

44/87

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

COMMISSIONER FOR INLAND REVENUE

APPELLANT

and

PICK 'N PAY WHOLESALERS (PTY) LTD

RESPONDENT

CORAM : CORBETT, BOTHA, HEFER, NESTADT, JJA, et NICHOLAS, AJA.

HEARD : 16 MARCH 1987.

DELIVERED: 14 May 1987

J U D G M E N T

NICHOLAS, AJA :

The facts which gave rise to this case had their beginning in 1977. In April of that year PICK 'n PAY

WHOLESALERS.....2

WHOLESALERS (PTY) LTD ("PICK n PAY") pledged itself to donate to the URBAN FOUNDATION a total of R500 000 in five equal annual instalments. In each of the years of assessment ended 28 February 1978 and 28 February 1979 it claimed to deduct R100 000 from its income as "advertising". The Commissioner for Inland Revenue ("the Commissioner") disallowed the deductions and issued assessments accordingly. An objection by PICK n PAY dated 13 March 1981 was overruled.

There followed an appeal to the Cape Income Tax Special Court. The hearing began on 13 November 1981 with GROSSKOPF J presiding. On 17 March 1982 a judgment allowing the appeal was handed down.

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The Commissioner appealed to the full bench of the Cape Provincial Division. Shortly before the hearing of the appeal, notice was given of an application to amend the grounds of appeal in order to raise certain points not canvassed at the hearing before the Special Court. By consent the full bench set aside the order of the Special Court and remitted the matter thereto for the hearing of further evidence and additional argument.

There was a second hearing before the Special Court on 27 March 1985. In a judgment which was handed down on 6 June 1985, the Special Court rejected the new points raised in the amended grounds of appeal, and

again.....4

again allowed the appeal.

On 16 September 1985, GROSSKOPF J granted leave to appeal to this Court in terms of s. 86 A(5) of the Income Tax Act, 1962 ("the Act").

In the Special Court evidence was given on behalf of PICK n PAY by a number of witnesses including Mr. RAYMOND ACKERMAN and Mr. CHRISTOPHER HURST. This evidence was not contradicted, and GROSSKOPF J said in the judgment that the Special Court had no reason to doubt its correctness.

The main facts of the case were these.

Despite its name, PICK n PAY is not a wholesaler.

It carries on business as a retailer, operating super-

markets

markets in the Western and Eastern Cape, Natal and the Orange Free State. It has associated companies in the Transvaal, and together they comprise the PICK n PAY group, of which PICK n PAY is the managing company.

Mr ACKERMAN is the chairman and managing director, and as such he has had, to use his own words, "a strong direction of the company". He is the mainspring and driving force behind the group's activities. At the relevant time he held 30% of the issued shares in PICK n PAY. He is a public figure: he is a member of the main board of the URBAN FOUNDATION, a governor of RHODES UNIVERSITY, and head of S.A.FORUM and of other bodies.

Mr HURST is the secretary and financial director,

and.....6

and takes a special interest in the marketing side.

PICK n PAY keeps its name constantly before the public by sustained and intensive advertising which it regards as essential to the successful conduct of its business. Broadly its advertising falls into three categories. There is the "laundry list" type of advertisement, which appears from day to day, and lists goods and their prices. Then there is advertising of so-called "special events", which is more general in its nature: examples of "special events" are an anniversary of the opening of a supermarket; the launching of the company's "No Name" brands; an operation in which the price of chickens, which was raised by other supermarkets, was held down in PICK n PAY's stores; and a petrol sales scheme.

Thirdly

Thirdly there is "indirect advertising", which is considered to be the most important and valuable. This consists, not in placing paid advertisements, but in obtaining notice in the news and editorial columns of the media. Such publicity is not readily achieved.

PICK n PAY has always been concerned to promote its public image as "the consumer's champion" and as a company which has a concern for people and is aware of its social responsibilities to the community. So, it has campaigned against cartels, and for the need to fight inflation.

A notable example of PICK n PAY's promotion of its persona and its use of "indirect advertising" was provided by the donation to the URBAN FOUNDATION. This is an organisation

ganisation which grew out of a conference of concerned leading businessmen in 1976. It was formed to tackle South Africa's pressing social needs and to improve the quality of life of the less privileged urban dwellers.

It is specially concerned with the upgrading of housing and the provision of community facilities. Mr. Justice STEYN steered it through its formative years.

As a member of the main board of the URBAN FOUNDATION, Mr. ACKERMAN was involved in conceiving the idea of raising money by means of a self-imposed levy in the whole private sector of a percentage of turn-over or profits. His evidence was:

"So, then they said to me, wearing my Urban Foundation hat: Mr Ackerman, will you wear your Pick n Pay hat and lead the way? So,

then

then I had a private meeting with Mr Justice Steyn and I said, yes, we will lead the way but we want to be the first in and we would like to have a press publicity meeting ..."

