REPORTABLE

**REPUBLIC OF SOUTH AFRICA**

**IN THE TAX COURT HELD AT JOHANNESBURG**

**CASE NO: 12856**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

…………………….. ………………………...
DATE SIGNATURE

In the matter between:

**A (PTY) LTD** Appellant

and

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

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**J U D G M E N T**

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**COPPIN, J:**

[1] This is an appeal against the assessment by the respondent of the appellant's liability for income tax for the 2003 and 2004 years of assessment.

[2] There are no factual disputes and the issues between the parties were further narrowed by the time the matter was presented in court. The only

issues remaining for determination are questions of law. In terms of s 83(4c) of the Income Tax Act 58 of 1962 ("*the Act*") when an appeal before the court involves a matter of law only the court shall consist of the President of the court sitting alone.[1]

[3] It is common cause that at least during the years of assessment the appellant owned three goldmines, namely, B Mine, C Mine and D Mine. B Mine and C Mine, for the years under consideration, made a profit while D Mine made a loss. The appellant also derived an income from non-mining activities. The main question for determination is whether the loss of D Mine could be set-off against the taxable income derived by the appellant from its non-mining activities, or whether the loss, being a current or operating loss of D Mine, had to be deducted (and on a *pro rata* basis) from the income of the profitable mines, namely B Mine and C Mine.

[4] In its income tax returns for the years in question the appellant did not deduct the loss from the income of C Mine and B Mine, but deducted the loss from the taxable income derived by it from its non-mining activities, thus substantially reducing the taxable income in respect of its non-mining activities. The taxable income of B Mine and C Mine, respectively, was taken up by the redemption of capital expenditure (capex), which was deducted from such income up to the limit of such income, effectively leaving the profitable mines with no taxable income for the respective years. The only taxable income the appellant had was the reduced income from its non-mining

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[1] Members that were appointed were accordingly excused since the issues had been reduced to issues of law only.

activities. The effect of the appellant's approach was to effectively reduce the tax payable by it and to maximise the amount of capex it redeemed in respect of C Mine and B Mine.

[5] In its assessment the respondent applied a different approach. It deducted D Mine's operating loss from the income of the B Mine and C Mine on a *pro rata* basis, before redeeming capex against the respective taxable incomes of those mines. The respondent did not set-off D Mine's loss against the taxable income derived from the non-mining activities, but left that income intact. The effect of the respondent's assessment was to reduce the capex that the appellant could redeem, in the relevant years in respect of the B Mine and C Mine mines, and to, effectively, increase the appellant's tax liability in respect of its income from non-mining activities.

[6] Central to the differences in approach was the interpretation of, *inter alia*, ss 11(a), 15(a), 20(1)(b), 36(7E) and 36(7F) of the Act.[2]

[7] Much of the argument presented by the parties related to the interpretation of ss 36(7E) and 36(7F) and, in particular, to whether the approach of either the appellant, or that of the respondent, results in the mischief which those sections were intended to overcome. There were counter-submissions that the approach of the other gave rise to the very mischief which those sections were aimed at. As background, the meanings

[2] The appellant raised an alternative issue regarding section 36(7G) in the event of the court not agreeing with its interpretation and application of subsections 36(7E) and (7F). However, because it is accepted by the parties that there is no income available against which the allowances in respect of capex may be set-off, the argument in respect of section 36(7G), is hypothetical, or of academic interest only.

of those sections, including the mischief they were intended to overcome, shall be considered first. They are central to the appellant's approach. The other sections relied upon by the parties are dealt with in the course of the judgment.

