REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

Case No.: **IT 76795**

(1) REPORTABLE: **YES** / NO

(2) OF INTEREST TO OTHER JUDGES: **YES** / NO

(3) REVISED.

13 January 2025 .....
DATE SIGNATURE

In the matter between:

TAXPAYER TRUST Appellant

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE Respondent

J U D G M E N T

Myburgh AJ:

Introduction

[1] In October 2011, a South African resident trust ("the taxpayer"), bought two properties in Bloemfontein from the GN trust. The properties were "*the Absa precinct*", where Absa Bank leased offices, and "the Life facility", where Life Healthcare Limited leased a hospital. The Sanlam Group ("Sanlam") financed the purchases of the two properties, by making two loans to the taxpayer. The first was a R115 million loan for the purchase of the Absa precinct and the other was a loan of R295 million for the purchase of the Life facility. The transfers of the properties took place in 2012.

[2] Over the years that followed there were further loans by Sanlam to the taxpayer. In 2014 the taxpayer refinanced the Absa precinct with a R170 million facility, which it used to settle the initial capital advanced, and to pay a building contractor who was working on a new project in Cape Town. The taxpayer refinanced the Absa precinct again in 2018 with a R170 million loan from Sanlam. In addition to these loans, Sanlam provided the taxpayer with a mezzanine finance facility of R35 million in 2014, which the taxpayer used to make alterations and improvements to the Absa precinct. In 2015 Sanlam refinanced the mezzanine facility with a R25 million loan to the taxpayer and in 2018 it did so again with a loan of R16 million. In addition to the loans on the Absa precinct, in 2019 Sanlam provided a R150 million extension on the Life facility loan. The taxpayer used this to pay down R142 million on the Life facility loan and used the remainder to acquire another property.

[3] All the Sanlam loans were arranged by Sanlam Capital Markets (Pty) Ltd ("SCM") and for this SCM charged raising fees. Mr GG, a trustee of the taxpayer, explained that the salient features of the raising fees were virtually identical. First, they were 2% of the capital raised in each instance. Second, the drawing down of the loans was conditional upon the payment of the raising fees. Third, in raising the finance, SCM acted as a facility agent, whether or not it also loaned the money. While there was a bit of semantic jostling in cross-examination, all of this was essentially common cause.

[4] Three of the raising fees are relevant: the R3.4 million fee on the 2018 Absa precinct refinancing; the R320 000.00 fee in respect of the 2018 mezzanine refinancing; and the R3 million fee on the 2019 Life facility extension. The first two fees fell in the taxpayer's 2019 fiscal year and the third in its 2020 fiscal year.

[5] The parties' respective positions are as follows: The taxpayer argues that the raising fees are deductible "interest or similar finance charges" as envisaged in section 24J of the Income Tax Act 58 of 1962 ("the Act")[1] and in the alternative that the raising fees are deductible under section 11(*a*). SARS holds the view that the raising fees are not "interest or similar finance charges" as defined in section 24J, and are, in the alternative, capital in nature, and hence not deductible.

Case law under the previous regime

[6] This is not the first time the courts have grappled with the tax treatment of raising fees.

[7] In *Commissioner, South African Revenue Service v South African Custodial Services*,[2] the respondent had concluded a "concession contract" with the Department of Correctional Services ("the department"). In terms of the concession contract, the respondent designed, constructed and operated a prison in Louis Trichardt.[3] The respondent took out loans of R384 million in order to finance the project[4] and in so doing, incurred a financial advisory fee, a margin fee, a commitment fee, an initial fee, administration fees and legal fees. The respondent sought to deduct all of these fees in terms of section 11(*b*A), the provision that applied at the time.