He considered that in this way PICK n PAY would get very valuable publicity. He continued:

"... When I brought this matter to the Board (sc. of PICK n PAY), I was wearing my Pick n Pay hat that this would be a major way of us being first to support a good cause ... but that we could get major publicity out of it which would be good for our company and would draw customers in to our stores."

When Mr. HURST was asked in his evidence in chief about the motive for the donation, he said:

"Well, the main spring behind the idea was Mr Ackerman and we discussed the matter at Board level and its possibilities and we decided to go ahead and make this contri-

bution

bution as a business exercise".

He was sure that

"(W)e would, if we handled it correctly, get a great deal of publicity out of it."

He continued:

"... We were going to be the first ... There is a tremendous plus in being first, I think, and at the same time Mr Ackerman was going to ensure that we got the proper type of publicity; that once we've made our contribution, that the Press would be aware of it. With the knowledge of this I thought that ... (it) sounded like it was going to be a success The Urban Foundation was something that really seemed to appeal to the public. It was in the Press all the time, people were talking about it. It was an opportunity waiting to be seized and I don't think that type of opportunity comes along very often."

The Board of directors of PICK n PAY took the decision

to

to make the donation of R500 000 to the URBAN FOUNDATION.

It was announced at a press conference in Cape Town which was attended by Mr. Justice STEYN and Mr. ACKERMAN. The announcement received wide publicity throughout the Republic. This was shown by a bundle of press cuttings which was put in through Mr. HURST. They included one from THE ARGUS newspaper. It was a front page story with banner headlines.

The following are extracts:

" R25-M AID PLAN FOR NEEDY

FOOD CHAIN GIVES URBAN FUND R ¹/₂-M

The Urban Foundation's initial target of R25-million to improve the quality of life of South Africa's urban communities came nearer achievement today with a gift of R500 000 over five years.

The gift from Pick n Pay is linked to the

supermarket

supermarket chain's annual turnover - and other firms are to be asked to participate on a similar basis.

The newly-formed Urban Foundation is being steered through its formative years by Mr Justice Steyn, who is on three years' leave from the Cape Supreme Court for the task.

.....
 In Cape Town today, Mr Justice Steyn announced Pick n Pay's 'wonderful contribution' at a Press conference attended also by the chairman, Mr Raymond Ackerman. The R500 000 would be paid in annual instalments of R100 000.

'This represents a self-imposed tithe based on a percentage of Pick n Pay's annual turnover,' he said.

Investment

'Mr Ackerman has emphasised to me he believes this is an investment in the future of a stable South Africa.

'He has also emphasised how essential it is that the private sector must make its contribution to the solution of our vexed urban problems.

I

'I trust that Mr Ackerman's magnificent example will act as a stimulus and an inspiration for other organisations and individuals.

I anticipate that others will also give consideration to giving an annual tithe to the Foundation - based on a percentage of turnover or after-tax profits.'

....."

For a period of several months after the announcement, the publicity had a marked positive effect on PICK n PAY's turnover in all its stores throughout the group.

Mr. HURST was cross-examined by the Commissioner's representative, Mr. VAN BREDA, in regard to the purpose of the donation.

"MR VAN BREDA: Now, what motivation did you advance for this donation to be made? Was it based on purely business considerations or were there also other motivations? -- The motivation behind this contribution

was

was, as I've said before, part of our public relations exercise. There was a golden opportunity to contribute to this (cause) and bring to the company an immense amount of publicity. The reason for the contribution was to get publicity.

Was that also how Mr Ackerman put it to the board? -- Absolutely."

Again,

"MR VAN BREDA: ... Did the Board go along with the aims of the Urban Foundation? -- Absolutely. We thought that it was a good cause. I want to emphasise again: we picked this cause because it was a good one in which the public were interested ... Here was a cause which was an excellent cause and the public was interested in it. If it had been a bad cause, then, if the public knew about it, it would have reflected badly against us and if the public didn't know about it, then it wouldn't have achieved the object any way. So, this cause was picked because it was a good cause in the

public

public eye. Of necessity it is a good cause.

But also in the eyes of the Board? -- We analysed it as a Board and saw it to be a good cause.

I want to put it to you that the Board had dual intentions. It wanted to get the publicity but also albeit secondary, it wanted to contribute towards a worthy cause. Isn't that so? -- The Board's object was to subscribe to a worthy cause. It must be a worthy cause. That was their object ... So far as the Pick n Pay Board is concerned, this is publicity and I reiterate it again: I think you relate it to be a good cause and therefore you say it is a donation ..."