[8] Section 36(7E) provides:

> '*The aggregate of the amounts of capital expenditure determined under subsection (7C) in respect of any year of assessment in relation to any mine or mines shall not exceed the taxable income (as determined before the deduction of any amount allowable under section 15(a), but after the set-off of any balance of assessed loss incurred by the taxpayer in relation to such mine or mines in any previous year which has been carried forward from the preceding year of assessment) derived by the taxpayer from mining, and any amount by which the said aggregate would, but for the provisions of this subsection, have exceeded such taxable income as so determined, shall be carried forward and be deemed to be an amount of capital expenditure incurred during the next succeeding year of assessment in respect of the mine or mines to which such capital expenditure relates.*'

[9] Section 36(7F) provides:

> "*The aggregate of the amounts of capital expenditure determined under subsection (7C) in respect of any year of assessment in relation to any one mine shall, unless the Minister of Finance, after consultation with the Minister of Mineral and Energy Affairs and having regard to any relevant fiscal, financial or technical implications, otherwise directs, not exceed the taxable income (as determined before the deduction of any amount allowable under section 15(a), but after the set-off of any balance of assessed loss incurred by the taxpayer in relation to that mine in any previous year which has been carried forward from the preceding year of assessment) derived by the taxpayer from mining on that mine, and any amount by which the said aggregate would, but for the provisions of this subsection, have exceeded such taxable income as so determined, shall be carried forward and be deemed to be an amount of capital expenditure incurred during the next succeeding year of assessment in respect of that mine: Provided that where the taxpayer was on 5 December 1984 carrying on mining operations on*

> *two or more mines, the said mines shall for the purposes of this subsection be deemed to be one mine.*"

[10] The respondent relied on various memoranda that accompanied the bills that introduced these subsections into the Act as well as comments and opinions of the Margo Commission of Enquiry Into The Tax Structure Of The RSA 1986 ("*the Margo Commission*"), press releases of the then Minister of Finance and commentary of academic writers, to elucidate the mischief that these sections were intended to deal with and prevent. The appellant was critical of this approach.

[11] The admissibility of reports of commissions of enquiry, preceding legislation, and of explanatory memoranda, that accompanied bills introducing such legislation, was considered by the Constitutional Court, for the purpose of interpreting the Constitution, in *S v Makwanyane and Another*[3], and for the purposes of interpreting legislation, in *Minister of Health v New Clicks SA (Pty) Ltd and Others*[4].

[12] In *New Clicks,* where *certain* medicine pricing provisions in the Medicines and Related Substances Control Act 101 of 1965, introduced by an amending Act of 1997, and pricing regulations, were being considered, Chaskalson CJ stated the position on their admissibility as follows:

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[3] 1995 (3) SA 391 (CC) at para [90]; 1995 (2) SACR 1; 1995 (6) BCLR 665.
[4] 2006 (2) SA 311 (CC) at paras [199]-[200].

'*[200] In S v Makwanyane and Another 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, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution".*

*[201] Although it is not entirely clear whether the majority of the Court concurred in 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 and Others and Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd and the cases from other jurisdictions referred to in Makwanyane's case.*'

In *New Clicks* it is similarly not entirely clear whether the majority agreed with what Chaskalson CJ stated. However, none of the other members of the court expressed any disagreement with that view.

[13] Material that is not background material, such as the report of the Margo Commission and the views of commentators, are not admissible for the aforementioned purpose, but may be used in argument in an effort to persuade. I should add that the appellant did not dispute the authenticity of the materials and both parties, in argument, referred to certain sections of the report of the Margo Commission.

[14] Subsections 36(7E) and 36(7F) apply to mining and introduced a ring-fencing in respect of mining income (details of which will be considered below). In their report the Margo Commission stated the following about the position before and after the introduction of those subsections:

> ‘*14.20 The capital expenditure ranking for redemption is deducted from income in accordance with special rules, which have been changed twice since the beginning of 1984 by the addition of section 36(7E) and 36(7F) to the Income Tax Act. The reduction itself is, of course, what is referred to as the redemption allowance.*
>
> *14.21 In years of assessment ending before 1 January 1984 redemption was allowed in full against income from mining operations. Any balance represented an assessed loss which qualified as a deduction against income from any other source. There was, in short, no ring fence.*
>
> *14.22 For years of assessment ending on or after 1 January 1984 the deduction of the redemption allowance is limited to taxable income from mining. Any excess is carried forward to the next year. In short, a ring fence, impenetrable to capital expenditure, but not to revenue losses, is placed around the company's mining operations. This is the effect of section 36(7E) of the Act.*
>
> *14.23 On 5 December 1984 it was announced that, except in those cases where, on that date, more than one mine was being operated by the same person the capital expenditure incurred by any mine was to rank for deduction from the income of that mine only. That is to say, each individual mine was surrounded by a ring fence, impenetrable to capital expenditure, but through which current losses would be allowed to pass. A new section 36(7F) imposed this restriction. Provision was made for the Minister to grant exemption in special cases …*’

