CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 47/23

In the matter between:

CORONATION INVESTMENT MANAGEMENT SA (PTY) LIMITED Applicant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Neutral citation:	*Coronation Investment Management SA (Pty) Limited v Commissioner for the South African Revenue Service* [2024] ZACC 11
Coram:	Zondo CJ, Bilchitz AJ, Chaskalson AJ, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J.
Judgment:	Majiedt J (unanimous)
Heard on:	13 February 2024
Decided on:	21 June 2024
Summary:	Income Tax Act 58 of 1962 — section 9D exemption — foreign controlled company — foreign business establishment — meaning of "business" and "primary operations"

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Tax Court, Cape Town):

1. Leave to appeal in respect of the appeal is granted.
2. The appeal is upheld. The order of the Supreme Court of Appeal is set aside and substituted with the following:
   "The appeal is dismissed with costs, including the costs of two counsel."
3. The respondent must pay the costs, including the costs of two counsel.

JUDGMENT

MAJIEDT J (Zondo CJ, Bilchitz AJ, Chaskalson AJ, Madlanga J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring):

Introduction and background

[1] During the mid to latter part of the 1990s, as South Africa increasingly gained acceptance back as a member of the international community, exchange controls were being relaxed by the government. There was significant appetite among South African investors to gain access to global markets and to externalise assets. As a consequence, local companies increasingly established foreign subsidiaries. The Coronation group was one of those which did so. A notable related development was that during 2001 the South African tax system changed from a source-based system of taxation to a residence-based system. This came about through the enactment of the Revenue Laws

Amendment Act.[1] The worldwide income of a South African tax resident then became subject to normal taxation. Non-residents are only subject to tax in South Africa to the extent that they have income from a source in South Africa.

[2] Section 9D of the Income Tax Act[2] (ITA) is an anti-avoidance provision that was introduced by the Revenue Laws Amendment Act.[3] That section was introduced to deal with the taxation of South African taxpayers on their income earned abroad, particularly income earned by South African owned foreign corporate entities. As will appear more fully later, in respect of foreign-earned company income, the section seeks to strike a balance between the opposing paradigms of pure anti-deferral (warranting complete taxation) and international competitiveness (exemption).[4] It does so by favouring international competitiveness where the income emanates from active operations abroad.

[3] The central issue is whether the net income of Coronation Global Fund Managers (Ireland) Limited (CGFM), a foreign subsidiary of the applicant in the main application, Coronation Investment Management SA (Pty) Limited (CIMSA), was exempted from tax for the 2012 year of assessment in accordance with the provisions of section 9D of the ITA. The exemption will apply if, at that time, CGFM had met the requirements for constituting a "foreign business establishment" (FBE) as defined in section 9D(9)(b). It is not in issue that at that time CGFM was a "controlled foreign company" of CIMSA, as defined in section 9D.

[4] In respect of the 2012 tax year, the respondent, the Commissioner for the South African Revenue Service (SARS), assessed CIMSA's tax liability to include in its income an amount equal to the entire "net income" of CGFM. In doing so, SARS sought

[1] 59 of 2000.

[2] 58 of 1962.

[3] The National Treasury *Explanatory Memorandum to the Taxation Laws Amendment Bill of 2009* (10 September 2009) (Explanatory Memorandum) explains this.

[4] This is comprehensively discussed and explained in National Treasury *Detailed Explanation to Section 9D of the Income Tax Act* (June 2022) (Treasury Explanation).

to apply section 9D(2) read with section 9D(2A) of the ITA.[5] In its Finalisation of Audit Letter, SARS concluded that CGFM does not meet the requirements for recognition as an FBE as the primary functions of its business had been outsourced. The Tax Court in Cape Town held that CGFM was an FBE as defined and, accordingly, qualified for a tax exemption. It upheld CIMSA's objection to that additional assessment. The Tax Court thus set aside SARS's additional assessment against CIMSA and ordered it to issue a reduced tax assessment, excluding therein any amount that was included in CIMSA's income under section 9D of the ITA pertaining to CGFM's income. Consequently, the Tax Court held that SARS was not entitled to claim: (a) understatement penalties in terms of section 222 of the Tax Administration Act[6] (TAA); (b) understatement penalties for provisional tax under paragraph 20 of the Fourth Schedule to the ITA; and (c) interest in terms of section 89(2) of the ITA. The Tax Court granted leave to appeal to the Supreme Court of Appeal.

[5] The Supreme Court of Appeal upheld the appeal. It disagreed with the Tax Court in respect of the question as to whether CGFM met the definition of an FBE as defined in the ITA. That Court held that CGFM does not meet the requirements for an FBE exemption and, instead, the net income of CGFM is imputable to CIMSA for the 2012 tax year under section 9D(2). It thus upheld SARS' appeal to the extent that it directed CIMSA to pay the income tax on CGFM's income and the interest in terms of section 89(2) of the ITA. However, the Supreme Court of Appeal found that SARS' claim for understatement penalties and underestimation penalties must fail.[7] CIMSA seeks leave to appeal against the judgment of the Supreme Court of Appeal. There is also an application by SARS for leave to cross-appeal against parts of the judgment and order of the Supreme Court of Appeal relating to the penalties.

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[5] In its Finalisation of Audit Letter, SARS concluded that CGFM does not meet the requirements of an FBE as the primary functions of its business had been outsourced.

[6] 28 of 2011.

[7] *Commissioner for the South African Revenue Service v Coronation Investment Management SA (Pty) Ltd* [2023] ZASCA 10; [2023] 2 All SA 44 (SCA); 2023 (3) SA 404 (SCA)

(*SCA judgment*).

The legislative scheme

[6] Since CGFM is a controlled foreign company of the applicant, CIMSA, it is subject to South African tax law. Section 9D(2) provides that the net income of a controlled foreign company is imputed to its South African parent company. The section reads:

> "There shall be included in the income for the year of assessment of any resident . . . who directly or indirectly holds any participation rights in a controlled foreign company . . . an amount equal to . . . the proportional amount of the net income of that controlled foreign company."

[7] The imputation of income is subject to certain exceptions, one of which relates to the net income of a controlled foreign company that derives from an FBE. In this regard, section 9D(9)(b) states:

> "in determining the net income of a controlled foreign company . . . , there must not be taken into account any amount which is attributable to any foreign business establishment of that controlled foreign company."

