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

Case No: 13753

In the matter between:

ABC (PTY) LTD	Appellant
and	
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Respondent

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JUDGMENT

DLODLO, J

[1] The Respondent's statement of grounds of assessment and opposing appeal in terms of Rule 31 read together with the Appellant's statement of grounds of Appeal in terms of Rule 32 reveal that there were two main disputes between the parties and these were:

(a) A dispute relating to the deduction from the Appellant's income of amounts expended in carrying out repairs to a travelling vessel in the Appellant's 2009 and 2010 years of assessment; and

(b) A dispute relating to the allowance claimed by the Appellant in terms of section 14(1)(*c*) of the Income Tax Act 58 of 1962 in its 2011 year of

assessment, including the associated questions of penalties and interest.

However, the dispute mentioned in (a) above has been resolved by agreement between the parties. An Order giving effect to that agreement on terms fully addressed therein has been granted by this Court. There is the sole remaining issue for determination by this Court. It shall be properly set out before it is discussed.

[2] Subject to the qualification below, the Respondent accepts both the methodology used to calculate the section 14(1)(*c*) allowance claimed by the Appellant in respect of its 2011 year of assessment and the reasonableness of the estimates used by the Appellant in making such calculation. The qualification to the above statement is that, while the Respondent does not dispute the *quantum* of the various underlying expenditures, he does dispute that the allocation by the Appellant of the charge-out rates applicable to internal repairs by the Appellant's engineering division, referred to below, would constitute *"expenditure … on repairs to any ship"* for the purposes of section 14(1)(*c*) or *"expenditure actually incurred on repairs of property"* as contemplated in section 11(*d*) of the Income Tax Act. The point of dispute described above has given rise to the sole remaining issue which this Court is called upon to decide and which the parties are agreed should be decided with reference to the agreed facts set out below, which are subject only to the qualification mentioned *supra*.

AGREED STATEMENT OF FACTS

[3] The Appellant, is the operating company of the X Fishing Group, which operates as owners and charterers of fishing vessels, and producers and wholesalers of fresh and frozen fish products. The Appellant has been an owner and/or charterer of fishing vessels for 35 years. In 2011, the Appellant operated 25

deep sea fishing vessels. The Appellant's fishing vessels operate year-round at maximum output, and can fish for up to 18 hours a day. This, together with the extreme nature of the environmental conditions to which the vessels are exposed throughout the year, contributes to the vessels having to be continuously repaired.

[4] Initially, the Appellant's fishing vessels were repaired by outside engineering contractors, but over time the Appellant developed its own in-house facilities to assist with the repair of its fishing vessels, in keeping with industry norms. This proved to be more efficient and cost-effective. The Appellant's engineering and repair workshops at the Appellant's premises (*"the engineering division").* The engineering division includes physical infrastructure (such as workshops, plant and tools, crane facilities and associated infrastructure) and employees equipped with the skills necessary to carry out vessel repairs (such as engineers, electricians, boilermakers, carpenters, riggers, fitters and related trades). The primary task of the engineering division is the repair and maintenance of the Appellant's fleet of fishing vessels. The engineering division operates at full capacity year-round, as there are always vessels in port that require repairs.

[5] In 2011, there were approximately 130 engineering employees working in the engineering division. Notwithstanding the fact that the Appellant has developed its own engineering division, it still needs to make use of external engineering contractors on an ongoing basis. This is especially so for technical input, the installation and testing of various machinery and electrical components, and for advising on a host of technical issues.

[6] The Appellant also regularly makes use of external suppliers and resources to assist with major repair work. Most engines and spare parts are purchased from external engineering suppliers, both international and local. When effecting repairs,

the Appellant also makes use of the Port's dry-docking and other facilities owned or operated by Y. In order to calculate the cost of the in-house repairs done by it, the Appellant works out standard engineering charge-out rates. These rates are calculated with effect from 1 July of each year, there is Annexure A attached and which reflects the charge-out rates which were effective from 1 July 2011. As set out in Annexure A hereto, specific rates are set for different categories of persons employed in the engineering division. In order to arrive at these charge-out rates, the Appellant takes into account the costs incurred by or associated with its engineering division. These costs include the proportion of the rental paid by the Appellant to its landlord, the electricity, water and similar associated costs incurred by the engineering division, the costs of repairing and maintaining the workshops and the equipment situated therein and all the salary and associated costs of the staff employed in the engineering division.

