IN THE TAX COURT OF SOUTH AFRICA
(CAPE TOWN)

Case No.: IT 24510

Hearing: 25 March 2019
Judgment: 17 April 2019

In the matter between:

ABC PROPRIETARY LIMITED Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

BINNS-WARD J:

[1] The taxpayer carries on business as a high street retailer of clothing, comestibles and general merchandise. As part of the facilities offered to its customers, it 'sells' gift cards. These can be redeemed for goods at any of the taxpayer's stores. The question in this appeal from the additional assessment by the Commissioner of the taxpayer's taxable income in the 2013 fiscal year is whether the revenue from the 'sale' of the taxpayer's gift cards during that year constituted part of its '*gross income*' for the purposes of the Income Tax Act[1] as soon as it was received by the taxpayer (as contended by the Commissioner), or would become such only when the card was redeemed, or having not been redeemed, expired (as contended by the taxpayer).

[2] The additional assessment followed from an audit by the South African Revenue Service ('SARS') of the taxpayer's return of income for the 2013 tax year. In its finalisation of audit letter, dated 22 May 2017, SARS characterised an amount of R140 984 321, being the taxpayer's receipts in that year in respect of unredeemed gift cards, as part of the taxpayer's gross income, and recognised a related s 24C allowance[2] in the amount of R94 123 389. This resulted in the taxpayer's assessed income tax liability being increased by R13 121 060

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1 Act 58 of 1962.
2 Section 24C of the Income Tax Act 58 of 1962.

in terms of the additional assessment, also dated 22 May 2017, which was made in terms of s 92 of the Tax Administration Act.[3]

[3] The meaning of '*gross income*' for the purposes of the Income Tax Act is defined in s 1 of the statute. The material part of the definition for present purposes goes as follows:

> ' **"gross income"**, in relation to any year or period of assessment, means—
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> (i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; … during such year or period of assessment, excluding receipts or accruals of a capital nature … .'

[4] The conceptual question in issue in this appeal is whether the moneys that the taxpayer takes from its customers for the issuance of its gift cards are '*received*' by it within the meaning of that word in the definition of '*gross income*' at the time that the transaction for the issue of the card is concluded, or only when the card is redeemed or expires. As barring refunds,[4] the moneys in question are on any approach eventually appropriated by the taxpayer, the question practically in issue between the parties is one of timing; it is ultimately a matter of determining *at what stage*, rather than *whether*, the revenue in question falls to be included in the taxpayer's gross income.

[5] As a first line of attack on the taxpayer's stance that its receipt of the proceeds of the 'sale' of gift cards as income in its hands is deferred until the cards are redeemed or expire, whichever occurs later, the Respondent/Commissioner's counsel sought to characterise the transactions in terms of which the gift cards are issued as sales. On that argument the taxpayer would be the seller, the customer paying for the gift card would be the purchaser, the *merx*[5] would be the gift card and the price would be the consideration paid for the issuance of the card. Leaving aside the difficulties for it raised by certain provisions of the Consumer Protection Act ('the CPA'),[6] to which I shall come later, the argument postulates a cash sale, with the taxpayer, as the seller, being put in receipt of the purchase price when it issues the card. If the argument were sound - again leaving out of consideration any complications caused by the CPA – it would seem to provide a straightforward answer to the

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3 Act 28 of 2011.

4 The terms of the transactions in terms of which gift cards are 'sold' exclude cash refunds, but suggest that a credit card refund might be possible. No evidence was adduced at the hearing, but I think it may be accepted as a matter of common knowledge that in certain circumstances payments made by credit card are amenable to chargebacks, whereby the credit to the merchant or supplier's account is reversed and the consumer's credit card account is credited. Chargebacks are effected in terms of the card scheme's rules, and are not related to the terms of the contract between the consumer and supplier in respect of which the credit card payment was made.

5 Thing being sold.

6 Act 68 of 2008. See paragraph [9] below for the text of the provision.

question in issue. It would impel the conclusion that the purchase price received by taxpayer when it made the sale formed part of its income. This makes it important at the outset to examine the proper characterisation of the transactions.

[6] Notwithstanding the reference in common parlance to the 'sale' of gift cards, it is clear that the transactions in terms of which the taxpayer's customers acquire them are actually not contracts of sale properly so characterised. They entail the customer making a prepayment in respect of the supply by the taxpayer of as yet unidentified goods when the gift card is redeemed later. Neither the identity of the goods to be supplied when the gift card is presented, nor their price, is determined in the transaction in terms of which the card is issued. It is a term of the transaction that the beneficiary of the prepayment is whomsoever happens to be the bearer of the card when it is redeemed. The bearer is entitled to the benefit of the prepayment in lieu of payment of the whole or part of the purchase price if he or she presents the card when purchasing goods at any of the taxpayer's stores. A sale in the true sense only takes place when the card is presented in partial or complete redemption of the purchase price of goods selected by the consumer who is the bearer of the card at the time. The card is nothing more than a piece of paper that vouches for the existence of the bearer's personal right against the taxpayer for the redemption of the prepayment. It is not a thing (*res vendita*) that is the subject of a sale.[7]

[7] Section 63(2)(*b*) of the CPA prescribes that, unless a longer period is determined by the parties to a transaction in terms of which a gift card is issued, the cards are valid for three years from date of issue. If they are not redeemed within the period of their currency, they expire, and the taxpayer is entitled to retain the prepayment whilst being relieved of any obligation to accept it in lieu of payment for goods sold; in other words, in those circumstances the bearer's personal right against the card issuer lapses by effluxion of time.

