



**IN THE TAX COURT OF SOUTH AFRICA
(CAPE TOWN)**

CASE NO: 13 254

In the matter between:

AB TRUST

Appellant

And

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

Respondent

JUDGMENT DELIVERED ON 22 JANUARY 2014

YEKISO, J

[1] The appellant (“the Trust”) is an *inter vivos* trust established in terms of a deed of trust (“the Trust Deed”) concluded on 15 March 2010. The appellant was registered with the Master of the High Court, Cape Town on 7 September 2010 under the Master’s reference number IT XXX /2010

[2] The respondent is the Commissioner for the South African Revenue Service (“the Commissioner”) and, among other offices it has countrywide, has offices at 11 Buitengracht Street, Cape Town.

[3] On 24 December 2010 the Trust launched an application with the Commissioner seeking approval as a public benefit organisation in terms of section 30(3) as well as approval in terms of section 18A of the Income Tax Act, 58 of 1962 (“the Income Tax Act”) to issue tax deductible receipts to donors.

[4] In order to qualify for the exemption from income tax on certain receipts and accruals in terms of section 10(1)(cN) of the Income Tax Act, the Trust had to be approved by the Commissioner in terms of section 30(3), read with the 9th Schedule to the Income Tax Act. The Trust’s application for approval was refused by the Commissioner on 13 December 2011.

[5] Aggrieved by such a decision, the Trust objected to the Commissioner’s decision to refuse its application and upon disallowance of its objection lodged an appeal to this court.

NATURE OF THE DISPUTE

[6] Based on the evidence on record it would appear that the dispute between the parties is whether the Trust meets the requirements of section 30(3) of the Income Tax Act and whether its sole or principal objective is the carrying on of public benefit activities listed in the 9th Schedule to the Income Tax Act in order for it to qualify for approval as a public benefit organisation under section 30 and approval to issue tax deductible receipts under section 18A of the Income Tax Act.

THE LEGAL REQUIREMENTS

[7] Section 10(1)(cN) of the Income Tax Act provides for a partial exemption from normal tax of certain receipts and accruals of any public benefit organisation approved by the Commissioner in terms of section 30(3) of the Income Tax Act. To be approved as a public benefit organisation as contemplated in section 30 of the Income Tax Act, the organisation, in the first instance, must fall within the definition of a public benefit organisation as defined in section 30(1) of the Income Tax Act; it should have as its sole or principal objective the carrying on of one or more approved public benefit activities listed in Part I of the 9th Schedule to the Income Tax Act; and must comply with the formal requirements set out in section 30(3) of the Income Tax Act.

FACTUAL MATRIX

[8] ABC (formerly known as “AB (Association incorporated under section 21)”) is the founder of the Trust. ABC plays an active and significant role in the administration and management of the Trust.

[9] Prior to the Trust’s inception, ABC also applied for approval as a public benefit organisation under section 30(3) and also sought approval to issue tax deductible receipts to donors in terms of section 18A of the Income Tax Act. The application was refused in 1998 as the Commissioner was of the view that the company did not comply with the requirements as set out in section 30(3) of the Income Tax Act and so also was its application for approval to issue tax deductible receipts to donors in terms of section 18A of the Income Tax Act.

[10] After the refusal of the application in 1998 ABC never stopped attempts to gain the required approval, including attempts by way of correspondence and visits to the head office of the Commissioner in Pretoria. The efforts of ABC culminated in the visit by two officials of the Commissioner to ABC offices in Cape Town where in-depth discussions took place. Shortly after these discussions were held, and during 2004, ABC was issued with an approval in terms of section 18A of the Income Tax Act to issue tax deductible receipts to donors in terms of section 18A of the Income Tax Act. However, such approval was summarily withdrawn by the Commissioner during 2006.

[11] Acting on advice, ABC formed the Trust with the specific purpose to again lodge an application for approval and, more particularly, approval in terms of section 18A to issue tax deductible receipts to donors. In terms of the Trust Deed, the objectives of the Trust are the “provision of poverty relief to poverty stricken communities, community development and anti-poverty initiatives, training for actively poor persons to enable them to obtain employment or improve their employment, the advancement, promotion or preservation of arts, culture and custom, engaging in the conservation, rehabilitation or protection of the natural environment, the promotion, monitoring or reporting of development assistance aimed at benefitting the poor and needy”.

