REPUBLIC OF SOUTH AFRICA

IN THE SPECIAL TAX COURT

HELD AT MEGAWATT PARK JOHANNESBURG
GAUTENG

CASE NO: 13410

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

In the matter between:

ABC (PTY) LIMITED Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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J U D G M E N T

VICTOR, J:

THE ISSUES

[1] The main issue in dispute is whether s23 F(2) of the Income Tax Act No 58 of 1962 ("*the Act*") takes away the benefit which a tax payer may claim in terms of s 11(a) and s24M of the Act. The respondent's case

in essence is that the introduction of s23F(2) was to balance the benefits a tax payer has in terms of 24M.

[2] A second issue relates to the imposition of additional charges imposed in 2007 by the respondent in terms of s76(2) as a penalty because in the respondent's view the appellant had not provided sufficient evidence that the income tax returns were not done with the intention to evade tax. The complexity of interpreting and applying s23F(2) certainly mitigates an intention to evade tax and the imposition of additional tax was abandoned during argument. The third issue raised by the appellant is the respondent's consistent refusal to correct arithmetical errors of approximately R160million in the assessments. By the end of argument this issue was resolved but the applicant sought costs by virtue of the respondent's intransigence. A fourth issue was raised in relation to the recoupment of administration and audit expenses, further drying of the Concentrate by the customer and royalty expenses. In argument the respondent conceded that the recoupment of the administration and audit costs were incorrect but the drying costs still remained an issue. The royalty fee was conceded by the appellant as it was a sale based and not a production based expense.

BACKGROUND

[3] The appellant is a subsidiary of D Holdings. It is listed on the Johannesburg Stock Exchange and London Stock Exchange. Among its subsidiaries are E Company and F Company.

[4] The appellant operates a mine consisting of two inclined shafts, L & M, and a Concentrator plant located in Limpopo. It does not own the land on which it mines the mineral ore nor does it trade in the ore that it has

mined. It is the extraction from the mineral ore brought to surface that is sold.

[5] The appellant derives mining income and the mining operations consist of two distinct phases. Phase 1 extracting ore from the ground containing platinum, palladium, gold, rhodium, iridium, ruthenium as well as nickel, copper and cobalt. In Phase 2 the ore is smelted to expose the mineral elements and then subjected to a flotation process from which is derived.

[6] The appellant emphasises the following: that at no stage did it acquire the ore that it mined. It took possession of the ore and also submitted that it took possession of the subsequent concentrate as per phase 2 above. It did not acquire it as envisaged in terms of S23F(2). The central submission by the appellant is that the nothing should be recouped in terms of s23F(2) for either phase 1 or phase 2. An alternative submission is that if anything is to be recouped by the respondent it should be from the Concentrate process.

[7] On 17 August 2004 the appellant concluded a written contract with E Company for the supply of concentrate. Clause 7.1 of the contract provides that the exact amount of the full purchase price payable to the appellant for the Concentrate delivered in one month is only quantifiable on the fifth month after the month of delivery. This is due to various uncertain factors such as ruling market prices for the metals and relevant foreign exchange rates. This means that the purchase price for the Concentrate delivered in the last four months of the year of assessment can only be quantified in the following year and it is common cause that the provisions of s24M of the act apply.

[8] S 24M provides a taxpayer with an opportunity to defer income incurred in one financial year to the following one where the corresponding revenues would only be earned then. This is a result of timing differences occurring in year one where hypothetically only 8-months of sales is considered during the financial year, as the remaining 4-months' production accrues to the subsequent financial year. The respondent submitted that s23F(2) sought to match expenses with the corresponding income in the same financial year. In other words the expenses incurred in respect of the deferred income could not be deducted in the year they were incurred but in the following year.

[9] In the 2007, 2008 and 2009 income tax returns the appellant excluded these estimated amounts of income from its gross income on the basis that it is deemed not to have been accrued in those relevant years of assessment. It received the benefit of the application of s 24M of the Act in respect of that income. It however deducted the expenses for mining the ore and for the cost of the Concentrate process in the year of assessment. It also deducted the cost of additional drying of the Concentrate as the moisture level was outside the parameters as defined in the contract. This additional drying occurred at the E Company site and not at the appellant's premises. The appellant had to pay this drying cost.