[8] The taxpayer transfers the revenue generated from the 'sale' of gift cards to a separate banking account that is conducted solely to hold the proceeds of its gift card transactions until the cards are redeemed or become expired. Comparative research reveals that the taxpayer's practice of holding the revenue from the 'sale' of gift cards in a separate bank account that is not drawn on to service the company's requirements does not appear to have been unique. The Law Commission (England and Wales) report, *Consumer Prepayments on Retailer Insolvency* [2016] EWLC 368 (14 July 2016),[8] testifies to an

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[7] It is perhaps of significance in this respect that the language of the CPA avoids the terminology of sale, speaking of the acceptance by the supplier of consideration 'in exchange' for a prepaid certificate, card, credit, voucher or similar device. See s 63(1) of the Act. I think it may reasonably be inferred that the language was chosen mindful of the *sui generis* nature of the transaction concerned.

[8] https://www.bailii.org/ew/other/EWLC/2016/lc368.html (accessed on 6 April 2019).

identical practice by a number of retailers in the United Kingdom. The practice seems to have developed there in response to the public outcry that had occurred in a number of cases in which retailers had been placed in administration and the administrators had declined to honour unredeemed gift cards. (The report names seven 'high street chains' that had gone into administration since the 2008 recession to illustrate that the issue has not been an academic one.)

[9] The Law Commission report suggests that the practice was directed by retail companies at creating earmarked funds to which administrators[9] could, should the need arise, have regard in deciding to honour cards in such circumstances. The availability of such funds was considered to have beneficial effects, particularly by contributing towards the maintenance of the value of the goodwill of a company in administration. Honouring gift cards while a retailer is under administration apparently helps to encourage customers to come into the shops, thereby assisting in the boosting of trading activity generally, which can enhance a company's chances of surviving administration. And the availability of such earmarked funds for use in maintaining the confidence of gift card holders in times of corporate financial crisis was also thought to be useful to upholding the reputation of businesses in a way that could conduce to their disposal on more favourable terms should the administration or liquidation of the companies concerned require that.

[10] The report recognised, however, that the existence of such separate accounts did not, without more, create any protection for gift card bearers that was legally binding in the event of the issuer's insolvency. The Law Commission reported that some companies had therefore provided for the proceeds of unredeemed gift cards to be held in specially created trust accounts to cater for that contingency. The effectiveness of a supplier protecting consumer prepayments by putting them into a separate trust account until they had been redeemed against the supply of goods or by refund had been confirmed more than 40 years earlier in *Re Kayford Ltd* [1975] 1 WLR 279, [1975] 1 All ER 604 (Ch.D.). The Commission noted, however, that the high costs of administration that attended that more effective form of independently provided consumer protection acted as a disincentive to the use of formally created trusts.[10]

[11] In the present matter it had been the taxpayer's practice since 2007 to segregate its receipts in respect of unredeemed gift cards. But, until the 2013 tax year, it had nonetheless declared all of the revenue generated by the 'sale' of gift cards as part of its gross income in the year in which such revenue was received. Neither side adduced any oral evidence at the hearing of the appeal, but I think it can safely be inferred that the change in the taxpayer's

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[9] Business rescue practitioners in South African terminology.

[10] See especially §3.5 and 3.6 of the report.

approach, which made it exclude the consideration received in respect of the issue of unredeemed cards from its declared gross income in the 2013 year, was inspired by its understanding of the effect of the CPA, which had then newly come into operation. Indeed, that much is clear from the correspondence between it and SARS in connection with the audit. The provisions of the CPA that are relevant for the purposes of this income tax appeal came into operation on 31 March 2011, probably during the taxpayer's 2012 year of assessment.

[12] It was, correctly, common ground that the 'sale' by the taxpayer of gift cards is regulated by the pertinent provisions of the CPA, being ss 63 and 65, respectively. They resort within Part I of chapter 2 of the CPA. Chapter 2 is entitled '*Fundamental Consumer Rights*' and Part I thereof bears the heading '*Supplier's accountability to consumers*'. The taxpayer is a '*supplier*' within the meaning of that word as defined in s 1 of the CPA.