[12] In its application the Trust indicated that it would be performing the following public benefit activities listed in the 9th Schedule to the Income Tax Act, namely:

[12.1.] Welfare and humanitarian: these activities would entail the provision of poverty relief as contemplated in paragraph 1(f) in Part I and Part II of the 9th Schedule;

community development for poor and needy persons and anti-poverty initiatives including:

- (i) the promotion of community based projects relating to self-help, empowerment, capacity building, skills development or anti-poverty;
- (ii) the provision of training, support or assistance to community based projects contemplated in (i) above; or
- (iii) the provision of training, support or assistance to emerging micro-enterprises to improve capacity to start and manage businesses, which may include the granting of loans on such conditions as maybe prescribed by the Minister by way of regulations as contemplated in paragraph 1(p) in Part I and Part II of the 9th Schedule.

[12.2.] Cultural: The activities contemplated under this public benefit activity would involve the advancement, promotion or preservation of the arts, culture or customs as contemplated in paragraph 6(a) in Part I of the 9th Schedule.

[12.3.] Conservation, environment and animal welfare; this public benefit activity would entail engaging in the conservation, rehabilitation or protection of the natural environment, including flora, fauna or the biosphere as contemplated in paragraph 7(a) in Part I and paragraph 4(a) in Part II of the 9th Schedule.

[13] After a series of correspondence and interactions between the Commissioner and the Trust, the Commissioner, in its letter of 13 December 2011, refused the Trust's application for approval as a public benefit organisation.

[14] On 18 January 2012 the Trust, after providing additional reasoning, requested the Commissioner to reconsider its decision of 13 December 2011. After reconsidering the facts and information at its disposal, the Commissioner re-affirmed its earlier decision by way of a letter addressed to ABC dated 22 February 2012.

[15] On 19 March 2012 the Trust noted an objection against the Commissioner's decision not to approve its application for approval as a public benefit organisation. This objection was disallowed on 21 June 2012. Once the objection was disallowed, and on 5 July 2012, the Trust noted an appeal to this court against the Commissioner's disallowance of its objection.

DISALLOWANCE OF THE OBJECTION

[16] In its statement of grounds of assessment the Commissioner sets out the material facts and the legal grounds upon which the Commissioner relied in disallowing the Trust's objection. In its application for approval as a public benefit organisation, the Trust stated the following activities as the basis upon which it applied for approval as a public benefit organisation; provision of poverty relief; community development for poor and needy persons and anti-poverty initiatives; the advancement, promotion or preservation of the arts, culture or customs; and conservation, environment and animal welfare.

[17] As regards poverty relief contemplated in paragraph 1(f) of Part I of the 9th Schedule the Commissioner starts off by contending that poverty relief is not defined in the Income Tax Act. For this reason, so the Commissioner contends in its statement of assessment, a narrow rather than a wide interpretation of the concept "poverty relief"

should be attributed to the term “poverty relief”. The Commissioner contends that the actual activities undertaken by the Trust are the establishment of tourist routes and a website to market these routes and the services offered to route participants. The route participants, so the Commissioner contends, are included irrespective of financial status and that the majority of these participants do not qualify or fall within the scope of requiring poverty relief. The benefit contemplated, so the Commissioner contends, is to a small and inclusive list of route participants and that the Trust’s proposed public benefit activities are therefore not for the benefit of the needy and the poor or are not widely accessible to the general public as is required in terms of section 30 of the Income Tax Act.

[18] As regards the community development for poor and needy persons and anti-poverty initiatives contemplated in paragraph 1(p) of Part I of the 9th Schedule, the Commissioner contends that in interpreting this provision, all elements set out in the main paragraph of community development activity are required to be present, namely, “poor”, “needy” and “anti-poverty initiatives”. It contends that the activities must be directed at assisting persons in dire straits to survive. The Commissioner further contends that the word “including” in paragraph 1(p) requires that one of the three listed activities, these being, (i) the promotion of community based projects relating to self-help, empowerment, capacity building, skills development or anti-poverty; (ii) the provision of training, support or assistance to community based projects contemplated in (i); or (iii) the provision of training, support or assistance to emerging micro-enterprises to improve capacity to start and manage businesses, must be carried on. The majority of route participants, so the Commissioner contends, are not poor and needy nor do the activities in developing tourist routes qualify as anti-poverty initiatives.

The Commissioner thus concludes that the activities contemplated by the Trust are not designed or will not be performed for the benefit of the poor and the needy or shall not be widely accessible to the general public.