Mr. ACKERMAN was similarly cross-examined:

"But the point is you made a donation in order to derive maximum publicity, but what do you say about my submission that you were equally moved by other considerations that being in order to advance the aims of the Urban Foundation? -- No, to support a good cause which as Mr Hurst said, a good cause

we

we will always look at and particularly at a timeous good cause like something like this and we will support it and then wearing our PICK n PAY hat, try and maximise the promotion effort out of it but supporting a good cause and we always want to hold our head up high.

Just tell the Court: if it wasn't for this publicity, you wouldn't have made the donation to the Urban Foundation although you agree with its aims? -- That is a very good question. I am very frank: We certainly would have made a donation but it would have been absolutely a R10 000 or R20 000 donation. It would have been a very big donation for us to have made. It would have been a donation to that category. Yes, we would have made one. But we went for this high figure as a package deal to really promote it strongly."

The Special Court held against the Commissioner on all of the issues raised at the hearing. In this Court counsel for the Commissioner submitted that

"(a)

- "(a) The expenditure of the two amounts of R100 000 was of a capital nature.
- (b) The said amounts were not wholly or exclusively laid out for purposes of trade.
- (c) In the alternative to the foregoing and even if it should be found that the R100 000 donated during the 1978 fiscal year was deductible, the further amount of R100 000 donated during the 1979 fiscal year did not constitute expenditure actually incurred in the production of income and/or was not wholly or exclusively laid out for purposes of trade."

The result of the appeal turns on the proper application to the facts of the present case of para (a) of s. 11 and para (g) of s. 23 of the Act. Section 11 provides:

"11. For the purpose of determining the taxable income derived by any person from carrying on any trade within the Republic, there

shall

shall be allowed as deductions from the income of such person so derived -

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

And in terms of section 23 -

"23. No deduction 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, which are not wholly or exclusively laid out or expended for the purposes of trade:"

(On the relation between these provisions, see the discussion

in Commissioner for Inland Revenue v Nemojim (Pty) Ltd 1983

(4) SA 935 (A) at 946.)

In the view that I take of the matter, it is necessary to consider only the second of the submissions

by

by counsel.

It arises by reason of s. 23(g), and the first question to be considered is the meaning of the words "moneys ... which are not wholly or exclusively laid out or expended for the purposes of trade". The answer is provided by the analysis of similar words in the judgment of ROMER L J in Bentleys, Stokes and Lowless v Beeson (1952) 33 T.C. 491 (CA) at 503-4

(See also (1952) 2 All ER 82 (CA) at 84 G to 85 B):

"The relevant words .. - 'wholly and exclusively laid out or expended for the purposes of the profession' - appear straightforward enough. It is conceded that the first adverb - 'wholly' - is in reference to the quantum of the money expended and has no relevance to the present case. The sole question is whether the expenditure in question was 'exclusively'

laid

laid out for business purposes, that is: What was the motive or object in the mind of the two individuals responsible for the activities in question? It is well established that the question is one of fact: and again, therefore, the problem seems simple enough. The difficulty however arises, as we think, from the nature of the activity in question. Entertaining involves inevitably the characteristic of hospitality. Giving to charity or subscribing to a staff pension fund involves inevitably the object of benefaction. An undertaking to guarantee to a limited amount a national exhibition involves inevitably supporting that exhibition and the purpose for which it has been organised. But the question in all such cases is: Was the entertaining, the charitable subscription, the guarantee, undertaken solely for the purposes of business, that is, solely with the object of promoting the business or its profit earning capacity? It is, as we have said, a question of fact. And it is quite clear that the purpose must

be

be the sole purpose. The paragraph says so in clear terms. If the activity be undertaken with the object both of promoting business and also with some other purpose, for example, with the object of indulging an independent wish of entertaining a friend or stranger or of supporting a charitable or benevolent object, then the paragraph is not satisfied though in the mind of the actor the business motive may predominate. For the statute so prescribes. Per contra, if in truth the sole object is business promotion, the expenditure is not disqualified because the nature of the activity necessarily involves some other result, or the attainment or furtherance of some other objective, since the latter result or objective is necessarily inherent in the act."

In a comment on this judgment in Bowden v Russel & Russel

(1965) 42 T C 301 (Ch.) at 306, PENNYCUICK J said:

"... As appears from that judgment it may often be difficult to determine whether the

person

person incurring the expense has in mind two distinct purposes, or a single purpose which will or may produce some secondary consequences. But once it is found that the person has a distinct purpose other than that of enabling him to carry on and earn profits in his trade or profession Section 137(a) prohibits deduction of the expense."

In his speech in Mallalieu v Drummond 1983(2) All

ER 1095 (H L) LORD BRIGHTMAN said at p 1100 a-d that the distinction between the object of the expenditure and its effect was basic:

"The object of the taxpayer in making the expenditure must be distinguished from the effect of the expenditure. An expenditure may be made exclusively to serve the purpose of the business, but it may have a private advantage. The existence of that private advantage does not necessarily preclude the exclusivity of the business purposes."

