

IN THE TAX COURT
(HELD AT PRETORIA)

CASE NO: 12895

In the matter between:

XYZ

Appellant

And

**THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE**

Respondent

JUDGMENT

FABRICIUS J

[1] Before me is an appeal against the Respondent's decision to reject the objection of Appellant to his 2008 assessment.

[2] The Appeal was argued on the basis of agreed facts which are the following:

2.1 A total amount of R521 484.00 accrued to the Appellant during the year of assessment ending on 29 February 2008 (herein after “the assessment”);

2.2 Of this amount R259 375.72 was paid to Appellant by VM Pensioen Fonds (“The Fund”), in accordance with the rules of the fund;

2.3 At all relevant times the fund was a fund as contemplated in paragraph (a)(ii) of the definition of “pension fund” in Section 1 of the Income Tax Act 58 of 1962 (“ The Act”), governed by the rules contained in its Statutes and annexures thereto;

2.4 At all relevant times Appellant was a member of the fund;

2.5 The accrued amount of R259 375.72 was a withdrawal from the fund, and represented Appellant’s vested benefit in terms of the Statutes of the fund as at 30 June 2004;

2.6 Throughout the 2008 year of assessment, Appellant remained in the employ of the same employer, being the public sector;

2.7 Appellant was in the employ of the public sector service for a total period of seven years, of which 2 years preceded 1 March 1998, and was a member of the fund during such a period;

2.8 On 8 December 2008 Respondent issued to Appellant an income tax assessment in respect of the 2008 assessment, wherein two thirds of the amount of R259 375.72 namely R172 917.15 was included in Appellant's gross income in terms of sub-paragraphs (iii) of paragraph (eA) of the definition of "gross income" in Section 1 of the Act. The amount of R172 917.15 was calculated without allowing for any exclusion pertaining to membership prior to 1 March 1998, alternatively 29 June 1998;

2.9 A portion of the amount R259 375.72 relates to the employment of appellant during the period preceding 1 March 1998, alternatively 29 June 1998. The exact amount which related to such employment would be calculated by the parties, if necessary, in the light of my judgment;

2.10 On 9 March 2008 Appellant objected to the inclusion of the total amount of R172 917.15 , on the basis, that no exclusion was made pertaining to employment prior to 1 March 1998 or 29 June 1998;

2.11 On 30 November 2008 disallowed Appellant's objection whereupon the Appellant appealed to the Tax Court.

[3] Grounds of Appeal:

These grounds emanate from Appellant's grounds of appeal in terms of Rule 11 of the Rules promulgated in terms of Section 107A of the Act. They are contained in the relevant dossier which was before me, and were the following:

- 3.1 The amount R259 375.72 , which accrued to Appellant was a pre-retirement withdrawal from the fund pertaining to the Appellant's service in the public sector;
- 3.2 Two thirds of this amount was included in Appellants gross income;
- 3.3 This was done by Respondent in terms of the provisions of Paragraph (eA) of the definition of "gross Income" in Section 1 of the Act;
- 3.4 Paragraph (eA) only pertains to rights to benefits relating to the period after 1 March 1998;
- 3.5 Appellant was in the employ of the public sector service for a total period of 7 years, of which 2 years preceded 1 March 1998;
- 3.6 Accordingly, two sevenths of the amount of R259 375.72 , being R74 107.35, related to the period pre- 1 March 1998;

3.7 Of the balance of R185 268.37, one third should be exempted in terms of paragraph (eA), leaving a balance of R123 512.25, which amount should be the amount included in Appellant's gross income in terms of paragraph (eA).

[4] In the mentioned Pre-Trial Minute the issue in dispute before me was formulated by agreement as follows: "Whether , in arriving at the two thirds of the amount to be included in Appellant's gross income pertaining to the 2008 year of assessment, in terms of sub-paragraph (iii) of paragraph (eA) of the definition of "gross income" in Section 1 of the Act, that part of the amount of R259 375.72 which relates to Appellant's employment prior to 1 March 1998 alternatively prior to 29 June 1998, should be excluded."

[5] It is at this stage convenient to quote the definition of "gross income" as it was for the 2008 year of assessment:

"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)

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

(a)

(b)

(c)

(d)

(e) *any retirement fund lump sum benefit and any other 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 a 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 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;

(eA) where, in relation to a member who effectively remains in the employment of same employer,.....