[13] Section 63 of the CPA provides as follows:

Prepaid certificates, credits and vouchers

(1) This section applies only to a transaction in which a supplier—

(*a*) accepts consideration from a person in exchange for a prepaid certificate, card, credit, voucher or similar device; and

(*b*) expressly or implicitly agrees to provide goods or services to any person who subsequently presents that certificate, card, credit, voucher or similar device, up to the value represented by it,

but does not apply with respect to such a device, or the value represented by it, after all of the value of the device has been exchanged for goods, services or future access to services.

(2) A prepaid certificate, card, credit, voucher or similar device contemplated in subsection (1) does not expire until the earlier of—

(*a*) the date on which its full value has been redeemed in exchange for goods or services or future access to services; or

(*b*) three years after the date on which it was issued, or at the end of a longer or extended period agreed by the supplier at any time.

(3) Any consideration paid by a consumer to a supplier in exchange for a prepaid certificate, card, credit, voucher or similar device contemplated in subsection (1) is the property of the bearer of that certificate, card, credit, voucher or similar device to the extent that the supplier has not redeemed it in exchange for goods or services, or future access to services.

[14] The relevant part of s 65 reads as follows:

Supplier to hold and account for consumer's property

(1) …

(2) When a supplier has possession of any prepayment, deposit, membership fee, or other money, or any other property belonging to or ordinarily under the control of a consumer, the supplier-

(*a*) must not treat that property as being the property of the supplier;

(*b*) in the handling, safeguarding and utilisation of that property, must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person; and

(*c*) is liable to the owner of the property for any loss resulting from a failure to comply with paragraph (a) or (b).

(3) A person who assumes control of a supplier's property as administrator, executor or liquidator of an estate—

(*a*) has a duty to the consumer-

(i) to diligently investigate the circumstances of the supplier's business to ascertain the existence of any money or other property belonging to the consumer and in the possession of the supplier; and

(ii) to ensure that any such money or property is dealt with for the consumer's benefit in accordance with this section; and

(*b*) is liable to the consumer for any loss, unless that person has acted-

(i) in good faith; and

(ii) without knowledge of the existence of the consumer's interest.

[15] So much for the relevant factual and statutory context.

[16] The words '*received by*' in the setting of the definition of '*gross income*' in the Income Tax Act have been construed to be limited to amounts received by the taxpayer '*on his own behalf for his own benefit*' or '*received by him in such circumstances that he becomes entitled to it*'; see *Geldenhuys v Commissioner for Inland Revenue* 1947 (3) SA 256 (C) at 266 (per Steyn J) and at 269 (per Herbstein AJ). The construction applied in *Geldenhuys* was effectively endorsed in the approach adopted to the identification of receipts for the purposes of '*gross income*' in the judgment of the late Appellate Division in *Secretary for Inland Revenue v Smant* 1973 (1) SA 754 (A), [1973] 2 All SA 208, 20 SATC 113.

[17] In the lead judgment in *Van der Merwe v Sekretaris van Binnelandse Inkomste* 1977 (1) SA 462 (A) at 472G, Rabie JA referred to the judgments in *Geldenhuys* and *Smant* and remarked that they served to demonstrate that when it fell to be determined whether a taxpayer was liable for tax in respect of one or other amount that he had received, the question whether or not he had personally derived any benefit from it may *in certain cases* be a relevant consideration. The qualification expressed by Rabie JA serves to highlight that the usefulness of the 'benefit' test implied in *Geldenhuys* as a determinant consideration arises when the enquiry in issue is whether the receipt in question formed part of the taxpayer's income or whether it was received not for its benefit, but for that of somebody else, in which case it would not be part of the taxpayer's gross income. Otherwise, as the majority judgments in *Ochberg v Commissioner for Inland Revenue* 1931 AD 215, 5 SATC 93 illustrate, it is generally irrelevant to the computation of its gross income that the taxpayer has actually benefitted by the receipts or accruals that go to make it up. There is, however, no basis to doubt that the current matter, at least insofar as the effect of the CPA is entailed, gives scope for the test in *Geldenhuys* to be appropriately applied; cf. the observation of Schreiner JA, distinguishing *Ochberg*, in *Commissioner for Inland Revenue v Genn & Co (Pty) Ltd* 1955 (3) SA 293 (A), [1955] 3 All SA 382, 20 SATC 113 at 301-302 (SALR).

[18] The taxpayer's argument that the receipts in respect of the 'sale' of unredeemed gift cards did not constitute part of its gross income was advanced on two levels. The first was that, as a matter of principle, and irrespective of the incidence of the CPA, the fact that the monies received by it in respect of the 'sale' of gift cards are held in a separate bank account, and are not applied in the conduct of the taxpayer's business, until the cards are redeemed or expire, and that they are discretely accounted for in its financial records as an unredeemed gift card liability, renders it inconsistent with it being 'income' within the ordinary meaning of the word until such time as it is appropriated. This argument is premised on the contention that the facts demonstrate that the money is not received for the taxpayer's own benefit, but rather to be held for the benefit of another (i.e. the bearer of the gift card). The taxpayer, so I understood the argument, obtains the benefit of the money taken in only when it discharges its obligation or the card expires. The second level of the taxpayer's argument was premised on what it contends is the legal effect of the characterisation of its receipts in respect of unredeemed gift cards in ss 63 and 65 of the CPA, coupled with its treatment in practice of those receipts consistently with the statute.