[8] Plasket JA, in a unanimous decision, held as follows:

> [47] In order to bid for the tender and to raise the loans that it required to finance the construction of the prison, SACS incurred a number of fees payable to various parties. The individual fees, their purpose and the parties to whom they were paid have been set out above. SACS also incurred interest on its loans. It claims to be entitled to a deduction in respect of the various fees and the interest in terms of s 11(*b*A) of the act.
>
> [48] Section 11(*b*A) provides:
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> 'For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived—
>
> …
>
> (*b*A) <u>any interest (including related finance charges)</u> which is not otherwise allowable as a deduction under this Act, which has been actually incurred by the taxpayer on any loan, advance or credit utilised by him for that acquisition, installation, erection or construction of any

1 Where I refer to provisions without more, I am referring to provisions in the Act.
2 2012 (1) SA 522 (SCA), 74 SATC 61.
3 [62].
4 [13].

> machinery, plant, building, or any improvements to a building … to be used by him for the purposes of his trade …'
>
> [49] Interest that SACS has incurred is, in my view, deductible in terms of s 11(*b*A): it has been 'actually incurred' by SACS on its loans from BoE Merchant Bank and First Rand Bank to pay SGM for the construction of the prison. I am also of the view that the various fees are deductible in terms of s 11(*b*A): because of their close connection to the obtaining of the loans and the furtherance of SACS' project, they qualify as 'related finance charges' for purposes of this section."[5]
>
> [Emphasis added]

[9] In Custodial Services, the fees in question were thus held to be deductible due to their "close connection to" the loans. This is what made them "related finance charges". Trevor Emslie SC in The Taxpayer[6] when commenting on the case, expressed the opinion that "related finance charges" was interpreted very widely. I agree with the learned author. It was certainly not a short list of fees the taxpayer sought to deduct. Here the taxpayer seeks to deduct only one species of fees, i.e. the raising fees charged by the facility agent who arranged the loans. What the taxpayer in this case seeks to deduct is thus far more circumscribed.

[10] The Tax Court in *Fourways Precinct v Commissioner for the South African Revenue Service*[7] followed *Custodial Services* when it held that a "statutory and execution fee" and a "debt origination fee", both upfront fees in the context of loans, constituted "related finance charges".

[11] The statutory regime has since changed, it seems in response to the *Custodial Services* decision. The most significant change is that section 11(*b*A), which spoke of any "any interest (including related finance charges)" was repealed and a new definition of interest introduced. Interest is now defined as including the "the gross amount of any interest or similar finance charges".[8] [Emphasis added]

[12] As far as I am aware, there is no judicial authority on the current formulation.

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5 The interpretation adopted in *Custodial Services* was confirmed in *NTC1870* 76 SATC 97, a decision that flowed from the referral back to SARS for a decision on the quantum.

6 January to February 2023 at p. 12.

7 IT25042, 14 July 2022.

8 There was an intervening formulation which retained "related finance charges".

The interpretive exercise

[13] The determination of the matter involves the interpretation of statutory provisions. While the principles that guide the interpretive exercise are settled, four cases, in my view, are particularly instructive.

[14] In *Capitec*,[9] Unterhalter AJA said this about the correct approach when interpreting words in a document:

> "[25] . . . The much cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)* offer guidance as to how to approach the interpretation of words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasises, citing well-known cases, '[t]he inevitable point of departure is the language of the provision itself'.
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> . . .
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> [50] . . . The meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but also understanding the words and sentences that compromise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of the sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.
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> [51] . . . The proposition that context is everything is not a license to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."

[15] In *Tshwane City v Blair Atholl*[10] it was observed that the Supreme Court of Appeal:

> "[63] . . .has consistently stated that in the interpretation exercise the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue."

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9 *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99, 2022 (1) SA 100 (SCA).

10 2019 (3) SA 298 (SCA).