[7] When third party engineering contractors calculate their own prices, they take into account the same costs, but they also incorporate a profit margin. Each employee in the engineering division compiles a worksheet each day which records the type of repair and the time which he spent on each vessel. The Appellant's accounts department then utilises the worksheets together with the charge-out rate sheet in order to calculate the cost of the repairs which were done to each vessel by its engineering division. The Appellant keeps separate ledger accounts for each vessel. Each ledger account for each vessel records both the cost of repairs which were done by its engineering division as well as the cost of repairs effected by third parties. Thus, at the end of each year and with reference to each ledger account for each vessel, it is possible to assess the total costs incurred by it on repairs for each such vessel. These costs have two components: the costs of the in-house engineering division and the costs paid to third parties. In order to calculate the

section 14(1)(*c*) estimate in respect of future expenditure to be incurred during the forthcoming 5 years on repairs to the Appellant's vessels, the methodology adopted in 2011 was the same methodology which has been used for the previous 16 years. This methodology utilised a standard framework which had been developed by the Appellant. This framework identified the major components of each of the fishing vessels. The estimated costs were then allocated in respect of each of these components on a year-by-year basis.

[8] Each year, the Appellant commenced the exercise by having regard to the forecast that had served as the basis for the previous year's section 14(1)(*c*) allowance. The forecast was updated taking into account the charges that had occurred throughout the fleet since making the previous forecast, the most recent information available pertaining to the likelihood of future repairs, the likely costs thereof and the date when they were likely to be incurred. After compiling this estimate, regard was also had to the past 5 years of actual repair costs for each vessel irrespective of who had done the repair, so as to confirm that the estimate was reasonable. When calculating its section 14(1)(*c*) deduction, the Appellant drew no express distinction between what it regarded as the cost of the anticipated repairs which would be attributable to the Appellant's engineering division and those which would be attributable to third parties. This was not done as the repair expenditure would have to be incurred in either event. However, it was inevitable that the forecast would include a significant provision for the cost of repairs likely to be attributed to the engineering division.

[9] Once the estimated annual cost of the future repairs was calculated, a percentage deduction (20%) was made therefrom in order to take into account the suggestion in SARS' Practice Note dated 4 April 1996 (attached as Annexure B) to the statement that *"ordinary running repairs"* are excluded from the allowance.

Thereafter, the annual cost was further adjusted in accordance with SARS' *"accepted method for the calculation of the expenditure to be allowed as a deduction",* which is referred to in paragraph 4.1 of the Practice Note, involving a graduated attribution of costs in each of the 5 successive years. A schedule setting out the calculation of the allowance claimed for 2011, with reference to the anticipated costs to be incurred in respect of each of the ships in the succeeding 5 years of assessment, and showing the actual repair costs incurred by the Appellant in the 5 prior years up to 2010, is attached as Annexure C. Attached as Annexure D, are copies of the supporting schedules prepared in respect of the anticipated future repair costs for each vessel in the 2011 year.

[10] Attached as Annexure E is a schedule showing (in the table on the right side) the actual repair expenditure (less the deductions referred to above) incurred by the Appellant in the years from 2011 to 2015, together with (in the table on the left side) the estimates used for claiming the allowance in the 2010 year in relation to each of those years. The equivalent schedule pertaining to the 2011 year is attached as Annexure F. This schedule shows the actual repair expenditure (less the aforesaid deductions) incurred by the Appellant in the years from 2012 to 2015, plus the expenditure which it had forecast would be incurred in 2016, together with (in the table on the left side) the estimates used for claiming the allowance in the 2011 year in relation to each of those years. Prior to the SARS audit of the 2010 (and later 2011) years of assessment, SARS had never objected to the above methodology or the estimated amounts which it produced for purposes of determining the allowance claimed, notwithstanding that the estimated repairs may be done either in house by the Appellant's engineering division or by third parties, nor did SARS subject the Appellant to an adverse assessment in regard to those claims.

[11] Pursuant to the 2010 and 2011 assessment:

(a) The Appellant's section 14(1)(*c*) allowance for the 2010 year was allowed in its entirety, with the effect that the entire amount of the claim was added back to income in the 2011 year of assessment; and

(b) The Appellant's section 14(1)(*c*) allowance for the 2011 year was disallowed in its entirety.

