OFFICE OF THE CHIEF JUSTICE

REPUBLIC OF SOUTH AFRICA

**IN THE TAX COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: IT 13164**

In the matter between:

**ABC (PTY) LTD** Appellant

and

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

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**JUDGMENT: 7 SEPTEMBER 2016**

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**ALLIE, J:**

1. During November 2010. The Respondent ("SARS") issued an assessment against the Appellant, concerning the 2005 to 2008 income tax years.

2. Appellant filed an objection which SARS partly allowed.

3. A revised assessment followed, Appellant's claim for assessed losses for previous years was disallowed, leaving the Appellant with an income tax assessment of R19 342 685 plus interest.

4. SARS relies on section 103 (2) of the Income Tax Act 58 of 1962 ("the Income Tax Act") for disallowing the Appellant's claim for assessed losses.

5. The Appellant appeals to this Court against SARS' disallowance.

**The History of the Appellant and its predecessor in title**

6. The Appellant was incorporated on 24 February 2000 under the name: D (Pty) Ltd with 100% of its issued shares being owned by DX Ltd (Australia).

7. Prior to 2002, the Appellant established a 120 seat call centre in Cape Town, which it used to provide services to telecommunication companies.

8. Those services included data sourcing, data profiling, sale generation, risk assessment, sale processing, customer care, billing, collections and retentions.

9. The Cape Town call centre had assets, such as telephonic and computer equipment and software.

10. From December 2001, the Appellant terminated its cellular service provider contracts and disposed of its cellular telephone subscriber bases to certain telecommunication companies.

11. As a consequence, legal disputes arose between the Appellant and some of these telecommunication companies for amounts allegedly due to the Appellant.

12. The appellant continued to own the call centre and was bound to a lease agreement over the property in which the Cape Town call centre was housed.

13. DX Ltd was looking to divest itself of the shares in the Appellant and it was introduced to the Y Group, who used JK ( Pty) Limited ("JK"), which at the time registered as JK 1234 (Pty) Ltd, to purchase the Cape Town call centre at a purchase price of one million rand. The agreement concluded on 1 March 2002, for the purchase of the call centre excluded the shares and was referred to as the "sale of assets agreement". JK was granted the option to purchase the shares in the Appellant on a future date, when the legal disputes with the telecommunication companies had been resolved.

14. In approximately November 2002, JK was looking for a buyer for the Appellant, although it had not yet acquired the shares in the Appellant.

15. Shortly after the dispute with the telecommunication companies was settled, JK exercised its JK option to purchase the shares in the Appellant.

16. On 5 March 2003, DX Ltd concluded a sale of shares agreement with JK. (hereafter referred to as “the first change of shareholding”).

17. Mr A, who owned the H group of companies (“H”), had a vision since the late 1990s of establishing a business which would provide business processing outsourcing (“BPO”) services and he took certain measures to give effect to that vision.

18. JK was looking to sell the call centre because it wasn’t making optimum use of its 120 seats. It wanted to lease back 30 seats, which is all that it requires.

19. H already had a fitment call centre in Johannesburg, referred to as MNO branch of H.

20. H had developed its processing systems referred to as “GPS” to the extent where insurance companies had become reliant on their system. It was looking to provide processing services to its main competitor, VD.

21. Mr B who was the auditor for the Y group and for H and Mr C, spoke about JK wishing to sell the Cape Town call centre.

22. Mr A was interested in acquiring a call centre in premises separate from those of H, so that he could attract VD’s business and he was also interested in diversifying into other categories of claim processing, other than glass claims. He also believed that Cape Town was becoming the call centre destination for international companies. He expressed an interest in acquiring the Cape Town call centre.

23. H employed Mr B to start the due diligence process on the Appellant during November 2002 already. As part of that process, H had access to the Appellant’s annual financial statements, including the draft financial statements for the 2002 year, management accounts, the sale of assets agreement dated March 2002 and correspondence from its auditors addressed to Appellant’s sole shareholder at the time, namely, DX.