[16] In *ITC 1930*,[11] Savage J cautioned against an interpretation that:

> "[7] . . . would strain at the language of the provision and lead to an unbusinesslike and unwieldy result…"

[17] In *Telkom SA SOC v Commissioner, South African Revenue Service*,[12] Swain AJ held that:

> "[18] I turn to consider the *contra fiscum* rule. In *NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue* 2000 (3) SA 1040 (SCA) para 17, the rule was described in the following terms:
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> > 'An alternative argument advanced on behalf of the appellant was that subpara (d)(iv) was at least reasonably capable of the construction which the appellant sought to place upon it. Accordingly, so it was contended, the *contra fiscum* rule required that the subparagraph be so construed. Where there is doubt as to the meaning of a statutory provision which imposes a burden, it is well established that the doubt is to be resolved by construing the provision in a way which is more favourable to the subject, provided of course the provision is reasonably capable of that construction . . . But, where any uncertainty in a statutory provision can be resolved by an examination of the language used in its context, there is no rule of interpretation which requires that effect be given to a construction which is found not to be the correct one merely because that construction would be less onerous on the subject.'
>
> [19] C I Miller Application of a New Approach to Interpreting Fiscal Statutes in South Africa (2016) para 6.4, in a limited-scope dissertation submitted in January 2016 as part fulfilment of the requirements for the degree of Master of Commerce, at the University of Johannesburg, states the following, with which I agree:
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> > 'It is submitted that the *contra fiscum* rule still applies in South African law and that it would be incorrect to conclude that the *contra fiscum* rule has no application in the context of an interpretation of a fiscal provision, anti-avoidance or otherwise. The rule is clearly consistent with the values underlying the Constitution. It is conceded that in the modern era of a purposive approach to interpretation, this rule may have a reduced application when compared to the previous era which favoured a strict literal approach to interpretation which more easily appeared to lead to ambiguity. However, to the extent that following analysis, a purposive approach ultimately yields two constructions which are both equally plausible, it is submitted that the *contra fiscum* rule should apply and the court should ultimately conclude in favour of the taxpayer.'
>
> [20] Counsel for Telkom submitted that the *contra fiscum* rule should be applied at the outset, as part of the interpretive technique to be utilised in establishing the meaning of words, contained in a fiscal statute. I, however, agree with the submission by counsel for the

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11 *ITC 1930* (2019) 82 SATC 271 (C).

12 [2020] ZASCA 19 at paragraphs [18] – [20].

> Commissioner, that the rule should only be invoked, after an interpretational analysis results in an irresoluble ambiguity as to the meaning of the particular provision in the fiscal statute."

[18] Informed by these cases, I understand these to be the interpretive principles: **(1)** The interpretive exercise is a search for the meaning embedded in the text, and in this sense, meaning is "the most compelling and coherent account the interpreter can provide". **(2)** Meaning is ascertained by way of a unitary exercise "making use of the sources of interpretation" (i.e. the triad of text, context, and purpose). **(3)** The exercise must be undertaken in an open-minded fashion. One must guard against the application of the triad in a mechanical fashion. **(4)** The interpretative exercise must not be aimed at the rationalisation of a predetermined result. **(5)** Words and language matter as without them there can be no interpretive exercise. They are the inevitable point of departure. **(6)** Regard must be had to the relationship between the words, the concepts, or ideas they express, and the place of the contested provision within the whole. **(7)** Context is not everything. It is not a licence to attribute a meaning that is untethered to the text and architecture of the document. **(8)** One must guard against a meaning that strains the language of the provision. **(9)** One must also guard against an interpretation that yields an unbusinesslike and unwieldly result. **(10)** The *contra fiscum* rule must only be invoked if the interpretive analysis results in an irresoluble ambiguity.

The relevant provisions

[19] The relevant statutory provisions are section 11(*a*) and 11(*x*) and section 24J(2).

[20] Section 11(*a*) and 11(*x*) read as follows:

> **"11. General deductions allowed in determination of taxable income—**For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived—
>
> (*a*) expenditure and losses actually incurred in the production of income, provided such expenditure and losses are not of a capital nature,
>
> …
>
> (x) any amounts which in terms of any other provision in this Part, are allowed to be deducted from the income of the taxpayer."