THE ISSUE FOR DETERMINATION

[12] According to an agreement reached by the parties the sole issue for determination is as follows:

> *"For the purpose of calculating the allowance referred to in section 14(1)(c) of the Income Tax Act, 58 of 1962, in respect of the appellant's 2011 year of assessment:*
>
> *(1) is the appellant, as a matter of law, precluded from taking into account as part of its future estimate of expenditure the estimated cost of effecting future repairs through its own in-house repair facilities (such costs being the appellant's workshop infrastructure and operating costs, which in turn include the costs of employment attributable to those facilities), to the extent that such future repairs would be conducted utilising those facilities, as the appellant contends it is entitled to do; or*
>
> *(2) was the estimated future expenditure on repairs, as contemplated in section 14(1)(c), required, as a matter of law, to exclude such costs, as is contended by the respondent?"*

I mention that the parties have also agreed on the practical consequences of whichever Order the Court ultimately makes on the legal issue set out *supra*.

[13] The Respondent indeed does not dispute (a) that the Appellant envisaged carrying out "*repairs*" to its ships in the succeeding five years, nor (b) that it actually and reasonably envisaged spending the amounts on which the allowance was calculated in connection with those repairs. It would appear though, the narrow question is merely whether any costs which were projected to be incurred in regard to the in-house salary or wage costs of persons employed for purposes of conducting the repairs, and the other costs incurred to support the Appellant's in-house engineering infrastructure, constitute *"expenditure …. on repairs to* an*y ship"* for purposes of section 14(1)(*c*). The Respondent accepts that amounts envisaged to be paid to third party contractors or external service providers or suppliers in conducting or assisting with repairs to the Appellant's vessels constitute *"expenditure … on repairs to any ship."*

THE RELEVANT STATUTORY PROVISION

[14] Section 14(1)(*c*), at the time relevant to the 2011 year of assessment, read as follows:

> *"There shall be allowed to be deducted from the income of any resident who carries on any business as owner or charterer of any ship—*
>
> *(c) in respect of any expenditure which such person satisfies the Commissioner he is likely to incur within five years from the end of the year of assessment in question on repairs to any ship used by him for the purpose of his trade, such an allowance as, notwithstanding the provisions of section 23(e), the Commissioner, having regard to the estimated cost of such repairs and the date on which they are likely to be incurred, may make each year: Provided that any such allowance in respect of any year of assessment shall be included in the income of the taxpayer for the following year of assessment."*

I hasten to mention that section 14(1)(*c*) has subsequently been repealed and was replaced by section 24P. The latter section now in force is by and large to the same effect.

[15] In truth section 14(1)(*c*) empowered the Respondent to exercise a discretion in granting an allowance based on the expenditure which he was satisfied the Appellant was likely to incur in the next five years on repairs to any ship used by the Appellant for the purposes of its trade. The Respondent's decision was, however, made subject to objection and appeal in terms of section 3(4)(*b*) of the Income Tax Act. Of course this in effect means or must mean that this Court is empowered to stand in the shoes of the Commissioner for the SARS and to exercise the same discretion *de novo.* In *CIR v Da Costa* 1985 (3) SA 768 (A) at 7741 – J Van Heerden JA stated the following:

> *"It seems clear, therefore, that in cases involving the exercise of a discretion by the Commissioner the Special Court on appeal to it is called upon to exercise its own, original, discretion … "*

Thus for present purposes, the key question pertains to the framework within which the discretion is to be exercised. More particularly the question is rather whether the expenditure which the Appellant envisaged incurring on its engineering division in the five succeeding years was *"any expenditure …. on repairs to any ship for the purposes of his trade …. "*

THE RESPONDENT'S SUBMISSIONS AND COMMENTARY THERETO

[16] Mr. Emslie (SC) prefixed his submissions emphasising that in terms of section 3(4)(*b*) of the Act any decision of the Commissioner in terms of section 14 of the Act is subject to objection and appeal. This of course in effect means that the Tax Court can substitute its own decision for that of the Commissioner. As alluded to *supra* earlier the matter proceeds by way of an appeal rather than a review notwithstanding the fact that the Commissioner's decision in terms of section 14(1)(*c*) constituted the exercise of a discretionary power.