24. On 4 December 2002, Mr B submitted a report on the due diligence process to H in which he stated that the Appellant had ceased trading after year-end; the Appellant had an assessed loss and there was a risk that SARS could apply section 103 (2) and disallow the assessed loss.

25. From December 2002 through to March 2003, while the Appellant was not trading, H made various offers to JK to acquire the shares in the Appellant.

26. At some point during March 2003, negotiations ceased and were later revived culminating in H acquiring the shares in the Appellant in November 2003 ("the second change in shareholding")

27. H nominated MM Investments (Pty) Ltd as the purchaser. The purchase price was R3.85 million. The sale was subject to a lease agreement between JK and the Appellant in which JK leased 30 seats in the Cape Town call centre from the Appellant for R210 000 per month.

28. During 2002, H and VD had discussions about outsourcing business of VD which culminated in a Memorandum of Understanding ("MOU") that was signed between them during September 2003.

29. The MOU envisaged the setting up of a joint call centre which would consolidate the work hitherto undertaken by H and VD separately and the creation of a steering committee to manage the process.

30. H moved the MNO component of its business into the Appellant and later operated the joint call centre in Bryanston in the name of the Appellant.

31. H also used the Cape Town call centre for the processing of claims other than glass claims.

32. The minutes of the steering committee reflect discussions concerning the establishment in one neutral venue, of a joint call centre which was to operate from Johannesburg, called the Consolidated Call Centre ("CCC").

33. It was eventually decided that the equipment and technology in the Cape Town call centre could not be utilised by the CCC.

34. Discussions ensued in the steering committee meetings about the name of the company in which the CCC was to be housed and the Appellant was considered for that purpose.

35. Eventually the joint venture between H and VD didn't materialise and H merely performed BPO work for VD.

36. Mr C, the Y Group representative was questioned about why JK wanted to exercise the option to buy the shares in the Appellant when it knew that the Appellant only began conducting business in 2002, that it was operating at a loss and that the Appellant had terminated its contracts with two telecommunication companies. He said that JK knew that if it wanted to obtain the benefit of the assessed loss, it would have to begin trading in the Appellant soon. Mr C agreed that the primary financial gain for JK at that stage was the assessed loss and easy access to an established call centre. This question relates to the first change in shareholding. The relevant change in shareholding remains the first change in shareholding as ordered by Rogers J.

37. The offers made by H for Appellant's shares were initially R10 million and R7.5 million and eventually H bought the Appellant's shares for R3.68 million.

38. Mr C said that H was paying for the established call centre and the potential tax shield created by the assessed loss. From JK's point of view, the tax shield represented the substantial portion of the purchase price.

39. Mr B, the Chartered Accountant of H testified that Mr C informed him that the Y Group was looking for a purchaser for its 120 seat call centre in Cape Town and that the Appellant also had a R90 million assessed tax loss. He however flagged the risk that section 103(2) could be applied to the assessed loss which could be disallowed.

40. According to Mr B, H's decision to offer to purchase the Appellant was made on sound commercial grounds, namely, the established call centre which could implement Mr A's plan to expand the business process outsourcing model to other areas of claims and to other industries, the value of the rent Appellant would receive from JK for the 30 seats that they leased, the lease agreement for the premises from which the call centre operated and the assessed tax loss.

41. He explained that the tax loss was an extremely contingent factor because Appellant's ability to utilise it depended on whether the Appellant would make substantial profits, which were not known at that stage, and the possibility of SARS invoking the provisions of section 103(2) remained.

42. Mr B said that H needed a vehicle in which to operate its BPO business and its CCC and the Appellant had already established premises, and already fitted

and operating technology. He said that the cost of setting up a call centre was approximately R20 million and therefore there was considerable financial gain in acquiring the Appellant with its call centre.

43. According to Mr B, H didn't acquire the Appellant with the specific intention of moving the joint venture of H and VD into the Cape Town Call Centre. It was acquired to house the expansion into call centre business generally.