[19] As regards the public benefit activity referred to in paragraph 6(a) of Part I of the 9th Schedule, the activity in point being the advancement, promotion or preservation of the arts, culture or customs, the Commissioner contends that the Trust must show that it will perform overt acts to advance, promote or preserve arts, culture or customs. The use of the internet to display and market attractions to expose tourist routes to potential tourists cannot be regarded as advancing, promoting or preserving arts, culture or customs. For these reasons, so the Commissioner contends, the contemplated activities are not designed to benefit the poor and the needy or shall not be widely accessible to the general public.

[20] With regards to the public benefit contemplated in paragraph 7(a) of Part I of the 9th Schedule to the Income Tax Act, the Commissioner contends that in order to meet the requirements of this activity, the Trust must “engage” in conservation of the natural environment. This requires that the Trust must have the necessary infrastructure and skilled personnel to perform the functions for the protection of the environment. The listing of selected species on a website does not constitute “engagement” by the Trust in conservation, rehabilitation or protection of the environment. Thus, the Commissioner concludes that the proposed activities are not designed or will not be performed for the benefit of the poor and the needy or shall not be widely accessible to the general public.

THE CONTENTIONS OF THE TRUST

[21] The Trust, on the other hand, contends that it fulfils all of the requirements set out in section 30 of the Income Tax Act to qualify for approval as a public benefit organisation. In particular, the Trust contends that it uses tourism as a platform to create and to sustain jobs in rural communities whilst at the same time promoting local culture and conservation of the natural environment. This it does by encouraging tourists to take off the beaten track self-drive travel routes to enable communities on those routes to benefit from tourism. To achieve this objective, so the Trust contends, it adopts a collaborative approach with the local communities by way of workshops to identify attributes of the area or community concerned that could attract travellers and tourists to the area. These attractions may include local flora, fauna, scenic attractions, services, arts, culture or local customs. Thus, the Trust contends that it proposes to establish markets and monitor the routes arising therefrom in terms of workshop processes. It proposes to create forums to sustain the process and to stay in touch with those forums to answer questions and provide mentorship and share best practice. The opening and marketing of tourism routes to marginalised and rural areas encourages tourists to visit and spend money on ventures operated by poor people in those areas and thus contributes to poverty relief. These areas, so the Trust contends, have both large and small businesses. Thus, so the Trust contends, its activities are aimed at bringing in tourists for the purposes of supporting poor people on those tourist routes. The Trust concludes by contending that it is purely incidental that established business would benefit from the Trust's proposed public benefit activities.

[22] The Trust further contends that paragraph 1(p) of the 9th Schedule to the Income Tax Act envisages two distinct activities, these being (i) community development for poor and needy persons; and (ii) anti-poverty initiatives and that these

activities need not be read together. Based on this approach, the Trust thus contends that it satisfies the formal requirements for approval as a public benefit organisation as provided for in section 30(3) of the Income Tax Act.

[23] The Trust further contends that the activities listed under paragraph (1) of Part I of the 9th Schedule under the heading “Welfare and Humanitarian” are not restricted to assisting persons in dire straits to survive. The Trust contends that that heading covers other activities such as rehabilitation of prisoners, conflict resolution, promotion of human rights and democracy. The word “including” in paragraph (1)(p) of the 9th Schedule should be interpreted as extending the range of activities listed in that paragraph and should not be interpreted to introduce a list of further requirements.

[24] Thus, the Trust contends that it proposes to advance, promote and preserve arts, culture and customs by encouraging tourists to visit off the beaten track routes, creating forums from local communities, mentoring and encouraging these forums, and conducting workshops for those persons and thereby assists in creating markets for the products produced by these communities or performances by such communities. The Trust finally contends that the relevant provisions do not require overt engagement in conservation of the natural environment on the part of the public benefit organisation concerned, or that it must have the necessary infrastructure or skilled personnel. The Trust concludes by contending that many public benefit organisations are operated by unskilled volunteers with little or no infrastructure and that the fact that the Trust does not have the infrastructure alluded to, is no reason for it not to be approved as a public benefit organisation.

[25] Prior to the commencement of the hearing of this appeal on 23 August 2013, we were informed by the parties that the court would be required to determine certain issues raised by way of points *in limine* so that if those issues are determined in favour of the Trust, that would mark the end of the proceedings and arising therefrom the Commissioner would be obliged to approve the Trust's application for approval as a public benefit organisation in terms of section 30 of the Income Tax Act and, consequently, to issue the Trust with a certificate contemplated in section 18A of the Income Tax Act on the basis of which the Trust will be empowered to issue tax deductible receipts to its donors.