[19] The first level of the argument postulates that the moneys are received and, pending the redemption or expiry of the cards, held under some form of entrustment for the benefit of the cardholders. If the money were indeed received by the taxpayer qua trustee, it would not form part of its gross income; see, for example, *Brooks Lemos Ltd v CIR* 1947 (2) SA 976 (A), [1947] 3 All SA 137, 14 SATC 295 at p. 983 (SALR).[11] It is an argument that was advanced with success in the context of the treatment of prepayments in the English courts in the matter of *Kayford* mentioned earlier,[12] but in that case, which was about whether the unredeemed prepayments remained vested in the supplier company when it was placed into liquidation, the result turned on the court being persuaded that the receipts in respect of prepayments by a mail order business had been sequestered from the company's operational accounts in a manner consistent with the effective creation of a trust in the formal sense of the concept.

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11 In that case, Watermeyer CJ, treating of the question whether certain cash receipts had been '*received*' by the taxpayer within the equivalent meaning of the word in the definition of '*gross income*' in the 1941 Income Tax Act, said '*If such amounts are really received as trust moneys, of which the recipient is not the beneficial owner but merely a trustee, then doubtless Mr. Duncan's contention* [that the receipts in issue were 'which are received as security or amounts which are held in trust for someone or for some purpose' are not "received", in the sense in which that word is used in the definition] *is correct …* .'

12 In paragraph [8] above.

[20] Although there are some differences between our law and that of England and Wales in respect of the establishment of trusts, and as to their character, I think that the essential determinant of whether there is validity in the taxpayer's first level argument is the same as it was in *Kayford*'s case. That is, were the payments received and held in a manner that, in a legally effective way, distinguished the funds segregated in the separate bank account from the taxpayer's property? As with English law, so too with us, merely segregating the funds, as the taxpayer did in the current matter, would not, by itself, be enough.[13] A cognisable legal context, such as the establishment of a trust, the terms of a will, or the existence of a principal-agent relationship, is necessary to give the segregation of the funds the effect of putting them outside the holder's estate, avoiding the ordinary incidence of *commixtio*. Absent such a context, I am unable to conceive of how a prepayment to the taxpayer for goods to be sold by it later could differ in its proprietary effect from a contemporaneous payment in the context of a cash sale. The money becomes that of the contemplated or

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[13] As to the position in English law, consider the observation by Lord Hope in *Re Lehman Brothers International (Europe) (in administration)* [2012] UKSC 6, [2012] 3 All ER 1 (SC) at para. 2: '*Under English law the mere segregation of money into separate bank accounts is not sufficient to establish a proprietary interest in those funds in anyone other than the account holder. A declaration of trust over the balances standing to the credit of the segregated accounts is needed to protect those funds in the event of the firm's insolvency. Segregation on its own is not enough to provide that protection. Nor is a declaration of trust, in a case where the client's money has been so mixed in with the firm's money that it cannot be traced.*' A point reiterated by Lord Walker at para. 47. The questions in issue in *Lehman Brothers* were whether a statutory trust, established in terms of UK legislation enacted pursuant to a European Community Directive included identifiable client moneys that had not yet been segregated in accounts of the statutory trust when Lehman Brothers was placed under administration, and whether such funds were protected by the statutory entrustment despite not having been segregated by Lehman Brothers before it was placed under administration. The statutory trust arose from a provision in the relevant statutory instrument that read '*A firm receives and holds client money as trustee (or in Scotland as agent)...* .' The statutory regime was directed at the protection of investors making use of intermediaries such as Lehman Brothers. The answers to the questions turned on the proper construction of the client money rules made by the UK Financial Services Authority. The court was unanimously of the opinion that the statutory entrustment occurred at the moment the firm received the client moneys, and not when the funds were segregated. But the justices were divided on the question whether non-segregated client money came into the trust. The majority (Lord Clarke, Lord Dyson and Lord Collins) held, on the basis of statutory construction, that the unsegregated funds were protected by the statutory trust, even if they could not be traced or followed (as to the meaning of which, see Cameron et al. *Honoré's South African Law of Trusts* 5 ed. at pp. 29-30), notwithstanding they would not have been protected under the generally applicable principles of English trust law. It interpreted the legislation to give best effect to its evident object: protection of client money. The minority (Lord Hope and Lord Walker), influenced by the general principles of English trust law, upon which they considered the rules to have been founded, held that they were not. I found the judgments in *Lehman Brothers* helpful in this matter because they dealt with a statutory trust situation in which a boldly purposive approach to construction was required in order to afford the client protection intended by the legislation, which would have gone limping had conventional trust law principles been implied. That has some resonance in the current case in the context of the difficulties that have been identified with making sense of ss 63 and 65 of the CPA if conventional principles are to be applied.

actual seller as soon as it is paid over. It does not matter where it keeps it, or how it accounts for it in its books. It may spend it or save it as it wishes.