In

In terms of s. 82 of the Act, the onus of proof is on the taxpayer. He must show that the donation was made solely for the purpose of trade. He must exclude any other purpose - in this case a philanthropic purpose. If he does not do so, the paragraph is not satisfied.

In the judgment of the Special Court GROSSKOPF J

dealt with the matter as follows:

"The final question was whether the expenditure was wholly or exclusively laid out or expended for the purposes of trade (vide

sec.

sec. 23(g) of the Act which is quoted above). The Commissioner's representative contended that in part at least the donation was made for philanthropic reasons. We do not think that the evidence supports this contention. I have already referred to the evidence of Messrs Hurst and Ackerman on this point. The fact that the appellant might in different circumstances have made a relatively small donation to the Urban Foundation from motives of liberality does not detract from the evidence that the large donation which was in fact made, was made for purposes of trade. Expenditure which is made for purposes of trade is not rendered non-deductible merely because the maker of the expenditure is pleased to be able to support or help the person to whom it is made. Business which is conducted with friends, relatives or well-wishers does not cease to be business."

In the case of an appeal under s. 86 A of the Act, an appellant is not bound by the facts found by the Special Court. He has a full right of appeal. In Hicklin v

Secretary

Secretary for Inland Revenue 1980(1) SA 481 (A) TROLLIP JA

said at 485 E:

"The appeal is therefore a re-hearing of the case in the ordinary, well-known way in which this Court, while paying due regard to the findings of the Special Court on the facts and credibility of witnesses, is not necessarily bound by them."

In the present case counsel for the Commissioner does not impugn the credibility of the witnesses for PICK n PAY.

This Court is therefore in as good a position as was the Special Court to decide the issue.

It was contended on behalf of PICK n PAY that the donation was merely the vehicle which it used to ride to publicity and profits, and that the benefit to the URBAN FOUNDATION

was

was incidental. While charity was an effect of the donation, it was not part of PICK n PAY's purpose, which was solely the promotion of business. The contention of the Commissioner on the other hand was that the donation was made with a dual purpose which included philanthropy.

The question is one of fact, and the fact is the state of mind of those responsible for making the donation at the time it was made. See Mallalieu v Drummond (supra) at 1097 h to 1098 a; 1099 h-j. A witness can testify directly to his own state of mind but not to that of others. Apart from direct evidence, state of mind is a matter for inference from relevant and admissible contemporaneous statements and from the surrounding circumstances.

The

The direct evidence as to the purpose of the donation was given by Mr ACKERMAN and Mr HURST. Their veracity is not in question. There are however circumstances which affect the cogency of their evidence in this regard.

That evidence was given more than 4¹/₂ years after the date of the donation. Human memory is inherently and notoriously liable to error. One knows that people are less likely to be complete and accurate in their accounts after a long interval than after a short one. It is a matter of common experience that during the stage of retention or storage in the memory, perceived information may be forgotten or it may be modified, or added to, or distorted by subsequent information. One is aware too that there can occur

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a process of unconscious reconstruction.

Moreover there is the fact that the issue - whether the expenditure was exclusively for the purpose of trade but produced the incidental effect, or the secondary consequence, of benefit to the Urban Foundation, or whether it had the dual purpose of promoting trade and benefiting the Urban Foundation - is a narrow one, and the line difficult to draw. There is nothing in the record to suggest that the distinction was present to the mind of any one at the time of the donation, or that it was of any importance before the expenditure was disallowed by the Commissioner.

In the circumstances the direct evidence cannot be decisive, but it must be weighed together with all the other evidence in the light of the probabilities.

It.....

It is clear on the evidence that an object of the making of the donation was to obtain major publicity and so attract customers into PICK n PAY's stores. Without that business object, the donation might indeed have been ultra vires of the directors. In Hutton v West Cork Railway Company (1888) L.R. 23 Ch. D 654 (CA) BOWEN L J said at 673 that in the case of Hampson v Price's Patent Candle Company,

"The Master of the Rolls ... held that the company might lawfully expend a week's wages as gratuities for their servants; because that sort of liberal dealing with servants eases the friction between masters and servants, and is, in the end, a benefit to the company. It is not charity sitting at the board of directors, because as it seems to me charity has no business to sit at boards of directors qua charity. There is, however, a kind of charitable dealing which is for the interest of those who

practise

practise it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board, but for no other purpose."

But it may be that there existed a dual purpose, namely, a purpose to make a benefaction to the Urban Foundation and a purpose to promote the business of PICK n PAY by the publicity which was to be obtained from the announcement of the benefaction.