44. Mr B explained that H attached to its various offers to JK, the value apportioned to the individual components of the business of Appellant as motivation for the purchase price that it offered but those calculations don't represent an accurate valuation as it is sound practice for a prospective purchaser not to reveal the correct value which it places on the different components of the business and not to reveal one's true motivation for value in negotiations, with the other side.

45. H also established a Performance Based Outsourcing business ("PBO") to introduce new call centre business from the U.K which involved selling cellular contracts in the U.K but from South Africa's call centre. This dovetailed with Mr A's plan to expand H's business into other areas of call centre business. The PBO also rented seats in the Cape Town call centre.

46. Later other parties also rented seats in the Cape Town call centre.

47. Mr A testified that glass claims for insurance companies are high volume low values. His staff's intellectual capital was their expertise with the use of technology to enable them to make their claims more systems-driven. In doing that, they eliminated the cumbersome physical claims processing. Instead of an insurance company receiving many claims, they could receive one invoice from a glass company containing various claims from the different fitment centres.

48. He believed that they could do more because other industries had similar problems. He felt that the high volume low value claims of even geysers & electrical claims were an area to expand in. Most claims had little dispute because if a window is broken, it's broken and the cause of the damage is easily established. He was constantly looking at ways of making the company more successful. They manufactured their own product previously. In 1998, they left the manufacturing part and he felt there was an opportunity to do

things differently. The pressure on insurance claim processing wasn't because of the value of claims but because of administration.

49. He was particularly influenced by the AAA bank system where they used a clearing house to process cheques. He didn't have much expertise in the company to develop IT systems. He shared his ideas to rewrite and develop systems for the MNO with Mr B who employed DDD Co. to upgrade their information technology.

50. He said he was interested in acquiring a call centre. Mr B mentioned the company in Cape Town that wanted to sell. He was introduced to Y Group's people, like Mr C and others. They had a call centre that they ran in conjunction with an Australian company who wanted to divest and they had no interest in running 120 operators. The Australian Company is called DX Ltd. It was used to sell cellular contracts on behalf of two telecommunication companies.

51. Mr A said that Mr B informed him that the Appellant had a fully operational call centre, premises, seats, computers, telephone system and staff. He met with B and DX Ltd and he saw it as an opportunity to kick start his ambitions in the call centre industry because he didn't have a contract with VD at the time. The word went round in business circles that Cape Town was going to compete with India and Phillipines in the call centre environment and Mr A wanted to be a part of that expansion.

52. He admitted that he initially thought that H could use the Cape Town call centre for the joint venture with VD but the latter didn't want to move the call centre to Cape Town. He believed that the largest insurer in S.A. is XX and they are in Cape Town, therefore he thought they could operate from Cape Town but that didn't materialise.

**Applicable Law**

53. Section 20(1) of the Income Tax Act allows a taxpayer to set off against the income derived by him/her from conducting of a business, the balance of the assessed loss incurred by him/her in any previous year of assessment that has been carried forward from the preceding year of assessment.

54. An ‘assessed loss’ is defined in Section 20(2) of the Act as any amount by which the deductions admissible under sections 11 to 19 of the Act, exceed the income in respect of which they are so admissible.

55. Although the terms ‘balance of assessed loss’ is not defined in the Act, the words envisage the aggregate portions of any assessed losses incurred by the taxpayer in the carrying on of business that exceeds the taxable income derived by the taxpayer from carrying on of that business.

56. In terms of section 20(1) of the Act there are three requirements which must be met in order for a taxpayer to set off an assessed loss against taxable income, namely:

56.1. the taxpayer must be carrying on a trade;

56.2. the assessed loss may only be set-off against income derived from that trade;

56.3. before the taxpayer can carry forward its assessed loss from the immediately preceding year of assessment, the taxpayer must have carried on a trade during the current year of assessment. If it is found that the taxpayer did not carry on a trade during the relevant year of assessment, the taxpayer will forfeit its right to carry forward the balance of the assessed loss.