[10] The respondent conducted an audit into the income tax affairs of the applicant and recouped expenses from its gross income in the same proportions as the deferred income in terms of s24M. These proportions were 23,87%, 30,86% and 26,96% of the total sales for those years. The respondent also exercised it rights in terms of s76(1)c of the Act and imposed an additional amount representing 50% of the tax liability for 2007.

[11] The total expenditure claimed in terms of 11(a) of the Act by the appellant for those years of assessment was R279 183 247, R740 179 830 and R872 659 397. The total expenditure consisted of the mine-on-mine operational costs, concentration and smelting operation costs and overhead expenses.

THE S 23F(2) ISSUE

[12] The respondent's case is that expenses incurred in the year of assessment cannot be disregarded in the year of assessment albeit that payment is not received in the same tax year. The years in question are 2007, 2008 and 2009 years of assessment.

[13] The appellant had tried to deduct the expenditure in the year it was incurred but the respondent invoked s23F(2) to disallow certain portions of s11(a) deductions in the years 2007 in an amount of R63 254 644; in 2008 in an amount of R220 592 861; and in 2009 an amount of R170 388 451.

[14] S 23F(2) provides:

'Where a taxpayer has during any year of assessment disposed of any trading stock in the ordinary course of his or her trade for any consideration the full amount of which will not accrue to him or her during that year and any expenditure incurred in respect of the acquisition of that trading stock was allowed as a deduction under the provisions of s 11(a) during that year or any previous year of assessment, any amount which would otherwise be deducted must, to the extent that it exceeds any amount received or accrued from the disposal of that trading stock, be disregarded during that year of assessment.'

[15] The appellant contends that the mineral bearing ore mined by it does not meet the necessary requirements of *trading stock* and *acquisition* as envisaged in s23F(2) and therefore the section does not apply. The respondent contends that the mineral bearing ore does constitute *trading stock* and is *acquired* as defined and therefore falls to be determined by the provisions of s23F(2). These issues are referred to as the trading stock and acquisition issues. The respondent in calculating the s23F(2) adjustments applied the total expenditure in the same percentage borne by s24M exclusions to the amount of total sales for the respective years of assessment.

[16] During the relevant years under objection the term trading stock was defined in s 1 of the act to mean:

> ‘(a) anything-
>
> (i) Produced, manufactured, constructed, assembled, purchased or in any other manner acquired by a taxpayer for the purpose of manufacture, sale or exchange by him or on his behalf, or
>
> (ii) the proceeds from the disposal of which forms or will form part of his gross income, otherwise than in terms of paragraph (j) or (m) of the definitions of gross income, or as a recovery or recoupment contemplated in s 8(4) which is included in gross income in terms of paragraph (n) of that definition; or
>
> (iii) (b) any consumable stores and spare parts acquired by him to be used or consumed in the course of his trade….,

[17] In order for s23F(2) to apply the appellant’s suggested model of analysis is:

17.1 That the appellant during the relevant year of assessment disposed of *trading stock* in the ordinary course of its trade;

17.2 The full amount of the consideration for the trading stock would not accrue to the tax payer during that year of assessment but in the future; and

17.3 any expenditure incurred in respect of the *acquisition* of that trading stock was allowed in terms of s11(a) during the year of assessment or any previous year of assessment.

TRADING STOCK ISSUE

[18] The ore that is won from the ground is bulky and cannot be sold. If it cannot be sold in the state that it emerges from the earth then it cannot constitute trading stock. It is mined from the earth. In a statement of agreed facts it was agreed between the parties that the appellant's operation was a mining operation. In considering phase 2 once it is turned into Concentrate it is a question of applying the principles to determine whether the Concentrate constitutes trading stock. The ore is not kept in stock piles as set out in *Commissioner for South African Revenue Service v Foskor (Pty) Ltd* 72 SATC 174 (Foskor). The ore immediately goes from the ground onto a conveyer belt to the Concentrate process so there are no stock piles that require a s22 determination. Once the Concentrate is extracted in phase 2 of the process it becomes a commodity which can be sold. If the Concentrate can be sold it must be considered to be trading stock.