There are passages in Mr. ACKERMAN's evidence which point to such a dual purpose. He said:

"... this would be a major way of us being first to support a good cause ... but ... we could get major publicity out of it ..."

When asked whether PICK n PAY would not have made a donation to the URBAN FOUNDATION in any event, Mr. Ackerman replied:

"Yes, we would have made one. But we went for

for this high figure as a package deal really to promote it strongly."

(There was some debate in argument as to what he meant by "package deal", but I think that in the context his meaning is reasonably clear. The package consisted of a single large donation made with two objects: a benefaction to the URBAN FOUNDATION and the obtaining of publicity in consequence.)

Again, Mr. ACKERMAN said that they would always support a "timeous good cause" ("You must run the business in a way that we can all hold our heads up high and that to me is all part of the game"), and then try and maximize the promotion effort out of it.

The fact that there may have been no discussion at the directors' meeting about the benefit to the

the URBAN FOUNDATION does not, I think, affect the matter.

There would have been no call for such discussion. The donation of R500,000

was considerable. It would have been obvious to anyone that it would

greatly benefit the URBAN FOUNDATION, which was regarded by all as

a very worthy cause. The case was one where res ipsa loquitur

- the purpose was on the face of it philanthropic.

Mr. ACKERMAN's involvement in this matter was in a

dual capacity. He was a director of the URBAN FOUNDATION,

and the chairman and managing director of PICK 'n PAY. He was

on the side of the donor and also that of the donee. His

evidence makes it clear that, sitting at the board table of

the URBAN FOUNDATION, he saw the donation as a benefaction

to

to the URBAN FOUNDATION, while he perceived at the same time that it could provide valuable publicity for PICK n PAY.

Sitting at the board table of PICK n PAY he no doubt saw the operation as an opportunity for indirect publicity, but it was publicity which would be given to a philanthropic action.

It is suggested that when dealing with the matter as chairman and managing director of PICK n PAY, his purpose was solely a business one, although it was the same donation to the same charity. I cannot accept that. A man does not change his mind when he changes his hat.

Then regard should be had to what was said at the press conference in April 1977. A "press publicity meeting" was something for which Mr. ACKERMAN had stipulated when agreeing to make the donation. He attended the meeting as chairman of PICK n PAY. He did not in his evidence disavow anything

which

which was said there in regard to PICK n PAY by Mr. Justice STEYN.

According to the report in THE ARGUS, Mr. Justice STEYN described the donation as PICK n PAY's "wonderful contribution". Mr. ACKERMAN had emphasized to him that he believed that this was an investment in the future of a stable South Africa, and had also emphasized how essential it was that the private sector should make its contribution to the solution of our vexed urban problems. Mr. Justice STEYN trusted that Mr. ACKERMAN's magnificent example would act as a stimulus and an inspiration to other organisations and individuals.

Thus, the donation was presented at the press conference,

and

and in the ensuing publicity, as an act of disinterested benevolence. I think that what was said about PICK n PAY in Mr. ACKERMAN's presence is to be given its face value, and that Mr. ACKERMAN's philanthropic purpose was genuine. The alternative - to regard it, so far as PICK n PAY was concerned, merely as a cynical ploy to trade on the charitable sentiments of the community, in order to promote the naked business advantage of PICK n PAY - is unworthy and unacceptable. The alternative is wholly inconsistent with the persona of a company concerned for people and aware of its social responsibility to the community, which PICK n PAY has sought over the years, no doubt sincerely, to build up.

In all the circumstances I am of the opinion that

PICK

PICK n PAY did not show, on the probabilities, that in making the donation it did not have a philanthropic purpose as well as a business purpose.

The appeal is allowed with costs including the costs of two counsel. The order of the Special Court is altered to read: "Appeal dismissed. The assessments are confirmed."

H C NICHOLAS, AJA

CORBETT, JA } Concur
BOTH, JA }

44a/87

CASE NO. 364/85
/CCC

COMMISSIONER FOR INLAND REVENUE

APPELLANT

and

PICK 'N PAY WHOLESALERS (PTY) LTD.

RESPONDENT

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

COMMISSIONER FOR INLAND REVENUE

APPELLANT

and

PICK 'N PAY WHOLESALERS (PTY) LTD

RESPONDENT

CORAM: CORBETT, BOTHA, HEFER, NESTADT JJA
et NICHOLAS AJA

DATE HEARD: 16 MARCH 1987

DATE DELIVERED: 14 MAY 1987

J U D G M E N T

NESTADT, JA:

I have/

I have, unfortunately, come to a different conclusion, viz, that the appeal should succeed in part only. In my opinion the Special Court correctly held that the expenditure in question was (i) not of a capital nature and (ii) was laid out wholly and exclusively for the purposes of trade (so that the 1978 payment was deductible) but (iii) should have disallowed the 1979 deduction.