[Emphasis added]

[21] Section 24J(1) which resides under "this Part", defines "interest" and "issuer":

> " **'interest'** includes the—
>
> (*a*) gross amount of any interest or similar finance charges, discount or premium payable or receivable in terms of or in respect of a financial arrangement;

"issuer" in relation to any instrument–

(*a*) means any person who has incurred any interest or has any obligation to repay any amount in terms of such instrument …"

[22] Section 24J(2) provides that:

"Where any person is the issuer in relation to an instrument during any year of assessment, such person shall for the purposes of this Act be deemed to have incurred an amount of interest during such year of assessment, which is equal to—

(*a*) the sum of all accrual amounts in relation to all accrual periods falling, whether in whole or in part, within such a year of assessment; or

(*b*) an amount determined in accordance with an alternative method in relation to such year of assessment in respect of such instrument which must be deducted from the income of that person derived from carrying on any trade, if that amount is incurred in the production of the outcome."

[23] The first point of contention is whether the raising fees fall under the definition of "interest or similar finance charges". If so, they are deductible in terms of section 11(*x*) read with section 24J(1) and (2). If not, it must be determined whether they are deductible under section 11(*a*).

The most compelling and coherent account

[24] Perhaps it is stating the obvious, but "the most compelling and coherent account" is not the same as "the only account". It is the most persuasive and consistent account that the interpreter is able to provide given the material at their disposal. It may be, as I suggest it is in this case, that both interpretations contended for, are somewhat strained in the sense that there is a residual and unresolved linguistic tension with the text. But that cannot, of course scupper the interpretive exercise. A determination must be made.

Words and language: the inevitable point of departure

[25] Section 24J(1) provides for an expanded definition of what is generally understood as interest where it provides that "interest" for the purposes of section 24J includes "interest or similar finance charges". Thus "interest" as defined must necessarily be wider than "interest" in the common law or normal sense. It cannot be otherwise. If a diminished meaning was envisaged, the definition would exclude things rather than include them.

[26] The courts have had occasion to consider determine the meaning of "include". *Attorney-General, Transvaal v Additional Magistrate, Johannesburg*[13] *and Dibowitz v CIR*,[14] to which I was referred, are two such cases. In the former Innes CJ held that "include" when "used in a definition clause or in an interpretative sense is no doubt generally a word of enlargement" and De Villiers AJ held that "including" in that context "is a word of addition, not of limitation". In *Dibowitz* it was held that the word "including" was used by the legislature "in order to enlarge the meaning of 'profits distributed' and must be construed as comprehending not only profits distributed in the ordinary meaning of those words but also things that are not profits distributed *stricto sensu*".

[27] I agree that the use of "including" enlarges or broadens the definition of interest for purposes of section 24J.

[28] The use of "or" between "interest" and "similar finance charges" is also significant. "Or" is "used to link alternatives".[15] Thus "similar finance charges" is an alternative to "interest". It is something other than interest.

[29] As to the meaning of "finance charge", the Oxford Online Dictionary defines as "an amount paid by the borrower to a lender for arranging a loan, or interest amounts paid on the loan". It was accepted by all that raising fees are finance charges.

[30] What about "similar"? "Similar" and its various iterations connotates resemblance of some sort. The extent of the similarity is often indicated by adverbs such as "vaguely", "very" or "remotely" or the context in which the word is used. "Similar" does not mean "identical to" or something to that effect, certainly not in this context. If it were so, that would render the whole phrase "similar finance charges" superfluous.

[31] As with "include", the courts have also considered the meaning of "similar". In *South African Railways and Harbours v Springs Town Council*,[16] the question arose as to what constituted "properties of <u>similar</u> class, character, value [or] position". In response to a suggestion that "similar" meant properties that also abutted a railway line, the Court held that:

> "But this is to interpret the words 'of similar class, character…' as meaning 'of identically the same class, character…'; and to lose sight of the difference between 'same' and similar'. A thing is similar to another if, without being identical with it, there is a <u>resemblance in some relevant respect</u>." The distinction is well brought out in the case of Drew v Guy (1894 (3) Ch. 25) where the question was whether there had been a breach of a covenant in a lease

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13 1924 AD 430 at 429 and 430.
14 *Attorney-General, Transvaal v Additional Magistrate, Johannesburg* 1952 1 SA 61 (A) at 61B – D.
15 Oxford Online Dictionary.
16 1949 (2) SA 34 (T).

