U (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 5 FEBRUARY 2018 and 8 JANUARY 2020

Income Tax Appeal

E Matinenga, for the appellant
T Magwaliba, for the respondent

KUDYA J: This appeal seeks to answer the question whether the payment made to a Community Share Ownership Trust, CSOT, by a holder of a Special Mining Licence, SML, before 1 January 2013 constituted a deductible expense in terms of para 4 (1) (a) of the Twenty-Second Schedule to the Income Tax Act *[Chapter 23:06]*.

The Facts

The parties did not call any evidence but proceeded by way of a statement of agreed facts to which was attached 5 annexures. These annexures comprised the Cession Claims Agreement, dated 25 March 2008, Annexure 1, the appellant's holding company's "Indigenisation and Economic Empowerment (General) Regulations Indigenisation Plans and Extent of Indigenisation document dated April 2012, Annexure 2, the appellant's holding company's "Revised Empowerment Proposal" dated 5 June 2012, Annexure 3, the letter from the Minister for Indigenisation approving the Implementation Plan in Annexure 3, dated 7 June 2012, Annexure 4 and the approval of the "Revised Implementation Plan" by the same Minister dated 10 August 2012, annexure 5. In addition, the parties adopted the contents of the Heads of Agreement concluded on 1 November 2012 between the Minister of Indigenisation and the National Indigenisation and Economic Empowerment Fund, on the one hand, and the appellant and three other related companies, which were the South Africa registered AP Limited, the appellant's holding company AM Ltd and S Ltd and the Trust Deed executed by the Minister of Indigenisation and the appellant's holding company as Founder 1 and 2, respectively, the appellant and 5 "Founding Trustees" on 23 November 2011. The Founding Trustees comprised

of 3 local chiefs and two nominees of the appellant. The following facts are derived from these documents:

The appellant is a wholly owned local subsidiary of a locally registered company, O Ltd which is in turn wholly owned by another local company, referred to in this judgment as the appellant's holding company or AM Ltd. AM Ltd is wholly owned by a Dutch company, E BV, which in turn is a wholly owned subsidiary of a South African registered and Johannesburg Stock Exchange listed company, AP Ltd[1]. These entities are all members of the worldwide AH Group, which prides itself as a "natural resources business of international scale."[2] The appellant is a platinum group metals, PGMs', mining company, which is in the business of developing and exploiting mining claims in and exporting PGMs from Zimbabwe[3]. It is also a holder of a Special Mining Lease, SML, issued in March 2008. At the special instance and request of the Government of Zimbabwe, GoZ, represented by the Minister of Mines and Mining Development, the appellant and a related local company, S Ltd, entered into a cession of mining claims agreement with the Government of Zimbabwe on 28 March 2008, through which the government sought to broaden the participation of indigenous players in the platinum mining industry. The cession of claims agreement predated the SML. The ceded mining claims were valued at US$142m payable by way of cash, equity in joint ventures, processing rights, empowerment credits or any agreed composition of these methods of payment.

On 15 April 2010, AM Ltd submitted its initial indigenisation implementation plan, which also covered its local subsidiaries, to the Minister of Indigenisation for approval, in terms of the prevailing indigenisation legislation. It was revised on 5 June 2012 and approved on 7 June 2012. The plan was further amended and approved on 10 August 2012. The heads of agreement of 1 November 2012 were concluded after the approval of the indigenisation implementation plan.

On 30 May 2011, the appellant filed an income tax self-assessment for the tax year ended 31 December 2011 showing an assessed loss of US$ 41 652 575[4]. The total expenses, excluding interest and tax were in the sum of US$30 254 95, which included the sum of

[1] P13 para 8 of annexure 2 to the Statement of Agreed Facts.
[2] P 5 para 7 of Annexure 2.
[3] Clause 3.2 of heads of agreement and directors report in the 2011 financial statement on p 106 and 131 of the r11 documents.
[4] P125 of r 11 documents.

US$10m categorised in the notes to its financial statements for the year ended 31 December 2011 as "Contribution to Community Share Trust".[5]

The respondent commenced a tax compliance investigation of the appellant on 12 November 2012 for the period January 2009 to 31 December 2012 which culminated in the issuance of a Manual Notice of Assessment for the Income Tax year ended 31 December 2011, assessment number 1/5114 on 2 September 2015. The appellant was in a tax loss position of US$54 083 639.04. The respondent disallowed US$405 852 101.50 from the assessed loss of US$ 459 935 739 .54[6] in the self-assessment filed on 30 May 2012. On 11 November 2015, the appellant belatedly lodged objection with the respondent on the disallowance of the US$10m only, which effectively reduced the carried forward tax loss in the same amount in the 2011 tax year. The respondent, acting in terms of s 62 (2) of the Income Tax Act, condoned the late objection by letter of 17 November 2015. On 13 April 2016, the respondent disallowed the objection on two bases. The first was that the payment was not made wholly and exclusively for the purposes of the special mining lease operations but largely for obtaining approval of the indigenisation implementation plan. The second was that the expenditure was in any event of a capital nature.

