

*IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA*

In the matter between

NST FERROCHROME (PTY) LIMITED

Appellant

and

THE COMMISSIONER FOR INLAND REVENUE

Respondent

*CORAM: HEFER, SCOTT, ZULMAN, PLEWMAN et STREICHER
JJA*

HEARD: 12 MAY 2000

DELIVERED: 26 MAY 2000

**Deduction in terms of s 12 C of Income Tax Act - meaning of “any person”
in subpara (d)(iv) of definition of “connected person” in s 1.**

J U D G M E N T

SCOTT JA:

[1] The question that arises in this appeal is whether the expression “any person” in subpara (d)(iv) of the definition of “connected person” in s 1 of the Income Tax Act 58 of 1962 (as it read in 1994) is to be construed as including a company.

[2] The appellant owns and operates a furnace. Its main business is the production and sale of ferrochrome. It was incorporated in pursuance of a joint venture agreement concluded between Samancor Ltd and Dippon Denko Co Ltd on 20 September 1993. In terms of the agreement the shareholding in the appellant is held equally by Samancor and Dippon Denko. Each appoints an equal number of directors with equal voting rights. Each enjoys joint control.

[3] In terms of a written agreement of sale similarly dated 20 September 1993 (but with a later effective date) the appellant purchased from Samancor a furnace situated at Tubatse for the production of ferrochrome together with

ancillary equipment and the site on which the furnace was located for a total amount of R89 650 000. This amount comprised R89 623 760,88 in respect of the furnace and R26 239,12 in respect of the land. At the effective date of the sale the tax value of the furnace was nil. The original cost price of the furnace to Samancor was R48 million.

[4] Section 12 C of the Income Tax Act, broadly stated, permits the cost of certain qualifying items of machinery and plant brought into use and used by a taxpayer to be written off on a straight-line basis over 5 years at a rate of 20 per cent per annum. However, in terms of s 12 C (4), if the asset in question which is brought into use by the taxpayer was previously brought into use by a “connected person” in relation to the taxpayer and that “connected person” was previously allowed a deduction under *inter alia* s 12 C, the deduction available to the taxpayer under s 12 C is to be calculated on the lesser of the cost of the asset to such connected person or the market value thereof on the date upon which the

asset was brought into use by the taxpayer. It follows that if Samancor was a “connected person” in relation to the appellant the deduction allowable is to be calculated on the cost of the furnace to Samancor, *viz* R48 million; if it was not, the deduction is to be calculated on the amount of approximately R90 million paid by the appellant to Samancor.

[5] In respect of the year of assessment ended 30 June 1994 the appellant claimed a deduction in terms of s 12 C calculated on the amount of approximately R90 million. The respondent (“the Commissioner”) was of the opinion that Samancor was a “connected person” in relation to the appellant in terms of s 1 and that the limitation imposed by s 12 C (4) was accordingly applicable. He therefore issued an assessment on the basis that the deduction was to be calculated on the lower amount of R48 million. The appellant objected and appealed successfully to the Special Court. The Commissioner in turn appealed to the Full Court of the Transvaal Provincial Division (Van Dijkhorst, Kirk-Cohen JJ and Maritz AJ). The

appeal was upheld and the order of the Special Court reversed. The judgment is reported *sub nom Commissioner for Inland Revenue v NST Ferrochrome (Pty) Ltd* 1999(2) SA 228 (T). The appeal to this Court is with the leave of the Court *a quo*.

[6] At the relevant time the definition of “connected person” in s 1 was as follows:

“In this Act, unless the context otherwise dictates, ‘connected person’ means -

- (a) in relation to a natural person -
 - (i) any relative; and
 - (ii) any trust of which such natural person or such relative is a beneficiary;
- (b) in relation to a trust -
 - (i) any beneficiary of such trust; and
 - (ii) any connected person in relation to such beneficiary;
- (c) in relation to a member of any partnership -
 - (i) any other member; and
 - (ii) any connected person in relation to any member of such partnership;
- (d) in relation to a company -
 - (i) its holding company as defined in section 1 of the Companies

Act, 1973 (Act No 61 of 1973);

- (ii) its subsidiary as so defined;
 - (iii) any other company where both such companies are subsidiaries (as so defined) of the same holding company;
 - (iv) any person who individually or jointly with any connected person in relation to himself, holds, directly or indirectly, at least 20 per cent of the company's equity share capital, members' interest or voting rights;
 - (v) any other company if at least 40 per cent of the equity share capital, members' interest or voting rights of both such companies is held by the same persons; and
 - (vi) where such company is a close corporation -
 - (aa) any member;
 - (bb) any relative of such member or any trust which is a connected person in relation to such member; and
 - (cc) any other close corporation which is a connected person in relation to the relative or trust contemplated in item (bb); and
- (e) in relation to any person who is a connected person in relation to any other person in terms of the foregoing provisions of this definition, such other person, and in this definition the expression 'beneficiary' means any person who has been named in the will or deed of trust concerned -
- (i) as a beneficiary; or
 - (ii) as a person upon whom the trustee of the trust has the power to confer a benefit from such trust;"