The judgment of Nicholas, AJA is based on a finding contrary to (ii) above. I therefore propose to deal with it first. The issue is whether respondent established that the so-called donation was made exclusively for the purposes of trade, ie that its sole object was the acquisition of what has been referred

to/

to as indirect advertising with a view to the promotion of its image. In judging this the following must be borne in mind. The test is subjective. The inquiry does not relate to the effect of the disbursement

(Mallalieu v Drummond (Inspector of Taxes) (1983) 2 All E R

1095 (H L) at 1100 (a)). As stated by Lord Sumner in

Usher's Wiltshire Brewery Ltd v Bruce 1915 AC 433 at

469 - 470:

"Where the whole and exclusive purpose of the expenditure is the purpose of the expender's trade, and the object which the expenditure serves is the same, the mere fact that to some extent the expenditure enures to a third party's benefit ... cannot in law

defeat/

defeat the effect of the finding as to the whole and exclusive purpose".

Such benefit would, in the words of Pennycuik J in

Bowden (Inspector of Taxes) v Russell & Russell (1965)2

All E R 258 (Ch D) at 263 D, be a secondary (and, I

would add, irrelevant) consequence. As appears from

the judgment of Romer LJ in Bentleys, Stokes and Lowless

v Beeson (Inspector of Taxes) (1952)2 All E R 82 (CA)

at 84G - 85B, the difficulty in the present type of case

is that there is unavoidably and inevitably present the

intention to benefit the donee; it is inherent in the

activity in question. But that does not per se dis-

qualify or preclude the expenditure from having been in-

curred with the sole object of promoting trade. For,

as the learned judge observes (at 85G):

"(O)therwise/

"(O)therwise it would follow that all entertaining expenses, all charitable donations, would be necessarily excluded".

This is not so. There will, in these circumstances, only be a dual purpose where there exists a deliberate and independent or distinct secondary motive which inspired the expenditure; as it has been called, a private purpose.

It is not in dispute that an object of respondent in making the donation to the Urban Foundation was, in effect, the purchase of indirect advertising.

This was clearly a trade purpose. The narrow, factual question is whether this was its sole or exclusive aim.

What weighs with me in answering it in the affirmative is the following:

(i) /

(i) Mr Hurst said in his evidence:

"(W)e are a very aggressive company. Our advertising is extremely aggressive and in particular we work tremendously hard on this public relations aspect ... I believe that linking our name with the Urban Foundation fits in beautifully with this overall advertising message that we are trying to get across about Pick 'N Pay. When you associate yourself with the Urban Foundation ... (y)ou are ... broadening its image ... that we care about things ... It is part of our theme that builds up our relationship with the public ... It is all part of the public relations ... part of advertising ... (It was) just like a special event advertising campaign. It took a different form. Instead of the special event being in the pay page of the Press, it was in the editorial pages".

Its tenor: thus is that the disbursement was made pursuant to and in order to achieve respondent's pre-conceived/

conceived policy of promoting its image in the eyes of the consumer. As such, it was simply a variation on a theme. In my view, this is a factor tending to show that there was no other (ie philanthropic) object in mind.

- (ii) In substance, this is what Mr Hurst testified to directly. According to him, the contribution was a "business exercise ... The motivation behind (it) was ... part of our public relations exercise ... The reason for the contribution was to get publicity". And that is how the matter was put to respondent's board of directors. In this regard I refer, in addition to what has been cited by my Brother, to the/

the following passage from Mr Hurst's evidence, viz

"That is how it was put and how we discussed it, that it would be part of our advertising budget and part of our public relations exercise".

(iii) Mr Hurst's credibility as a witness was accepted by

the Special Court and, as has been pointed out, was not

impugned before us. This can be (Malan v Kommissaris van

Binnelandse Inkomste 1983(3) S A 1(A) at 18 G - H)

and is, in casu, a matter of decisive importance.

(iv) The proposition put to Mr Hurst in cross-examination

was that respondent "wanted to get the publicity

but also, albeit secondary, it wanted to contribute

towards a worthy cause". This did not constitute

one of the dual intentions on which appellant now

relies/

relies. The object of subscribing to a good cause, viz, the Urban Foundation, was an essential and indivisible part of the acquisition of publicity and thus of the indirect advertising referred to.

Unless the donation was to such a cause, respondent's object could not be achieved. This is borne out by other parts of Mr Hurst's evidence, namely:

"From a Board level, we had a vehicle, a great cause ... (T)he advance of the cause is secondary. The first thing is that we are attaching ourselves to the cause and we are getting the publicity therefrom ... Yes, but the directors equally want to advance that cause although it is only a secondary motivation - No, what we want is a good cause ... because we know that that cause is a perfectly good one and very much in the eyes of the public and an ideal vehicle with which to attract publicity to Pick 'N Pay ... When I say 'secondary', I mean it

has/

has nothing to do with Pick 'N Pay ...
The first thing is Pick 'N Pay are
looking for a vehicle. We were presented
with a vehicle to which they could
make a contribution and attract enormous
publicity because the public had so much
interest. That is the first stage and
that is really the end of it so far as
Pick 'N Pay is concerned".