[8] Section 9D(1) defines and outlines the requirements of an FBE. It reads:

> "'foreign business establishment', in relation to a controlled foreign company, means-
>
> (a) a fixed place of business located in a country other than the Republic that is used or will continue to be used for the carrying on of *the business of that controlled foreign company* for a period of not less than one year, where-
>
> (i) that business is conducted through one or more offices, shops, factories, warehouses or other structures;
>
> (ii) that fixed place of business is suitably staffed with on-site managerial and operational employees of that controlled foreign company who conduct *the primary operations of that business*;
>
> (iii) that fixed place of business is suitably equipped for conducting *the primary operations of that business*;
>
> (iv) that fixed place of business has suitable facilities for conducting *the primary operations of that business*; and

(v) that fixed place of business is located outside the Republic solely or mainly for a purpose other than the postponement or reduction of any tax imposed by any sphere of government in the Republic:

Provided that for the purposes of determining whether there is a fixed place of business as contemplated in this definition, a controlled foreign company may take into account the utilisation of structures as contemplated in subparagraph (i), employees as contemplated in subparagraph (ii), equipment as contemplated in subparagraph (iii), and facilities as contemplated in subparagraph (iv) of any other company-

(aa) if that other company is subject to tax in the country in which the fixed place of business of the controlled foreign company is located by virtue of residence, place of effective management or other criteria of a similar nature;

(bb) if that other company forms part of the same group of companies as the controlled foreign company; and

(cc) to the extent that the structures, employees, equipment and facilities are located in the same country as the fixed place of business of the controlled foreign company." (Emphasis added.)

[9] CGFM, and not CIMSA, would ordinarily be liable for local taxes in Ireland. If CGFM was in fact liable for local taxes in Ireland, CIMSA would be able to deduct the amount of those local taxes from its tax liability under section 6*quat*(1)(b).[8] That section would be of relevance only if CGFM is not an FBE, because if CGFM is an FBE, section 9D(9)(b) provides that none of the income of CGFM is included in CIMSA's taxable income under section 9D(2).

[8] Section 6*quat*(1)(b) reads:

"Subject to subsection (2), where the taxable income of any resident during a year of assessment includes-

. . .

(b) any proportional amount contemplated in section 9D

. . .

in determining the normal tax payable in respect of that taxable income there must be deducted a rebate determined in accordance with this section."

Issues

[10] Two elements of the definition of an FBE are central to the determination of the main issue. They are: (a) identifying the "business of that controlled foreign company" and (b) determining whether the fixed place of business was suitably staffed and equipped for conducting "the primary operations of that business". Plainly, therefore, the enquiry must be undertaken as a two-stage process: first, what is CGFM's "business" and, second, what are its "primary operations". These two enquiries are interrelated and discussing them may overlap. CGFM's business activities in Dublin bear close scrutiny to answer these two questions.

[11] CIMSA's case has consistently been that the business operations conducted by CGFM in Ireland complied with the FBE requirements set out in section 9D(1)(a)(i)- (v). It did not seek reliance on the proviso in that section at all. SARS accepts that CGFM had adequate on-site operations, employees and management. But SARS contends that CGFM's business lacked economic substance. That contention is based on SARS' averment that CGFM had outsourced its entire core business and all that remained in Dublin were ancillary, non-core activities. It was common cause that CGFM had, apart from investment management trading, also outsourced the marketing and distribution functions.

[12] The determination of whether CGFM's operations in Ireland had the requisite economic substance to qualify for the tax exemption in section 9D calls for a close scrutiny of the facts relating to CGFM's business activities. Importantly, a distinction must be drawn between fund management and investment management, an aspect that will be considered presently.

Factual matrix

[13] Virtually all the facts are common cause or not seriously disputed. They appear in SARS' statement of the grounds of assessment and CIMSA's statement of the grounds of appeal. The facts also emerge from the evidence led by CIMSA before the

Tax Court of Mr Alan King,[9] Ms Tracy Doyle,[10] Mr John Snalam[11] and Mr Declan Casey.[12] CIMSA also adduced documentary evidence in the form of board packs and minutes of board meetings relating to CGFM's Dublin operations. SARS led no evidence.

[14] Coronation Fund Managers Limited (Coronation) is a South African public company listed on the Johannesburg Stock Exchange (JSE). It has various subsidiaries, here and abroad, that operate in the sphere of fund management and investment management. At all material times, CIMSA was a 100% subsidiary of Coronation and held all the shares as the holding company of Coronation Management Company (RF) (Pty) Limited (CMC) and Coronation Asset Management (Pty) Limited (CAM), both registered as tax residents in South Africa. CIMSA was also the 100% holding company of Coronation Fund Managers (Isle of Man) Limited, tax resident in the Isle of Man. The latter, which has since been deregistered, in turn, was the 100% owner of CGFM and Coronation International Limited (CIL), which were registered and tax resident in Ireland and the United Kingdom (UK) respectively.[13] The applicant explains that Ireland was selected because of its highly regarded regulatory regime.

[15] CGFM was established in 1997 as a fund management company in Dublin, Ireland, to provide foreign investment opportunities in Irish collective investment funds (often referred to as unit trusts). CIMSA did so because Irish law did not permit it or any of its South African subsidiaries to manage Irish domiciled collective investment funds – it had to establish an Irish fund management company to do so. It was common cause that tax considerations played no role in the decision to establish CGFM in

[9] CGFM's managing director in Dublin.

[10] An Irish solicitor.

[11] Mr Snalam is one of the founders of the Coronation business in 1993 and remained there until September 2019.

[12] Mr Casey is employed at the Irish Funds Industry Association (the representative body of the International Asset Management Industry in Ireland), responsible for regulation and advocacy.

[13] The Coronation group of companies' corporate structure is available at: https://www.coronation.com/en-za/institutional/shareholder-information/corporate-structure/.

Ireland. A collective investment fund receives and pools money from external investors for investment in terms of the prospectus of the fund.

[16] The business model chosen by CIMSA in relation to CGFM in Ireland is an exact replica of the business model it uses in relation to its fund management business in South Africa, where CMC was established as a fund manager (or "management company") for a South African-domiciled collective investment fund. CMC does not conduct investment trading[14] activities, because it is not licensed to perform investment trading – that would require it to obtain a licence from South Africa's Financial Services Board (FSB). It contracts with CAM which is a specialist investment manager (that is licensed under a different licensing regime) to conduct investment trading activities. Similarly, in Ireland, CGFM does not conduct investment trading activities because it is not licenced to do so. It contracts with CIL and CAM, which are specialist investment managers licensed to conduct investment trading activities within their respective jurisdictions. On the evidence, the business model used by CIMSA in South Africa and Ireland is one used by most South African and Irish fund managers.