The appellant was granted leave to appeal out of time by this Court by order dated 6 July 2016 and duly filed its notice of appeal on 11 July 2016. The appellant duly filed its case on 29 August 2016 while the respondent filed the Commissioner's case on 25 October 2016.

By letter of 21 October 2016[7], appellant's erstwhile legal practitioners, *inter alia*, indicated that by that date the heads of agreement had not yet been implemented nor had the Trust been allocated the envisaged 10% equity in AM Ltd, as specified in the transaction documents.

At the first pre-appeal hearing of 17 March 2017, the sole issue referred for determination on appeal was whether the payment of US$10 m to the Rural District Community Share Ownership Scheme made in November 2011 was properly claimed as a deduction?

On 22 November 2017, counsel for the parties further agreed to file a statement of agreed facts by 29 November 2017. The parties undertook to file their heads of argument by 18 and 31 January 2018, respectively. In November 2011, the appellant paid US$10m to the

[5] P57 r 11 documents in the 2011 financial statements issued by the Board on 30 March 2012.
[6] P17-19 of r 11 documents.
[7] P1-2 of r 11 documents.

CSOT and claimed a deduction of that amount from its tax returns for the 2011 tax year. The amount was disallowed by the appellant in both the amended assessment of 2 September 2015 and the determination to the objection on 13 April 2016.

It was common ground that in terms of s 3 (1) (a) of the Indigenisation and Empowerment Act, *[Chapter 14:33]*, the Indigenisation Act, the Government was mandated to compel "every public company and any other business" with a minimum value of US$500 000 to dispose of at least 51% of its equity to indigenous Zimbabweans at a fair market value.

The appellant contended, on the one hand, that the disbursement was in part fulfilment of its legal obligation to indigenise in terms of the Indigenisation Act and was of a revenue nature while the respondent contended that the appellant did not have any legal obligation to pay the CSOT and that such payment was of a capital nature.

The issue

The issue referred on appeal on 17 March 2017 was whether the payment of US$10 million to the CSOT made in 2011 was an allowable deduction.

The resolution of the issue

It was common ground that the provisions of s 15 (2) (ll) allowing the deduction of contributions made to Community Share Ownership Trusts was not applicable in the present case as they only came into force on 1 January 2013.[8]

The contents of Annexure 2 to 5 to the Statement of Agreed Facts

Annexure 2, the original empowerment plan, was compiled on 14 April 2010 by the appellant's holding company for the indigenisation of the holding company and all its local subsidiaries. It provided the estimated gross and net values of each of its four local subsidiaries, inclusive of the appellant. The estimated net fair market value of the four subsidiaries was in the sum of US$ 480.2m of which US$25.5m was attributed to the appellant. The sum of US$142.8m constituted 51% of the net fair market value of these four subsidiaries from which the amount attributed to the appellant would be in the sum of US$13 005 000. Annexure 2 indicated that the appellant was by virtue of the Cession of Claims agreement to be regarded as having been indigenised at the rate of 31.3 % in April 2010.[9]

[8] P 3-4 of r 11 documents and para 19 of the appellant's case and para 50 and the extract of the 2014 National Budget Statement of the Minister of Finance of 19 December 2013, annexure E, of respondent's case.
[9] Pp8, 14, 15 and 16 of annexure 2.

The document listed amongst AM Ltd's "socially and economically desirable activities that ought to be given indigenisation credit" the development of the appellant's mine from 2007 and the concomitant supply of materials to 363 households for the construction of Blair toilets, drilling, casing and equipping 7 boreholes and training village pump minders, construction of a shelter at a local clinic, electrification of 3 classroom blocks at a local secondary school, refurbishment of a local primary school, donation of an ambulance at the local district hospital and the donation of six months' worth of drugs at three local health centres at an aggregate cost of R7m. Other projects included the provision of national provincial scholarships to 300 pupils in the country's 10 provinces since 1987, construction of a US$2m water supply dam for the mine and surrounding communities, construction of a road and bridge and the donation by the AH Group of £270 000 for the enrolment of up to 1 000 children with disabilities in 21 primary schools over a three year period.

An overview of the original plan, Annexure 2 and the revised plan, Annexure 3, was captured in Annexure 3[10]. The summary highlighted that each plan comprised of "a donation of US$10 million to the CSOT". In addition, in regards to the original plan, the outstanding Cession of Claims Agreement financial obligations due from the Government were rated at 30% of the indigenisation threshold. The holding company undertook a 28% equity ownership transaction through the Notional Vendor Funding, NVF structure. 10% of this equity would be allocated to Strategic Equity Partners, SEPs, and the Sovereign Wealth Fund, SWF, while another 10% would be allocated to the CSOT and the remaining 8% to the Employee Trust. The South African based AP Ltd would hold 72% of the holding company's equity. The chart flow summary showed that the holding company would continue to hold 100% equity in the appellant.

