



South African Fiscal Association

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Newsletter 4/2005

Dear members

Next evening seminar

1. Our next evening seminar is scheduled for the 27th September 2005 in Cape Town, and the 29th September 2005 in Johannesburg. We have invited the following eminent speakers to address SAFA on two recent leading cases:

- 1.1 **Judge Robin Marais** will deliver a presentation on *Welch's Estate vs C (66 SATC 303, 2004 SCA)* in his capacity as a member of the bench who sat on the case. He also wrote the case report. The case deals with the meaning of 'donation' for the purposes of Donations Tax. However, the meaning of 'donation' is important for various other tax reasons (such as section 7 or CGT) and this case therefore has wide ranging implications.

For purposes of inviting members to forward questions to Basil Newton on specific issues they wish to pose to Judge Marais, we briefly discuss the case below:

It is submitted that the essence of the case was the finding that the meaning of 'donation' for the purposes of donations tax is not dissimilar from the common law concept of 'donation' in that there must be 'pure liberality' or 'disinterested benevolence'.

Briefly, the facts were that Mr Welch settled certain assets upon a trust, in terms of a trust deed that obliged the trustees to apply the income (and capital, if necessary) to discharge certain maintenance obligations due by Mr Welch to his ex-wife and their child. The issue was whether this 'transfer' of the maintenance obligation from Mr Welch to the trust

constituted a *quid pro quo* in return for the assets transferred from Mr Welch to the trust. By a 3-to-2 majority, the court effectively held that:

- The fact that the trust was taking over Mr Welch's maintenance obligations did indeed constitute a *quid pro quo* for the assets;
- The existence of a *quid pro quo* meant that the disposition was not motivated by 'pure liberality' or 'disinterested benevolence', nor was it 'gratuitous' if indeed this means something different.
- Therefore the disposition was not a 'donation'.

Interesting questions and comments :

- Part V of the ITA, which contains the Donations Tax rules, is the only place in the ITA where the term 'donation' is actually defined. But the word 'donation' or '*donated*' is used in several other places in the ITA, like s8(4)(k), s7, s18A, the CGT rules in the 8th Schedule, and more.
- Whilst there might have been arguments as to whether all these other provisions should rely on the Donations Tax or common law meaning of 'donation', the current case presumably suggests that the distinction is irrelevant.

The dissenting judgment does not seem to disagree with the conclusion regarding the meaning of '*donation*', but rather takes issue with the appropriateness of viewing the maintenance obligations as a *quid pro quo*. The dissenting judges felt that the transfer of the assets (on the one hand) and the trust deed which took on the maintenance obligations (on the other) should be viewed as two separate events. The majority judgment simply viewed the two components together, and this of course begs the question of how close or remote the 'settlement' and the *quid pro quo* could be. For example, the perceived mischief that s7 ITA attacks is where the purpose of the 'transfer' is to reduce a tax liability – but the very fact that that there is a tax avoidance motive means that the disposition was not motivated by '*pure liberality*' or '*disinterested benevolence*' – which then means that there was no 'donation' to start with? (S7 simply used as an example, but there could be other applications not related to tax avoidance.)

- 1.2 Adv Geert Stevens** will deliver his address on *Chipkin v SARS (SCA)*, he was Counsel for SARS in this case which effectively found that where a partner sold his interest in an aircraft operating partnership the partner was subject to income tax on the recoupment on his share of tax allowances previously claimed in respect of the aircraft. This case is important not only for businesses operating as a partnership but also for companies and other persons who may enter into joint venture arrangements.

The case poses a number of questions.

- Many an accountant will testify that in practice partnership accounts are drawn up and the net profit split between partners and taxed in their hands almost as if the partnership is a separate person. No account recoupments are calculated in respect of partners leaving the partnership. Will this now come to an end?
- If a partner leaving is subject to a recoupment can the partners who acquired the partnership share then start to claim say section 12C allowances on this newly acquired share?
- Was the decision in this case influenced by the fact that this was maybe seen as a tax scheme?
- This is an Appeal Court decision, but is this the last word on the matter? Had the decision anything to do with the way in which this specific partnership agreement was drafted? Is there e.g. a difference between selling and purchasing a partnership asset (a transaction taking place between two partners) as opposed to a case where a departing partner withdraws his capital and a new partner contributes capital to the partnership?
- There is overseas case law suggesting that the interest of a partner in a partnership does not mean that from a tax point of view the partner owns a fractional interest in the assets of the partnership. Do we now have to accept that the situation is different in South Africa?
- Partners are regarded as connected persons for tax purposes. Does this mean that an arm's length recoupment must be calculated even in cases where a departing partner is not compensated for his share?
- Etc.

1.3 Twenty minutes will be devoted to a report-back on the topics canvassed at the 2005 IFA Congress which is to be hosted in Buenos Aires from 12th to 15th September 2005.

2. Confirmation shall be posted on the website by 20 September 2005, reservation details are as follows:

Date: 29 SEPTEMBER 2005
Place: Johannesburg
 KPMG Auditorium, 85 Empire Road, Parktown
Time: 18h00 to 19h30
Topics: 1. *Welch's Estate v C 66 SATC 303, 2004 SCA* –
Judge Robin Marais
 2. *Chipkin v SARS(SCA)* - **Advocate Geert Stevens**
Bookings: Zelda.Dasilva@kpmg.co.za

Date: 27 SEPTEMBER 2005
Place: Cape Town
PricewaterhouseCoopers
No 1 Waterhouse Place
Century City
Time: 18h00 to 19h30
Topic: 1. *Welch's Estate v C 66 SATC 303, 2004 SCA* –
Judge Robin Marais
2. *Chipkin v SARS(SCA)* - **Advocate Geert Stevens**
Bookings: hilda.lodewyk@za.pwc.com

3. All members are invited to send questions to Basil Newton at basilnewton@iafrica.com which will be put to the panel. For the sake of good order, questions should be submitted by the 15th September 2005.

Charl du Toit

President: SAFA