[26] The issues we were required to determine are that the application by the Trust for approval as a public benefit organisation should not be refused purely on the basis that the Trust has not yet commenced with the contemplated public benefit activities; that if the Trust founding documents complied with the requirements of the Income Tax Act and, in particular, those requirements set out in section 30 of the Income Tax Act, in that event, the Commissioner would be obliged to grant approval without the need for the Trust to lead oral evidence. In the event it being determined that the Trust's application not be approved even though the Trust's founding documents comply with the provisions of the Income Tax Act and that oral evidence is required to amplify the application, reference should be made to the activities of ABC to determine if such activities, which shall be undertaken by the Trust should its application be approved, do meet the requirements of one or more of the activities listed in the 9th Schedule to the Income Tax Act; and, the final issue being if the Commissioner was misled to believe that the Trust, as opposed to ABC, the founder of the Trust, was carrying on the

proposed activities, and if so, whether the Commissioner's decision would have been different had the Commissioner been aware of the true facts.

[27] The proposition advanced on behalf of the Commissioner was that the appeal cannot be determined purely on the basis of the points *in limine* raised but, rather, that it should be determined on the basis of the facts and documentation presented to the Commissioner from the date the application was launched upto and including the date the Trust's objection was disallowed.

[28] Once we had heard argument on the points *in limine* raised, we were of the view that the appeal cannot be determined on the basis of the question as to whether the trust instrument, together with the annexure thereto, complies with the formal requirements of the Income Tax Act. We were of the view that oral evidence needed to be led with reference to the activities currently undertaken by ABC, it appearing to be common cause that in the event of the Trust's application being approved, such activities shall be undertaken by the Trust. Based on that approach, we did not uphold the points raised *in limine*. The Trust then proceeded to tender the evidence of Mr. K, one of the founder members of the Trust. The Commissioner did not call a witness. Thus, the appeal will be determined on the basis of the facts and the documentation presented to the Commissioner from the date the application was launched up to the date the objection was disallowed, duly amplified by oral evidence of Mr. K.

ONUS OF PROOF

[29] It is trite that in matters of this nature, the taxpayer bears a burden to prove that the decision to disallow an objection, is incorrect. Section 102 of the Tax Administration Act, 28 of 2011, under the heading “Burden of Proof” provides as follows:

- “1. A tax payer bears the burden of proving –
- (a) – (e) ...
 - (f) whether a decision that is subject to objection and appeal under a Tax Act, is incorrect.”

[30] Section 102(f) of the Tax Administration Act, properly interpreted, raises a statutory presumption in favour of the correctness of a decision made by the Commissioner, and the onus is placed on the appellant to show that the decision by the Commissioner is incorrect. This appears to be the approach adopted in such authorities as *Commissioner for Inland Revenue v Goodrick* 1942 OPD1, 12 SATC 279, where it was held, at 296, that what is required of the tax payer to discharge this onus is affirmative evidence that satisfies a court upon a preponderance of probabilities that the amount is not taxable.

[31] It has further been held in authorities such as *Auto Protection Insurance Company Limited v Hanmerstrudwick* 1964 (1) SA 349 (A) that the mere fact that evidence placed before the court by the taxpayer has not been contradicted does not mean that same should be accepted as such. The evidence of a person on whom the onus rests can be so improbable that the onus has not been discharged.

THE EVIDENCE OF MR. K

[32] The evidence of Mr. K (was intended to amplify the stated objectives of the Trust and the activities of ABC. Mr. K confirms in his evidence that it is anticipated that the activities of ABC shall be undertaken by the Trust should the decision of the Commissioner to disallow the objection by the Trust be overruled. His evidence was further intended to amplify the Trust's proposed activities as set out in paragraphs 1(f); 1(p); 6(a) and 7(a) of Part I of the 9th Schedule. He testified that many rurally located people found themselves, for the most part, outside the economic loop and that they are mired in a cycle of poverty and isolation in rural areas around South Africa. He states in his evidence that it is this dire situation that ABC sought to remedy. This it does by way of undertaking programmes and activities intended to achieve those objectives contemplated in paragraphs 1(f), 1(p), 6(a) and 7(a) of the 9th Schedule to the Income Tax Act. It was specifically for this reason that ABC was established, so states Mr. K in his evidence.