(i);or

(ii);or

- (iii) Any amount in a fund contemplated in paragraph (a) or (b) of the definition of “pension fund” has become payable to the member...**

An amount equal to two-thirds-

(aa)

(bb)

- (cc) In the case of an amount becoming payable to a member or being utilised to redeem a debt, of the amount so payable or so utilized”**

Read therewith must be paragraph (eA), as far as it is relevant for present purposes:

“ where, in relation to a member who effectively remains in the employment of the same employer,...

(i)

(ii)

- (iii) Any amount in a fund contemplated in paragraph (a) or (b) of the definition of “pension fund” has become payable to the member...**

An amount equal to two thirds-

(aa)

(bb)

- (cc) In the case of an amount becoming payable to a member... of the amount so payable...”**

[6] In the above context, Appellant argued that it appeared on the face of the relevant definitions as if the two thirds were simply to be calculated on the “amount payable”. However, Appellant contended, that properly interpreted, that part of the “amount payable” which relates to contributions made by Appellant prior to 1 March 1998, alternatively 29 June 1998 is to be excluded from such amount, and the two thirds should only be calculated on the balance.

[7] For purposes of that contention Appellant referred to a number of decisions of Higher Courts, which according to it supported the said contention.

In **Commissioner SARS v Airworld CC and Another 2008 (3) SA 335 (SCA) at 345 I-346A** the following was stated: “In recent years Courts have placed emphasis on the purpose with which the legislature has enacted the relevant provision. The interpreter must endeavour to arrive at an interpretation which gives effect to such purpose. The purpose (which is usually clear or easily discernable) is used in conjunction with the appropriate meaning of the language of the provision, as a guide to ascertain the legislature’s intention.” It was then argued that while there was a previous reluctance by Courts to permit recourse to explanatory memoranda and other Parliamentary materials in interpreting legislation, the modern trend was in favour of the use of such materials, at least to identify the purpose of the legislation and the mischief at which it was aimed. More specifically, it appeared that regard could be had to the

legislative history of legislation. In this context reference was then made to ***Minister of Health and Another v New Clicks South-Africa (Pty) Ltd and others 2006 (2) SA 311 (CC) at 391 D-G, (Par 199 to 201)***. Closely related to this purpose of interpretation, so it was contended, was the principle that a word or phrase should be interpreted in its context. In support of that contention reference was then made to ***Commissioner SARS v Dunblane Transkei (Pty) Ltd 2002 (1) SA38 (SCA) at 46E to H***. The crux of the relevant *dictum* therein appears to be that the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted, without sufficient attention to the contextual scene.

But see also: *Jaga v Dónges NO, and Another ... 1950 (4) SA 653 (A) at 664, E* where it was said that the clearer the language was, the more it would dominate over context.

Appellant then also referred to the so-called time- honoured principle of construction, that no Statute was to be construed so as to have retrospective operation, unless the legislature clearly intended the Statute to have that effect.

See: *Transnet Ltd v Chairman, National Transport Commission 1999 (4) SA 1 (SCA) at 7A to B*.

In the case law a distinction was also made, so the argument continued, between “true” retrospectivity, and cases where the question was whether a new Statute or provision or an amendment, interfered with-or was applicable to existing rights. However, in that same context, it was said that regarding the distinction between presumption against retrospectivity, and the presumption against interference with vested rights, it was not of great importance, “as both cannons led in the same direction”.

See: National Iranian Tanker Company v MV Pericles GC 1995 (1) SA 475 (A) at 483 I to 484A.

[8] Having made these submissions Appellant then set out the legislative history of paragraph (eA) and paragraph (e) of the definition of “gross income”. Paragraph (eA) of the definition of “gross income” was introduced by Section 2(h) of the Income Tax Act 28 of 1997. Section 2(e) of the same Act, amended paragraph (e) of the definition. The explanatory memorandum which accompanied the amendment Act when it was still in the form of a Bill, was then referred to in great detail, as well as that relating to sub-paragraph (iii) which was inserted in paragraph (eA) by Section 19 (1)(i) of the Taxation Law Amendment Act 30 of 1998. The amendment Act introducing sub-paragraph (iii) was promulgated on 29 June 1998. Paragraph (eA) of the definition of “gross Income” was amended by Section 3(a) of the Revenue Laws Amendment Act 19 of 2001, by the addition of the following exclusion to that paragraph: “other than any amount included under paragraph (eA))” Thereafter further