[17] In its business plan, CGFM enumerated the managerial functions that it was licensed and required to perform – these were identified by the Central Bank of Ireland (CBI) as operational functions. They were: decision-taking, monitoring compliance, risk management, monitoring of investment performance, financial control, monitoring of capital, internal audit and *supervision of delegates*. In 2011, the business plan was updated to add complaints handling and accounting policies and procedures as functions.

[18] CGFM has a licence, issued by the CBI under the European Communities (Undertakings for Collective Investment in Transferable Securities) (UCITS)

[14] The term "trading" does not appear anywhere in the licence issued to CGFM or in its business plan, but I use it intermittently in this judgment to denote the function of buying, selling and placing investments. I do so for purposes of drawing a distinction between that function and the much broader investment management that is part of fund management. Ms Doyle, the Irish solicitor who testified as an expert witness, did the same.

Regulations,[15] that authorises it to manage various collective investment funds in Ireland, but the licence does not authorise CGFM to conduct investment management trading activities itself. CGFM is thus a UCITS fund management company. CGFM adopted as a business model in its business plan, which formed part of its licence application (as the licence in effect required it to do), the delegation of investment management trading activities to third parties. As stated, CGFM has delegated these functions to CAM and CIL in South Africa and the UK respectively. CAM and CIL were appropriately licensed and independently regulated specialist investment managers. They made all the decisions and performed all the tasks in respect of the collective investment funds in South Africa and the UK respectively, but under the supervision of CGFM. The latter established the investment objectives and policies in an offering document, the prospectus. The CBI reviewed the prospectus which CGFM would usually have shared with investors. CGFM retains overall responsibility for the prospectus.

[19] Clause 23 of the UCITS Regulations makes provision for the delegating of business activities and functions. It reads:

> "(1) A management company may delegate activities to third parties for the purpose of the more efficient conduct of the company's business provided that –
>
> (a) the management company has informed the Bank in an appropriate manner (whereupon the Bank shall, without delay, transmit the information to the competent authority of the home Member State of a UCITS managed by that management company),
>
> (b) the delegation mandate does not prevent the effectiveness of supervision over the management company, and in particular it shall not prevent the management company from acting, or the UCITS from being managed, in the best interests of its investors,
>
> (c) when the delegation concerns investment management, the mandate is only given to undertakings which are authorised or registered for the purpose of asset management and subject to prudential supervision;

[15] European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011, SI. No. 352 of 2011.

the delegation shall be in accordance with investment-allocation criteria periodically laid down by a management company,

(d) where the mandate concerns investment management and is given to a third country undertaking, cooperation between the Bank and the supervisory authorities of the third country concerned is ensured,

(e) a mandate with regard to the *core function of investment management* is not given to the trustee or to any other undertaking whose interests may conflict with those of the management company or the unit-holders,

(f) measures are put in place which enable the persons who conduct the business of the management company to monitor effectively at any time the activity of the undertaking to which the mandate is given,

(g) the mandate does not prevent the persons who conduct the business of the management company either from giving at any time further instructions to the undertaking to which functions are delegated or from withdrawing the mandate or both with immediate effect when this is in the interest of investors,

(h) having regard to the nature of the functions to be delegated, the undertaking to which functions will be delegated is qualified and capable of undertaking the functions in question, and

(i) the prospectuses issued by a UCITS list the functions which a management company has been permitted to delegate in accordance with this Regulation.

(2) Neither the management company's nor the trustee's liability shall be affected by the fact that the management company delegated any functions to third parties, nor shall the management company delegate its functions to the extent that it becomes a letterbox entity."

[20] In Dublin, CGFM executed its business activities in terms of its licence through its directors who held quarterly meetings to set its business strategy, and through its executive team who managed the daily operations. As stated, documentary evidence before the Tax Court and the evidence of particularly Mr King provided insight into these operations. Oversight and supervision of the investment management functions, outsourced to CAM and CIL, formed a significant part of CGFM's tasks.

Tax Court

[21] The Tax Court distinguished between fund management and investment management and noted that CGFM is not an investment management company, but a fund management company. CGFM's licence authorises it to conduct collective portfolio management, that is, fund management. While a fund management company can do investment management, in this instance that function was outsourced to CAM and CIL.

[22] The Tax Court held that CGFM fulfilled the requirements of an FBE, because its fixed place of business is conducted in a physical structure, it is suitably staffed and equipped, has suitable facilities to conduct its primary operations (of fund management) and is located outside South Africa not for the purpose of postponing or reducing tax imposed in South Africa. That Court held that CGFM has economic substance and does not merely exist on paper – it said that CIMSA did not form CGFM to "house activities in the foreign company to avoid tax in the home country on the income they produce".[16] It thus qualified for the section 9D tax exemption.

[23] The Tax Court upheld CIMSA's appeal and set aside SARS' additional assessment for the 2012 year of assessment. It directed SARS to issue CIMSA with a reduced assessment for the 2012 year of assessment in which no amount was included in CIMSA's income pertaining to the income of CGFM.

Supreme Court of Appeal

[24] The Supreme Court of Appeal understood the primary operations of CGFM's business to be investment management. It reasoned that if CGFM had outsourced all the primary operations, then the fixed place of business in Ireland lacks the staff and facilities to conduct those operations. That Court further reasoned that if these outsourced operations are central to the business of CGFM, because they go to the very

[16] *Coronation Investment Management SA (Pty) Ltd v The Commissioner for the South African Revenue Services*, unreported judgment of the Tax Court of South Africa, Cape Town, Case No 24596 (17 September 2021) at para 40.

nature of what its business does, then CGFM does not conduct its primary operations in Ireland.

[25] The Supreme Court of Appeal further reasoned that, to qualify for the exemption under section 9D, the essential operations of a business must be conducted within the jurisdiction in respect of which exemption is sought. While there are undoubtedly many functions that a company may choose to outsource legitimately, it cannot outsource its primary business. To enjoy the same tax levels as its foreign rivals, making it internationally competitive, the primary operations of that company must take place in the same foreign jurisdiction. Therefore, CGFM does not meet the requirements for an FBE exemption and, consequently, the net income of CGFM is imputable to CIMSA for the 2012 tax year under section 9D(2).