[21] I am not persuaded that the mere segregation of the receipts in respect of unredeemed gift cards in a separate banking account identified for that purpose gave rise to a cognisable legal context that would sustain a determination that they had not been received by the taxpayer for itself and its own benefit. The taxpayer might see itself as some sort of trustee but, ignoring for present purposes the possible effect of the CPA, there is no evidence that it had bound itself in a legally effective manner to hold the receipts in a fiduciary capacity. The first level argument advanced on behalf of the taxpayer therefore falls to be rejected.

[22] Whether the CPA provides what I have called the 'cognisable legal context' to sustain the taxpayer's trusteeship contention falls to be considered when the taxpayer's second level argument is examined. However, before I get to discussing the effect of the pertinent provisions of the CPA on the question in issue, it is convenient first to consider the argument addressed by the Commissioner's counsel on the matter of the ownership of the moneys paid over to the taxpayers by its customers when they acquire gift cards from it. I understood the argument to be directed at two objects. Firstly, at dismissing the taxpayer's contention that it had not received the money for itself, and bringing the current matter within the principles applied in the determination of the so-called 'deposit cases' (see *Pyott Ltd v Commissioner for Inland Revenue* 1945 AD 128, 13 SATC 121; *Brooks Lemos Ltd v CIR* 1947 (2) SA 976 (A), [1947] 3 All SA 137, 14 SATC 295 and *Greases (SA) Ltd v Commissioner for Inland Revenue* 1951 (3) SA 518 (A), 17 SATC 358); namely, that the gift card receipts were ordinary trade receipts in respect of sales of goods to be executed later and that there was nothing in the transactions that bound the taxpayer not to use the receipts in its working operations until after the cards had been redeemed.[14] Secondly, at demonstrating that, notwithstanding the provisions of ss 63 and 65 of the CPA, the moneys could not legally have become '*the property*' of the gift card bearer, at least not in any sense relevant for income tax purposes.

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[14] Ms *Williams*, quite rightly, did not suggest that the current case was a 'deposit case', quite the contrary; but the essence of her argument, consistently with the position adopted by SARS in its correspondence with the taxpayer, was that on the reasoning of the courts' rejection of the taxpayers' contentions in those cases, the taxpayer's argument in the current matter should also be rejected.

[23] The Respondent contended that the taxpayer's receipts in respect of the 'sale' of gift cards were indistinguishable from any other receipts taken at its tills when merchandise was sold, and that the revenue was available for use in the taxpayer's operations if it chose. It argued that it was therefore of no significance that an amount equal to the sum of the gift token receipts was *subsequently* sequestered in a separate specially identified banking account.

[24] That the gift card receipts are intermingled at the till point with the monies received in respect of the sales that the taxpayer makes in the ordinary course of its business operation, and that the 'sale' of gift cards is part of its business operation, is of course correct. And money is a fungible. But I do not think that those factors are, without more, in any way determinative of the question whether the taxpayer receives the gift token receipts on its own behalf in the sense of the test stated in *Geldenhuys*.

[25] A comparable situation presented for consideration in *Holley v Commissioner for Inland Revenue* 1947 (3) SA 119 (A). In that matter, according to the finding of the court, the taxpayer had been constituted a fiduciary, who was required to pay out of the income of a business that had been bequeathed to him an annuity to his aunt (the fideicommissary). Of course, the income of the business initially came into the hands of the taxpayer, for it was from that income that he was required by the terms of the will to fund the annuity that he was obliged to pay. Davis AJA treated of the question whether the part of the business's income that was used to fund the annuity was '*received by*' the taxpayer in the sense relevant for income tax purposes, as follows (at p. 131):

> The last question to be considered is whether a *fideicommissum* of this nature will make the fiduciary receive the annuity in that capacity and not in his personal capacity for the purposes of the Income Tax Act - whether, in other words, he himself 'receives' the annuity in terms of sec. 7. In my opinion, he does not do so. It is true that the fiduciary becomes the owner of the moneys he receives, and that the claim of the fideicommissary heir would seem only to be personal (*Kemp v McDonald's Trustee (supra)* – *per* Innes CJ, and Solomon JA, at pp. 503 and 510 respectively). But that must always necessarily be the case wherever the *fideicommissum* is of an annuity or of any other payment of money … .

The learned judge concluded that the part of the business income received by the taxpayer that he was obliged to use to pay the annuity was, in the circumstances, received by him as a '*trustee*' within the meaning of that term in the then Income Tax Act, [15] and not in his personal capacity; and thus did not form part of his gross income, notwithstanding that he had been the owner of the money when it passed through his hands.

[15] Act 31 of 1941.