[17] Mr. Emslie contended that in order to qualify for a section 14(1)(*c*) allowance, the estimated expenditure must be an estimate of future *"expenditure…on repairs to any ship used by him for the purposes of his trade."* In Mr. Emslie's contention the future expenditure on repairs contemplated in section 14(1)(*c*) is expenditure that, as and when it is actually incurred in the future, will qualify for deduction in terms of section 11(*d*) of the Act. Other expenses such as salaries, associated staff costs, rent, electricity, water and repairs and maintenance of workshops and equipment, argued Mr. Emslie, would ordinarily be deductible by the Appellant in terms of section 11(*a*) of the Act, which together with section 23(*g*) is commonly referred to as the *"general deduction formula"*. The Court was, in this regard referred to *Solagas Finance Co. (Pty) Ltd v Commissioner for Inland Revenue* 1991 (2) SA 257 (A) at 284 where the following appears:

> *"For example: in the present case the appellant presumably incurs ordinary day-to-day expenses in the running of its business, such as paying salaries to its employees, perhaps paying rental for the premises occupied by it, and so forth. There is no doubt that the deduction of such expenses is not precluded by section 23(g)."*

The significance of the above authority (I agree) is that Botha JA recognised that salaries paid to employees and rental paid for the premises occupied would be deductible in terms of section 11(*a*).

[18] I was also referred to *Commissioner for Inland Revenue v Nemojim (Pty) Ltd* 1983 (4) SA 935 (A) at 946-7 where Corbett JA (as he then was) described the general deduction formula (sections 11(*a*) and 23 (*g*)) as follows:

> *"Section 11(a) provides positively and in general terms, in the case of a person deriving income from the carrying on of a trade within the Republic, what expenditure and losses shall be allowed as deductions from income so derived in order to determine his taxable income. The subsection limits the deductions to expenditure and losses incurred in the Republic in the production of income, other than those of a capital nature."*

The truth is that indeed almost all employers who carry on a trade and who pay salaries to their employees in the course of conducting their trade and who pay rent for their trading premises deduct such salaries and rent under section 11(*a*) of the Act. Notably, section 23B(3) of the Act makes the following provisions:

> *"No deduction shall be allowed under section 11(a) in respect of any expenditure or loss of a type for which a deduction or allowance may be granted under any other provision of this Act, notwithstanding that—*
>
> *(a) such other provision may impose any limitation on the amount of such deduction or allowance; or*
>
> *(b) that deduction or allowance in terms of that other provision may be granted in a different year of assessment."*

From the above it is of course pertinently clear that expenditure on repairs which are deductible under section 11(*d*) cannot be deducted under section 11(*a*) of the same Act, so argued Mr. Emslie.

[19] I fully agree with the assertion by Mr. Emslie that the *"architecture"* of the Act is clearly that section 11(*a*) and other specific deductions and allowances (such as *inter alia* section 11(*d*)) are mutually exclusive. In other words one may not deduct under section 11(*a*) expenditure that is deductible under other provisions of the Act or which qualifies for an allowance in terms of any other provision of the Act. It is Mr. Emslie's contention that the various categories of the underlying expenditure used by the Appellant to arrive at the *"charge-out rates"* which the Appellant notionally charges itself for repairing its own ships are deductible in terms of section 11(*a*) and are not deductible under section 11(*d*). It is important to note that Mr. Emslie in his submissions scarcely refers to the particular provisions of section 14(1)(*c*) of the Act. Of course on behalf of the Respondent the following reasons are advanced why it is contended that estimated future expenditure on repairs to any ship in terms of section 14(1)(*c*) allowance were wrongly taken into account:

(a) The attribution of the *"charge-out rates"* to the repairs effected by the Appellant internally represents notional expenditure which is not deductible at all; and

(b) Once the inter-relationship between section 11(*a*), section 11(*d*) and section 14(1)(*c*) necessitated by the provisions of section 23B is appreciated, it becomes clear that certain types of expenditure are deductible only under section 11(*a*) whereas others are deductible only under some other specific provisions of the Act.

[20] Talking to the charge-out rates Mr. Emslie made the following important submission:

> *"It is important to appreciate that the "charge-out rates" arrived at by the appellant…….represent notional expenditure. The "charge-out rates" are applicable*

> *to the appellant's engineering division. This is not a separate company, but merely a division of the appellant itself".*

In Mr. Emslie's contention this is a case of the Appellant notionally charging itself for repairs effected internally. In his view the phrase *"charge-out rates"* is a misnomer as nothing is *"charged-out". "Rather, the Appellant is "charging-in" – it is notionally charging itself for what is done by one division for another division of the same company."*

[21] One needs to be careful in considering these *"charge-out rates".* Of course just as one cannot contract with oneself, so one cannot charge oneself and nor can one pay oneself. This Court was referred to *Commissioner, South African Revenue Service v Labat Africa Ltd* 74 SATC1 (SCA) at para [12] where Harms AP held as follows:

> *"The term 'expenditure' is not defined in the Act and since it is an ordinary English word, unless context indicates otherwise, this meaning must be attributed to it. Its ordinary meaning refers to the action of spending funds; disbursement or consumption; and hence the amount of money spent. The Afrikaans text, in using the term 'onkoste', endorses this reading. In the context of the Act it would also include the disbursement of other assets with a monetary value. Expenditure, accordingly, requires a diminution (even if only temporary), or at the very least movement, of assets of the person who expends. This does not mean that the taxpayer will, at the end of the day, be poorer because the value of the counter-performance may be the same or even more than the value expended."*

I was also referred to *BP Southern Africa (Pty) Ltd v Commissioner, South African Revenue Service* 69 SATC 79 at para [14] where Ponnan JA held as follows:

> *"The recurrent cost of procuring the use of something which belongs to another is usually recognised as being of a revenue nature. The most obvious example is the recurrent rent paid by a taxpayer for the use of premises from which he/she trades."*

Mr. Emslie is of the view that the above dictum shows why rent is deductible under section 11(*a*): *"it is because it is the cost of procuring the use of something that*

belongs to another and this is why the rent paid by the appellant for the premises used by it is deductible under section 11(a)."

In *Solagass Finance Co. (Pty) Ltd v Commissioner for Inland Revenue* 1991 (2) SA 257 (A) at 284, the then Appellate Division per Botha JA held as follows:

> *"For example: in the present case the appellant presumably incurs ordinary day-to-day expenses in the running of its business, such as paying salaries to its employees, perhaps paying rental for the premises occupied by it, and so forth. There is no doubt that the deduction of such expenses is not precluded by section 23(g)."*

[22] Expenditure (ordinarily) on repairs is indeed where a taxpayer contracts with another person or an entity to repair something and incurs expenditure on repairs by agreeing to pay the other party for effecting the repairs. This would also include the purchase of parts that will be used by the Appellant to repair its own assets. In Mr. Emslie's submission expenditure on repairs does not include expenditure which is incurred to remunerate employees, to contribute to their pension funds or to procure the use of premises etc.

[23] I agree that the purpose of section 14(1)(*c*) is rather to grant an allowance in respect of estimated future *"expenditure on repairs to any ship used for the purposes of trade"* in the form of (a) expenditures that will be paid to third parties to effect repairs to the Appellant's ships and (b) expenditure on parts to be purchased for use in repairing the Appellant's ships. I also recognise that the section 14(1)(*c*) allowance accords favourable tax treatment to owners and charterers of ships which is not available to taxpayers generally in the form of an allowance in respect of estimated future expenditure. Of course this is a class privilege and the question is how must section 14(1)(*c*) be construed. See in this regard *Western Platinum Limited v Commissioner for the South African Revenue Service* 67 SATC1 (SCA) para [1] at 6B-C where the following dictum appears:

> *"The fiscus favours miners and farmers. Miners are permitted to deduct certain categories of capital expenditure from income derived from mining operations. Farmers are permitted to deduct certain defined items of capital expenditure from income derived from farming operations. These are class privileges. In determining their extent, one adopts a strict construction of the empowering legislation. That is the golden rule laid down in Ernst v Commissioner for Inland Revenue 1954 (1) SA 318 (A) at 323C-E and approved in Commissioner for Inland Revenue v D & N Promotions (Pty) Ltd 1995 (2) SA 296 (A) at 305A-B."*

THE CONTEXT OF SECTION 14(1)(*c*) AND THE INTERPRETATION THEREOF

[24] Section 14(1)(*c*) has been contrasted with sections 11(*a*) and 11(*d*) of the Income Tax Act. The latter sections provide as follows:

> *"For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived—*
>
> *(a) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature;…*
>
> *(b) expenditure actually incurred during the year of assessment on repairs of property occupied for the purpose of trade or in respect of which income is receivable, including…sums expended for the repair of machinery, implements, utensils and other articles employed by the taxpayer for the purposes of his trade."*

It is needless to mention that these sections quoted above are used by the taxpayer to make deductions in the current year of assessment of expenditure actually incurred in that particular year. There is a marked difference between section 14(1)(*c*) and sections 11(*a*) and (*d*) of the Act. Section 14(1)(*c*) does not deal with and has no impact on the deduction of actual expenditure incurred in the actual tax year in question. It is and remains an allowance which is permitted to be deducted in the current year of assessment with reference exclusively to estimated expenditure likely to be incurred in future years.