[26] The Supreme Court of Appeal upheld SARS' appeal to the extent that it directed CIMSA to pay the income tax on CGFM's income and the interest in terms of section 89(2) of the ITA. However, the Court held that SARS' claim for understatement penalties and underestimation penalties must fail. The latter conclusion was based on its earlier judgment in *Thistle Trust*[17] relating to the provisions of section 222 of the TAA.

In this Court

CIMSA's submissions in the appeal

[27] CIMSA submits that this Court's jurisdiction is engaged as the appeal raises arguable points of law of general public importance. The interpretation of "the business of the controlled foreign company" and "primary operations of that business" for purposes of the FBE definition are points of law. That legal question transcends the interests of the parties, since it impacts all South African resident companies that hold controlled foreign companies.

[17] *Commissioner for the South African Revenue Service v The Thistle Trust* [2022] ZASCA 153; 2023 (2) SA 120 (SCA) (*Thistle Trust*).

[28] Regarding the merits, CIMSA submits that the Supreme Court of Appeal erred in its interpretation of the FBE definition. CIMSA draws a distinction between what it terms the Supreme Court of Appeal's "notional-business interpretation" and its own "actual-business interpretation". The latter interpretation means that the business of a controlled foreign company and the primary operations of that business must be determined by having regard to what the company in fact does. The Supreme Court of Appeal's interpretation, on the other hand, adopted the approach that the business of a controlled foreign company and the primary operations of that business must be determined by having regard to what the company could in theory perform and not what it actually does.

[29] According to CIMSA, a controlled foreign company's business is not defined by what it could potentially or theoretically do, but by what it actually does. It cannot have operations (primary or otherwise) that are not part of its chosen business.

[30] CIMSA submits further that in its business plan, presented as part of its licence application, CGFM undertook to follow a delegated business model in which it would conduct specified fund management functions, and would delegate investment management trading activities (which it is not authorised to do) to competent third parties, while retaining overall supervision of, and responsibility to the regulatory authority, for those functions. Further, the licence application was reviewed on the basis that CGFM was a "management company who will delegate all constituent [collective portfolio management] functions to third parties and [will] maintain the management functions".

[31] According to CIMSA there is no single ideal way to conceive of a business, particularly having regard to innovation in commerce. The manner in which companies employ and manage third-party resources to achieve their commercial purposes does not mean that they are not performing "their business"; on the contrary, that is exactly what they are doing.

[32] CIMSA submits that the Supreme Court of Appeal's approach requires a company like CIMSA to select the ideal and all-inclusive form of that business, and then set up a controlled foreign company in a manner that necessarily makes it uncompetitive, by resourcing itself to perform functions that are much more efficiently and sensibly outsourced, as its competitors do.

[33] CIMSA contends further that section 9D and the FBE definition do not use the word "outsource". The FBE definition is not an "anti-outsourcing" provision, as appears to be central to the Supreme Court of Appeal's reasoning. The focus is on economic substance. The FBE definition seeks to ensure that a foreign business has economic substance in the foreign jurisdiction, regardless of its chosen business model, and is not an illusory or "paper" business. The rationale is that section 9D must not enable tax avoidance.

[34] CIMSA argues that the business of CGFM is that of a fund manager. Thus understood, the Ireland office had sufficient staff and equipment to enable CGFM to perform the primary functions needed to carry on fund management in accordance with the delegation model in that fixed place of business in Dublin. As a result, CGFM satisfied the requirements in (ii), (iii), and (iv) of the FBE definition, because the fixed place of business was suitable for the business that CGFM in fact conducted in Ireland.

[35] Finally, CIMSA points out that, contrary to the finding of the Supreme Court of Appeal, CGFM had not been granted a licence to perform investment management trading activities. The correct position was that CGFM's licence was, in law, limited to being a fund management company which supervised the performance of its delegates, CAM and CIL. Thus, investment management trading cannot be part of CGFM's primary operations under the FBE definition, and therefore cannot be outsourced as envisaged by the definition's proviso. It is only fund management (without investment management trading) that forms part of CGFM's primary operations.

SARS' submissions in the appeal

[36] SARS argues that there is no arguable point of law, because neither the Supreme Court of Appeal nor the Tax Court undertook any interpretive exercise in respect of section 9D or the FBE definition. Furthermore, the Supreme Court of Appeal judgment is of no general public importance.

[37] In respect of the merits, SARS submits that CGFM had outsourced all its core functions for which it is licensed as a management company, including its primary function of investment management, to offshore entities – CAM and CIL.

[38] SARS contends that the proviso to the FBE definition expressly allows for the outsourcing of various functions in relation to the location permanence and the economic substance of a controlled foreign company to other structures. The proviso makes plain that, when assessing the notion of a "fixed place of business" in relation to a controlled foreign company, it may utilise the premises, employees, equipment and facilities belonging to one or more other companies. However, the proviso requires that any other structure that is utilised by the controlled foreign company:

(a) must be subject to tax in the country in which the fixed place of business of the controlled foreign company is located by virtue of residence, place of effective management or other criteria of a similar nature (subsection (aa));

(b) must form part of the same group of companies as the controlled foreign company (subsection (bb)); and

(c) to the extent that the structures, employees, equipment and facilities are located in the same country as its fixed place of business (subsection (cc)).

[39] SARS submits that a proviso is not a separate and independent enactment. The words of a proviso are dependent on the principal enacting words to which they are attached as a proviso and must be read and considered in relation to the principal matter to which it is a proviso.

[40] In relation to the proviso, SARS submits that few companies function completely independently, and most benefit from partnerships with suppliers as well as outside contractors. Working with outside contractors, or outsourcing, enables companies to conduct their activities more efficiently and effectively, although it would self-evidently be contrary to the definition of an FBE for all the activities of a business establishment to be outsourced to third-party suppliers.

[41] SARS submits that CGFM outsources its investment management function to CAM, a South African resident, and to CIL, a UK resident, contrary to the requirements of subsections (aa) and (cc), as both CAM and CIL are not subject to tax in Ireland and the operational employees to whom the function is outsourced are not located in Ireland. As a result, CGFM does not meet the requirements of an FBE. The words of the proviso cannot be read as though divorced from their context.

[42] Emphasis is placed on the fact that section 9D is an anti-avoidance provision and that, through the use of controlled foreign company legislation, the delay or deferral of taxes is curbed by taxing the South African owners of foreign companies on the income earned by those foreign companies as if they have repatriated their foreign income as soon as it was earned.