[26] In my judgment, depending on the effect of the CPA, the position with regard to the payments received by the taxpayer for gift cards in the current matter may be analogous to that of the taxpayer in *Holley*, as found by the court in that case. I am aware that it has been suggested that the appeal court's characterisation of the arrangement in *Holley* as a *fideicommissum* may be suspect, and that it might have been more accurate to recognise that it entailed a bequest *sub modo* (cf. *Van der Merwe v Sekretaris van Binnelandse Inkomste* supra, at 477E-F, and *Kommissaris van Binnelandse Inkomste v Van Blommestein* 1999 (2) SA 367 (SCA) at 380D-382I), but the pertinence of the analogy with the approach in *Holley* that I have sought to draw applies irrespective of the soundness or otherwise of any such criticism of the judgment.

[27] The current case is not concerned with a *fideicommissum*, it is concerned with the effect on the entitlement of the taxpayer, in the context of the pertinent provisions of the CPA, to accept the receipts of the 'sale' of gift tokens on its own behalf and for its own benefit. The significance of the *Holley* case in the context of the argument advanced by the Respondent, however, is that assuming that the existence of a *fideicommissum* had been established in that matter, as held by Davis AJA, the fact that the taxpayer had received the money mixed up together with money generated for his own benefit did not constitute an obstacle, when it came to calculating the taxpayer's gross income, to treating that amount of it intended for the testator's widow discretely from the amount of it that the taxpayer was entitled to keep for himself. The initial actual receipt, in the ordinary sense of the word, of all of the money did not prevent its discriminatory treatment when it came to deciding, for the purposes of calculating his gross income, what the taxpayer had received for his own benefit and what he had received, as 'trustee' within the meaning of the Income Tax Act, for the benefit of somebody else.

[28] Much the same point was made in *Genn*'s case supra, at 301F (SALR), where Schreiner JA noted '*It certainly is not every obtaining of physical control over money or money's worth that constitutes a receipt for the purposes of these provisions.*[16] *If, for instance, money is obtained and banked by someone as agent or trustee for another, the former has not received it as his income*'. See also *Commissioner South African Revenue Service v Cape Consumers (Pty) Ltd* 1999 (4) SA 1213 (C), 61 SATC 91, in which the court held that monies received by the respondent - which operated as a 'buyers' club' - that it was bound, in terms of its articles of association and contractual relationship with its members, to credit to a 'buyer's reserve fund' did not form part of its gross income. The basis for the court's conclusion was that the monies in question had not been received by it for itself, but

[16] The learned judge of appeal was treating of s 12(f) of the Income Tax Act 31 of 1941, but expressly acknowledged that his remarks would apply equally in respect of a receipt within the meaning of '*received*' in the definition of '*gross income*'.

under an obligation to hold and apply them for the benefit of the members of the buyers' club.

[29] So, while the Respondent is correct that the taxpayer would, under the common law, become the owner of the money paid for the gift cards as soon as it changed hands, that does not, as she sought to contend, answer the question whether the revenue generated by the 'sale' of the cards was received by or accrued to the taxpayer in the relevant sense when the money was paid to it. There is, moreover, nothing in our common law, as there also is not in the English law, that forbids a trustee from paying money received in trust for someone else temporarily into the trustee's personal account provided that the account is not overdrawn and provided further that the trustee does not use the account by drawing it down for his personal purposes to a balance that is less than the amount of the trust money that is being held in it.[17] The difficulties to which the deposit of trust money in mixed accounts can lead in cases of intervening insolvency or breach of trust is another question that, fortunately, it is not necessary to go into in this matter.

[30] Were it not for the effect of the CPA, to which I am to come next, I would, however, have been inclined to uphold the Respondent's argument that the gift card receipts were received by the taxpayer in respect of sales of goods to be executed later, and therefore part of its gross income when the payments were taken. That much really follows as a corollary to my rejection earlier of what I labelled as the taxpayer's first level argument. I am accordingly of the view that the taxpayer was correct to have included its receipts in respect of unredeemed gift cards in its accounting for its gross income in the period before the commencement of the CPA.

[31] But what is to be made in the circumstances of the effect of the provisions in the CPA that provide that '*any consideration paid by a consumer to a supplier in exchange for a prepaid … card … or similar device … is <u>the property of the bearer of that</u> … <u>card</u> … or similar device <u>to the extent that the supplier has not redeemed it in exchange for goods</u>* …'[18] and '[w]*hen a supplier has possession of any prepayment … or any other property belonging to … a consumer, the supplier … <u>must not treat that property as being the property of the supplier</u>, … .*'?[19] In the light of the excursus above about the ordinary consequences of a transaction in which a gift card is issued by a supplier, they certainly suggest that the introduction of the CPA meant that it was no longer business as usual.

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[17] See *Honoré's South African Law of Trusts* op. cit. supra, at p. 97 and *Lehman Brothers* supra, at para. 65 read with para. 153 of the judgment at first instance reported *sub nom. Lehman Brothers International (Europe) v CRC Credit Fund Ltd & Ors* [2009] EWHC 3228 (Ch) (15 December 2009), [2010] 2 BCLC 301.