[19] It is the appellant's case that the ore should be excluded from the definition of trading stock as it was acquired for the purpose of mining and not for manufacture, sale or exchange in the definition of 'trading stock' as contemplated in ss(i) in para (a) of the definition of trading

stock. The ore was not intended to be disposed of in that state and does not fall within the definition of "trading stock". In the alternative it is appellant's case that deriving the ore and Concentrate is really taking possession of the ore and then taking possession of the Concentrate. It is the appellant's submission that because the ore never constituted trading stock and therefore it is only the cost of extracting Concentrate that should be disallowed in term of s23F(2). A further alternative argument is that the expenses claimed under s11(a) did not represent 'amounts which would otherwise be deducted under another s of the act e.g. opening stock s22(1) of the act. Furthermore, the ore does not fall within subparagraph (2) of paragraph 1 of the definition of trading stock by virtue of the *ratio* in *De Beer's Holdings (Pty) Limited v CIR* 1986 (1) SA 1 (A) at p32

'The definition of trading stock falls notionally and grammatically into two parts:

> *(1) anything produced, manufactured, purchased or in any other manner acquired by a taxpayer for purposes of manufacture, sale or exchange by him or on his behalf, or*
> *(2) anything the proceeds from the disposal of which forms or will form part of his gross income.'*

[20] Neither party relies on the second part of the definition in *de Beers supra.* It is necessary therefore to consider the purpose. It is the appellant's case that it never intended to dispose of the ore but to extract the Concentrate and relies on the *ratio* in *De Beers Holdings*. Accordingly the appellant contends that nothing was produced, manufactured, purchased or in any other manner acquired for the purpose of manufacture, sale or exchange.

[21] In *Richards Bay Iron and Titanium (Pty) Ltd and Another v CIR* 1996 (1)SA 311 (A) at 324I-325A Marais JA with reference to *De Beers Holdings* stated the following:

> "*The second part makes no direct reference to any purpose which the taxpayer must have had at the time of acquisition; it postulates an objective assessment, namely whether, if the thing under consideration was disposed of, the proceeds would form part of his gross income.*"

[22] In *Matla Coal Limited v CIR* 1987 (1) SA 108 (A) at 128 Corbett JA:

> *"Moreover, I cannot agree that the sale of coal rights can be equated to a sale of all the extractable coal in the coalfield. It seems to me that the coal itself can only be regarded as stock-in-trade and become the subject-matter of a sale in the course of a business once it is separated from the land of which it forms part, ie is mined. (Cf remarks of Innes CJ in Commissioner for Inland Revenue v George Forest Timber Co Ltd 1924 AD 516 at 523 - 4, 525 - 6.)*

In *Richards Bay supra* the context was that of manufacture as opposed to that of an agreed mining operation. Accordingly the two requisites in paradigm set out in paradigm in paragraphs 17.1 and 17.2 are met not in respect of the ore but the Concentrate thus bringing it within the ambit of s23F(2). The use of the word acquisition as referred to in s23F(2) still requires consideration.

ACQUISITION ISSUE

[23] The critical question for determination is the meaning of the word *acquisition* as intended in s23F(2). The appellant contends that the word acquisition in s23F(2) should be interpreted to mean acquire

ownership and not any other form of acquisition. The appellant contends that once the ore is mined this is when it takes possession of the ore and becomes the owner. Ownership cannot re-occur once the ore is turned into a concentrated form of its constituents. The ore has already been acquired.

[24] The respondent's submission is that in order to properly apply s 24M and 23F(2) the following principle is involved. The purpose of those two sections is to attain equipoise i.e. a condition in which there is a balance or something that creates a balanced state. In other words if the appellant is to benefit from the provisions of s 24M then it is also necessary for the Commissioner to benefit from the provisions of s 23F(2).

[25] The interpretation of the words "*any amount which would otherwise be deducted must, to the extent that it exceeds any amount received or accrued from the disposal of that trading stock, be disregarded during that year of assessment*" requires verbal acrobatics as the words are confusing and no wonder this section was amended. The respondent contends that the interpretation must take into account deductions in the year of assessment to the extent that it exceeds any amount received or accrued from the disposal of that trading stock. In other words the expenses does not qualify for deduction in terms of s11(a). The appellant correctly in my view submitted in the alternative that the Concentrate is trading stock as defined in s 1 of the Act but to fall within the provision of S23F(2) it also had to be *acquired*. It is also common cause that the applicant sold the Concentrate to E Company and excluded those portions of the selling price which were not quantifiable as envisaged in s 24M of the Act.

[30] The word "*acquisition*" is not defined in the Act. Its reliance on the interpretation of the word "*acquire*" according to the New Shorter Oxford Dictionary means "*gain or get as one's one, by one's own exertions or qualities; or secondly come into possession of*". It is for the interpreter to decide the context. The respondent contends that the context on which it relies is the fact that the term "*acquisition of trading stock*" is used opposite the term "*disposal of trading stock*". s23F2 is a timing issue.