[15] The Margo Commission Report also states the following regarding the mischief which these ring fencing provisions were intended to prevent:

> ‘*14.27 … Redemption allowances were being used on a large scale to shelter income that had little or no connection with the mine on which the capital expenditure giving rise to the allowances was taking place …*’

[16] In the explanatory Memorandum on the Income Tax Bill (1983), which accompanied the Bill which introduced section 36(7E) into the Act and effected consequential amendments to the Act, the following is stated:

> 'subclause*(a) The amendment by this subclause to section 36(7C) of the principal Act is consequent upon the insertion of the new subsection (7E) in terms of subclause (c)*
>
> *Subclause(b)…*
>
> *subcluase(c) In determining the taxable income derived by a taxpayer from mining operations a number of the allowances provided for in sections 11 and 12 of the principal Act (e.g. the wear and tear and obsolutions allowances, also the initial and investment allowances) may not be deducted. Instead, it is provided in section 15 that the taxpayer may deduct, inter alia, an amount determined under the provisions of section 36. The latter section provides, briefly, that in the year in which a mine commences production the amount of capital expenditure incurred up to the close of that year of assessment shall be allowed as a deduction. In subsequent years the capital expenditure incurred during the year is allowed as a deduction. It follows from this that if the accumulated capital expenditure exceeds the profits of the mine for the year in which the mine comes into operation, an assessed loss will arise. An assessed loss will also arise in any subsequent year in which capital expenditure exceeds the profits from the mine.*
>
> *By extension, it follows that if the taxpayer is also carrying on some other trade such assessed losses will reduce his liability for tax on his profits from that trade and may even extinguish it altogether.*
>
> *The new subsection (7E) inserted in section 36 of the principal Act by this subclause, limits the deduction of capital expenditure in respect of the mining operations to an amount equal to the taxable income derived from such operations for the year of assessment, as determined before taking such capital expenditure into account. Any excess capital expenditure will be carried forward and considered for deduction in the next succeeding year of assessment.*'

[17] An explanatory memorandum on the Income Tax Bill (1985), which accompanied the Bill which introduced s 36(7F) into the Act, states the following regarding that subsection:

> '*The provisions of the new subsection introduced by subclause (l), will have the effect that where more than one mine is operated by the same person the capital expenses relating to any one mine may be set-off only against the income from that mine unless the Minister of Finance, in consultation with the Minister of Mineral and Energy Affairs and having regard to the relevant fiscal, financial and technical implications, otherwise decides.*'

[18] In the explanatory memorandum on the Income Tax Bill (1990), which accompanied the Bill that introduced amendments to ss 36(7E) and 36(7F) of the Act, the following is said about the amendment.:

> *' Subclauses (b) and (c) amend section 36(7E) and (7F) of the principal Act in order to make it clear that any assessed loss incurred in relation to a mine or mines, contemplated in section 36(7E) or a single mine contemplated in section 36(7F), must be taken into account against a taxpayer's income from mining in relation to such mine before any capital expenditure can be allowed as a deduction against the income from the exploitation of such a mine. Presently section 36(7F) of the principal Act provides that where more than one mine is operated by the same taxpayer the capital expenditure relating to one mine may not be set-off against the income from any other mine, unless the Minister of Finance, after consultation with the Minister of Minerals and Energy Affairs and having regard to the relevant fiscal, financial and technical implications otherwise decides. In an effort to encourage the opening up of new mines the limitations on the deduction of capital expenditure is partially lifted by subclause (d) which has the effect that 25% of a taxpayer's taxable income from mining can now be utilised for the redemption of surplus capital expenditure of all producing new mines belonging to the taxpayer. This concession will, however, not apply in cases where …*'

[19] In *Escoigne Properties Ltd v Inland Revenue Commissioners*[5], Lord Denning stated *inter alia* the following:

> "*A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used; and what was the object, appearing from those circumstances, which Parliament had in view.*"

[20] The circumstances which generally prevailed before ss 36(7E) and (7F) were enacted, were that schemes were devised whereby, for example, a profitable gold mining company which was paying tax at a high rate would take over the operations of another mining company which was making a loss, or had low profits, or which had a substantial balance of unredeemed capex, and write-off the same against the income of the profitable mine. The effect of this was that the income of the profitable mine would either be substantially reduced, or totally used up. These schemes were offensive, because the mining revenue was being eroded at the expense of taxpayers by means of a concession granted to mining companies regarding the deduction of capex.[6] The fear of potential losses to the fiscus, as a result of these schemes, prompted the introduction of ss 36(7E) and (7F) into the Act.[7]

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[5] [1985] 1 All ER 6.

[6] For the privileges of mines in this regard see *inter alia Western Platinum Ltd v C: SARS* [2004] 67 SATC 1 (SCA) para [1].

[7] See the press release by former Minister of Finance Mr Barend du Plessis issued by former Minister of Finance on the 5th December 1984.

[21] Those provisions were intended to prevent erosion of the mining tax base, in particular, by the use, or potential use, by mining companies, of capex to generate losses which would result in a substantial reduction, or total elimination of the mining income as a source of taxation. Subsection 36(7E) prohibits the redemption of capex relating to mine activities against income derived from other sources and provides that such capex can only be redeemed against the taxable income from mining. It also limits the amount of capex that may be redeemed to the amount of such taxable income. Subsection 36(7F) governs the situation where the mining company (the taxpayer) has more than one mine. It prohibits the capex of one mine from being redeemed against the taxable income of another mine and provides that the capex of a mine may only be redeemed against the taxable income of that mine. Subsection 36(7E) also further limits the amount of capex that can be redeemed in a particular year of assessment by providing that it can only be redeemed against a taxable income from mining after set-off of any balance of assessed loss incurred by the taxpayer in respect of a mine in a previous year of assessment. Arguably subsection 36(7E), by ring- fencing income from mining, also ring fenced, to an extent, the income derived by the taxpayer from other sources, in that the capex relating to its mining operations may not be redeemed against the income from those other sources, but may only be redeemed against the mining income. The ring fences imposed by ss 36(7E) and (7F) renders the income from mining impervious to the redemption of capex, but does not render those incomes impervious to the deduction of, say, current losses. In my view s 36 (7E), where it deals with the deduction of assessed losses carried over from preceding years of assessment, implies

that such losses may only be deducted from the mine or mines that incurred them. I am fortified in this view that one of the main purposes of the subsection was to limit the amount of capex redeemed in any particular year. If the taxpayer was free to deduct the assessed loss from the preceding year from any other income it could undermine this purpose of the subsection. Subsection 36(7F) also provides that capex can only be redeemed against the taxable income of that mine after set-off of any assessed loss incurred by the taxpayer in relation to that mine in any previous year which has been carried forward from the preceding year of assessment.

[22] However, the main issue raised in this matter is whether the Act prohibits the current loss incurred by the taxpayer in respect of a particular mine from being deducted from the income derived by the taxpayer from a source other than mining and the related issue, namely, whether the current year's operating loss from such a mine may only be deducted from the incomes of other mines of the taxpayer and, if so, whether the deduction should be *pro rata* from the incomes of the other mines.

[23] The respondent submits that the method adopted by the appellant prioritises the deduction of mining capex over the deduction of mining operating expenditure "*in the name of ring fencing,that the method is incorrect for the simple reason that all mining operating expenses/losses must be claimed against mining income before mining Capex is redeemed*". In elaborating on this point the respondent accepts that the loss of D Mine (for the years 2003 and 2004) was due to operating expenses and that the whole

of section 36 does not regulate the deduction of mining operating expenditure, but submits that the deduction of such expenditure is governed by section 11(a) of the Act and not by section 36 of the Act. The respondent further submits that capex deductions in terms of ss 36(7E) and (7F) cannot enjoy preference over the deduction of operating losses in terms of section 11(a), because section 11(a) deductions are deductible against "*income*" as defined in the Act, while capex is deductible against "*taxable income*" as defined in the Act, i.e. operating losses are deducted from income and capex is redeemed against taxable income.