(v) Mr Ackerman was also found to be a credible witness.

Nothing that he said or did detracts, in my view, from
the clear effect of Mr Hurst's evidence. His in-
tention may be taken as reflecting that of respondent.

"Wearing his Urban Foundation hat" he obviously wished
to benefit this organisation. In this capacity,
therefore, it may be assumed that he acted from
motives of philanthropy. But the matter has to
be judged from a different point of view, viz,

his/.....

his thinking qua managing director of respondent.

Not only can this distinction be made on the facts;

it must be made. As Centlivres CJ said in

Commissioner for Inland Revenue v Richmond Estates

(Pty) Ltd 1956(1) S A 602(A) at 606 G:

"A company is an artificial person with no body to kick and no soul to damn and the only way of ascertaining its intention is to find out what its directors acting as such intended"

(My emphasis). In other words, in the circumstances under consideration, one has to guard against merging Mr Ackerman's activities and intentions in his personal capa-

city and those in conducting the affairs of respondent

(see the minority judgment of Corbett JA in

Elandsheuwel Farming (Edms) Bpk v Sekretaris van

Binnelandse Inkomste 1978(1) S A 101(A) at 123 B

and/

and in fin). As to the latter, I do not understand the passages from his evidence, cited by my Brother, to be consistent with a dual intention or other than confirmatory of Mr Hurst's evidence. I would just refer to the following further extracts.

Dealing with the importance of "promoting" the company, Mr Ackerman said:

"(T)he promotional leg, be it to Urban Foundation, be it to a no name brand event, is all inextricably linked with the marketing"

And then a little later:

"(B)ut the fact was that we put it (the Urban Foundation campaign) down and planned it as a whole campaign like exactly Mr Hurst said, instead of being merchandise, it was the non-aggressive type of campaign".

(vi) It cannot be gainsaid that the donation was presented at the press conference as being "a self-imposed tithe" which, according to what Mr Justice Steyn said, Mr Ackerman believed was "an investment in the future of a stable South Africa", a "solution to our vexed urban problem." This is, prima facie, indicative of it having been made from motives of "disinterested benevolence". But in his evidence the witness explained that:

"We wanted our consumers to say: well Pick 'N Pay once again it is not chickens this week, it is helping the Urban Foundation. It is another chicken event. It happens to be in a different category, but everything we do is geared to: is it good for our company? The fact that it is good for South Africa as well, is an entirely

separate/

separate issue... Wearing my outside hat, and I do wear a lot of outside hats besides the Urban Foundation, about five others, I will certainly talk very openly and very fully about the importance of business social responsibility in South Africa, yes".

It was never put that this was not reconcilable with the rest of his evidence or that at the press conference he was acting in his capacity as managing director of respondent. Only Mr Hurst had previously been asked about this. And his answer was that the views imputed to Mr Ackerman (at the press conference) were:

"from the point of view of the Urban Foundation ... It is not talking about the Pick 'N Pay Board discussing the contribution to the Urban Foundation. That is another context ... The fact

that/

that Mr Ackerman is a director of the Urban Foundation and then talks about what the Urban Foundation is going to do, that is not at our board meeting".

It might be (I do not say this is so) that respondent's contribution was not presented to the public in a true light, namely, that it was acting purely for business reasons. But even so, this would not preclude the matter being looked at, as I think it has to be, in the light of what was said and thought and aimed at at respondent's board meeting.

To sum up on this issue. Whatever the subordinate and private or personal objective of Mr Ackerman may have been, from respondent's point of view it discharged the onus of proving that the donation was actuated purely by commercial motives; its purpose in benefiting the Urban Foundation was not an independent/

independent or distinct one; it was purely a means to an end, viz, to acquire indirect advertising in the form of favourable publicity; the latter was, in reality, its sole aim; the expenditure was entirely divorced from the element of charity for charity's sake. This, in substance, is what the Special Court found and, for the reasons stated, I agree with it.