[31] Once this court has accepted the appellant's alternative argument in relation to the Concentrate being trading stock it is the appellant's case that the ore should be excluded as it was acquired for the purpose of mining and not for manufacture, sale or exchange as set out in the definition of 'trading stock' as contemplated in ss(i) in para (a) of the definition of trading stock. The ore was not intended to be disposed of in that state and does not fall within the definition of "trading stock". One of the several alternative arguments by the appellant that when winning the ore and Concentrate the appellant is really taking possession of the ore and then taking possession of the concentrate. This argument must fail. A further alternative argument is that the expenses claimed under s11(a) did not represent 'amounts which would otherwise be deducted under another s of the Act e.g. opening stock s22(1) where it is necessary to establish the time of incurral of the expenditure and the proceeds pertaining thereto.

[32] The appellant contends that to refer to a disposal and an acquisition of an asset in the context of s 23F(2) there must be something more than possession. If transfer of possession was intended then there would be no incurral of an amount as envisaged by the s. Acquisition cannot mean something less than ownership as the word is used in the context of trading stock. The appellant looks to s 22 of the Act which states that the taxpayer must account for opening and closing stock,

held and not disposed of during the year of assessment which also presupposes ownership. Appellant contends that both the ore and the Concentrate were acquired by the appellant at the time when the ore was severed from the land. When the minerals are severed from the land by the holder of the mineral lease, ownership of such minerals vests in the holder and not in the owner of the mineral right. At all times the appellant was the holder of a mining right in respect of the ore that it mined in terms of the Mineral and Petroleum Resources Development Act No 28 of 2010 ("*MPRD Act*"). The MRPD Act it did not amend the principle laid down by the courts that the holder of the mineral right, mining right or mineral lease becomes the owner of the mineral on severance of the mineral from the land. Ownership of the unsevered minerals still vests in the owner of the land but unless the necessary permit or right is granted to the owner he may not exploit such minerals. See Dale *et al South African Mineral and Petroleum Law* at page 122 and *LAWSA* 2nd Edition Vol 18 para 101.

[33] The appellant contends that the Concentrate which was mined from the ore falls was acquired on severance of the ore from the land therefore the costs incurred to mine the concentrate did not represent expenditure incurred to *acquire* ownership of the concentrate. In the appellant's case though, mining activities were their primary business activity, which was followed by stockpiling the ore containing rock on the surface. Nonetheless, once the broken rock had been extracted and stockpiled on the surface, processes of refining it were undertaken with the sole purpose of extracting more value from them. In this form, this rock fails the trading stock test. The process from rock to Concentrate can be referred to as a form of conversion and adding value but the question to be considered is whether this is sufficient to bring the deduction into the ambit of s23F(2). The essence is the rock has been transformed into trading stock but it was not manufactured. It still consists of the same elements as it came out of the earth.

[34] An important principle established in *Secretary for Inland Revenue v Safranmark (Pty) Ltd* 1982 (1) SA 113 (A) provides: “that the ordinary connotation of the term ‘process of manufacture’ is an action or series of actions directed to the production of an object or thing which is different from the materials or components which went into its making, appears to be generally accepted. The emphasis has been laid on the difference between the original material and the finished product.” Navsa JA accepted in *Foskor* that the definition of trading stock has expanded. The mineral bearing ore is not materially different from the finished product, being the mineral bearing concentrate, as the mineral bearing Concentrate is merely more refined than the ore which occurs in nature. As a result, the process of obtaining the mineral concentrate does not meet the definition of a ‘process of manufacture’.

[35] The definition of mining in the MPRD Act includes ‘every method or process by which any mineral is won from the soil or from any substance or constituent thereof’. Therefore the extraction of the mineral bearing ore from the ground meets the definition of mining.

[36] In my view there are similarities between the Foskor and Appellant’s case. Some form of transforming low value raw materials occurred, resulting in high value finished goods. The only difference is that the Appellant was involved in the entire process, from mining, to manufacturing and trading. The purpose of the taxpayer in both cases is similar, and hence their treatment should actually be the same as the raw material was acquired. The difference will be in the taxation formula applied in manufacturing versus mining.