[43] According to SARS, after outsourcing its main function, the only remaining functions that CGFM could perform were the managerial functions, attached to collective portfolio management. This is borne out by the CBI's response. They categorically stated that "it has reviewed the application by [CGFM] as a management company who will delegate all constituent CPM functions to third parties and consequently the only operational functions retained by [CGFM] will be the performance of the managerial functions". SARS contends that the licence does not state that CGFM is not approved by the CBI to perform investment management. The authorisation includes everything except "individual portfolio management" and non-core services, neither of which CGFM applied for.

[44] SARS further submits that the licence expressly provides that, in the event that CGFM wishes to carry out individual portfolio management services and / or other non-core services (such as investment advice, safekeeping, and administration), CGFM was required to obtain the appropriate extension of its authorisation from the CBI. Investment management is neither the business nor the primary business activity of CGFM. Schedule 1 of the investment management licence, however, authorised CGFM to perform collective portfolio management and expressly excluded individual portfolio management.

Jurisdiction and leave to appeal

[45] I am of the view that this matter engages our jurisdiction. It does not concern a mere factual enquiry to decide what business activities CGFM had delegated to CAM in South Africa and to CIL in the UK. The fundamental enquiry is this: what is the proper interpretation of "the business of that controlled foreign company" and "the primary operations of that business" as they appear in section 9D, for purposes of applying the FBE exemption? That is a question of law. This is similar to *Big G Restaurants*,[18] where the question of law and the interpretation of the relevant contracts was closely linked to the interpretation of section 24C(2) of the ITA. In the present instance, the interpretation of these key concepts in the statute is a question of law as it involves forming a view on the meaning of section 9D of the ITA.[19]

[46] This is a question that transcends the interests of the parties and is of general public importance. It has an impact on all South African resident companies which hold controlled foreign companies and which rely on the existence of an FBE to avoid being subjected to tax on an amount equal to the controlled foreign company's net income under section 9D. The interests of justice require that leave be granted so that certainty

[18] *Big G Restaurants (Pty) Ltd v Commissioner for the South African Revenue Service* [2020] ZACC 16; 2020 (6) SA 1 (CC); 2020 (11) BCLR 1297 (CC).

[19] *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation* ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC); 2019 BIP 34 (CC) at para 36.

regarding a question of significant importance to the South African economy can be attained in light of the diverging conclusions of the Tax Court and the Supreme Court of Appeal. Given my conclusion in respect of the outcome in the main appeal, as will appear, the cross-appeal will not arise and I say nothing further about it under this rubric.

Merits

The rationale behind the enactment of section 9D

[47] As stated, the central enquiry concerns whether CGFM'S business activities in Dublin during the 2012 year of assessment had the requisite economic substance envisaged in section 9D. Before answering that question, it is useful for the contextual background to understand the rationale behind the enactment of section 9D. That rationale appears from the Treasury Explanation. It bears repetition that section 9D does not seek to subject a foreign company to South African tax. It subjects the South African holding company or shareholders of a controlled foreign company to tax on an amount equal to the net income of that controlled foreign company.

[48] The Explanatory Memorandum explicates that section 9D was enacted as an anti-avoidance provision with a general objective to deter South Africans from moving tainted forms of taxable income beyond South Africa's taxing jurisdiction by investing through a controlled foreign company.[20] The section further has as its purpose to permit South African multinationals to establish corporate entities abroad in a way that would enable them to compete there. Its aim is to strike a balance between offshore competitiveness and protecting the South African tax base.

[49] Key to section 9D is competitiveness abroad for controlled foreign companies. The means of achieving that without jeopardising the South African tax base is the FBE exemption. In the Treasury Explanation, the rationale behind the FBE exemption is expressed thus:

[20] Explanatory Memorandum above n 3 at 73.

> "A pure anti-deferral regime would immediately deem back all the South African owned foreign income so that none of this foreign income receives any advantage over domestic income. Yet, section 9D (*like other internationally used regimes of its kind*) falls short of this purity *in order to cater for international competitiveness*. International competitiveness dictates that foreign company income should be ignored so that South African multinationals can fully compete on an equal basis with their foreign local rivals.
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> . . .
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> The principles of anti-deferral and international competitiveness are diametrically opposed. Anti-deferral warrants complete taxation, whereas international competitiveness warrants complete exemption. *In the end, section 9D follows international norms favouring a balanced approach. Section 9D achieves this balance by favouring international competitiveness (ie exemption) where the income stems from active operations*. Anti-deferral (ie immediate taxation) applies where the income stems from passive investments or from transactions that meet objective criteria with a high tax avoidance risk."[21] (Emphasis added.)

[50] The Explanatory Memorandum enunciates this principle as follows:

> "Active income of controlled foreign companies are, however, exempt under section 9D(9) in order to ensure that foreign businesses remain competitive with local businesses in the foreign country from a tax point of view. This active income includes income attributable to a business establishment, unless it is passive or diversionary."[22]

[51] The Treasury Explanation requires that "the location of the business establishment must additionally contain further substance". That "economic substance" must be demonstrated in terms of operations and business purpose.[23] Importantly (although of course not decisively on its own), the Treasury Explanation states that "the business establishment threshold is very light".[24] Economic substance counterpoises

[21] Treasury Explanation above n 4 at 1-2.

[22] Explanatory Memorandum above n 3 at 14.

[23] Id at 9.

[24] Id at 12.

illusory or non-substantive business activities simply utilised to avoid tax in South Africa.[25]

CGFM's actual business and its primary operations

[52] It bears repetition that CGFM was established in Ireland as a fund manager, and not an investment manager.[26] The function of investment trading was delegated (or "outsourced" as the Supreme Court of Appeal phrased it), as CGFM was legally entitled to do. The undisputed evidence shows that this business model is also common commercial practice in Ireland and other fund domiciles. Mr Casey testified that 70 to 80% of UCITS fund managers in Ireland delegated investment trading activities. His evidence was confirmed by Mr Snalam and Ms Doyle.[27] In terms of that delegation model, a fund management company establishes a highly specialised business to hold and maintain a licence to perform fund management which includes the supervision and oversight of services provided by third parties on a delegated basis. The trust deeds of the collective investment funds in respect of which CGFM fulfilled the role of fund manager also recognised the delegation of the investment management trading activities to third parties, the specialised investment managers.

