

reportable: Yes / No Circulate to Judges: Yes / No Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

DATE HEARD: 11 June 2002
DATE DELIVERED: 12 August 2002

In the matter of:

AKHARWARAY G H

Versus

THE COMMISSIONER for the SOUTH AFRICAN REVENUE SERVICES

Coram: **LACOCK J, WJK DU TOIT (Member), JJ SPIES (Member)**

LACOCK J:

1. This is a direct appeal to the Tax Court under the provisions of Section 83 of the Income Tax Act, no 58 of 1962 (The Act). We were informed that, by reason of the uniqueness of the relevant facts pertaining to this matter and the legal principles involved, the Commissioner for the South African Revenue Services (The Commissioner) has exercised his discretion under Section 83 A(1) of the Act to refer the appeal directly to this Court instead of referring same to the Tax Board in terms of the provisions of the aforesaid Section of the Act.

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2. The uncontested facts pertaining to this matter are the following:

2.1 The appellant was at all relevant times a member of the African National Congress (ANC), a political organisation.

2.2 During the 1994 National Elections for Members of the Provincial Legislatures, the appellant was deployed on the list of candidates of

the ANC for the Provincial Legislature of the Northern Cape Province. In accordance with prevailing legislation at the time, candidates for inter alia Provincial Legislatures were internally nominated by their respective political parties and their names appended to a list of candidates. These lists (referred to as party lists) were then submitted by the participating political parties to the Electoral Officer whereupon it became the official party list of candidates for each political party participating in the elections. On election day voters did not vote for individual candidates, but voted for a political party. The percentage of votes obtained by each participating political party, determined the number of elected candidates of that particular party proportionally to the total number of Members of the Legislature.

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20 2.3 The appellant, by reason of his ranking on the party list of the ANC, was elected as a Member of the Provincial Legislature in the 1994 Provincial Elections.

2.4 As a member of the ANC and prior to the aforesaid elections, the appellant bound himself to the terms and conditions of the Code of Conduct for elected members of the ANC. What is of relevance for purposes of this matter are the contents of the following paragraphs of the Code reading as follows:

10 5.1 *"A portion of this salary of elected members shall be paid into the coffers of the organisation. The proportion of taxable salary to be directed to the organisation shall be determined from time to time by the NEC and shall be paid by way of compulsory stop-orders.*

6.2 *All elected representatives shall be available for parliamentary or governmental or organisational work and activity. They shall be fully accountable to the organisational structures in the regions/provinces where they are located.*

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7.1 *Every elected representative shall sign and therefore bind herself/himself to this Code of Conduct as soon as it is promulgated by the National Executive Committee."*

During the 1995 year of assessment, the monthly levy (the levy) payable by the appellant and as determined by the National Executive Committee of the ANC, amounted to R1500.00 per month.

- 10 2.5 In pursuance of the Code, the appellant contributed an amount of R12 000.00 to the coffers of the ANC over a period of eight months during the 1995 year of assessment. The deductibility of this amount from the income of the appellant during the said year of assessment, forms the subject matter of this appeal.
- 2.6 Payment of the levy by an elected member to the Executive of the ANC, is compulsory. Failure to pay the levy will lead to the forfeiture of such member of his listing and membership of the Provincial Legislature, and consequently his entire income as a Member of the Provincial Legislature.
- 20 2.7 The monthly levy is paid to the national office of the ANC where it becomes part of the national pool of funds of the ANC. These funds are inter alia appropriated for the maintenance and management of party offices, the covering of expenses incurred for debating and assessing of party policies, the training and education of party members of Local Authorities, Members of Provincial Legislatures and Members of the National Assembly, and, generally for the promotion of the political agenda of the ANC.
- 10 2.8 The appellant, in his capacity as Member of the Provincial Legislature makes use of the aforesaid party facilities and derive benefits therefrom. Party offices and office facilities are regularly used by ANC Members of the Provincial Legislature, since no constituent government offices are available for Members apart from their Kimberley offices. These facilities are used by Members of the Provincial Legislature in the furtherance of their objectives and responsibilities as a Member of the Provincial Legislature. There is no real distinction between the objectives of the ANC as a political party

and those of a Member of the Provincial Legislature as an elected member of the ANC in his/her official capacity as such: the ANC members of the Provincial Legislature holds office at the behest of the ANC and is duty-bound to promote the objectives and political policies of the ANC.

10 3. The appellant also appealed against the refusal of the Commissioner to allow a deduction of R12.00 in respect of an annual subscription paid by the appellant to the ANC, but the appellant abandoned his appeal in regard hereto and same is of no further relevance.