amendments were effected to paragraph (e), as well as to the Second Schedule to the Act in terms of the Taxation Laws Amendment Act 8 of 2007. Again, in that context, reference was then made to the relevant explanatory memorandum. These memoranda refer to the mentioned proposed amendments which were affected to paragraph (e) of the definition of “gross income” and to the Second Schedule of the Act. Paragraph (eA) of gross income, was however left unchanged, and in terms of Section 2 (1)(m) of the Taxation Laws Amendment Act of 2008, paragraph (e) was substituted merely to refer to “a retirement fund lump sum benefit or retirement fund lump sum withdrawal benefit”

The result was, so it was argued, that as a result of the applicability of the provisions of the Second Schedule of the Act, and more specifically Formula C in paragraph 1 thereof, which deals with the computation of gross income derived by way of lump sum benefits from public sector funds for purposes of paragraph (e), pre- 1 March 1998 benefits remain excluded from that paragraph.

[9] The following submissions were then made by the Appellant in regard to the interpretation of the phrase “amount payable” in paragraph (eA) (iii):

9.1 In the light of the mentioned authorities, and especially the dictum referred to in **SARS v Dunblane (supra)**, it would be wrong simply to focus on the phrase “amount payable” in sub-paragraph (iii) of

paragraph (eA), and to attribute thereto a *prima facie* meaning, without reference to purpose or context of paragraph (eA);

9.2 When attempting to ascertain the true meaning of the phrase “amount payable” with reference to the context and purpose of subparagraph (iii) and paragraph (eA), the following considerations were relevant:

9.2.1 Paragraph (e) of the definition of “gross income” was amended by the Income Tax Act, 28 of 1997, in order to tax lump sum benefits paid by public sector funds, but only with effect from 1 March 1998. It was clearly stated in the relevant explanatory memorandum that the (then) new dispensation was subject to the protection of the existing rights of members of public sector funds, namely that benefits emanating from such funds was not taxable until then ;

9.2.2 The principle of preserving the tax-free portion of pre-1 March 1998 membership and employment, was also reiterated in subsequent explanatory memoranda, as recently as in 2007;

9.2.3 After the promulgation of the Taxations Law Amendment Act, 3 of 2008, the position was the following:

- If a lump sum benefit is received from a fund on retirement or withdrawal from the fund, Formula C in paragraph 1 of the Second Schedule ensures that that part of the pre-1 March 1998 membership and employment contract, is excluded from paragraph (e) and accordingly from the gross-income of the tax payer;
- If, however, a member of a fund remains in the employ of the public sector employer, and an amount becomes payable out of a public sector fund, or is utilised to redeem a debt of the member, sub-paragraph (iii) of paragraph (eA) on a literal interpretation, would take two-thirds of such amount without allowing any reduction in respect of pre-1 March 1998 membership and employment;
- the remaining one third is apparently taxed in terms of paragraph (e), and accordingly pre-1 March 1998 membership benefits are excluded from that one third;

9.3 It was accordingly submitted that there was no rational basis upon which to exclude pre-1 March 1998 membership benefits from lump sum benefits received upon retirement or withdrawal from a fund, but not to exclude such membership benefits from the two thirds to be taxed in terms of sub-paragraph (iii) of paragraph (eA) , upon

amounts becoming payable out of the public sector fund or being utilized to redeem debts of the member;

9.4 It was then submitted that having regard to sub-paragraph (iii) of paragraph (eA) and having regard to the purpose of paragraph (eA) and paragraph (e), namely to treat payments from public sector funds on the same basis as payments from private sector funds, but only with effect from 1 March 1998, membership benefits relating to membership prior to that date, should also be excluded from sub-paragraph (iii) of paragraph (eA).

[10] In the alternative it was contended that there was no indication in sub-paragraph (iii) of paragraph (eA) that it was intended to have retrospective operation, and therefore in the light of the mentioned presumption against retrospectivity and the presumption against interference with vested rights, it should be found that sub-paragraph (iii) of paragraph (eA) does not apply to benefits arising from membership and employment prior to 29 June 1998.