> against carrying on the business of a restaurant similar to that carried on by another tenant. The other tenant had a restaurant on licenced premises connected with his hotel. The defendant had no licence to sell intoxicating liquors and his business was of an inferior class to the other and his prices were much lower. There were also other points of difference; but it was held that the defendant's business was similar to the other because it was calculated to compete with it, particularly in the supply of hot meals."

[Emphasis added]

[32] The "similarity" in question must thus be relevant. In *Drew* the relevant similarity was that both businesses were competing in the same class. The irrelevant dissimilarity was that the one was licenced to serve alcohol and the other was not. "Similarity" must also not be conflated with "sameness".

[33] In *R v Revelas*,[17] the Court held that:

> "It has been said that that word [i.e. similar] is 'almost always a difficult word to construe' (*Union Government (Minister of Finance) v Gower* 1915 A.D. 426 …). Obviously there are degrees of similarity or likeness, some approaching, and exceptionally perhaps even reaching, sameness, others amounting to no more than a slight resemblance. The similarity may be basic or superficial, general or specific. I do not think the words 'a similar'… should be given the meaning 'the same'."

[Emphasis added]

[34] Relying on these authorities, the taxpayer argued that there must be relevant resemblance to interest in one or more respects and "similar" cannot mean "strictly comparable by having characteristics in common" or "predominantly have matching characteristics to interest" as SARS contended.

[35] In my view the notion of "relevant resemblance" makes sense. It speaks to peculiar context of the case. For example, differences in the colour of houses in a housing complex where there are colour prescripts is relevant. In another case, for example if there were no colour prescripts, the colour of a house would, in all likelihood, be entirely irrelevant.

[36] This takes me to the meaning of "interest". In *Commissioner for Inland Revenue v Lever Brothers & Unilever Ltd*,[18] Watermeyer CJ held that:

> "In the case of a loan of money, the lender gives the money to the borrower, who in return incurs an obligation to repay the same amount of money at some future time and, if the loan is one which bears interest, he also incurs an obligation to pay that interest. … As a rule the lender either gives credit to the borrower or transfers to him certain rights of obtaining credit

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17 1959 (1) SA 75 (A).
18 1946 AD 441.

> which had previously belonged to the lender, and this supply of credit is the service which the lender performs for the borrower, in return for which the borrower pays him interest … Although, colloquially, one speaks of a debt carrying interest, or interest on a debt, as though interest were a sort of growth sprouting from the debt, the language used means no more than that the borrower pays interest, if that is the agreement between the borrower and lender, as consideration for the benefits allowed to him by the lender."

[37] In *Cactus Investments (Pty) Limited v Commissioner for Inland Revenue*,[19] the Court stated the following:

> "In the present case Cactus did not give its customers credit; we are dealing with ordinary loans for consumption and with money actually paid to borrowers. The interest which they were obliged to pay was certainly not to compensate Cactus for any service rendered to them. In the Lever Bros case Watermeyer CJ illustrated his remarks by referring by way of analogy to the relationship between a lessor the analogy of a lease may have been apt but in the present situation it is not a true analogy at all. Rent can obviously be regarded as compensation to the lessor for the use of his property and the lessor can (depending on the terms of the agreement) rightly be said to have continuing obligations apart from making the subject of the lease available to the lessee. <u>But, bearing in mind again that we are dealing with loans for consumption which brought about that each borrower became the owner of the money received, the interest cannot be compensation to Cactus for the use of Cactus's money</u>."