4. Section 11(a) of the Act reads as follows:

"For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived-

(a) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature;"

20 What is also of relevance is Section 23(g) of the Act, reading as follows:

"No deductions shall in any case be made in respect of the following matters, namely-

(g) any moneys, claimed as a deduction from income derived from trade, to the extent to which such moneys were not laid out or expended for the purposes of trade"

10 The first issue for determination is therefore whether the aforesaid monthly levies paid by the appellant to the ANC were expenditure actually incurred in the production of income; and, secondly, whether such expenditure are not of a capital nature.

5. The onus of proving that the Commissioner wrongfully disallowed the deduction claimed by the appellant, rests on the appellant. See Section 82 of the Act.

20 6. To my mind, the appellant has succeeded in discharging the aforesaid onus for the reasons that follow.

7. Having regard to the electoral system and the governmental structures of the Republic of South Africa, as well as, the pivotal role played by political parties in the 3 tiers of Government, i.e. National-, Provincial- and Local Government, the following emerges:

7.1 Voters no longer vote for individual candidates, but vote for a political party of their choice.

10 7.2 The executive authority of political parties compile their party lists of candidates and determine the ranking of their candidates on such party lists.

7.3 Elected candidates hold office for example as Members of Provincial Legislatures at the behest of the executive authority of its party.

20 7.4 Elected candidates are expected and in fact duty-bound to advance the political policies of the political party to which they belong.

8. As an elected member of the ANC, the appellant is, in terms of the Code of Conduct of the ANC (and which code is binding upon the appellant) obliged to pay the monthly levy to the ANC. The levy is therefore an obligatory expense.

10 9. Failure to pay the levy will inevitably result in the appellant's forfeiture of his office as an elected member of the ANC and consequently as a Member of the Provincial Legislature. His ability to derive any (taxable) income as a Member of the Provincial Legislature is therefore dependent upon his payment of the levy. Payment of the levy can therefore be regarded as a prerequisite to the appellant's ability to earn an income as an elected member of the ANC. There is therefore a direct link between the expenditure incurred (the levy paid) and the income producing out of the appellant, i.e. the earning of a salary as a Member of the Provincial Legislature.

10. The levies paid by elected members of the ANC are inter alia appropriated by the ANC to provide office facilities for its elected members, and elected members derive other benefits therefrom for instance educational benefits for the betterment of their performance as an elected member of the ANC. ANC members of the Provincial Legislature, and the appellant in particular, make use of these office facilities on a regular basis, and are directly involved in the ongoing debating process regarding party policies and objectives. It is the duty of the appellant as a Member of the Provincial Legislature to acquaint himself of these policies and objectives and to implement same in his capacity as an ANC elected member of the Provincial Legislature. Viewed from this angle, there is again a direct link detectable between the expenditure incurred and the income producing act of the appellant.

11. The obligation to pay the monthly levy is however not a once-off obligation, but is a recurrent and continuous one. The appellant is obliged to pay the levy every month for as long as he earns an income as an elected member of the ANC.

Rhodesia Railways and Others v Commissioner of Taxes 1925 AD 438 at 469.

Neither can it be said that the relevant expense was incurred for the purpose of acquiring some income producing concern.

George Forrest and Timber Co. Ltd. v CIR 1924 AD at 527

The purpose for the payment of the levy was not to acquire the income derived as an elected member of the ANC, but rather the consequence thereof.

The relevant expenditure is therefore not of a capital nature.

By reason of the aforesaid, I am of the opinion that the Commissioner wrongfully disallowed the deduction of the monthly levies paid by the appellant to the ANC during the 1995 year of assessment.

The appeal is accordingly upheld. No order is made in regard to the costs of the appeal.

H J LACOCK
JUDGE


WILLEM J K DU TOIT
MEMBER

JJ Spies 7/8/2002

JJ SPIES
MEMBER

I agree with the judgement

The appeal is accordingly upheld. No order is made in regard to the costs of the appeal.



H J LACOCK
JUDGE

WILLEM J K DU TOIT
MEMBER

JJ SPIES
MEMBER

The appeal is accordingly upheld. No order is made in regard to the costs of the appeal.

H J LACOCK
JUDGE



WILLEM J K DU TOIT
MEMBER

JJ SPIES
MEMBER

Mrs a Collins represented the Commisioner for Inland Revenue.

Mr G.H. Akharwaray appeared on behalf of himself.