power involves his "determining" a liability for tax. An appeal in this context is against the Commissioner's "decision" (Section 103(4)), namely his determination of a tax liability and its amount.

[60] The basic jurisdictional requirement for the exercise of the power is that the Commissioner is "satisfied" of the various requirements. Once the Commissioner reaches the requisite level of satisfaction, and exercises the power to determine the tax liability on the strength of such satisfaction, an appeal must of necessity go to whether he was justified in being so satisfied. He must stand and fall by his reasons for exercising the power. If the Commissioner did not make his tax determination on the basis of being "satisfied" about an alternative scheme, he cannot rely on the alternative when his Section 103(1) determination is challenged on appeal.

[61] A Ltd's contention is that the arguments which the Commissioner now urges upon the Court deviate materially from the substance of the Rule 10 statement, that he attempts now to justify his exercise of the Section 103 power by reference to facts and arguments – in essence, a new conception of the impugned scheme – that were not the basis for the exercise of the Section 103 power in the first place.

[62] A Ltd's contention is this. The original exercise of the Section 103(1) power was based on his apparent satisfaction that the sale of A Ltd shares by ALS to A Ltd (i.e. the "step two" transactions) was the culmination of a pre-ordained scheme whereby A Ltd bought back its shares *via* its subsidiary ALS, which it set out specially and funded through interest-free loans, and where the shares were held by ALS for no other purpose other than to facilitate their repurchase by A Ltd. This is pleaded clearly in paragraphs 10.11, 10.12, 10.13.8, and 10.14. The pleaded scheme was that from the very outset it was always intended for A Ltd to acquire the shares ("step one") through Section 85, but it established and interposed ALS as a conduit so that when the shares were repurchased and cancelled ("step two") as had always been the intention, there would be no STC liability.

[63] The Commissioner it appears now accepts that when the shares were purchased by ALS they were acquired as treasury shares and that there are valid commercial reasons to do so. In the course of oral argument, Mr Fine conceded that "no one ever says anything untoward with regard to step one…". That by itself seems fatal to the scheme as pleaded. His main focus was no longer on the pleaded scheme as a whole, but on the repurchasing of shares by A Ltd, possibly coupled with the subsequent acquisition of new treasury shares by ALS. He challenges the commercial rationale of the step two repurchase in isolation, whereas in the pleadings his focus is on the lack of commercial rationale in the acquisition of shares by ALS.

[64] Mr Fine further stated on more than one occasion, if I recall correctly, that the Commissioner does not have any complaint about the step one transaction. This appears not to be correct. The step one transactions form an essential part of the scheme as pleaded, constituting the first stage in a two stage scheme to cancel the shares. The Commissioner's letter of assessment expressly questions the commercial rationale for the shares being purchased in a subsidiary as opposed to A Ltd repurchasing and cancelling them directly.

[65] The Commissioner's shift in approach, it seems, follows on Mr. T being unable to criticise the commercial purpose or effect of "step one" transactions.

[66] The Commissioner's pleaded case does not allow it to advance this alternative contention as I have already indicated, such a version is not to be found in the Commissioner's Rule 10 statement. In addition, the present case is an appeal in terms of Section 103(4) against the Commissioner's Section 103(1) decision. The only thing that the Court has jurisdiction to determine in the appeal is whether the Commissioner's actual decision is right or wrong. His actual decision comprises the various aspects of which he was "satisfied" in terms of section 103(1). The composite scheme alleged in the Commissioner's pleaded case is the only "scheme" on the existence of which the Commissioner claimed to be satisfied when assessing A Ltd.

[67] The pleaded scheme simply cannot be established because there is no evidence that the share repurchase programme was always intended to end with the cancellation of the shares, let alone that ALS was merely conceived and

interposed to facilitate what was always intended as a Section 85 repurchase. Furthermore when the programme was conceived as a commercial strategy, the (f) exemption was not in place and it was assumed that there would be STC on any subsequent repurchase. A Ltd's conduct was also entirely inconsistent with a plan to achieve a tax benefit, with no regular selling and particularly no immediate selling even when it was learned that the (f) exemption may be lost. Finally, the commercial rationale and normality of the purchase and holding of treasury shares were conceded.

[68] I have already made the finding that the Commissioner has failed to establish the transaction requirement as pleaded. A Ltd's case is equally good insofar as the other requirements are concerned.

[69] There are several reasons why the effect requirement has not been met in this case. The Commissioner must prove that the alleged scheme had the effect of avoiding liability for STC – this being the tax allegedly avoided. The A Ltd group was under no compulsion to buy its own shares. A Ltd shares would only have been bought if management thought it made good commercial sense. If financial analysis showed that a purchase of A Ltd shares would not be a good investment, the shares would simply not have been bought. If A Ltd had directly bought on the market the shares that ALS bought, STC would have been payable by A Ltd. However, would A Ltd have bought the shares and paid STC? STC would have added a cost of 12.5% to the purchase of the shares. Despite the onus, the Commissioner's counsel made no attempt to establish through cross-examination that with this additional cost A Ltd would have bought the

shares. Conceivably the board would have decided against the repurchase programme and would have retained the surplus cash for use in future external investment opportunities.

[70] The evidence overwhelmingly demonstrates that A Ltd's sole or main purpose in concluding the various transactions was not to obtain a tax benefit. The share repurchase programme was entered into for the purpose of making a long term investment in A Ltd's own shares. The shares were to be acquired by a subsidiary and held in treasury, not immediately cancelled. The evidence was that there was no intention to obtain a tax benefit. The impugned sales in fact only occurred in circumstances that were not anticipated at the time the repurchase programme commenced.

[71] Finally, as regards the normality requirement the Commissioner's own expert confirmed that it is quite normal for companies to repurchase their shares in subsidiaries. A Ltd's expert witness, although her evidence is susceptible to severe criticism, demonstrated, from her research sample of listed companies over the period 1999 – 2009, that only a small percentage of companies that repurchased their shares do so exclusively on a direct basis. According to her research the majority buy and hold treasury shares. About a third of all shares bought by subsidiaries in treasury were subsequently, she says, resold to their holding companies and cancelled. Such conduct is entirely lawful and permitted in terms of the Companies Act. The share repurchase programme as a whole was not shown to be abnormal in the sense of being any different from how other companies went about acquiring shares in treasury.

[72] Having regard to the circumstances in which the repurchase programme was entered into and carried out, we conclude that it was not entered into and carried out in a manner that would not normally be employed for *bona fide* business purposes, other than the obtaining of a tax benefit. It was carried out in a normal fashion for achieving *bona fide* business purposes.

[73] In the result the **APPEAL IS UPHELD AND THE DISPUTED STC ASSESSMENTS ARE SET ASIDE.**

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DESAI J