[37] According to the appellant the reasoning in *Foskor* does not apply because the emphasis was on the meaning of trading stock and the

dual requisites of trading stock and acquisition were not determined in terms of s23F(2) and therefore should not apply. The appellant submitted that the rules of *stare decisis* do not apply in the tax courts. See *LAWSA* 2nd Edition Vol 5 paras 163 to 172

[38] The appellant contends for the widest interpretation of the word "*acquisition*" to mean "*taking possession*". The costs incurred to mine the Concentrate will constitute expenditure incurred in respect of the acquisition of trading stock that was allowed as a deduction under s 11(a). The appellant contends that the phrase "*any amount which would otherwise be deducted*" should be interpreted to mean "*amounts deducted under any other s other than s 11(a) of the Act*". For example s 22 of the Act reflects opening and closing stock and in this case the appellant claimed expenditure on the s 11(a).

[39] If the words "*any amount which would otherwise be deducted*" should be interpreted to include amounts deducted under s 11(a) it is contended that such interpretation should be restricted to only disallow the actual cost of mining the Concentrate that is overhead costs such as drying charges, administration costs and audit fees and should not be recouped for the following reasons. The words "*in respect of*" may be used in various senses and in each case it is necessary to examine the context. See *CIR v Crown Mines Limited* 1923 AD 121 at 128. See also *Rabinowitz and Another v De Beers Consolidated Mines Limited and Another* 1958 (3) SA 619 (AD) at 631 Schreiner JA stated the following:

"*Expressions like 'in respect of' and 'in connection with', they may sometimes be used to cover a wide range of association must in other cases be limited to the closer or more direct forms of association indicated by the context.*"

[40] In the *Foskor* case, Foskor extracted phosphates and other materials from the ore delivered by PMC by way of crushing and milling to liberate the mineral reserve from the ore. The pulp containing the minerals is then pumped into a flotation plant where the minerals of economic importance are separated by means of metallurgical processes, namely a froth flotation process, a magnetic concentration step and a gravity separation process. The result of these processes is various mineral concentrates. The phosphate concentrates are then sold to the customer who uses the phosphate mineral primarily for the purpose of producing fertiliser. The ore extracted from the ground in the appellant's case is subject to a similar process as that detailed above. Therefore if the effect of s 23F(2) is to limit deductible expenditure it is submitted that the *contra fiscum* rule should be embraced (ITC 1611 59 SATC 126 and 136). There must be a causal relationship between the expenditure claimed and the acquisition of the trading stock to ensure that the taxpayer is not penalised for income tax purposes.

[41] The drying charges and audit fees that the respondent added back from deductible expenditure in terms of s 23F(2) were not incurred by the appellant to acquire that it had mined as these expenses were incurred after the appellant had acquired the concentrate. The audit administration fees were also not incurred by the appellant to acquire concentrate.

[42] The unchallenged evidence of Mr X who testified on behalf of the appellant was to the effect that mines L and M turn on the old ore rights and these rights were ceded to the appellant and converted into new ore rights. At no stage did the appellant intend to sell the ore that it mined. It only wished to extract the concentrate. The drying charges

and audit fees which the respondent recouped in terms of s 23F(2) were not incurred by the appellant to acquire the Concentrate that it mined as these expenses were incurred after the appellant had produced the concentrate. Appellant also contends that the administration fees which the respondent recouped in terms of s23F(2) were also not incurred by it to achieve the concentrate. It is clear that the drying charges audit fees and administration fees were incurred post production and should properly be allowed and should not be dealt with in terms s23F(2).

[43] The respondent contends that the structure of the income tax system gives meaning to the term "*trading stock*" and s 23F(2). In *Richards Bay (supra)* the court took into consideration the structure of the South African income tax system. It dealt only with s 22 and the rationale for its existence. *Richards Bay* sought to prevent the mismatch and hence the introduction of s 22 of the Act. It contends that s 23F(2) also was introduced to prevent a mismatch of the deduction of the cost of trading stock. S 23F(2) is a perfect correlation to s 24. It achieves a true picture of the taxpayer's trading results for the year. S 23F(2) must be interpreted to achieve rather than distort the true picture of trading results. Courts must achieve interpretation which result in the true reflection of the taxpayer's trading fortunes.