[24] The respondent submits that the appellant's method of calculation must be rejected on four grounds which I will summarise. Firstly, all mining operating expenses or losses must be deducted from mining income before any capex is redeemed. The reason being that operating expenses must be deducted from "*income*" (from the mining trade) while capital expenditure relating to a particular mine is to be redeemed against the "*taxable income*" of that mine. Only the deduction of capex is ring fenced in terms of section 36. According to the respondent, the appellant is thus wrong to redeem the respective capex from the respective mines (i.e. B Mine and C Mine) before deducting D Mine's operating loss from the income of those mines. Secondly, section 11(a) of the Act distinguishes between trades and requires the operating loss of a trade to be firstly deducted from the income derived from that trade, if any. The respondent submits that it is accordingly wrong to deduct D Mine's loss, which is a loss in the mining trade, from the income the taxpayer derived from another trade in circumstances where such a deduction

does not fall within the purview of section 20(1)(b) read with section 20(2) of the Act. Thirdly, the intention of the Legislature in enacting ss 36(7E) and (7F) was to prevent the erosion of the non-mining tax base. Allowing the appellant's method would be to promote the mischief which the Legislature intended to overcome by the introduction of those subsections. Fourthly, to allow the deduction of expenses from the trade of mining for gold from non-mining trades (and *vice versa*) carried on by the taxpayer, "*would distort and dilute the graduating tax rate applicable to the gold mining trade*". In this regard the respondent referred to the case of *ITC 1420*[8] where the taxpayer derived a substantial income from its gold mining activities but incurred a loss from its non-mining activities and the question was whether the loss could be set-off against the income derived from gold mining. The court held, *inter alia*, that the intention of the Legislature to tax gold mining companies differentially (in proportion to their profitability) would be stultified, or could be materially eroded, if a gold mining company was allowed to set-off losses it incurred in non-mining activities against mining income.

[25] The appellant, in essence, submitted that its approach was in accordance with ss 36(7E) and (7F). According to the appellant, the respondent was wrongly reading requirements into the Act regarding the deduction of operating losses. It submitted that a distinction had to be drawn between a current year loss (or operating loss) and an *'assessed loss*'. An 'assessed loss' was a loss incurred in a previous year. Such a loss carried over from a previous year was ring fenced in terms of subsections 36(7E) and

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[8] ITC 1420 (1986) 49 SATC 69 (T).

(7F) in that it was only the assessed loss of a particular mine carried over from the previous year that could be deducted from the taxable income of that mine and before redemption of the capex of that mine against its taxable income. The ring fencing did not apply in respect of current losses. The appellant submitted that at no point did it seek to deduct current losses in respect of the D Mine mine other than in accordance with section 11(a) of the Act. It also submitted that the capex it deducted for the years of assessment (i.e. 2003 and 2004) did not contravene the provisions of subsection 36(7E). Furthermore, that the capex of the B and C Mine mines, respectively, was deductible from their respective taxable incomes before the current year mining losses from D Mine was deducted. It was submitted that only once the required calculation in respect of each mine's capital expenditure was completed may reference be made to any current year loss of any other mine. Further, that a current year loss not utilised in the current year of assessment becomes an assessed loss for that ring- fenced mine which can be set-off against the taxable income of that mine after set-off of that mine's capex. The appellant further submitted that by setting off current year losses of one ring-fenced mine against the taxable profit of another ring- fenced mine is in fact to regard all mining income and assets as one for tax purposes, which is not correct. The appellant relied on *dicta* in *Conshu (Pty) Ltd v Commissioner of Inland Revenue*[9] and submitted that D mine was in a similar position to the taxpayer in that case because it had nothing against which its loss could have been set-off.[10] The appellant also submitted that it could not have been the

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[9] 57 SATC 1 at p 11.