The definition was amended by Act 21 of 1994 but the parties are agreed that the definition in its amended form provides no assistance in the present case. (Cf *Greeff NO v Registrar of Deeds, Cape Town, and Another* 1986(1) SA 175 (A) at 187 A - C.)

[7] As the appellant is a company, the relevant paragraph of the definition was para (d). It is common cause that subparas (d) (i), (ii), (iii), (v) and (vi) were not applicable; in other words, Samancor was not a “connected person” in relation to the appellant in terms of any of these subparagraphs. The question in issue, is whether it was a connected person in terms of subpara (d)(iv). This depends upon whether the words “any person” are to be construed as including a company.

[8] The word “person” was defined at the time in s 1 of the Income Tax Act so as to “include the estate of a deceased person and any trust”. It follows that its meaning was not limited to a deceased estate or trust; it had a wider meaning. Section 2 of the Interpretation Act 33 of 57 provides that “unless the context

otherwise requires or unless in the case of any law it is otherwise provided therein”, the meaning of the word “person” is to include inter alia “any company incorporated or registered as such under any law” and “any body or persons corporate or incorporate”. The words “any person” in subpara (d)(iv) of the definition of “connected person” are accordingly to be construed as including a company unless the context indicates the contrary.

[9] Counsel for the appellant referred to various features of the definition which they contended were indicative of an intention on the part of the legislature to limit the meaning of the words “any person” in subpara (d)(iv) to natural persons only. They submitted, first, that the word “himself” was inappropriate in so far as companies were concerned and its use therefore constituted an indication that only natural persons were being referred to. I do not think there is merit in this submission. Once the word “person” is used in relation to a company as well as a natural person I can see nothing untoward in the use of the corresponding

pronoun “himself” in relation to a company. That the provision could have been rephrased so as to avoid the use of “himself” is of little consequence. Second, it was pointed out that in terms of s 29 of the Close Corporations Act 69 of 1984 only natural persons may hold a members’ interest in a close corporation, not a company. Accordingly, so it was argued, “any person” had to be construed as a reference to natural persons only. Again I do not agree. The contention would be valid if subpara (d)(iv) sought to provide a definition of “connected person” solely in relation to a close corporation. In that event the “any person” could not be a company for the reason pointed out by counsel. But the subparagraph deals with a connected person both in relation to companies and close corporations. One company can of course hold the shares of another. There is accordingly no reason why “any person” cannot refer to both a natural person and a company.

[10] A third feature of para (d) to which counsel referred was its structure.

It was contended that while subparas (d)(i), (ii) and (iii) dealt with companies,

subparas (d)(iv) and (v) dealt with the interest of natural persons in companies or close corporations and subpara (d)(vi) dealt with close corporations. In other words, if “any person” and “persons” in subparas (d)(iv) and (v) respectively were construed as a reference to natural persons the subparagraphs in para (d) would be arranged in a logical sequence. As far as subpara (d)(v) was concerned, it was similarly argued that the reference to a members’ interest indicated that the members’ interest or shares referred to in the subparagraph had to be held by “persons” who were natural persons. What I have said with regard to the reference to “members’ interest” in subpara (d)(iv) applies equally to subpara (d)(v). But there is a more fundamental objection to counsels’ contention. Subparagraphs (d)(i)(ii) and (iii) relate to “connected persons” which are companies, but so does subpara (d)(v). In other words, if “any person” in subpara (d)(vi) is to be construed as a reference only to natural persons, subpara (d)(v) should have preceded subpara (d)(iv) if the subparagraphs were to be in logical sequence. The sequence

of the subparagraphs therefore does not support counsel's construction. On the contrary it supports the opposing view.

[11] Finally counsel submitted that if "any person" in subpara (d)(iv) were to be construed as referring to a company as well as a natural person the effect would be to render subpara (d)(i) superfluous. The reason for this, it was contended, was that subpara (d)(iv), so construed, would result in a company being a connected person in relation to another company even although the former held only 20 per cent of the latter's equity share capital or voting rights, while in terms of subpara (d)(i) the connected person had to be the holding company of the other for which control was necessary and not merely a 20 per cent interest.