57. Sections 103 (2) and 103(4) of the Income Tax Act 58 of 1962 provide as follows:

> “***103 Transactions, operations or schemes for purposes of avoiding or postponing liability for or reducing amounts of taxes on income—****(1) .....*
>
> *(2) Whenever the Commissioner is satisfied that—*
>
> ***(a) any agreement affecting any company or trust; or***
>
> ***(b) any change in—***
>
> ***(i) the shareholding in any company; or***
>
> ***(ii) the members' interests in any company*** *which is a close corporation; or*
>
> *(iii) the trustees or beneficiaries of any trust,*
>
> ***as a direct or indirect result of which—***
>
> ***(A) income has been received by or has accrued to that company*** *or trust during any year of assessment; or*
>
> *(B) any proceeds received by or accrued to or deemed to have been received by or to have accrued to that company or trust in consequence*

*of the disposal of any asset, as contemplated in the Eighth Schedule, result in a capital gain during any year of assessment,*

***has at any time been entered into or effected by any person solely or mainly for the purpose of utilising any assessed loss,*** *any balance of assessed loss, any capital loss or any assessed capital loss, as the case may be, incurred by the company or trust,* ***in order to avoid liability on the part of that company*** *or trust or any other person for the payment of any tax, duty or levy on income, or to reduce the amount thereof—*

*(aa)* ***the set-off of any such assessed loss or balance of assessed loss against any such income shall be disallowed;***

*(bb) the* ***set****-off of any such assessed loss or balance of assessed loss against any taxable capital gain, to the extent that such taxable capital gain takes into account such capital gain, shall be disallowed; or*

*(cc) the set off of such capital loss or assessed capital loss against such capital gain shall be disallowed.*

*(4) If in any objection and appeal proceedings relating to a decision under subsection (2****) it is proved that the agreement or change in shareholding*** *or members' interests or trustees or beneficiaries of the trust in question* ***would result in the avoidance or the postponement of liability for payment of any tax,*** *duty or levy imposed by this Act or any previous Income Tax Act or any other law administered by the Commissioner, or in the reduction of the amount thereof,* ***it shall be presumed, until the contrary is proved*** *in the case of any such agreement or change in shareholding or members' interests or trustees or beneficiaries of such trust,* ***that it has been entered into or effected solely or mainly for the purpose of utilising the assessed loss, balance of assessed loss****, capital loss or assessed capital loss in question* ***in order to avoid or postpone such liability or to reduce the amount thereof."***

(my emphasis)

58. **Silke on South African Income Tax**[1] states the following concerning the purpose of section 103(2):

"*Section 103(2) was introduced to nullify the tax benefits of a specific type of tax avoidance, namely, the trafficking in assessed losses, capital losses or assessed capital losses of companies, close corporations and trusts.*"

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[1] Volume 4, para 19.42.

59. The legislature clearly intended to discourage the wilful acquisition of juristic entities for the sole purpose of setting off against profits, previously assessed tax losses.

60. The tax avoidance as opposed to taxation nature of section 103, is explained in ***Glen Anil Development Corporation Ltd v Secretary for Inland Revenue*:**[2]

> "*Section 103 of the Act is clearly directed at defeating tax avoidance schemes. It does not impose a tax, nor does it relate to the tax imposed by the Act or to the liability therefor or to the incidence thereof, but rather to schemes designed for the avoidance of liability therefor. It should, in my view, therefore, not be construed as a taxing measure but rather in such a way that it will advance the remedy provided by the section and suppress the mischief against which the section is directed… The discretionary powers conferred upon the Secretary should, therefore, not be restricted unnecessarily by interpretation.*"

61. In ***Commissioner for Inland Revenue v Ocean Manufacturing Ltd***,[3] the court determined the meaning of the word "any" in section 103 (2), the court confirmed the nature of section 103 as a tax avoidance measure as follows:

> " … *a word of wide and unqualified generality. It may be restricted by the subject-matter or the context, but prima facie it is unlimited...In regard to the subject-matter there is nothing in section 103 (2) to suggest that the word 'any' was used in a limited sense. Section 103 (2) does not impose a tax, but relates to agreements designed for the avoidance of tax liability. It should be considered in such a way as to advance the remedy provided by the section and suppress the mischief against which it is directed. The Commissioner's powers should not be restricted unnecessarily by interpretation."*

62. In ***Conshu (Pty) Ltd v Commissioner for Inland Revenue***,[4] the court, quoted with approval the following passage from D M Stewart's **The Prohibition of Tax Avoidance: An Evaluation of s 103 of the South African Income Tax Act 58 of 1962 (1970) 3 CILSA 168 at 189:**

> "*The reason for this subsection is that elsewhere in the Act (s20) it is recognised that to divide a taxpayer's business up into separate yearly compartments is largely artificial, and, as a result, where in one year allowable deductions exceed income, the taxpayer may carry the balance of the deductible excess forward as an ' assessed loss.' This loss may be deducted from income earned in the next*

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2 1975 (4) SA 715 (A) at 727H- 728 A.
3 1990 (3) SA 610 (A).
4 1994 (4) SA 603 (A) AT 610 G-I.

*of a subsequent year. As a result, certain taxpayers, whose businesses have failed to profit, build up large assessed losses. Where these taxpayers are individuals the Revenue has nothing to fear for assessed loss is not itself transferable, but where the taxpayer is a company, whose shares will attach can readily change hands, new proprietors will attach themselves to the company and inject new income into it in order to exploit the assessed loss. It is this 'trafficking' in the shares of companies with assessed losses which gave rise to the enactment of s 103 (2)*."

63. In interpreting section 103(2), the court in Conshu's case, held that the intention of the legislature was to "*cast the net as wide as possible*." The court commented on the purpose of the section as follows:

> "*The use of a tautology is a device often used in order to emphasise a point… The provision is replete with the indefinite 'any'. It appears 13 times. And as Nicholas AJA pointed out in Commissioner for Inland Revenue v Ocean Manufacturing Ltd 1990 (3) SA 10 (A) at 618 H-619B, there is nothing in the provision to suggest that the word 'any' was used in a limited sense*."

**Analysis of Section 103**

64. For SARS to rely on s 103(2) to disallow the set-off of the assessed loss or the balance of the assessed loss in this matter, SARS must be satisfied that the following three requirements of s 103(2) have been met:

64.1 There must have been an agreement affecting the Appellant or a change in shareholding in the Appellant. The parties are *ad idem* that this requirement has been met and that the change in shareholding to which this case is limited, is the JK change in shareholding and not the H change in shareholding.

64.2 The circumstances in respect of the first requirement must have resulted directly or indirectly in income or any capital gain accruing to the Appellant, **and**

64.3 The agreement or change in shareholding must have been entered into solely or mainly for the purpose of utilising any assessed loss, any capital loss or any assessed capital loss.

65 Respondent argues that the income has 'directly or indirectly' accrued to the taxpayer as result of this change in shareholding.

66 The direct / indirect result requirement is however an objective requirement.

67 On behalf of the Respondent it was argued that JK knew that the object of its acquisition of Appellant's shares, was to convert the Appellant into a going concern by June 2003, which was the end of its financial year, and then to sell the shares to H who would channel its income through the Appellant and then set off against that income, the assessed loss.

68 Respondent submits further that had it not been for the first change in shareholding, the second transfer of shares to H would never have occurred.

69 Respondent's counsel argued that the two changes in shareholding are linked, as evidenced by the chain of events.[5]

70 Respondent's counsel contends that where a direct/ indirect chain or causa is present, then all income received would be tainted.

71 Section 103(2) however limits SARS' power to disallow such assessed loss to such income. It is therefore important to identify:

71.1 the unbroken chain (unbroken causation) and

71.2 the *tainted income* (such income).