[53] SARS misconceives the distinction between fund management and investment management. That is a fundamental misconception in respect of the central issue in the case. And the Supreme Court of Appeal committed the same error, leading to its conclusions with which, for the reasons that follow, I disagree.

[25] Olivier and Honiball *International Tax: A South African Perspective* 5 ed (SiberInk, Cape Town 2011) at 582.

[26] CGFM provided fund management services to: the Coronation Global Opportunities Fund, an umbrella open- ended unit trust established in Ireland and authorised by the CBI as a UCITS fund; the Coronation Universal Fund, an open-ended umbrella unit trust established as a professional investor alternative investment fund in Ireland, authorised by the CBI in terms of the Unit Trust Act, 1990, in Ireland; and the Coronation Investment Holdings Limited Fund, an umbrella limited liability corporate alternative investment fund domiciled in the Cayman Islands.

[27] Mr Casey also described the practice as "overwhelming", "commonplace" and "the prevalent model". Mr Snalam said it was "the norm". Ms Doyle called it "typical" and that "the majority" of UCITS fund management companies were authorised on that particular basis.

[54] A good place to start is the distinction between fund management and investment management trading, also called here investment management in the narrow sense to emphasise the distinction. In sum, managing a collective investment fund involves the governance of and ultimate responsibility for all regulatory, legal and other investor-related aspects of a collective investment fund. That entails administration of the fund, trusteeship or custodianship, the management of investments and distribution or marketing. CGFM does all of this as a fund manager under the auspices and control of the regulatory authority, the CBI. This is "investment management in the wide sense" – the oversight and setting of policies, mandate and restrictions for investments. CGFM's responsibilities arise from the regulatory responsibility to the CBI to comply with laws and regulations which apply to its business and to the Irish regulatory authorities.

[55] Investment trading, on the other hand, entails professionally and expertly allocating the funds invested in a collective investment fund. These allocations are made strictly within the parameters, policies, mandate and limits set out in the prospectus issued by the fund manager. Thus, CAM and CIL, as delegates of CGFM, would elect which assets to buy, hold or sell on behalf of the collective investment fund. They would do so subject to the policies, mandate and restrictions imposed by CGFM as the fund manager. This is "investment management" in the narrow sense – the actual trading of investments.

[56] The distinction can be explained in a different way – fund management in the present instance includes investment management in the wide sense, but not in the narrow sense. CGFM performed the former and not the latter – that had been delegated to CAM and CIL.

[57] Numerous features point to what CGFM's core business as a fund manager entailed and conclusively prove that this core business did not extend to investment trading activities. First, there is the licence issued by the CBI as the regulatory authority. The licence constitutes the sole and complete authorisation for CGFM to

conduct the business of fund management and the parameters of that authorisation. CGFM was licensed to provide oversight and overall management of investment collective funds, but CGFM did not have licensed approval to make decisions itself on where to place the investments pooled in a collective investment fund. That function was delegated to CAM and CIL. CGFM stated thus in its business plan as part of its application for a licence. It submitted an application unequivocally based on the delegation business model elected by it for commercial reasons and as it was in law entitled to do. The CBI viewed the licence application in the terms submitted by CGFM in its business plan, that is, that "[CGFM] was a management company who will delegate all constituent [collective portfolio management] functions to third parties and [will] maintain the management functions".

[58] The licence sets out the conditions of licensing in accordance with the business plan submitted by CGFM and any other conditions as the CBI required. These conditions in the licence are:

> "[CGFM] may not engage in activities other than the management of UCITS authorised according to the Regulations and other collective investment undertakings which are not covered by the Regulations and for which [CGFM] is subject to prudential supervision but which cannot be marketed in another Member State under the Directive . . . This authorisation does not include the provision of individual portfolio management services or other non-core services. . . . [CGFM] must revert to the Financial regulator seeking appropriate approval in the event that it proposes to engage in these activities."

[59] The evidence is persuasive that this is the common position for virtually all UCITS management companies – very few of them are approved to perform individual investment portfolio management functions in respect of the investment funds that they manage. In appointing CAM and CIL as external delegates to perform the functions of investment portfolio management, it acted in terms of the law and in accordance with prevailing general commercial practice. To hold, as the Supreme Court of Appeal did and SARS vigorously contended before us, that in doing so CGFM had "outsourced"

its core function, was left only with non-core ancillary functions and was thus not conducting the business of a UCITS management company, is fallacious.

[60] The second aspect is the prudential considerations behind separating the investment management (in the wide sense) and investment trading (investment management in the narrow sense) functions. The investment manager can perform oversight functions over the latter, the investment trader, who must perform its delegated functions within the mandate, policies and restrictions set by the investment manager. Thus, the investment trader may be motivated to take risks that are not acceptable to the investment manager; for this reason, the industry separates out supervision (which inclines towards a more cautious approach to investor funds) and trading (which tends to adopt a riskier approach).

[61] Third, there is the uncontested evidence of CGFM's witnesses, particularly of Mr King and Ms Doyle. As stated, SARS led no evidence and almost all the evidence was uncontested. In respect of Ms Doyle, in the Tax Court, SARS' counsel took issue with the admissibility of her evidence on the basis that it was irrelevant. That objection is ill-founded. Ms Doyle testified about a fiercely contested issue – what business CGFM conducted in Ireland. Her evidence contextualised the legal setting in Ireland in terms of which CGFM was established. It was thus relevant to set out the context within which the testimony of others like Messrs Snalam and King who testified about CGFM's business operations must be understood.

[62] As stated, Mr Snalam was with the Coronation group from its establishment in 1993 until 2019. He testified about the rationale behind the establishment of CGFM in Ireland to take advantage of the opening up of global markets for South African investors. He explained the role of a prospectus to set out investment policies and the mandate of a company. Mr Snalam also confirmed the rationale behind CGFM's business model – based on common commercial principles and the applicable legal framework.

[63] Ms Doyle explained the parameters of CGFM's licensing conditions. She emphasised that aspects like the setting of investment parameters and oversight over the investment managers also fell within the concept of "investment management". But, as she explained, CGFM could not itself conduct investment management trading, as that would contravene its licensing conditions and placed the licence at risk. Had it desired to perform investment management trading itself, CGFM would have had to make a fresh application in a new business plan, different in material respects to the one it had originally submitted. That new application would have to identify the individual portfolio managers, their experience and qualifications, the systems they would be using and CGFM's ability to resource appropriate trading activities within itself.

