

IN THE TAX COURT HELD IN PRETORIA /ES

CASE NO: 10849

IN THE MATTER BETWEEN:

APPELLANT

AND

THE COMMISSIONER FOR THE SOUTH AFRICAN

REVENUE SERVICE

RESPONDENT

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JUDGMENT

BERTELSMANN, J

This is an appeal against the respondent's decision to deny the appellant tax exempt status.

The appellant applied for exemption from income tax during September 1997.

The application was made in terms of section 10(1)(cA) of the Income Tax Act.

The application was based upon the assertion that the appellant was entitled to exemption from income tax as provided for in section 10(1)(cA) which reads:

**"10. Exemptions -**

(1) There shall be exempt from the tax-

...

- (cA) the receipts and accruals of-
- (i) any institution, board or body (other than a company registered or deemed to be registered under the Companies Act, 1973 (Act no 61 of 1973), or any law repealed by that Act and any co-operative formed and incorporated or deemed to be formed and incorporated under the Co-operatives Act, 1981 (Act no 91 of 1981), and any close corporation and any trust established by or under any law and which, in the furtherance of its sole or principal object-
    - (aa) conducts scientific, technical or industrial research;
    - (bb) provides necessary or useful commodities, amenities or services to the State (including any provincial administration) or members of the general public; or
    - (cc) carries on activities (including the rendering of financial assistance by way of loans or otherwise) designed to promote commerce, industry or agriculture or any branch thereof;

Provided that such institution, board, body or company-

- (a) has been approved by the Commissioner subject to such conditions as he may deem necessary to ensure that the activities of such institution,

board, body or company are wholly or mainly directed to the furtherance of its sole or principal object;

- (b) is by law or under its constitution-
  - (i) not permitted to distribute any of its profits or gains to any person, other than, in the case of such company, to its shareholders;
  - (ii) require to utilise its funds solely for investment or the object for which it has been established; and
  - (iii) required on dissolution-
    - (aa) where the institution, board, body or company is established under any law, to transfer its assets to some other institution, board or body which has been granted exemption from tax in terms of this paragraph and which has objects similar to those of such institution, board, body or company; or
    - (bb) where the institution, board or body is established by law, to transfer its assets to-

- (A) some other institution, board or body which has been granted exemption from tax in terms of this paragraph and which has objects similar to those of such institution, board, body or company; or
- (B) to the State; ..."

The appellant contends that it is an institution referred to in this section. In particular, it is the appellant's case that it was established "by or under any law".

In a letter addressed to the South African Revenue Service on 23 August 2001, the appellant's attorneys of record describe the status of the appellant as follows:

- “1. The X Association ('the association') was founded in New York.
2. The association later changed its name to Y.
3. Y carries on business as an independent Classification Society, incorporated and formed in terms of a special act of the New York state legislature, a copy of which is enclosed herewith marked 'annexure A'.
4. A classification society can be defined as setting and maintaining standards of safety and reliability by establishing rules for the design, construction and maintenance of merchant ships.

5. Y is a non-profit corporation without the power to distribute any of its profits.
6. ...
7. Y has a South African branch that performs the aforementioned public services for the South African maritime community.
8. ...
9. In terms of the Income Tax Act ('the Act'), Y was previously dealt with as an "external company".
10. In terms of the Revenue Laws Amendment Act, 2000, Y is now classified as a 'non resident'."

The letter continues to explain that Y enjoyed tax exempt status as from 1970, in accordance with the provisions of article XI of the Double Tax Convention between South Africa and the United States. This convention was abrogated in July 1987. This abrogation brought Y within the purview of the Income Tax Act.

The question that must now be decided is whether the appellant can qualify as an entity that is entitled to be exempt from income tax in terms of the provisions that I have quoted above.

The crisp question now arises whether the appellant can be regarded as "an institution, board or body ... established by or under any law ..."

The first issue that needs to be decided is whether the words "any law" refers to South African statutes only, or whether laws of federal states of the United States of America are included in that definition.

Before dealing with this issue, the definition of "company" must be considered. In section 1 of the Income Tax Act, 58 of 1962 ("the Act") it is defined as follows:

**"Company' includes-**

- (a) any association, corporation or company (other than a closed corporation) incorporated or deemed to be incorporated by or under any law in force or previously in force in the republic or in any part thereof, or any body corporate formed or established or deemed to be formed or established by or under any such law; or
- (b) ..."

The alternative does not apply to this case, as it deals with foreign dividends received.

Although the word "any" indicates inclusivity, Mr Spilg SC on behalf of the respondent contended vigorously that the "law" intended in section 10(1)(cA) is South African law and in particular South African statutory law. In this connection, he relied in the first instance upon the Interpretation Act 33 of 1957, which defines "law" as "means any law, proclamation, ordinance, Act of Parliament ..... an enactment having the force of law".

This approach is supported by a considerable body of venerable authority. Bell's *South African Law Dictionary* defines "any law" as "an enactment having legislative authority in the Union", and relies for this proposition upon *R v Adams* 46 CPD 288. In this decision it was held that the word "law" as used in the Criminal Procedure Act 31 of 1917 was intended to refer to "any law enacted by a body having legislative authority in the Union or any other law especially made applicable in the Union". (p293-294).

*R v Detody* 1926 AD 201 is to the same effect.

This interpretation of "law" is the same as that intended in section 229 of the Interim Constitution perpetuating the existing preconstitutional laws, albeit "subject to this Constitution". See *Ynuico Ltd v Minister of Trade & Industry and Others* 1996 3 SA 989 (CC) at 994I-995E.

*R v Detody, supra*, was referred to with approval by BOZALEK, J in *Robertson and Another v City of Cape Town and Another; Truman-Baker v City of Cape Town* 2004 5 SA 412 (C).

Strong support for Mr Spilg's contention is found in the fact that the word "law" has consistently been interpreted as excluding the common law, unless the contrary appears clearly. See *inter alia Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 1 SA 215 (W) at 226B-H.

See further *R v Malinge & Others* 1955 1 SA 345 (EDLD); *Marks and Another v Port Elizabeth Tramway Co* 1939 EDL 35; *R v Kisten and Others* 1959 1 SA 105 (N); *S v Khumbisa and Others* 1984 2 SA 670 (N).

Mr Shaw QC, who appeared for the appellant, argued that "any law" must include the legislative enactments of foreign countries.

Although this argument is attractive and I was initially inclined to uphold it (because the result may be regarded as iniquitous for the appellant if it is not) a moment's reflection must show that the legislature could not but have intended South African statutes. The entire purpose of the Income Tax Act is to control the revenue accruing to the state from taxes levied upon the income of the citizenry.

To give recognition to creatures created by foreign statutes without any qualification or definition or might seriously endanger the object of the entire Income Tax Act.

The entities which the legislature clearly had in mind to exempt from the tax are those to which Mr Spilg referred: parastatals created by statutes passed by the South African Parliament, such as the South African Bureau of Standards.

Once this conclusion has been reached, it becomes unnecessary to deal with the other interesting aspects and arguments advanced by counsel, nor is it necessary to deal with the evidence relating to the creation, operation and control of the appellant.



The appellant simply does not qualify as a body to whom section 10(1)(cA) of the Act applies.

Under the circumstances the appeal must be dismissed.

E BERTELSMANN  
JUDGE OF THE HIGH COURT