72 On respondent's behalf it was then argued that the transaction satisfied the third requirements as well, in that the transaction was concluded solely or mainly for purposes of utilising such assessed loss. The purpose test is a subjective test.

73 The Respondent's counsel argued that the chain of the events indicate that the parties to the transaction conspired to transact in this particular manner in order to utilise the assessed loss, and that the only real value to the taxpayer could have been its assessed loss, therefore the third requirement is also satisfied and the SARS can apply section 103(2).

74 Section 103 clearly limits the circumstances in which a past assessed loss in a company can be set off against current and future profits.

75 Section 103 (2) provides that if proceeds of income in the taxpayer company were a direct or indirect result of a change in shareholding which change was

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[5] In Juta's Income Tax, 103-3 the following is stated and reference is made to **ITC 1123 31 SATC 48** and **ITC 1388 46 SATC 126** as examples:

> "*There is no limitation on the meaning of an 'indirect result', and the chain of causation may therefore be long and involved, so long as not broken."*

"*…effected by any person solely or mainly for the purpose of utilising any assessed loss, any balance of assessed loss,"* then the set-off of that assessed loss against such income shall be disallowed.

76 Although the section refers to "any" change in shareholding; "any" proceeds, 'any" time, "any" person, "any" assessed loss "any" such income, the section clearly contemplates a causal link between the change in shareholding, the motivation for acquisition of the shares by the person who seeks to utilise the assessed loss and the means by which that income came to be owned and declared by the taxpayer.

77 The more contentious aspect of the formulation is the motivation for the change in shareholding. Those taxpayer companies that can show a sound commercial purpose for the acquisition of the shares will have less difficulty in establishing that they don't fall foul of the section.

78 The following evidence lend itself to the conclusion that the specific transaction has strong commercial substance as opposed to being an attempt to purely utilise the assessed losses acquired:

79 By acquiring the taxpayer company with the 120 seat operational call centre in Cape Town, Mr A begun to fulfil his vision of:

79.1 providing services to his largest competitor, VD, through the medium of a company that didn't carry the H name;

79.2 H's administrative system which were handling the high volume, low value transactions efficiently, were improved by expanding to provide similar services to other industries apart from glass;

79.3 H was developing systems and intellectual property that could be used for the expansion of the new company;

79.4 The new company could become a part of the DTI's initiative to promote Cape Town as a call centre location for international markets;

79.5 H could expand its own clientele base in Cape Town because the largest insurance company, XX, had their head office in Cape Town;

79.6 Mr A also testified that he would not have been interested in only acquiring the assets of a business, but rather shares in that company as

it had always been the policy of the H group to buy the shares of companies it acquired; and

79.7 The fact that the acquisition of the taxpayer company included an existing rental agreement of 30 seats at R7,000 per month to (JK) for eighteen months, made it an attractive acquisition. This would enable the taxpayer company to continue operations as a stand-alone company generating its own income separate from that of H.

80 If the income had been received or accrued to the taxpayer company when JK had acquired the shares, then JK would most likely have fallen foul of the section.

81 Since the income was derived from the efforts of H and after it had acquired the shares, it is H's motivation in acquiring the shares that ought to be relevant in determining whether section 103(2) can be applied.

82 The parties are however limited to the JK acquisition of shares by an earlier court order. Hence the causal link between the JK's motivation for the acquisition and the income has to be established, if the section is to find application.

83 The section doesn't contain the words "direct or indirect" in isolation. Those words are complemented by the word "result". The income having found its way into the taxpayer company, must result from a change in shareholding. If the legislature intended it to be any remote cause, the section would have been expressed in manner which reflects that the income could derive from any cause whatsoever.

84 In ITC 1123 31 SATC 48, the taxpayer company was involved in the manufacturing industry and was unable to pay its debts. It went into liquidation. The shares in the company were acquired by a new shareholder, who obtained a bank overdraft to purchase the shares in the company. The company commenced trading again. The new shareholder did not revive the manufacturing business but, produced income from *inter alia* commission and interest. The company attempted to set off this income from the balance of the assessed loss carried forward from previous years.