[11] Respondents Argument:

Respondent submitted, as background, that generally speaking only receipts and accruals, income in nature, are subject to inclusion for

gross income for purposes of taxation. The definition of gross income in Section 1 of the Act makes this clear. In some instances the full amount of a capital receipt or accrual is included in gross income, whilst in other instances only a part thereof, and in others still, an amount determined in a specific manner, depending on the nature of the receipt or accrual, and the specific provision in the definition that would be applicable. The starting point for determining what income tax consequences attributable to amounts received are, is always the definition of gross-income. Although capital in nature, the amount that accrued to Appellant was brought within the ambit of gross-income by virtue of its definition, and paragraph (e) of the definition directed one to paragraph (eA), so as to first determine the amount included in gross-income under that sub-paragraph. In terms of the last-mentioned, two thirds of the amount payable was thus included in gross income. Appellant's argument was fallacious, in that the Second Schedule that was relied upon, could only apply to amounts not already included in gross-income under paragraph (eA). The requirements for the application of Formula C are set out in the definition thereof. The Formula specifically caters for amounts becoming payable, where the number of completed years of service post and prior to 1 March 1998 are taken into account for purposes of determining the amount of the benefit payable to the member of the fund in terms of the rules thereof. (The definition of Formula C was inserted by Section 41 (1)(a) of Act 28 of 1997 with effect from 1 March 1998). It was contended that Appellant applied Formula C, but incorrectly, to achieve an amount

excluded or exempt from taxation, whereas in the structure of the definition of gross-income, it seeks to determine inclusions. Appellant's approach called for a "replacement" of the words "amount payable" in paragraph (eA), with something else, but Appellant did not say what that was. Appellant contended that paragraph (eA) only applies to rights to benefits relating to the period after 1 March 1998, but the clear wording of this paragraph refuted such a contention. The paragraph did not concern itself with "rights to benefits" but only with an amount payable by a fund to a member. The fact that Appellant was in the employ of the public sector service for a period of seven years, of which two years preceded 1 March 1998, was of no concern in the interpretation of paragraph (eA), which was very clearly worded, and did not concern itself with a period of employment, or whether a part thereof related to a period prior to 1 March 1998 or not. The paragraph concerns itself, in the context of the definition of "gross-income" with two thirds of the amount payable, irrespective of considerations relating to periods of employment. It also does not concern itself with any exemption. Furthermore, any tax consequences flowing from withdrawing amounts from a fund occur from the election of that particular member. Every person of course has the right to structure his affairs as he wishes, and thereafter tax consequences may either flow or they may not.

See: *CIR v Sunnyside Centre 1997 (1) SA 68 (A) at 77 E-F*

[12] It was contended on behalf of Respondent that the plain wording of any words used by the legislature is central to the interpretation of all Statutes, and this applies to tax legislation as well.

[13] Interpretation of Statutes:

It is my respectful view that Schutz JA, in the context also of other well known decisions of the Appellate Division, and even in the context of the Constitution of the Republic of South Africa, has emphasized correctly that legislation must have its language respected. Legislation does not mean whatever we might wish it to mean, be it “ordinary” legislation or even the Constitution itself. One can not subvert the words chosen by Parliament either in favour of the spirit of the law, or by referring to background policy considerations that were not reflected in the language of the particular statute itself. The legislative authority of the Government is vested in Parliament. Parliament exercises its authority mainly by enacting Acts. Acts are expressed in words. Interpretation concerns the meaning of words used by the legislature and is therefore useful to approach the task by referring to the words used, and to leave extraneous considerations for later.

See: *Standard Bank Investment Corporation Ltd v Competition Commission 2000 (2) SA 797 (SCA) at 810 to 811 and*

Abrahamse v East London Municipality and Another; East London Municipality v Abrahamse 1997 (4) SA 613 SCA at 632 G to H.

It is also abundantly clear that although it has been said that our law is an enthusiastic supporter of “purposive construction”, the purpose of a Statutory provision can provide a reliable pointer to the intention of the legislature but only, where there is an ambiguity.

See: Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Another 1990 (1) SA 925 (A) at 942 - 943.