[33] Once established, ABC identified the product which was thought to be competitively exclusive and potentially appealing to an ever growing segment of tourism on the understanding that tourism is the biggest market and job creator of them all. Tourism, once established, would create a platform on the basis of which communities established alongside the proposed tourist routes could be garnered together to form co-operatives which, in turn, could be used as a vehicle to empower communities and create jobs through conservation and competitiveness; bring about rural prosperity; and to generate customer traffic through which to start trade exchanges.

[34] Mr. K points out in his evidence how ABC connects with the communities along the proposed travel routes. His evidence is that the current activities of ABC are already

known to some of the communities along the proposed travel routes. He states that the development of a route typically starts when someone within a community makes contact requesting details of the programmes ABC proposes to offer. His evidence is that ABC only goes to where it is invited and, if the enquiry is positive, the enquirer is asked to arrange a stakeholder meeting where the project can be explained. If local interest is affirmed, the next step is to raise funds to undertake a situational analysis.

[35] The first workshop in such situational analysis is aimed primarily at setting the scene and identifying what will become marketable products. Following a technique which the personnel of ABC has dubbed “big five”, all features and characteristics of the local scene and communities will be extracted. Once these features and characteristics of the local community have been identified, an interim forum is elected to drive the process and tasked to arrange the follow-up meetings. The route launch is the first output of the route forum and generally excites much interest. Revealing a local sense of pride and place, it festively draws those involved together and gives them status building exposure to dignitaries and the media. Once this happens, management and growth will thereafter be the responsibility of a local community whilst ABC helps with marketing and capacity building.

[36] Mr. K testified to a considerable length and concludes his evidence by stating that the proposed initiatives create collectives encompassing both the established and the marginalised members of a particular community. He makes a point in his evidence that this does not mean that ABC, and the Trust in the event of it taking over the initiatives of ABC, has, as an objective, the advancement of the interests of the established business community. On the contrary, so Mr. K states in his evidence, its

brief is to uplift the poor who are isolated and marginalised, but it cannot achieve this objective in a sustainable manner without involving the whole community. He makes a point that this is in no way a departure from or a dilution of its objectives. It is the manner in which it achieves its objectives and is the only way its objectives can be achieved permanently and sustainably and for the benefit of local communities.

SUBMISSIONS ON BEHALF OF THE COMMISSIONER

[37] Based on the evidence of Mr. K and the evidence at the disposal of the Commissioner when the objection was disallowed, it is submitted on behalf of the Commissioner that not only has it come to light that the information provided by the Trust in support of its application pertains to another entity and not the Trust, the stated objects of the Trust, as per its Trust Deed, serve no purpose as they constitute a mere regurgitation of some of the public benefit activities listed in the 9th Schedule to the Income Tax Act. The crucial question, so the submission goes, is whether the object of carrying on the proposed public benefit activities is the Trust's main or principal object.

[38] The submission goes further to point out that there are two possible approaches in the determination of a sole or principal object of a public benefit organisation. One such approach is based on what is referred to in the submissions as a subjective qualitative test whilst the other approach is based on an objective quantitative test. The submission goes further to make a point that the subjective qualitative test is based on the subjective purpose of those who founded the public benefit organisation and, who ultimately control it. The problem of a subjective qualitative test, to which the Trust is classified on the basis of this submission, is that those who historically establish the

public benefit organisation and those who subsequently control it, would not perpetuate its existence if it were not for the fact that it was carrying on the public benefit activities.

[39] It is finally submitted on behalf of the Commissioner that the objects referred to in the definition of a public benefit organisation are not the subjective goals of the organisation's controllers but the activities which the organisation is mandated by its constitution to perform. The very definition of the public benefit organisation equates object with the actual carrying on of activities. In order to determine which (if any) of an organisation's mandated objects is its principal object, one must inevitably look at the extent to which each of the objects is actively pursued through what the organisation does.

[40] The submission concludes that in the case of the Trust, the Trust Deed merely states what its objects are by regurgitating the 9th Schedule and by stating what it is prohibited from doing. It is thus silent, so the submission goes, on what it is actually authorised to do and how it should go about performing the proposed public benefit activities.

