REPORTABLE

CAPE INCOME TAX SPECIAL COURT

BEFORE :

The Honourable Justice JHM Traverso	**:**	**President**
Mr. R. de Beer	**:**	**Accountant Member**
Mr. E.E. Grubb	**:**	**Commercial Member**

CASE OF

NO: 11515

(Heard in Cape Town on 19 August 2005)

J U D G M E N T

[1] The appellant is an employee of A.

[2] He was previously employed by B, as group secretary and group accountant. He retired in February 1995. The appellant was at the time of his retirement a member of B Pension Fund ("the Fund"). The Fund was administered by Old Mutual.

[3] After the appellant's retirement he received a monthly pension from the Fund.

[4] During 1999 Old Mutual decided to demutualise and as a result of the demutualisation Old Mutual allocated 3826900 shares to the Fund. The shares were converted to cash by the Fund and added as a windfall profit to the general reserve account.

[5] During March 1999 the trustees decided to offer the value of the share allocations to pensioners through the following options:

(a) To remain members of the Fund and receive 50% of the share allocation in cash or as an additional pension;

(b) To have their pensions transferred to individual contracts in terms whereof their membership of the Fund would cease and they would become eligible to receive 100% of the value of the demutualisation shares made available to them in a lump sum.

[6] On 7 March 2000 the appellant chose the second option and therefore received 100% of the value of the shares allocated to him whereupon his membership of the Fund ceased.

[7] In his 2001 tax return the appellant included the receipt of the amount of R155 302,00, which he indicated as a receipt of a capital nature.

[8] The respondent however assessed the appellant on the basis that the amount received was income.

[9] The respondent initially contended that the amount is included in paragraph (a) of the definition of "*gross income*", alternatively that the amount falls within paragraph (e) of the definition of gross income.

[10] The appellant objected to the assessment. The objection was dismissed as a result whereof the appellant noted an appeal to the Tax Board. The Tax Board dismissed the appeal.

[11] This Court is therefore seized with the appeal *de novo*. For purposes of this appeal the respondent relies solely on the definition of gross income contained in paragraph (e).

[12] Paragraph (e) of the definition of gross income provides:

"***'gross income'**, in relation to any year or period of assessment, means –*

(i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or

(ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within or deemed to be within the Republic,

during such year or period of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder, namely – 6.1, 6.39, 7.3

…

(e) any amount determined in accordance with the provisions of the Second Schedule (other than any amount included under paragraph (eA)), in respect of lump sum benefits received by or accrued to such person from or in consequence of his membership or past membership of –

(i) any fund which has in respect of the current or any previous year of assessment been approved by the Commissioner, whether under this Act, or any previous Income Tax Act, as a pension fund, provident fund or retirement annuity fund; or

(ii) a fund referred to in paragraph (a) or (b) of the definition of 'pension fund',

if such person was a member or past member of such fund during any such year: Provided that the provisions of paragraph (g) of subsection (1) of section nine shall `mutatis mutandis` apply in the case of any amount determined as aforesaid; 23.3, 23.31"

[13] The Second Schedule deals specifically with the computation of Gross Income derived from Lump Sum Benefits from Pension Funds. Paragraph 2 of the Second Schedule provides:

> ***"2 Subject to the provisions of paragraph 2A, the amount to be included in the gross income of any person in terms of paragraph (e) of the definition of 'gross income' in section one of this Act shall be the aggregate of the amounts received by or accrued to such person by way of lump sum benefits during any year of assessment from or in consequence of membership or past membership of any pension funds, provident funds or retirement annuity funds, less the deductions permitted under the provisions of this Schedule. 23.25"*** (Emphasis supplied)

[14] The only question to be determined is whether the amount received by the appellant was received "*from or in consequence of*" his membership of the Fund.

[15] It goes without saying that had the appellant not been a past member of the Fund, he would not have received the amount in question. This the appellant conceded. He however argued that the *causa causans* of him receiving this amount, was not the fact that he was a member of the Fund, but the fact that Old Mutual demutualised. There is no doubt that the demutualisation of Old Mutual was the event that triggered the windfall that accrued to the Fund. The question

however is – did the appellant receive his share of the windfall as a consequence of his membership of the fund, or as a result of the demutualisation of Old Mutual.