[64] Mr Casey confirmed this evidence and presented details of the business model employed by most of the Irish domiciled management companies, including CGFM. That model entailed the establishment of an Irish management company with a strong governance model in order to oversee the outsourced activities. The industry and the regulatory authorities in Ireland operated on the central premise that while activities and functions can be delegated, the ultimate responsibility for that activity and function remains with the Irish management company.

[65] Mr King, CGFM's managing director during the 2012 year of assessment, gave a detailed description of what CGFM's oversight of the delegated functions entailed at the time. Their main function was to provide oversight of the external service providers. Mr King emphasised that the variety of functions performed in CGFM's Dublin office were aimed at ensuring that they were compliant with their licence conditions. They had access to the systems used by external service providers and/or systems used by the providers from which CGFM could obtain information and assess their performance. In some instances, CGFM would perform corrective work like reconciliations. CGFM would from time to time have meetings with the service providers to review their services and to suggest ways of addressing gaps or weaknesses. There were systems through which monitoring could be done. For present purposes, a system known as "Statpro" was used to monitor whether investment restriction breaches had occurred.

[66] In summary – these three features, the licence conditions, prudential considerations and the uncontested evidence, compellingly show that at all material times CGFM had conducted the business of a fund manager. It performed the core functions of a fund manager, including the management, oversight and supervision of the delegated investment management trading activities.

[67] These features also overwhelmingly point to CGFM's primary operations being that of a quintessential fund manager operating in terms of a delegation business model. That was in accordance with the overwhelming majority of Irish fund managers and, for that matter, in other similar fund management domiciles, like South Africa. It was also in accordance with the business model used by CIMSA within South Africa. Moreover, the evidence clearly shows that the performance of investment trading activities was not the main source of CGFM's income. In terms of the prospectus of the relevant collective investment fund (or unit trust) CGFM earned its fees as a percentage based on the market value of that fund's assets. The confidence that the investors have in CGFM as the regulated fund manager and the responsible execution of its tasks like administration and the oversight of the allocation of investor funds as per the prospectus, provide the basis for CGFM to earn the fees that it does.

[68] To sum up – in accordance with its business plan, presented as part of its licence application, CGFM employed a delegated business model through which it would conduct specified fund management functions, and would delegate investment management trading activities (which it is not authorised to do by its licence) to competent third parties, CAM and CIL, while retaining overall supervision of and responsibility to the regulator for those functions. CGFM performed a number of core management functions under its licence, including the supervision of delegates like CAM and CIL as investment managers. Its day-to-day operations from its Dublin office in pursuit of these management functions met the "economic substance" requirements of the FBE definition, namely that the company must have a fixed place of business which is suitably staffed and equipped to conduct the primary operations of its business

– the provision of fund management in accordance with the delegation model. For these reasons, the Tax Court was correct in holding that CGFM qualified for a tax exemption and that SARS must issue a reduced tax assessment, excluding in it any amount that was included in CIMSA's income under section 9D of the ITA pertaining to CGFM's income. What bears consideration next is the flaws in the reasoning and ultimate outcome of the Supreme Court of Appeal.

The judgment of the Supreme Court of Appeal

[69] For the reasons stated, the Supreme Court of Appeal misconceived CGFM's actual business as a fund manager. Instead of determining what CGFM's business actually is, the Court examined CGFM's licence and the delegation provisions under the UCITS Regulations. It concluded from this that "collective portfolio management, which CGFM has been authorised to conduct, includes investment management, administration and marketing". The Court stated that this was confirmed by Ms Doyle, Mr King and Mr Snalam who had testified that "the licence permitted investment management of collective investment schemes and this was one of the 'core functions' which the company 'elected to outsource as it did with administration and distribution and trusteeship by custody'".[28]

[70] The Court held that "the regulations indicate that the purpose of delegation is to enhance the efficiency of the company's business. It does not detract from the business of the company, nor is it possible for delegation to alter that business".[29] In adopting this "notional business" approach (as it was called by CIMSA's counsel), the Supreme Court of Appeal erred. As explicated earlier, the Court should have had regard to CGFM's business model (the manner in which it elects to do business) and its licensing conditions (what it may lawfully do). And the Court failed to draw the important distinction between investment management in its wide sense and investment management trading, the narrower concept.

[28] *SCA judgment* above n 7 at para 33.

[29] Id at para 34.

[71] A further misconception on the part of the Supreme Court of Appeal is that the evidence given by the witnesses for CIMSA was that the regulatory functions were incidental. It held that Mr King testified that the licence "largely looked after itself" and that Ms Doyle went so far as to state that it was unnecessary to have employees in Ireland, as the board members could have carried out the function of fund management at their quarterly meetings. That managerial functions, according to the Supreme Court of Appeal, are ancillary to the investment function is also evidenced by the appendix to the application for the authorisation, in which "managerial functions" are listed. These are decision-taking, monitoring compliance, risk management, monitoring of investment performance, financial control, monitoring of capital, internal audit and supervision of delegates.

[72] The Supreme Court of Appeal further held:

> "CIMSA has conflated the role of a management company with its outsourcing or delegation of its investment and other functions. By so doing, it has impermissibly elevated the management role. The licence granted to CGFM was for fund management, which includes investment management, administration and marketing. That it elected to outsource these functions and merely manage these functions, does not change the nature of the licence or elevate the managerial role into any other than an ancillary one."[30]

[73] As shown, this is fallacious reasoning based on a misconception of what CGFM's business entailed and a misreading of the evidence, both oral and documentary, adduced by CGFM.

[74] In respect of CGFM's primary business operations, the Supreme Court of Appeal rejected CIMSA's contentions that regard must be had to the practical actions required to operate its fund management business based on a licensed delegated model and that,

[30] *SCA judgment* above n 7 at para 38.

on this interpretation, CGFM was suitably staffed, equipped and resourced to carry out its primary operations which are conducted in Ireland. Instead, said the Court, "the meaning to be ascribed to 'primary operations' and 'business' must be contextual, relative to the definition of an FBE, where the words are found".[31] The Court had regard to the dictionary meaning of the words "primary" and "operations" and CGFM'S Memorandum of Association.[32] Based on the latter, the Court held:

> "The notion that investment management is not CGFM's core business is at odds with what is stated in its memorandum of association. The stated objects of CGFM are to carry on the business of establishing specified collective investment undertakings; to promote, establish, manage, regulate and carry on any investment, unit or other trust or fund; and to carry on the business of investment and financial management."[33]

[75] The Court concluded that CGFM's primary business is investment management and that, while there are numerous functions that a company may choose to legitimately outsource, it cannot outsource its primary business. To enjoy the same tax levels as its foreign rivals, making it internationally competitive, the primary operations of that

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[31] Id at para 45.