THE TRUST'S PROPOSED OBJECTIVES

[41] It is accepted that applications for approval in terms of section 30 of the Income Tax Act should be strictly scrutinised. This approach does not mean that a narrow rather than a wider view should be taken as to what constitutes public benefit activity. Where a narrow sector of the public may benefit from an exemption, as for an example, farmers who receive certain tax benefits in terms of the Income Tax Act, then the provisions should indeed be interpreted narrowly. However, the ambit of section 30 of

the Income Tax Act is to encourage activities that will benefit the general public. With this in mind, the net should be thrown fairly wide to encourage and promote the carrying on of all and any *bona fide* public benefit activity provided always the organisation seeking approval complies with the requirements as set out in section 30 of the Income Tax Act and provided further the proposed public benefit activity falls within the framework set out in the 9th Schedule to the Income Tax Act. In my view, the 9th Schedule provides a framework of activities to be undertaken in order to qualify for approval in terms of section 30 of the Income Tax Act.

[42] Mr. K was at pains to emphasise in his evidence that the proposed public benefit activities are not intended to advance the interests of the established business community. He makes a point in his evidence that, as for an example, “poverty relief” may be achieved in many ways by carrying out various different types of activities such as attracting tourists to unique and unusual geographic features, fauna, arts and similar other attractions that may be draw cards to tourists. Such attractions, properly marketed, are capable of creating tourism routes which can benefit communities alongside such routes. In this way tourism may thus benefit communities alongside such tourist routes and thus contribute to alleviation of poverty.

[43] It is in this regard that the internet may be a powerful tool. Evidence tends to suggest that ABC’s website is extremely professional and on par with other commercial websites. Use of a website in the promotion of the proposed travel routes should not be viewed negatively. The better the website, the more internet traffic it will generate and the more actual tourism it may attract, the more likely it will yield the achievement of the Trust’s stated objective of poverty relief, job creation and other such similar objectives.

[44] The public benefit activities listed under the heading “welfare and humanitarian” are not restricted only to activities that assist persons in dire straits to survive. In my view, that heading covers other activities such as rehabilitation of prisoners, conflict resolution, promotion of human rights and many other activities of like nature and that these activities integrate a much wider spectrum of activities than assistance of persons in dire straits to survive. The word “including” in paragraph 1(p) of the 9th Schedule to the Income Tax Act does not introduce a list of further requirements. Such a construction provides examples of what may be included in the proposed public benefit activities but should in no way be construed as being restrictive.

[45] Based on the facts and the documentation presented to the Commissioner from the date the application was launched up to and including the date the objection was disallowed, duly amplified by the evidence of Mr. K, I am satisfied that the proposed public benefit activities that the Trust undertakes to do are benevolent in nature and that no one connected to the Trust or employed by the Trust is likely to receive undue benefit other than reasonable remuneration contemplated in section 30 of the Income Tax Act.

[46] Having said that, I am satisfied, on the balance of probabilities, that the public benefit activities and *modus operandi* of ABC, being the same approach the Trust proposes to follow if it be held that the Commissioner’s disallowance of the Trust’s objection be overruled, meet the requirements of “public benefit activities” contemplated in Part I of the 9th Schedule to the Income Tax Act.

[47] I am not persuaded that the object of the Trust is merely to establish tourism routes as the Commissioner seeks to suggest. The evidence of Mr. K clearly shows that ABC has an established process in terms of which the holding of workshops with communities is a starting point. Once these community forums are established, greater participation is encouraged in order to gain as many diverse attractions as possible for the route. Such routes attract more adventurous travellers who tend not to be satisfied with mainstream attractions and who, in turn, opt for unique and unusual geographic features, fauna, flora, arts and all such other incidental activities that are likely to become a draw card to potential tourist and, needless to say, yield the much hoped for benefit to the wider communities established alongside such routes.

[48] As for the cultural activities contemplated in paragraph 6(a) of Part I of the 9th Schedule I am satisfied that the workshops described in the evidence of Mr. K, the identification of activities and products referred to in his evidence, the mentorship and best practice referred to, meet the requirements contemplated in paragraph 6(a) of Part I of the 9th Schedule. That said, I am satisfied that the Trust's contemplated activities could very well be regarded as promoting arts, culture or customs. The internet method contemplated in the *modus operandi* to achieve the desired objectives is a powerful tool to create markets for such activities and products and which activities and products might otherwise disappear from lack of a market or audience to sustain them.

[49] As for the public benefit activities contemplated in paragraph 7(a) of Part I of the 9th Schedule, I am persuaded that it is not necessary for the Trust to have the kind of infrastructure or skilled personnel referred to in the submissions on behalf of the Commissioner for it to properly engage in conservation of the natural environment.