[16] The term "*in consequence of*" was considered in The Commissioner for Inland Revenue v. Shell South Africa Pension Fund, 1984 (1) SA 672 (AD) at 676. Nicholas, JA said the following at 678 – 679:

> ***"In the Australian case of McIntosh v Federal Commissioner of Taxes [1979] 25 ALR 557 the Court was concerned with a provision in the Income Tax Assessment Act 1936 that the assessable income of a taxpayer should include a lump sum amount paid in consequence of retirement from, or the termination of, an office of employment. It was held that within the ordinary meaning of the words a sum is paid in consequence of the termination of employment when the payment follows as an effect or result of the termination, but that termination need not be the dominant cause of the payment. In my opinion that is the effect of the expression "in consequence of" (and also of the expression "following upon") in para 3: they import no more than that the death of a member should be a cause of the recoverability of a lump sum payment.***
>
> ***It is clear that the death of the member is a conditio sine qua non to the recoverability of the lump sum: but for the death, there can be no pension granted to an eligible widow or eligible dependant, and hence nothing which is commutable under rule 37 (3). A conditio sine qua non is not, however, necessary a causally relevant factor. (See Hart and Honoré Causation in the Law at 107, 121-2) As Denning J pointed out in Minister of Pensions v Chennell [1947] 1 KB 250 at 255 - in***

> ***fine, the latest event in a train of physical events is not necessarily "caused by" the first event. The learned Judge said at 254 that***
> ***"the test of causation is to be found by recognizing that causes are different from the circumstances in or on which they operate. The line between the two depends on the facts of each case"***
> ***and observed at 256 that an intervening cause or extraneous event may be so powerful a cause as to reduce what has gone before to part of the circumstances in which the cause operates.***
> ***…***
> ***The question is whether the intervening cause C, which contributes to bring about the result B, is of such a kind that it isolates the original cause A so as to relegate it "to the status of a merely historical antecedent or background feature". (See Iron and Steel Holding and Realisation Agency v Compensation Appeal Tribunal and Another [1966] 1 All ER 769 (QB) at 775D-G.)"*** (Emphasis supplied)

[17] This decision involved the interpretation of a rule of the Pension Fund that upon the death of a member who leaves dependants, a committee would in its discretion commute the whole or any part of the pension to a lump sum.

The Court found that although the death of the member was a *conditio sine qua non* to the recoverability of the lump sum, the decision of the committee was an "*intervention of an independent, unconnected and extraneous causative factor*" which isolates the death from the final result.

[18] The facts in this matter are however somewhat different. Although the demutualisation is the event that resulted in the windfall which accrued to the Fund, it is not, in my view, the event that resulted in the windfall benefit being passed on to the appellant. If the trustees of the Fund had decided not to distribute the windfall to its members or past members at the time, the appellant would not have received it. The appellant therefore benefited from the decision of the trustees to distribute the windfall amongst members or past members only because he was a member of the Fund. In the circumstances I am satisfied that the appellant received the amount in consequence of his membership with the Fund.

[19] The appellant argued that the fact that he had to relinquish his rights to his pension should detract from this finding. I do not agree with this submission. The fact that the appellant had to relinquish his rights to his pension was merely a condition of his election and a consequence thereof. I therefore agree with the submission by Mr. Stevens that in this case the appellant made the decision as to whether he wanted to receive a monthly pension or a lump sum. It was his decision. It was a choice that he was given only because he was a past member of the Fund.

[20] I therefore find that the amount is a lump sum as contemplated in paragraph (e) of the definition of "*gross income*" read with paragraph 2 of the Second Schedule.

[21] Mr. Stevens however conceded that the assessment should be referred back as the appellant is entitled to rating concessions as provided for in section 5(10) of the Act. These rating concessions were not taken into account in the assessment. Mr. Stevens therefore conceded that the appellant's tax was incorrectly calculated and that the formula was not properly applied. I must make it clear that it is for this purpose only that the assessment is referred back to the respondent.

[22] Mr. Stevens conceded that the grounds of appeal were not frivolous and accordingly did not ask for a costs order in terms of section 83(17) of the Act.

[23] In the circumstances the following order is made:

> The assessment on the ground that the lump sum falls within the definition of paragraph (e) as read with paragraph 2 of the Second Schedule is confirmed, save that the respondent

is ordered to revise the assessment insofar as it relates to the rating concessions provided for in section 5(10) of the Act.

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TRAVERSO, DJP
5 September 2005