[10] In *Conshu* the Commissioner invoked the provisions of section 103 of the Act and ruled that the taxpayer could not utilise an assessed loss of 1985 against income derived during 1986 from assets that had been transferred. In the course of his judgment Harms JA stated,

intention of the Legislature that the capex of a profitable ring- fenced mine should not be utilised in full, because of the deduction of the losses of an unprofitable ring- fenced mine in the same legal entity. In relation to the sequence for setting-off current year or operating losses the appellant submitted that in *Commissioner for Inland Revenue v Zamoyski*[11] *the court* dealt with a similar provision in the Act in connection with farming expenses and the court had to decide at what stage other losses may be deducted and when the setting-off of an assessed loss must occur. Relying on that decision the appellant submitted that in relation to mines, the setting-off of any assessed loss should only occur after redemption of capital expenditure.[12] The appellant also submitted that its method[13] was supported by the decision in *ITC 770* (1953)[14] where the court held, in circumstances where the taxpayer derived an income from three different activities, including coal mining and share-jobbing, that the loss from share-jobbing should be set-off against the income derived from the mining and the other activities on a *pro*

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regarding the facts there, that since the taxpayer did not claim the benefit of section 20 of the Act in 1985 and did so for the first time in 1986 there was no occasion for the Commissioner to allow the set-off in 1985 and furthermore the taxpayer had no taxable income otherwise during 1985 against which the assessed loss could have been set-off. However, it appears as if the appellant is misconstruing the passage it relies on in that judgment to mean that the attempt to set-off the loss in circumstances where there was no taxable income was destructive of the provisions. That is not what was stated by Harms JA. The learned Judge of Appeal stated that to hold that, because the Commissioner could not have applied section 103(2) to the 1985 year entails that he could also not have done it in relation to the 1986 year, was destructive of the purpose of the provisions, i.e. section 103(2).

[11] 47 SATC 50 at 54.

[12] This submission appears to be contradicted by the very wording of section 36(7E) and (7F) in particular insofar as the assessed loss is implied to include any balance of assessed loss incurred by the taxpayer in a previous year and carried forward from that year. According to those provisions (read together) such assessed loss is set-off before the capex in respect of that mine is redeemed against its taxable income.

[13] i.e. of setting-off current year losses after the capex has been redeemed in relation to each ring- fenced mine.

[14] 19 SATC 216 (T).

*rata* basis.[15] The appellant also cited other examples of calculations in textbooks and submitted that they served as authority for its method.[16]

[26] Subsections 36(7E) and (7F) do not prescribe what is to be done to current year losses. They only deal specifically with the balance of assessed losses from a previous year which were carried over from that year, but they make no express mention of the losses referred to in s. 20(1)(b) of the Act, namely, assessed losses incurred by the taxpayer during the same year of assessment in carrying on any other trade. In terms of s 20, for the purposes of determining taxable income, those kind of losses are to be set-off against income derived by a taxpayer from any trade. Read with ss. 36(7E) and (7F), the balance of an assessed loss from the previous year is subject to ring fencing and can only be deducted from the income of the mine to which it relates. The current year losses are not subject to the ring fencing envisaged in those subsections.

[27] In terms of s 11(a) of the Act, for the purposes of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such a person, so derived, expenditure and losses actually incurred in the production of such income, provided such expenditure and losses are not of a capital nature. The section

[15] This case appears to be distinguishable. It precedes the introduction of ss36(7E) and 36(7F); It does not deal with the sequence of deduction of expenses or losses and appears more supportive of the argument of the respondent that the loss of D Mine had to be apportioned on a *pro rata* basis.

[16] In *D. Clegg "Income Tax in South Africa"* at para 20.8; *Van Blerck M.C. "Mining Tax in South Africa" (2nd Edit.)* pp 12-30; Tables 12.2; 12.3.

does not expressly refer to different units within the same trade. It only refers to a trade. The respondent in its argument firstly excludes the possibility that that section recognises separate units (albeit impliedly) and secondly, considers the assessed loss in the current year referred to in s 20(1)(b) as the balance of the loss referred to in s11(a), after the loss had been deducted from the income of that trade (in this case mining) which can then be deducted from the income of any other trade (in this case the appellant's income from other activities).