Based on the evidence of Mr. K, I am persuaded that the creation of awareness in the local communities of the importance of preservation of fauna and flora and the marketing of these attractions to tourists very well meets the requirements contemplated in paragraph 7(a) of the 9th Schedule to the Income Tax Act.

[50] Nonetheless, nowhere is the Income Tax Act prescriptive as to how those objectives contemplated in the 9th Schedule should be achieved. In the instance of this matter, it is anticipated that the Trust would be dependent on donor funding to achieve its objectives. Without donor funding the Trust is unlikely to achieve the objectives set out in its founding instrument. Corporate sponsors tend to have stringent conditions as regards how the funds they donate in discharge of their social responsibilities are spent and applied. If sponsors are of the view that the Trust achieves its stated objectives of poverty alleviation and all other objectives set out in the Trust Deed, the Trust will attract more funding. If the Trust acts contrary to the objectives set out in its founding documents, funds will just simply dry up. In my view, the stated objectives of the Trust and its proposed day to day activities fall squarely within the framework of those activities listed in the 9th Schedule which the Trust proposes to undertake. In my view, this is a matter in which the Commissioner should have approved the Trust's application in terms of section 30 of the Income Tax Act so that, on the basis of such approval, the Trust would have been in a position to claim tax exemption in terms of section 10(1)(cN) of the Income Tax Act.

THE PERCEIVED DECEIT OF THE COMMISSIONER BY THE TRUST

[51] The issue of a perceived deception of the Commissioner by the Trust featured significantly in the course of evidence of Mr. K under cross-examination. The cross-

examination was based on certain audited financial statements submitted to the Commissioner, on request, as being those of the Trust instead of ABC.

[52] On 17 April 2012 and at 4.00pm Ms Y, a Tax Exemption Analyst in the office of the Commissioner, sent an email to a Mr Z, ostensibly an attorney dealing with both the affairs of the Trust and those of ABC, requesting for a copy of the latest annual financial statements of the Trust. In response thereto, and by way of an email dated 23 April 2013, Mr Z sent an email to Ms Y attaching what is referred to in the email as “pro forma accounts” as requested. The enclosed “pro forma accounts” appear to be Pro-Forma Financial Statements for the year ended 31 October 2011. It contains figures which appear to have been extracted from a Statement of Comprehensive Income for the year ended 31 October 2011 in respect of ABC.

[53] Based on the enclosed “pro-forma accounts” an impression is created that the Trust had already commenced carrying on business as opposed to it being dormant.

[54] Mr. K was extensively cross-examined by counsel for the Commissioner on this discrepancy, it being suggested to Mr. K that the submission of portion of audited financial statement of ABC as being those of the Trust was a deliberate attempt to deceive the Commissioner into believing that such audited financial statements are those of the Trust as opposed to being those of ABC. In the course of his evidence Mr. K acknowledged this discrepancy and offered an explanation that the submission of the audited financial statements as being those of the Trust, as opposed to being those of ABC, was as a consequence of a confusion or mistake on the part of the personnel at the offices of the Trust as both these entities were being managed from the same office.

Mr. K explained that the financial statements which constitute the basis of this discrepancy had earlier been submitted to the offices of the Commissioner as being the audited financial statements of ABC when the latter entity submitted its tax return and that the office of the Commissioner ought to have been aware of this fact.

[55] The fact that the Trust is to take over the activities currently undertaken by ABC, is evident on the basis of correspondence exchanged by those who manage and administer the Trust and the Commissioner. In a letter dated 27 September 2011 the following was asked by the Commissioner from the Trust: "Please explain whether the Trust or the company carries on the activities." Three days later ABC replied as follows:

"Many thanks for your fax dated 27 September addressed to Mr S.

In reply to your question, the AB Section 21 Company continues to be operative as an NPO dependent on donor funding. However, not being deemed by SARS as qualifying for Section 18A exemption is impacting severely on its sustainability, for which reason we have under legal advice registered the AB Trust in compliance with Part II of the 9th Schedule and made application for exemption through it."

[56] In a further letter by SARS dated 21 June 2012 and addressed to ABC the following observation is made: "OA is the founder of AT and it is evident from various provisions contained in the Trust Deed that OA has an active and significant role and responsibility in the administration and management of AT."

[57] In the same letter referred to in the preceding paragraph, the following observation is made: "It is therefore contended that although two separate legal entities have been established they do not function independently from each other, especially seen in the

light that, inter alia, the trustees of OA are also the directors of OA, the chief executive for OA is a trustee and is the chairperson of the board of trustees, OA has the power to appoint any other person to act as trustee, to remove any trustee from office and may determine whether trustees may reimburse themselves for expenses incurred in the administration of a trust.”