[18] Section 63(3) of the CPA, quoted in paragraph [11] above. Underlining for emphasis.

[19] Section 65(1)(a) of the CPA, quoted in paragraph [12] above. Underlining for emphasis.

[32] In advancing what I have chosen to call 'the second level' of the taxpayer's argument, its counsel submitted that the effect of these provisions was to constitute the taxpayer's receipts in respect of gift cards as 'trust money' in the taxpayer's hands until such time as the cards were redeemed or expired, or a refund was made. That followed, so the argument went, because the Act required the taxpayer to hold the consideration received for the cards not for itself, but, on a fiduciary basis, for someone else. That the receipts were not 'received' by the taxpayer within the accepted meaning of that word in the definition of 'gross income' in the Income Tax Act is confirmed, so it was argued, by the CPA's provision that the taxpayer was not entitled to treat the prepayment as its own property or apply it for its own benefit until the card had been redeemed or expired. And, in the event of the taxpayer being liquidated before the cards had been redeemed, the receipts would also not be available for the settlement of its creditors' claims because the liquidators would be bound to recognise them as the card bearers' property. This would be so even if the receipts had not been segregated, as long as they could be traced; which the liquidators were bound by the provisions to try to do.

[33] These seem to me to be compelling arguments. What then is the Commissioner's answer to them?

[34] The Commissioner contends that '*gross income inclusion for income tax purposes is not subject to … any other legislation governing receipts or accruals unless specifically provided in the* [Income Tax] *Act*'. He argues that the CPA '*merely sets out the treatment of the consideration and does not negate the fact that the money has been received as part of the appellant's normal operations*'. The Commissioner's counsel emphasised that the object of the CPA '*is the protection of consumer rights in the context of goods and or services*', and not to defer liability for income tax. The implication was that the CPA's provisions were to be treated discretely from those of the Income Tax in a manner that the former could not derogate from the latter. This would necessarily entail applying the Income Tax Act as if the CPA did not exist.

[35] The Commissioner's counsel also argued that, regardless of the effect of the CPA, the facts showed that the taxpayer had become the owner of the moneys received for the gift cards by *commixtio* when the moneys were mixed with its other receipts. The argument proceeded that a subsequent segregation of the funds to comply with the entrustment provisions in the CPA did not detract from the reality that the monies had, by then, already been 'received' by the taxpayer within the meaning of the Income Tax Act.

[36] It is convenient to begin the consideration of the Commissioner's argument by establishing what the effect of the pertinent provisions of the CPA is. The Respondent drew our attention in that connection to the criticism levied at ss 63 and 65 of the Act in Naude and Eiselen (ed) *Commentary on the Consumer Protection Act* (Juta) [Looseleaf, Original Service, 2014], where it is contended that the provisions are legally impossible, commercially impractical and 'absurd'. Whilst some of the criticism is justified – certainly, the suggestion of commercial impracticality, at least where gift cards are concerned, is supported by the report of the England and Wales Law Commission report referred to above[20] – one is nevertheless obliged to give the provisions practical effect, and construe their language purposively to that end.

[37] On that approach the legislature's intention to provide consumer protection by requiring the segregating by the supplier of its receipts from the 'sale' of gift cards from the other revenue generated in its business activities appears reasonably clear. The taxpayer does that in this case by crediting its receipts in respect of unredeemed gift cards monthly to a separate appropriately designated account. When it comes to money, that is the only way in which a supplier could keep the receipts in a manner that would practically achieve the statute's requirement that they be treated as property separate from that of the supplier itself. And how else would a supplier charged with such an obligation discharge it by handling, safeguarding and utilising the property with the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person?

[38] The effect of the legislation is the creation of some form of statutory trust, even if it might not conform in all respects with the trust forms recognised in our common law. The taxpayer is placed by virtue of the statute's prescripts under a fiduciary duty to the bearer of the card to ensure that the funds are kept available until the prepayment is redeemed.[21] The statutory conjuring of a proprietary interest by the cardholder in the receipts must be seen for what it is: a legal fiction. The evident intention being that the bearers of gift cards should be able to recoup their value in full in the event of the issuer being sequestrated or liquidated before the cards were redeemed.

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[20] In paragraph [7]. The Law Commission report noted that gift cards are generally of relatively low face value and that the incidence of potential loss to a consumer in the event of default by the supplier is consequently limited. It considered that in the circumstances it was not commercially viable for suppliers to be required to incur the costs involved in elaborately protecting the consumer against the possibility of a default.

[21] The status of any interest earned on the entrusted funds is not provided for in the CPA, and the issue of liability for income tax thereon does not arise on the facts of the current case. These questions illustrate some of the problematic incidences of the lamentable lack of detail in the legislation as to precisely how it should operate.