[28] In enacting ss 36(7E) and (7F) the Legislature did not regard the deduction of current operating losses as a mischief to be regulated by means of a ring-fencing provision in those subsections, in all probability because that was dealt with elsewhere in the Act.

[29] Section 20(1)(b)of the Act allows a taxpayer to deduct an assessed loss incurred in one trade from the income derived from another trade. It provides:

> "*(1) For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall, subject to section 20A be set-off against the income so derived by such a person –*
>
> > *(a) …*
> >
> > *(b) any assessed loss incurred by the taxpayer during the same year of assessment in carrying on any other trade either a loan or in partnership with others, otherwise than as a member of a company the capital whereof is divided into shares.*"

Paragraph (b) of the proviso to section 20(1) reads as follows:

> "*Provided that there shall not be set-off against any amount –*
>
> *(a) …*
>
> *(b) derived by any person from the carrying on within the Republic of any trade, any:*
>
> *(i) assessed loss incurred by such a person during such year; or*
>
> *(ii) any balance of assessed loss incurred in any previous year of assessment, in carrying on any trade outside the Republic.*"

[32] Section 20(2) of the Act defines "*assessed loss*" for the purposes of s 20 as meaning the amount by which the deductions admissible under section 11(a) exceed the income in respect of which they are so admissible. In the light of the decision in *ITC 1420,*[17] the reasoning and conclusion which I respectfully agree with, the assessed loss of the current year of assessment (i.e. a current year operating loss) incurred by the taxpayer in respect of non-mining activities, would not be deductible from income derived by it from gold mining despite the provision of section 20(1)(b). In ITC 1420, in interpreting, *inter alia*, section 20(1)(b) read with section 20(2), it was held that to allow the same would be to undermine the legislative intention to tax gold mining companies differentially; that the Legislature has drawn a distinction between income, expenditure and losses arising from mining for gold, on the one hand and those arising from all other sources, on the other hand. However, the facts of the present case are materially different.

[17] (1986) 49 SATC 69 (T).

[33] But for what was held in ITC 1420, it is apparent from s20(1)(b) that a loss incurred by a taxpayer in respect of one trade may, subject to exceptions, be written off against the income the taxpayer derived from another trade. However, it must be a loss incurred in respect of the trade and not only in respect of a unit or units in respect of that trade. In this case and in respect of the relevant years of assessment the appellant incurred an operating loss in respect of only one of its mines and not in respect of its entire gold mining operation. B and C Mines turned a profit. The provisions of s20(1)(b) are accordingly not applicable here.

[34] The applicable provision is s 11(a) of the Act. While ss 36(7E) and (7F) ring-fence mining and individual mines, respectively, and in particular in respect of the redemption of capex and the deduction of the balance of the assessed losses from the previous year, s 11(a) distinguishes between trades and allows certain expenses and losses (current or operating) to be deducted from the income derived by the taxpayer from a particular trade. Section 11(a) provides:

> *'For the purpose of determining the taxable income deived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived-*
> *(a) expenditure and losses actually incurred in the production of the income, provided such expenditure and lossesare not of a capital nature.'*

[35] The section does not allow such expenses, or losses, incurred in respect of one trade to be deducted from the income derived by the taxpayer from another trade. In the case of a taxpayer who derives an income from

mining and an income from another trade, the taxpayer is not allowed to deduct an operating loss incurred in the mining trade from the income derived from another trade and vice versa. The loss can only be deducted from the income derived from the same trade as the one in which the loss was incurred. The same would apply whether the taxpayer has one or more mines and also derives an income from another trade.

[36] The wording of s. 11(a) is clear and unambiguous. The view expressed in the previous paragraph is consistent with the legislative intention to preserve the tax bases of the different trades, which is also the intention behind the enactment of ss. 36(7E) and (7F).[18]

[37] The appellant's approach, namely, to deduct the current, or operating, loss of D Mine (a loss in the mining trade) from the income derived from its other trade, is not allowed by s. 11(a) or any other provision of the Act. The fact that the ring fences introduced by ss. 36(7E) and (7F) are not impervious to the deduction of current, or operating losses from another mine, or another trade, does not legally justify the appellant's approach. The Appellant's contention that its approach is supported by the decision in ITC 770(1953)[19]is flawed. The facts of that case are distinguishable and the court there was dealing with earlier legislation and in any event did not consider provisions similar, or equivalent to the sections considered in this matter. On the other

[18] Although s20(1)(b) of the Act allows the assessed losses contemplated in that section incurred by a taxpayer in respect of one trade to be set-off against income derived by that taxpayer from another trade that section must be read subject to ss36(7E) and (7F). In terms of those sections mining income is to be preserved.