More recently, in ***Mankayi v Anglogold Ashanti 2010 (5) SA 137 SCA*** the following was said by Malan JA at 154: “Interpretation seeks to give effect to the object or purpose of legislation. It involves an enquiry into the intention of the legislature. It is concerned with the meaning of words without imposing a view of what the policy or object of the legislation is or should be. “He again, as so many other Courts have done, returned to the classical case in that context of ***Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530 at 543*** where Innes CJ said:” speaking generally , every statute embodies some policy or is designed to carry out some object. When the language employed admits of doubt, it falls to be interpreted by the court according to recognised rules of construction, paying regard in the first place to the ordinary meaning of the words used, by departing from such meaning

under certain circumstances, if satisfied that such departure would give effect to the policy and object contemplated. I do not pause to discuss the question of the extent to which the departure of the ordinary meaning of the language is justified, because the construction of the statutory clauses before us not in controversy. They are plain and unambiguous. But there must, of course, be a limit to such departure, A Judge has authority to interpret but not to legislate, and he cannot do violence to the language of the law given by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be the policy or object of the particular measure”.

Before the **New Clicks decision (supra)** even saw the light of day, Corbett JA (in the context of Appellant’s argument that I can take note of Parliamentary memoranda) said the following:” In my opinion our courts to are entitled, when construing the words of a Statute which are not clear and unambiguous [my underlining] to refer to the report of a Judicial Commission of Enquiry whose investigations shortly proceeded the passing of the Statute in order to ascertain the purpose, provided that there is a clear connection, on the one hand, between the subject-matter of the enquiry and recommendations of the report and, on the other hand, the statutory provisions in question.

See: Attorney General, Eastern Cape v Blom and Others 1988 (4) SA 645 AD at 669 B.

In **INCOME TAX CASE 1804, 68 SATC 105**, Boruchowitz J held that any contextual and business-like interpretation of a statute or part thereof had to yield to the plain and unambiguous language employed. This rule has been consistently applied over the years, and for almost a century, I notice.

I have also noticed that in the context of interpretation of statutes the decision in ***Minister of Health, v New Clicks SA (Pty) Ltd and others 2006 (2) SA 311*** has been used enthusiastically (not only) to rely on a departure of what I believe the correct legal position is, as set out above, but also very often without having read it carefully. The passage relied on is by Chaskalson CJ at 391 E:” In ***S v Makwanyane and Another 1995 (3) SA 391 (CC)***) I had occasion to consider whether background material is admissible for the purpose of interpreting the Constitution. I concluded that “ where the background material is clear and not in dispute , and is relevant to showing why particular provisions were or were not in the Constitution, it can be taken into account by a Court in interpreting the Constitution.” Although it is not entirely clear whether the majority of the Court concurred to this finding, none dissented from it. I have no reason to depart from that finding and, in my view, it is applicable to ascertaining “the mischief” that a statute is aimed at where that would be relevant to its interpretation. This would be consistent with the decisions of the Appellate Division in ***Attorney General Eastern Cape v Blom (supra)***... “

The Constitutional Court in that context, in my view, did not say that as background material such as, in the present case, parliamentary memoranda, may be considered when legislation is interpreted where the language is clear, and where there is no ambiguity, and where the interpretation leads to no absurdity, or any result that could not possibly have been intended by the legislature even in the context of the words that it chose to use.

[14] In my view therefore this decision is of no assistance to the appellant herein, and I agree with the argument on behalf of the Respondent, that in the present context the wording of the definition of gross-income is clear, as are the provisions of paragraph (eA) of the Act. There is simply no scope of “reading in” as it were, of what was suggested on behalf of Appellant in the light of the clear language used. As a result therefore I have no hesitation in declining the kind invitation to have regard to the mentioned parliamentary memorandum and to “interpret” the relevant legislative provisions as a result, and to read-in what is not contained therein. There is in the present context no ambiguity in the relevant paragraphs of the Act, and as a result I prefer to follow the “old-fashioned” approach that concerns itself with the meaning of the words used in the absence of any ambiguity or absurdity. By saying that, I am not suggesting that the “modern” approach is rejected, whatever it may mean, but I am saying that the “modern” approach has almost in all cases been misapplied and its source been misinterpreted and taken out of context.

[15] Accordingly the Appellants appeal is dismissed and the assessment is confirmed in terms of Section 83 (13)(a)(1) of the Act. By agreement between the parties there is no order as to costs.

Date: 15 June 2011

H FABRICIUS J
Judge of the North and South Gauteng High Court

On behalf of Appellant: PJJ Marais SC

(Briefed by Durandt & Louw, Kroonstad)

On behalf of Respondent: Attorney B van Vuuren briefed by SARS Pretoria

Date of Trial: 7 June 2011

Date of Judgment: 15 June 2011