It remains to deal with the other two issues referred to at the commencement hereof. This being a minority judgment, I intend to consider them only briefly. I start with (i) above. As Ogilvie Thompson CJ, in Palabora Mining Co Ltd v Secretary for Inland Revenue 1973(3) S A 819(A) at 833 (F - G), pointed out, the problem of distinguishing between capital and revenue expenditure:

"is/

"is invariably a somewhat evenly balanced and difficult" one. In terms of sec 11(a) of the Act only the latter is, of course, deductible. A number of tests, or rather general guides, have been laid down for distinguishing between the two. One of them is to inquire whether or not the expenditure was made with a view to bringing into existence an asset or advantage for the enduring benefit of the trade (Silke on South African Income Tax, 10th ed, para 7.9, p 321). Ultimately, what has to be decided is whether the expenditure in question is properly to be regarded as part of the cost of performing the income earning operations or as part of the cost of establishing or improving or adding to the income earning plant or machinery (per Watermeyer, CJ in

New State Areas Ltd v Commissioner for Inland Revenue

1946 AD 610 at 620 - 1). The basis on which the Special Court concluded that the donation was expenditure of a revenue nature and therefore deductible is stated by Grosskopf J in the following terms:

"Was the expenditure of a capital nature and therefore not deductible in terms of sec 11(a) of the Act? On behalf of the Commissioner it was contended that the expenditure was designed to establish an asset or advantage providing an enduring benefit to the appellant, and was therefore of a capital nature. In our view the evidence refutes this submission. The witnesses to whom reference has been made, stated that in their experience all advertising is ephemeral and consequently has to be a continuing process. A special event such as the donation to the Urban Foundation could have an influence for several months, but no more.

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This evidence was supported by that of Dr Marius Leibold, a senior lecturer in business economics at the University of Stellenbosch who specializes in marketing and distributing. He wrote the thesis for his doctorate on retailing strategy, for which purpose he studied the major retailing groups, including the appellant. He confirmed that it was the lifeblood of a company like the appellant to have its name constantly presented to the public, and that indirect advertising can be more effective than direct advertising. Advertising whether direct or indirect, has, in his view, only a short term effect, and for that reason has to be carried on continuously. No long term benefit can be secured by any single act of advertising, whether direct or indirect.

On the basis of all the evidence we find that the expenditure was not designed to secure any enduring advantage, and did not in fact do so. We therefore hold that it was not an expenditure of a capital nature."

In/

In my opinion this was a correct assessment of the position.

This brings me to the issue of whether the 1979 payment of R100 000 was correctly held to have been deductible ((iii) above). What had to be decided was whether, in terms of sec 11(a) of the Act, it was incurred in the production of income. On the evidence, such income was earned in the 1978 tax year. The reason for this is the following. On the one hand, respondent did not claim the full amount of the donation (ie, R500 000) in 1978. It could not do so because no unconditional, legal obligation to pay the future instalments was then incurred. Mr Ackerman explained that their payment was

subject/

was subject to certain exigencies. Accordingly, the well-known principle of Caltex Oil (S A) Ltd v Secretary for Inland Revenue 1975(1) S A 665(A) (recently applied in this Court in Nasionale Pers Bpk v Kommissaris van Binnelandse Inkomste 1986(3) S A 549(A)) operated to preclude more than R100 000 being claimed as a deduction in 1978. This is the reason why the deduction of the second instalment was only claimed when it was paid, viz, in 1979. On the other hand, it did not relate to any income produced in 1979. This followed from the fact that the benefits of the publicity were of short-term duration only and had run their course during the 1978 tax year. Nevertheless, claimed respondent, the 1979 payment was deductible on the basis that it was expenditure incurred/

incurred in the production of 1978 income. It is, of course, clear that the words "incurred in the production of the income" do not mean that, before a particular item of expenditure may be deducted, it must be shown that it produced income for the particular year of assessment (Sub-Nigel Ltd v Commissioner for Inland Revenue 1948(4) S A 580(A) at 592). The income may be earned only in a future year. And I shall assume that the same principle applies to justify the deduction of expenditure relating to the income of a previous year (see the Australian High Court cases of The Texas Co (Australasia) Ltd v The Federal Commissioner of Taxes (1939-40) 63 CLR 382 at 427 and A G C (Advances) Ltd v The Commissioner of Taxation of the Commonwealth of Australia (1974-5) 132 CLR 175 at

197, but cf Silke para 7.8 p 318 and cases cited in footnote 73 thereof). There must, however, as Silke (p 317-8) points out, be a sufficiently distinct and direct relationship or link between the expenditure incurred and the earning of the income. Suffice it to say that, on the facts, I do not think that respondent established this.

In the result, I am of the opinion that respondent was entitled to deduct the amount of R100 000 paid to the Urban Foundation in 1978 but not that paid in 1979. I would, accordingly, allow the appeal to this extent that the order of the Special Court is altered to read: The appeal is upheld by allowing the deduction of R100 000 for the year of assessment ending 28 February 1978. The assessment disallowing the deduction for

the/

for the year ending 28 February 1979 is, however, confirmed. I would add that it is, in the circumstances, unnecessary to decide what should be the appropriate order in regard to the costs of appeal.

H H NESTADT, JA

HEFER, JA - CONCURS