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hand, the respondent's approach, namely, of deducting the D Mine loss from the incomes of the other mines, is consistent with the provisions of the Act.

[38] Other than the decision in ITC 770 (1953), I was not referred to any other authority for deducting the D Mine losses from the respective incomes of B Mine and C Mine on a pro-rata basis. It appears to be a practice or method of the respondent to apportion the set-off of such loss on that basis to the profitable mines. In my view there is no obstacle in the Act to this method or practice. Such an apportionment also appears to be appropriate.

[39] The approach advanced by the appellant of deducting capex from the taxable income of the mines before the current loss of D Mine is based on a flawed view that ss. 36 (7E) and (7F) regulates the deductions of operating losses. The deductions of such losses are regulated by s11 (a) and in terms of that section they have to be deducted from mining income and not the taxable income of a mine. On the other hand ss. 36 (7E) and (7F) regulate the deduction or redemption of capex and provides that the same is ring fenced and has to be set off against the taxable income of the mine to which it relates. The effect of the approach of the appellant is to maximise the amount of capex that is redeemed and effectively eliminate any mining income against which the current losses of its loss making mine could be set off against. Further, by deducting such loss from non mining income, it effectively reduces its tax liability in respect of such income. This approach could result in the very mischief which the Legislature sought to prevent by the introduction of ss. 36(7E) and (7F) and ignores a fundamental principle of interpretation,

namely, a harmonious construction of provisions within the same statute. It is obvious that the deduction of a mining loss from non mining income in circumstances where s. 20(1)(b) of the Act does not apply, is inconsistent with the provisions of s. 11(a) of the Act. The sequence of deductions of which the current operating loss of a mine is first deducted from mining income, before the deduction of the assessed losses contemplated ss. 36 (7E) and (7F) and thereafter the capex from the taxable income of the mine to which it relates is consistent with the Legislative intention. By reducing the income of the respective profitable mines through the deduction of the operating loss of one of its mines the amount of capex that may be redeemed against the respective incomes of such profitable mines is also reduced and a measure of preservation of the income from non mining activities is also achieved.

[40] The appellant raised an alternative argument which I have briefly referred to earlier in this judgment. It relates to the application of s. 36 (7G) of the Act. The appellant submitted that it was entitled to the concession in respect of capex contemplated in that section because it commenced with its mining operations (i.e. three mines) after 14 March 1990. It was common cause that a section can only apply where some mines had a surplus taxable income after their respective capex had been redeemed against their respective incomes and another of the mine(s) had an access of unredeemed capex. In the present case even though B Mine and C Mine were profitable they did not have any surplus taxable income after the redemption of their respective capex. It was accepted that all three mines (i.e. B Mine, C Mine and D Mine) still had huge balances of unredeemed capex in the relevant

years of assessment. There is no surplus taxable income after redemption of capex in accordance with the provisions of ss36 (7E) and (7F) against which the allowance contemplated in s36 (7G) maybe claimed. The alternative argument is accordingly of no practical effect and is purely academic. It stands to be dismissed on that ground alone.

[41] The parties did not ask for any costs orders against each other and were in agreement that the issues were novel and complex. Taking all the facts and circumstances into account I make no costs order.

[42] In the result the appeal is dismissed.

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**P COPPIN**
**JUDGE OF THE SOUTH GAUTENG**
**HIGH COURT, JOHANNESBURG**

FOR THE APPELLANT — MR E BRINCKER<br>CLIFFE DEKKER HOFMEYR INC.

FOR THE RESPONDENT — MR N K NXUMALO

DATE OF HEARING — 14 &15 MARCH 2011

DATE OF JUDGMENT — 1 August 2011