[Emphasis added]

[38] I was also pointed to section 8FA, which deals with the taxation of "hybrid interest". "Interest" is defined in section 8FA(1) as meaning "interest" as defined in section 24J(1). This means "interest" as contemplated in section 24J(1) includes "hybrid interest" which is not fixed with reference to an interest rate or to the time value of money. Accordingly, "interest" for purposes of section 24J is not necessarily interest determined with reference to the time value of money, it can be compensation in exchange for the provision of credit. A once-off lump sum payment based on a percentage of the value of the finance advanced, without regard to the period of the loan, may therefore not be closely associated with the time value of money, but that does not make it dissimilar to interest for purposes of section 24J.[20]

[39] SARS argued that for a raising fee to be a "similar finance charge" it must have to have the fundamental characteristics of common law interest. While this approach seems to conflate the meanings of "similar" and "same", I consider the arguments advanced by SARS.

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19 1999 (1) SA 315 (SCA).

20 Another provision that expands the definition of interest is section 24JA(2) which provides that "any amount received by or accrued to a client in terms of a *mudaraba* [a Sharia compliant financing arrangement] is deemed to be interest as contemplated in paragraph (*a*) of the definition of "interest" in section 24J(1)."

[40] It was argued that as the raising fees were incurred prior to the effective dates of the loan / facility agreements, they were “separate and distinct to and from the interest that can only occur after the loan / facility agreements become effective”. In my view, a timing difference as to the incurral of raising fees and the incurral of interest is not a relevant dissimilarity as it does not change the nature of the charges in question.

[41] A further argument was that “the payment of the raising fees is an Advanced Condition, whereas the due date for payment of the interest is in each instance at a future date subsequent to the use of the loan”. This argument is premised on the incorrect notion that interest is paid on the use of the loan when in fact it is a loan for consumption. For that reason, the argument does not, in my view have merit.

[42] SARS argued that because the raising fees had to be paid before the taxpayer would receive the benefit of the loan, the raising fees were not compensation for the use / benefit of the money. I do not agree with this submission. The payment of the raising fees is part and parcel of the compensation for the loan. Without the payment of the raising fees there would be no loan, and the taxpayer would not have had the benefit of the money.

[43] It was also argued that while the raising fees were expressed as a percentage of the loan amount, they were not fixed with reference to the “time value of money” and/or “the capital (loan amount) outstanding at any point during the term of the agreement”. SARS thus seems to appreciate the fact that the determination of the raising fee with reference to the loan amount constitutes a similarity. The fact that the raising fee is not determined with reference to the time value of money or the outstanding balance on the loan during the course of the agreement is a dissimilarity. However, in my view, it is not a relevant dissimilarity and in making the argument, SARS is elevating “similarity” to “sameness”.

[44] It was also argued for SARS that raising fees were a consideration for arranging the loans and not for the use of the loan. The raising fees are indeed a consideration for the arrangement of the loan. Without the payment of the raising fees there would be no loan. This underlines the close proximity or association between the raising fees and the loans and is indicative of a relevant similarity between the two.

[45] SARS argued that the raising fees involved once off payments while interest was paid periodically. As stated above I do not think this is a relevant dissimilarity.

Conclusion

[46] The raising fees in question are “interest or similar finance charges” as envisaged by section 24J(1). Whilst there is a residual linguistic tension with the text this is, in my view, the most compelling and coherent account I can provide, and it certainly does not yield an unbusinesslike and unwieldy result. I do not think that it is necessary to invoke the *contra fiscum* rule in this case, as there is not an irresoluble ambiguity.

[47] Given this it is not necessary for me to consider the taxpayer’s alternative argument based on section 11(*a*).

Order

Accordingly, I order that the taxpayer’s appeal be upheld.

MYBURGH AJ
Cape Town
13 January 2025

I agree.

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Dr Alison Futter

I agree.

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Ms Sonja Jordaan

Date of hearing: 27 and 28 August 2024

Judgment delivered: 13 January 2025