[12] It is a well established rule of construction that a statutory provision should, if possible, be construed in such a way that effect is given to every word so that no word, clause or sentence, if it can be prevented, is construed to be superfluous. (See *S v Weinberg* 1979 (3) SA 89 (A) at 98 D - G.) Nonetheless,

instances of obvious superfluity are not uncommon in statutory provisions. There is an example in the very provision with which we are concerned. In view of subpara (d)(vi) which expressly deals with taxpayers which are close corporations, the reference in para (d)(iv) to a members' interest and hence a taxpayer which is a close corporation is superfluous. This is because in terms of subpara (d)(vi) it is sufficient in order to be a connected person in relation to a close corporation merely to be a member; the extent of the interest need not be as much as 20 per cent. Reverting to subpara (d)(i), it is true that there would be a certain degree of overlapping if "any person" in subpara (d)(iv) is construed as including companies, but subpara (d)(i) would not be rendered superfluous as contended by counsel for the appellant. In terms of subpara (d)(i) the reference to "holding company" is as defined in s 1 of the Companies Act 61 of 1973. Section 1(4) of the Companies Act defines holding company as the converse of a subsidiary. The definition of a subsidiary is as follows:

“1(3)(a) For the purposes of this Act, a company shall be deemed to be a subsidiary of another company if -

- (i) that other company is a member of it and -
 - (aa) holds a majority of the voting rights in it; or
 - (bb) has the right to appoint or remove directors holding a majority of the voting rights at meetings of the board; or
 - (cc) has the sole control of a majority of the voting rights in it, whether pursuant to an agreement with other members or otherwise; or
- (ii) it is a subsidiary of any company which is a subsidiary of that other company; or
- (iii) subsidiaries of that other company or that other company and its subsidiaries together hold the rights referred to in subparagraph (i)(aa),(bb) or (cc).”

[13] What is apparent is that subpara (d)(iv) of the definition of “connected person” in the Income Tax Act required what it is convenient to call a lower level of control than that required in terms of ss (i) (aa) of the definition of subsidiary.

It follows therefore that there was some overlapping and subpara (d)(i) could to this extent be said to be superfluous. But the same is not true of ss (i) (bb) of the definition of subsidiary. In terms of this subsection a company will be the holding

company of another even if its shareholding or voting rights in that other is less than 20 per cent, provided only that it has the right to appoint or remove the directors holding a majority of the voting rights at meetings of the board of the other company, ie the subsidiary. It was not disputed that such a right to appoint or remove directors can be acquired by agreement. (It is unnecessary for the present purpose to consider the effect of ss (i) (cc).)

[14] It follows that subpara (d)(i) includes as “a connected person” a company that would not be a “connected person” in terms of subpara (d)(iv) if the latter is construed as applying to companies as well as natural persons. It is true that notionally subpara (d)(i) could have referred only to a part of the definition of “holding company” in the Companies Act but I do not think that it is of any significance that the legislature did not do so. This could in any event have caused uncertainty with regard to the meaning of “subsidiary” in subpara (d)(ii). The point is simply that subpara (d)(i) is not rendered superfluous by construing “any person”

in subpara (d)(iv) as including a company.

[15] The various features of the definition of “connected person” on which appellant’s counsel sought to rely must furthermore be considered in the context of the definition read as a whole. The word “person” is used repeatedly throughout the definition. Leaving aside for the moment subparas (d)(iv) and (v) in which the meaning of the word “person” is in issue, what is apparent is that save for three instances the word “person” clearly includes a company as well as a natural person. As to the three instances, the expression “connected person” in subpara (d)(vi)(bb) is expressly stated to refer only to a trust while in para (a) there is reference on two occasions to a “natural person”. The absence of a similar qualification to the word “person” in subpara (d)(iv) is further confirmation that it is to be interpreted as including a company.

[16] It follows that in my view there is no proper basis for limiting the expression “any person” in subpara (d)(iv) to a natural person and that the Court

a quo was correct in holding that it applied equally to a company.

[17] 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. (See for eg *Fundstrust (Pty) Ltd (In Liquidation) v Van Deventer* 1997(1) SA 710 (A) at 735 G - H; *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 (4) SA 202 (A) at 216 C.) 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.

(See for eg *Glen Anil Development Corporation Ltd v Secretary for Inland*

Revenue 1975 (4) SA 715 (A) at 726 *in fine* - 727 H.) For the reasons already

given, I am satisfied that the construction of subpara (d)(iv) advanced on behalf of

the appellant is not correct. It follows that the alternative argument must likewise

fail.

[18] The appeal is dismissed with costs.

D G SCOTT JA

Concur:

HEFER JA

ZULMAN JA

PLEWMAN JA

STREICHER JA