[32] The Memorandum of Association describes CGFM's objects:

> "(a) To carry on the business of establishing, either on the Company's own behalf or on behalf of other persons or bodies, specified collective investment undertakings, defined in Section 18 of the Finance Act, 1989 ("Collective Investment Undertakings") and to provide for such undertakings investment management services including but not limited to financial advisory services, administration services, marketing services, placement services, brokerage services, agency services and all other services of a financial nature and generally to deal in units of the undertakings managed by the Company.
>
> . . .
>
> (c) To carry on the business of investment and financial management including venture and development capital investment, corporate treasury management, fund management and fund administration for individuals, investment schemes or undertakings other than Collective Investment Undertakings international corporate bodies, governments or other authorities both as principals and agents and to transact and do all matters and things incidental thereto which may be usual in connection with the business of financing or dealing in monies.
>
> Provided that the Company shall not act as or accept any appointment as a fund manager for any investment scheme or undertaking other than a Collective Investment Undertaking without the prior approval of the Irish regulatory authority but for the avoidance of doubt the Company may provide fund administration, investment advisory or management services to any fund manager appointed to an investment scheme or undertaking other than a Collective Investment Undertaking."

[33] *SCA judgment* above n 7 at para 47.

company must take place in the same foreign jurisdiction. Therefore, held the Supreme Court of Appeal, CGFM does not meet the requirements for an FBE exemption and, instead, the net income of CGFM is imputable to CIMSA for the 2012 tax year under section 9D(2).

[76] The ultimate effect of the Supreme Court of Appeal's erroneous "notional business" approach is that CGFM's primary business is that which it calculatedly chose not to do, did not apply to do and by law was not able to do, namely investment management trading. The fallacy of that reasoning is self-evident. It is inconceivable that the business of a controlled foreign company envisaged in section 9D is everything that the controlled foreign company can in theory and notionally do in pursuing a commercial endeavour, even if that company does not actually do it.

[77] Moreover, and importantly, that approach leads to insensible and unbusinesslike results that do not achieve section 9D's objects, nor does it suppress the mischief at which the section is directed. CGFM had to set up offshore, due to the legal constraints of performing fund management in respect of Irish collective funds outside Ireland – thus the income was not diversionary. If CGFM had not been set up in Ireland, Irish law would have prevented any of this income from being earned by CIMSA or any of its South African subsidiaries. This was not income derived from royalties, dividends or interest – so it was not passive income. And it was certainly not mobile income derived from a shell business with a post-box. The company was adequately staffed to perform the functions which it sought to do. The fact that the separation of fund management and investment trading is standard practice in the industry fortifies the view that CIMSA's contentions in respect of CGFM as a qualifying FBE are sound. The income earned by CGFM in Ireland is therefore not diversionary, passive or mobile that can erode the South African tax base. Those are the three types of income that the Treasury Explanation denotes as falling outside the FBE definition. CGFM's fund management business plainly had the requisite economic substance.

[78] It is fallacious to reason that, for purposes of the tax exemption, a business entity can subjectively define what constitutes the business in a narrow way so as to fall within the realm of the exemption. There would be narrow definitions of the ambit of a business – such as the provision of secretarial services to a fund manager – which would clearly lack economic substance and create too wide a discretion for companies to avoid tax liability in South Africa. SARS and a court will look objectively at the actual operations of the business to determine whether they have a commercial rationale and the business has economic substance.

[79] The Supreme Court of Appeal held:

> "The FBE definition is not aimed solely at advancing international competitiveness for offshore businesses. Nor is the legislation concerned only to prevent diversionary, passive or mobile income eroding the South African tax base. It is also to limit a situation where an exemption is obtained over earnings in a low tax jurisdiction when the primary operations for the business are not conducted there."[34]

[80] This statement entirely undermines the stated objects of section 9D, to ensure that offshore companies remain competitive in relation to their foreign rivals. It loses sight of the fact that a South African company is legally constrained to move offshore to service their investor clients who want to take up the opportunities created abroad after the relaxation of foreign exchange controls. Moreover, there is no authority advanced by the Court for this statement, nor am I aware of any. As was correctly contended by CIMSA before us, in effect, this approach creates a further purpose for the words in the FBE definition, which are subject to interpretation exclusively from the words themselves. This is tantamount to expecting of the words to lift themselves up by their own bootstraps.

[81] Apart from the fact that the approach adopted by the Supreme Court of Appeal is legally and factually unsustainable, it does not make commercial sense at all. It

[34] *SCA judgment* above n 7 at para 53.

effectively means that, on this interpretation of what "business" and "primary operations" of that business mean, there is only a single, ideal notional concept of what a business entails. There is no scope at all for delegation that trenches on the core functions of the ideal notional "business" – the insurmountable strictures imposed by that narrow approach in setting up an FBE are self-evident. Requiring South African companies to set up an FBE within this anti-competitive limitation is illogical, does not make business sense and undermines the objects of section 9D. It would inadvertently discourage legitimate business practices that contribute to the efficiency and competitiveness of South African companies on a global stage.

[82] Lastly, as far as the Supreme Court of Appeal's reasoning is concerned, it bears emphasis that the FBE definition is not an anti-outsourcing enactment, as that Court appears to approach it. Instead, it aims to ensure that an offshore business, regardless of its chosen business model, has economic substance in that foreign country and is not merely an illusory or "paper" business. And its objects are to ensure that the offshore company remains competitive with its foreign rivals.

Conclusion

[83] CGFM met all the requirements of an FBE in terms of section 9D. Its net income ought to have been exempted from tax for the 2012 year of assessment. The appeal must succeed and it is thus not necessary to deal with the cross-appeal. Costs must follow the outcome.

Order

[84] The following order is made:

1. Leave to appeal in respect of the appeal is granted.
2. The appeal is upheld. The order of the Supreme Court of Appeal is set aside and substituted with the following:
   "The appeal is dismissed with costs, including the costs of two counsel."
3. The respondent must pay the costs, including the costs of two counsel.

For the Applicant:	M Janisch SC, C Rogers and V Jere instructed by Bowman Gilfillan Incorporated
For the Respondent:	R Williams SC and H Cassim instructed by the Office of the State Attorney, Cape Town