[25] It is of importance to remain aware that section 14(1)(*c*) deduction allowed in one year is reversed in the next year. Therefore if the taxpayer's projection of expenditure likely to be incurred in the next five years is identical to that on which the last year's allowance was based, the taxpayer will be in a neutral position in that year by operation of section 14(1)(*c*). It is also in that year that the actual taxable income for that year is calculated and it is in that year that various deductions under section 11 are dealt with.

[26] Mr. MacWilliam submitted that in implementing section 14(1)(*c*) no question of the double deduction of expenditure arises in that actual expenditure incurred in a year of assessment is dealt with in that year only. He contended that, on the other hand, the allowance under section 14(1)(*c*) relates notionally only to future years' deductions. He emphasised that in any event section 14(1)(*c*) deduction is reversed in full in the year in which the actual repair expenditure is incurred. Notably, *Silke on South African Income Tax*, describes the purpose of section 14(1)(*c*) applying only to the shipping industry as follows:

> *"This allowance, which was additional to the deduction for normal annual expenditure on repairs to a ship, was in the nature of a reserve and was originally designed to spread more evenly over the years the deduction for heavy expenditure on repairs that might be effected to a ship periodically".*

In Mr. MacWilliam's submission effectively it *"smooths"* the taxpayer's fiscal provision for such repairs which the legislature recognises could involve considerable cost for the taxpayer.

[27] Indeed as regards the provisions of section 11 quoted above section 11(*a*) provides the general deduction formula which is followed by more specific deductions such as section 11(*d*). The latter section is plainly directed at the deduction of what would amount to repairs of capital assets which might well not be

deductible on ordinary principles in the absence of section 11(*d*). In the words of Silke *supra* at para 8.93:

> *"if it were not for S11 (d), expenditure on repairs would often be of a capital nature, and therefore not deductible, in that the expenditure would have been incurred for the protection of a capital asset".*

[28] Various decisions of our Courts have repeatedly dealt with the proper approach to interpretation. Decisions such as *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) and various subsequent decisions including *Commissioner, South African Revenue Service v Bosch* 2015 (2) SA 174 (SCA) come to mind. In *Endumeni supra*, for instance, Wallis JA set out the state of the law at 603F to 604D as follows in this regard:

> *"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar, and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

Notably, the judgment in *Endumeni supra* clarified at 605B the *"conventional description of this process as one of ascertaining the intention of the legislature"*.

The Court at 606F said:

> *"Critics of the expression 'the intention of the legislature' are not saying that the lawmaker does not exist or that those responsible for making a particular law do not have a broad purpose that is encapsulated in the language of the law. The stress placed in modern statutory construction on the purpose of the statute and identifying the mischief at which it is aimed, should dispel such notion".*

Wallis JA emphasised that *"an interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration."*

Commissioner, South African Revenue Service v Bosch at 180E-G *supra*, crystallised the approach to interpretation as follows:

> *"That involves the proper construction of the section in accordance with ordinary principles of statutory construction. The words of the section provide the starting point and are considered in the light of their context, the apparent purpose of the provision and any relevant background material. There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning. One meaning may strike the reader as syntactically and grammatically more plausible than another, but, as soon as more than one possible meaning is available, the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions or what Schreiner JA referred to as 'excessive peering at the language to be interpreted without sufficient attention to the [hist*orical] *contextual scene'."*

[29] I fully associate myself with the above quoted sentiments. In the same *Bosch case supra* it was pointed out in paragraph [17] of the judgment as follows:

> *"[17] There is authority that in any marginal question of statutory interpretation, evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation. This is entirely consistent with the approach to statutory interpretation that examines the words in context and seeks to determine the meaning that should reasonably be placed upon those words. The conduct of those who administer the legislation provides clear evidence of how reasonable persons in their position would understand and construe*

> *the provision in question. As such it may be a valuable pointer to the correct interpretation. In the present case the clear evidence that for at least eight years the revenue authorities accepted in a DDS scheme the exercise of the option and not the delivery of the shares was the taxable event, fortifies the taxpayers' contentions".*

The words of section 14(1)(*c*) are broad and inclusive. What may be taken into account is *"any expenditure…on repairs to a ship."* The word *"any"* is a word of wide import. See *Minister of Health v New Clicks (Pty) Limited* 2006 (2) SA 311 (CC) in footnote 117; *Commissioner for Inland Revenue v NST Ferrochrome (Pty) Ltd* 1999 (2) SA 228 (T) at 232D-E where the following is stated:

> *"The word 'any' is a word of wide and unqualified generality. It may be restricted by the subject-matter of the context, but prima facie it is unlimited. R v Hugo 1926 AD 268 at 271; Commissioner for Inland Revenue v Ocean Manufacturing Ltd 1990 (3) SA 610 (A) at 618H."*

It was argued by Mr. MacWilliam that the plain language of section 14(1)(*c*) warrants a non-restrictive approach towards the types of expenditure that may be taken into account in claiming the allowance. One is hardly able to faulter this submission.

[30] Indeed there is a contextual limitation in section 14(1)(*c*). The only contextual limitation of the words *"any expenditure"* is that such expenditure must be incurred *"on"* repairs to a ship. I was referred to *Collins English Dictionary* and gathered therefrom that it includes as possible meanings of that word *"in the process or course of" and "concerned with or relating to".* Clearly both meanings could sensibly be applied in the present context although the second one is perhaps rather more apposite. Mr. MacWilliam submitted that the import of the word *"on"* in this context is merely that there be a sufficient close connection or relation between the expenditure and the envisaged repair of the ship to enable the expenditure to be identified primarily with the repair (rather than with some other action or thing). No distinction is drawn in the section in relation to different types of *"expenditure"* which may be incurred *"on the repairs". "Repairs"* is similarly a wide term the meaning of

which depends on the context in which it is used. *In CIR v Dunlop South Africa* 1987 (2) SA 878 (A) at 890F-1 the *Oxford English Dictionary* was cited and therein the word *“repair”* is said to mean *“restoration of some material thing or structure by the renewal of decayed or worn out parts, by refixing what has become loose or detached etc; the result of this.”*

[31] Numerous subsequent tax cases deal with the approach towards the meaning of *“repairs”* for purposes of section 11(*d*) of the Income Tax Act. These appear prominently from ITC 617 14 SATC 47 as follows:

> *“The principles applicable to the right of deduction or otherwise of items under the head of “Repairs” as admissible deductions in terms of sec 11(2)(c) have been laid down in the leading cases of Lurcott v Wakely and Wheeler (1911, 1 K.B. 905), Rhodesian Railways Limited v Collector of Income Tax, Bechuanaland (6 SATC at p. 229; 1933, A.D. 362). The dicta in these cases were accepted by BARRY, J.P. In Commissioner for Inland Revenue v African Products Manufacturing Company Limited (13 SATC at page 167). And it is accordingly by these principles that the Court should be guided in its decisions on the various items in the present case.*
>
> *From an examination of these cases the following principles emerge:-*
>
> *(1) Repair is restoration by renewal or replacement of subsidiary parts of the whole. Renewal as distinguished from repair is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject matter under discussion.*
>
> *(2) In the case of repairs effected by renewal it is not necessary that the materials used should be identical with the materials replaced.*
>
> *(3) Repairs are to be distinguished from improvements. The test for this purpose is – has a new asset been created resulting in an increase in the income-earning capacity or does the work undertaken merely represent the cost of restoring the asset to a state in which it will continue to earn income as before?”*

[32] Clearly the focus of the case law pertaining to what constitutes a repair is on what conduct or activity amounts to a repair of an item of property. Obviously the term is limited by the nature of the work done and the impact that work has on the property in question – more particularly whether the property is thereby merely

returned to its previous state or whether it is improved. I am unaware of an authority to the effect that *"expenditure incurred…on repairs"* for purposes of either section 11(*d*) or section 14(1)(*c*) is limited by the nature of the expenditure. The parties have also not referred me to any such authority.

[33] Therefore in applying the ordinary language of the statute there is no doubt that any expenditure incurred by a taxpayer primarily for purposes of effecting repairs of its own property is accommodated under the phrase *"any expenditure…on repairs"*, irrespective of whether it is paid to an employee or a third party. Expenditure is and should be included if it bears a sufficiently close relationship or connection with anticipated repairs so as to be regarded as being expended *"on"* those repairs rather than on something else.

[34] The test can be applied with reference to various factual scenarios. For instance, amounts spent by a taxpayer in acquiring parts or materials from third parties to enable a repair to be conducted on a ship is *"expenditure …on repairs"* of the ship. I agree with Mr. MacWilliam that the same must be true of amounts spent in contracting with third party to carry out the repair itself including the provisions of spare parts. It is a known practice that the third party will typically charge a fee which builds in the cost of both the materials and labour required to carry out the repair as well as general overheads and will add a profit margin.