[39] As discussed earlier, the receipts in respect of the 'sale' of gift cards will invariably be intermingled with the taxpayer's own money when the transaction is effected. This will either be by way of cash going into the till, or in the case of payment by credit card or EFT transactions by way of the crediting of the taxpayer's operational banking account. It is common ground that the receipts remain so intermingled with the taxpayer's own funds until there is a reconciliation and transfer of the unredeemed card receipts to the segregated funds account. That takes place monthly. As the commentators in the *Commentary on the Consumer Protection Act* op. cit. supra point out, the situation is conceptually problematic from an orthodox legal perspective. From a practical point of view, however, I see no reason why it cannot be dealt with purposively in a manner similar to that in which the majority of the UK Supreme Court dealt with the conundrums presented by the workings of the statutory trust in issue in *Re Lehman Brothers International (Europe) (in administration)* [2012] UKSC 6, [2012] 3 All ER 1 (SC) referred to in note 13 above, although here one would have to imply the applicable rules rather than construe them. The method of monthly segregation used by the taxpayer necessarily implies that the affected monies are identifiable and traceable in the taxpayer's accounting system from the moment they are taken in, and there should therefore be no difficulty with their practical identification as 'trust money' from the moment of their receipt in the taxpayer's hands (which is how the CPA characterises such moneys irrespective of segregation).

[40] But there is no need to dwell here at any greater length on the potential difficulties with the operation of ss 63 and 65 of the CPA, and how they might be practically addressed. It suffices to say that the taxpayer's method of doing so is cogently defensible. How effectively it would achieve the evident purpose of the provisions in the event of the taxpayer's insolvency intervening is a question for another case. The question in this case is simply this, did the taxpayer's method of dealing with the gift card receipts in apparent compliance with the requirements of the CPA entail that it received them for itself, or for the gift card bearers? The CPA required it to take and hold the receipts for the card bearers, and to refrain from applying them as if they were its own property, and its method of dealing with the receipts was directed to doing just that. The applicable legal framework forbade the taxpayer from receiving the moneys taken in for gift cards for itself until the cards were redeemed. This impels the answer that the gift card receipts were 'received' by the taxpayer, not for itself, but to be held for the card bearer.

[41] In my view, the questions of conflict between the Income Tax Act and the CPA and any hierarchical claim to precedence by the one set of legislation over the other posited by the Commissioner's counsel are lacking in any foundation. The Income Tax Act requires the taxpayer to include all the amounts '*received*' by it in the assessment period in the calculation of its gross income. The judgments in *Holley*, *Geldenhuys*, *Smant* and *Cape Consumers* mentioned earlier have established how that word falls to be applied in answering the question that has arisen in this case. The taxpayer is legally permitted in terms of the CPA to take the receipts for itself only when the cards are redeemed, and its business is ordered so as to comply with that statutory constraint. The taxpayer takes beneficial receipt of the revenue from gift card sales only when the funds are transferred from the specially designated 'Gift Voucher' bank account *pari passu* the redemption or expiry of the card. Indeed, it is only when the card is redeemed or expires that the proceeds of its 'sale' accrue to the taxpayer; for it is only then that it legally becomes entitled to them.

[42] The Respondent was quite right when it said that the object of the CPA is the protection of consumers, and not the deferral of tax liability. But if the manner in which the CPA protects consumers entails the deferral of beneficial receipt of revenue by suppliers as a matter of fact, then the knock-on effect on the determination of the suppliers' taxable income is only to be expected. Were it otherwise, the necessary implication would be that suppliers fall to be taxed on income they have not yet received, and which has not yet accrued to them. The CPA does not express any such intention. And any such effect would be at odds with the scheme of the Income Tax Act. A conflict between the two sets of legislation arises only if it is construed in the manner contended for by the Commissioner. It does not arise on the approach contended for by the taxpayer's counsel.

[43] The pertinent provisions of the CPA create a legal construct that results in the taxpayer initially taking the gift cards receipts not for itself, but for the card bearers. The effect of the resultant cognisable legal context as a factor bearing on the determination whether the receipts are taken for the taxpayer or for some one else, is, in principle, no different from that of the *fideicommissum* in *Holley*, the usufruct in *Geldenhuys*, the cession of shares in *Smant*, or the memorandum and articles of association in *Cape Consumers*. The effect of the peculiar legal contexts in those cases has never, to my knowledge, been perceived as giving rise to a conflict with the Income Tax Act; and there is no reason to distinguish the effect merely because the pertinent legal context for the receipt of the monies by the taxpayer not for itself, but for someone else, is afforded in the current matter by statutory provisions, rather than testamentary or contractual ones.

[44] For all of these reasons I have concluded, and the other members of the court agree, that there is no merit in the Commissioner's argument, and that the second level argument advanced by the taxpayer's counsel must be sustained. In the result the appeal will be upheld and the additional assessment set aside.

[45] The following order is made:

1. The appeal is upheld.
2. The additional assessment, dated 22 May 2017, in respect of the taxpayer's taxable income for the 2013 tax year is set aside.

A.G. BINNS-WARD
President of the Court