85 The court in that case, held that whether the income derived by the company arose directly or indirectly as a result of the change in shareholding was a question of fact. Based on the evidence presented, when the shareholder acquired the company it was an empty shell as its business of manufacturing had ceased. The shareholder arranged for financing and proceeded to conduct an entirely separate business which was as a consequence of the change in shareholding. Accordingly, the court held that the income derived by the company was derived as a 'direct or indirect result' of the change in shareholding.

86 The *nexus* between the accumulation of taxable income and the change in shareholding is palpable on the facts of that case.

87 In ***New Urban Properties Ltd v SIR***,[6] it was held that it will always be a question of fact whether a company has derived income "directly or indirectly" as a result of the change of shareholding.

88 In ***Natal Joint Municipal Pension Fund v Endumeni Municipality***,[7] it was said that the section ought to be interpreted with regard being had to"… the language of the provision itself, read in context and having regard to the purpose of the provision…"

89 Section 103(4) allows a presumption to be triggered the moment it is proved that the acquisition of shares leads to tax avoidance or a delay in tax liability. In that event, it is presumed that the change in shareholding was effected solely or mainly for the purpose of utilising the assessed loss.

90 Section 103(4) makes clear the purpose of section 103 (2), which is, to limit the circumstances in which an assessed loss can be utilised to situations other than those where the shares were acquired with the specific intention of utilising the assessed loss. The section prohibits intentional tax avoidance through the acquisition of shares in a company with an assessed loss that could otherwise be utilised.

91 Section 103(4) is silent on the income aspect referred to in section 103(2) for a patently obvious reason: implicit in the presumption that a specific intention to

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6 1966 (1) SA 215 (A).

7 2012(4) SA 593 (SCA) at [18].

utilise an assessed loss would have been formed at the time when the shares were acquired, is some foreseeable amount and source of income against which the loss could be set-off.

92 In situations where the chain of causation is broken between the change in shareholding and the income against which the assessed loss is sought to be set-off, that income would not be as a **result** of the change in shareholding at all. The operative word being "result' irrespective of whether it was direct or indirect.

93 That breaking of the chain of causation is referred to in delictual cases as, the *novus actus interveniens*, that is, a new intervening event.

94 *In casu,* the income was derived from a later, intervening event and the income was not contemplated at the time when JK acquired the shares.

95 It is indeed correct that a taxpayer's *ipse dixit* concerning its intention, cannot eclipse the court's duty to objectively consider all the relevant facts and circumstances to determine motive, intention and purpose. [8]

96 Even if it could be argued that JK acquired the shares with the specific intention of selling them later to new shareholders who could utilise the assessed loss, it can't be said that JK contemplated at the time of its acquisition, that the new shareholders would in fact have declared sufficient income to utilise the assessed loss.

97 The evidence however reveal that when JK exercised the option to purchase the shares in September 2002, H had not yet begun to negotiate with the Y Group for the purchase of appellant's shares.

98 When JK acquired the shares in March 2003, it was merely giving effect to a legally binding agreement that it had activated in September 2002.

99 I am satisfied that the appellant has discharged the onus of showing that sole or main purpose in the H change in shareholding was not to acquire the company to utilise its assessed loss.

100 When the facts are considered in totality, then the H group's vision and

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[8] ITC 1185 35 SATC 122 at 123.

projected business plan dovetailed with the existing call centre business that the taxpayer company had been engaged in, prior to the acquisition of the shares in the taxpayer company.

101 The appeal succeeds and the following order is made:

**IT IS ORDERED THAT**:

1. The appeal is upheld;

2. The Additional Assessments are set aside and referred back to the Respondent for re-assessment, on the ground that Appellant is entitled to set-off the Assessed Loss against its income during the relevant years.

3. No order as to costs is made.

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**ALLIE, J**

**ASSESSORS:**

**KARIN HOFMEYR**

**AND**

**JN LOUW**

**CONCURRING**