[35] The section under discussion envisages no basis to exclude from the concept of "expenditure…on repairs" the taxpayer's costs of contracting with a third party to carry out a particular repair (by way of a contract of *locatio conductio operis*) where the employer provides the contractor with the necessary spares or materials. In Mr. MacWilliam's submission there is no distinction in principle between the abovementioned scenarios and that in which (as in casu) the taxpayer has

established its own dedicated engineering division at significant cost to conduct repairs to a ship. He contended that there is a direct link between the expenditure and repairs particularly since the employees do nothing other than effect repairs. In this case, Mr. MacWilliam further submitted, as with the other three scenarios described *supra*, the taxpayer is plainly expending (or expected to expend) amounts of money directly in relation to (or *"on"*) "*repairs"*. I am of the view that there is no principle which differentiates external expenditure on repairs of the taxpayer's vessels from "internal" or in-house expenditure on such repairs. I find that there is plainly no basis in the statutory language for such a distinction.

[36] The following contention containing an example needs to be set out infra:

> *"The difficulty in the Respondent's approach is demonstrated by way of an example. Say the owner of a ship wishes to carry out a repair which would require particular labour, and decides to use a specialist to carry out that repair. Instead of contracting the specialist as an independent contractor, he or she concludes a fixed-term employment contract, with the job description being limited to working on the project. The employee proceeds to dedicate him- or herself to the project which is successfully completed."*

On the approach adopted on behalf of the Respondent the cost of the employed specialist would not be deductible under section 14(1)(*c*) or section 11(*d*) merely because it is an "internal" expenditure. It would also not be deductible under section 11(*a*) because the expenditure would in all probability be regarded as being of a capital nature pertaining as it does to work done exclusively on presenting a capital asset. Thus the costs of the employee would not be deductible (or taken account of for purposes of the section 14(1)(*c*) allowance) despite the fact that the taxpayer was in no different position for all relevant purposes from one who employed an external independent contractor (where there would be no dispute that the cost was expenditure incurred on repairs).

[37] I accept that the expenditure incurred on the independent contractor is just as directly related to the repairs as expenditure incurred on an employee who would be dedicated entirely to carrying out repairs. In my view there is no reason in principle why the two should carry different consequences for purposes of section 14(1)(*c*). Clearly the exclusion of the internal costs of employment would not meet the legislative purpose of allowing a deduction of what is expended on or in relation to repairs of assets. It cannot be denied that the purpose of the legislature was to assist the ship-owning or chartering taxpayer with an allowance based on its anticipated future repair expenditure. There seems to be no basis to even think that the legislature would have intended to deprive the taxpayer of this benefit simply because it invested in resources and facilities that would enable it to conduct the expected repairs itself in a rather more cost-effective way than by contracting third parties.

[38] The approach adopted by the Respondent would undoubtedly have the further unsatisfactory result that an entity such as the Appellant (which for good commercial reasons and to operate its business more efficiently) sets up an entire dedicated engineering division to enable it to carry out repairs being disadvantaged *vis-á-vis* its competitor that simply outsources its repairs to third parties (often at a higher cost). I am of the view that this would result in a most unbusinesslike interpretation being accorded to the section and this would frustrate or undermine the legislative purpose in making the allowance available to a taxpayer such as the Appellant. Bearing in mind the approach in *Endumeni supra,* such an interpretation will as far as possible be avoided. The only way in which the section can be practically and fairly applied is to permit the allowance to be determined in relation to all expenditure that is reasonably anticipated to relate to the envisaged repairs. This

of course must always depend on the facts of each taxpayer's business. Mr. MacWilliam concluding his submission stated the following:

> *"Where, as here, it is undisputed that the taxpayer's in-house repair facility is (and will in future be) dedicated exclusively and continually to repairing ships owned or chartered by the taxpayer, it is submitted that the expenditure so incurred (or expected to be incurred) must be treated in exactly the same way as outsourced repair expenditure, and included in the determination of the section 14(1)(c) allowance."*

I agree with the above submission.

ORDER

[39] In the circumstances I make the following order:

(a) The assessment is hereby set aside.

(b) For the avoidance of doubt all understatements and underestimation penalties and all associated interest charges are set aside.

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DV DLODLO, J