[58] It is quite evident on the basis of excerpts of correspondence cited in the preceding paragraphs that the Commissioner was all along well aware that ABC and the Trust were two entities and that the management and administration of these two entities were intertwined. I am of the view that whatever misrepresentation that came about or, whatever confusion that came about, arising from the submission of the audited financial statement to the Commissioner as being those of the Trust, was not intended to deceive the Commissioner but that such confusion arose due to the fact that the administration and management of ABC and that of the Trust is intertwined and undertaken by the same personnel. In any event, the perceived deception of the Commissioner was not part of the grounds on which the Commissioner disallowed the Trust’s objection. It appears to have been taken shortly before the hearing of this appeal.

SECTION 18A EXEMPTION

[59] The Trust not only seeks the Commissioner’s decision to refuse the Trust’s application for approval as a public benefit organisation to be overruled, but it also seeks an order that the Commissioner be directed to grant the Trust authority to issue tax deductible receipts in terms of section 18A of the Income Tax Act. Section 18A of the Income Tax Act enables the donors to claim a tax deduction in respect of a donation

made to a public benefit organisation which has been approved by the Commissioner in terms of section 30 of the Income Tax Act.

[60] Only public benefit organisations which have been approved by the Commissioner in terms of section 30 of the Income Tax Act may be issued with authority to issue tax deductible receipts to donors on the basis of which such donors may claim a tax deduction arising from such donations. However, section 18A(1)(a)(aa) of the Income Tax Act requires that the public benefit organisation seeking such tax exemption status to carry on such public benefit activities in the Republic; and that such activity should be a public benefit activity contemplated in Part II of the 9th Schedule. Section 30 of the Income Tax Act has no such territorial restriction with regard to the location of the beneficiaries to such public benefit activity.

[61] Prior to 2008 section 30 of the Income Tax Act contained a requirement that at least 85% of the activities of the public benefit organisation had to be for the benefit of persons in the Republic. However, this requirement was removed by section 22 of the Taxation Laws Amendment Act, No 3 of 2008. The explanatory memorandum that accompanied the amendment explained the reason for the removal of the restriction as follows:

“Given the fact that many public benefit organisations conduct a substantial amount of activities outside South Africa and the fact that foreign public benefit organisations fall outside the South African tax net *per se*, it is proposed that this restriction be removed.”

[62] An authority to issue a tax deductible receipt in terms of section 18A of the Income Tax Act has an effect of reducing the tax base in the Republic. The donors of

such donations are issued with tax deductible receipts on the basis of which they can claim a tax deduction based on such donations and thus reduce a tax base in the Republic. It therefore makes sense that only activities carried on within the Republic should be allowed to reduce the South African tax base. I am not persuaded by the contention advanced on behalf of the Trust that while it is a requirement that the organisation carry on the relevant activities in the Republic, it is not a requirement that the activity must be carried on exclusively in the Republic. I am of the view that, unless the Trust satisfies the Commissioner that the contemplated public benefit activities will be carried out in the Republic, it cannot be issued with authority to issue tax deductible receipts in terms of section 18A of the Income Tax Act.

[63] In paragraph [50] of this judgment I concluded that the Trust's proposed public benefit activities fall within the framework of the activities listed in the 9th Schedule to the Income Tax Act and that, on that basis, the Trust's application for its approval as a public benefit organisation should have been approved. In the preceding paragraph I concluded that unless the Trust satisfies the Commissioner that its activities shall exclusively be carried on in the Republic, it cannot be issued with authority to issue tax deductible receipts in terms of section 18A of the Income Tax Act. Thus, the appeal by the Trust is upheld, in part, to the extent reflected in the order I give below.

[64] In the result, I make the following order:

[64.1.] The decision of the Commissioner not to approve the Trust's application for approval as a public benefit organisation in terms of section 30 of the Income Tax Act,

and a subsequent disallowance of the Trust's objection, is hereby overruled and is set aside.

[64.2.] The appeal by the Trust against the refusal by the Commissioner to approve the Trust's application for approval as a public benefit organisation is upheld.

[64.3.] The appeal relating to the authority sought to issue tax deductible receipts in terms of section 18A of the Income Tax Act is dismissed.

[64.4.] Each party shall pay its own costs.

N J Yekiso, J