[44] The respondent tried to introduce the term "*manufacture*" for the winning of the ore and bring it to surface. This was not part of the statement of facts and it could not do so at the trial stage. See *SIR v Hersamar (Pty) Ltd* 1967 (3) SA 177 (A). See *SIR v Cape Lime Company Limited* 1967 (4) SA 226 (A). The respondent submits that the processes followed by the appellant to convert mineral bearing ore into mineral bearing Concentrate constitute a manufacturing process. Mining process and manufacturing process do not necessarily exclude each other. See *Foskor* judgment. The Act defines mining and mining

operations as to include every method or process by which mineral is one from the soil or form any substance or constitute thereof. *Richards Bay* case held that trading stock must be defined to include raw materials and work in progress. It uses the purposive approach to interpret the term trading stock to include a true reflection of the taxpayer's trading portions. Paragraph [39] of *Foskor*:

"*The present case has to be decided against the background of the rationale for the provisions relating to 'trading stock' and the progressive inclusion of raw materials acquired for the purpose of manufacture so as to widen the net to ensure proper accountability in each tax year.'*

[45] The court is urged to choose the interpretation of trading stock that will suppress the mischief of tax avoidance which results from the distortion of taxpayer's trading portions.

[46] The treatment and calculation of royalty payments is incumbent upon the sales value of the finished product, namely the concentrate. However, because royalty expenses arose from licensing charges, they should be treated as a capital and not as an operating expense. In this case, these expenses could only be determined once the product had undergone all flotation processes, and it was ready for the market. Therefore, this calculation would be limited to the sales that took place during the financial-year under review, and regardless of the number of months in that year

[47] The capturing, processing and administrative errors attracted negative business consequences, reputation risks, recurring negative reporting in the annual reports of the appellant, and cast a dark pall over the

management efficacy of the appellant. They also required the Appellant to report contingent liabilities and raise provisions in their financial statements. This is an unfortunate situation with very grave consequences to the future viability of the appellant, and to the reliance that future investors would place on the financial statements of the Appellant. This potential impairment on the reputation of the Appellant should be brought to the Respondents attention for correction.

[48] The order that the appellant seeks is that the respondent is ordered to alter the 2007 to 2009 additional income tax assessments in accordance with the original 2007 to 2009 income assessments and to pay 50% of the costs incurred by the appellant until the date of the pre-trial meeting on an attorney and client scale. Alternatively that the respondent alter the 2007 to 2009 additional income tax assessments to allow a portion of the expenditure recouped under s 23F(2) as an income tax deduction as claimed by the appellant.

[49] In my view the mineral ore upon extraction from the earth is a mining process and does not constitute trading stock. It would not be economically viable to sell in that form nor did the appellant intend selling it in that state. However once the mineral ore has gone through the concentrator it has been transformed into a higher value product and therefore qualifies to be characterised as trading stock. Once transformed it also meets the definition of acquisition. In the result the respondent may only recoup deductions at the extraction phase and not at the first phase of winning. The second phase process of producing Concentrate remains a mining process and not a manufacturing process. Accordingly the taxation formula to be applied to the second phase shall be that of mining.

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Costs

[50] The question of costs. The appellant seeks a costs order in relation to the failure by the respondent to concede and correct the arithmetical errors until the date of the pre-trial. S 130(1)(a) of the Tax Administration Act No 28 of 2011:

"*The tax court may in dealing with an appeal under this chapter and on application by an aggrieved party grant an order for costs in favour of the party if (a) ……..assessment or decision is held to be unreasonable.*"

[51] In my view there was an inordinate delay by the respondent to deal with the error of some R160mill. This is a large amount and reflects negatively on the appellant's financial profile in the annual financial statements. The appellant was forced to raise it in correspondence and in the grounds of appeal. The respondent failed to deal with it in the statement of appeal

The order I would make is the following:

1. The appeal succeeds in part.

2. The respondent shall only be entitled to recoup the deductions for the second phase being the Concentrate phase in terms of s23F(2) of the Income Tax Act.

3. The assessments for the years 2007, 2008 and 2009 are sent back to the respondent for reconsideration on the basis that s23F(2) of the Income Tax Act applies only to the second phase being the Concentrator phase.

4. The deductions for administration, audit and drying charges do not fall within the purview of s23F(2) of the Income Tax Act .

5. The respondent shall pay 50% of the applicant's costs for its failure to correct the arithmetical errors until the pre-trial conference.

6. Each party to pay its own costs.

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M VICTOR

MEMBERS OF THE COURT

ACCOUNTANT MEMBER: Ms M. Pabhoo

COMMERCIAL MEMBER: Mr S. Lumka

DATE OF HEARING: 18 November 2013

DATE OF JUDGMENT: 4 August 2014.

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