Apparently, the original plan was rejected by the Minister of Indigenisation who requested the holding company to submit a revised plan[11]. The holding company undertook to implement the revised plan in two phases. The first phase involved the allocation of an aggregate of 20% equity consisting of 10% equity to the CSOT and the Employee Trust, respectively. The balance of 31% would be allocated to SEPs and the SWF in the second phase through the Notional Vendor Funding structure. The remaining 49% would be held by the South African related company, AP Ltd. Again, the chart flow showed that the holding company would own all the equity of the appellant. By letter of 7 June 2012, Annexure 4, the

[10] P 4 of annexure 3.
[11] Bullet 4 on page 2 of annexure 3.

Minister approved the proposed empowerment distribution to the CSOT at 10%, Employee Share Trust at 10% and lastly the SWF and SEPs at 31%. He did not recognise the "donation of US$10m to the CSOT" as part of the approved indigenisation implementation plan. Apparently, the Minister and the holding company maintained dialogue on the plan, which culminated in a further approval on 10 August 2012 wherein the Minster distributed the 31% to the National Indigenisation and Economic Empowerment Fund, NIEEF, and the SEPs. He allocated 21% equity to the NIEEF and 10% to the SEPs.

The legislative requirements for indigenisation

The relevant indigenisation legislation at the time the US$10m payment was made comprised the Indigenisation Act, which was enacted in 2007 and operationalised on 17 April 2008[12], the Indigenisation and Economic Empowerment (General) Regulations SI 21/2010 as amended[13] and the Minimum Requirements for Indigenisation Implementation Plans Submitted by Non-Indigenous Businesses in the Mining Sector published in General Notice 114 of 2011.[14] The provisions of s 3 (1) (a) governed the indigenisation of the appellant. The appellant, which fell under the rubric of a "public company or any other business" was obligated to dispose at the fair market value 51% of its equity to indigenous Zimbabweans.

Mr *Matinenga*, for the appellant, in his written heads of argument, contended that the provisions of s 3 (1) (e) of the same Act also governed the indigenisation of the appellant. His submission that the appellant would not have been issued with an investment licence had it not donated US$10m to the CSOT was incorrect for two reasons. The first was that the provisions of s 3 (1) (e) of the Indigenisation Act as particularised by s 9 (2) of the Indigenisation and Economic Empowerment (General) (Amendment) Regulations, SI 34/2011 were inapplicable to the appellant because these provisions applied to the projected or proposed investment in a prescribed sector of the economy, to which platinum mining was excluded. The second was the agreed fact that the appellant was an old investor that had commenced mining operations in 2007, and not a new one. In terms of s 5(2) as read with the definition of "non-compliant business" in s 5 (1) of the Indigenisation Act, the Minister of Indigenisation could, *inter alia*, direct a licensing authority to terminate an indefinite licence of any eligible company that failed to submit a section 3 (b) (ii), (c) (i), (d) and (e) provisional indigenisation implementation plan

[12] Published on 7 March 2008 and operationalised on 17 April 2008.
[13] Published in the Supplementary to the Zimbabwe Government Gazette Extraordinary of 29 January 2010 and amended by SI 116/2010, SI 34/2011 published in the Supplementary Government Gazettes of 25 June 2010 and 25 March 2011, respectively.
[14] Published in Supplementary Zimbabwe Government Gazette of 25 March 2011.

within the prescribed period. This provision would also have been inapplicable to the appellant regard being had to the fact that there were no apparent sanctions imposed for infringing s 3 (1) (a) of the Indigenisation Act, which, in my view, would have regulated the conduct of the appellant.

It was common cause that the appellant's holding company timeously submitted the first indigenisation implementation plan in April 2010, well within SI 21/2010 first deadline of 30 June 2010. The first amendment to the Regulations, SI 116/2010 introduced CSOTs, in s 14B, as indigenisation partners. In terms of s 14B (3), the dividends and any money accruing to the Trust was to be applied towards community projects such as the construction and maintenance of schools, health centres, roads, dipping tanks, water reticulation and sanitation and gully reclamation.

The provisions of s 3 (4) of the Indigenisation Act accorded the Minister the power to prescribe the minimum indigenisation threshold in each sector by notice in a statutory instrument. He, however, did so by General Notice no 114/2011 and prescribed the minimum indigenisation threshold value in the mining sector at US$1. The General Notice prescribed the actual approval period of 45 days and a deemed approval of 90 days. The indigenising entity was further required to implement the approved plan within 6 months of the approval date, with a possible extension thereof of 3 months. The appellant's holding company submitted the first plan in April 2010, which was approved in clause 9.1 and 9.2.1 of the heads of agreement. This plan was amended on 5 June 2012 at the request of the Minister and a revised one subsequently submitted to and approved by him on 7 June 2012. The final plan that was approved on 10 August 2012 apportioned the 51% of the equity of the appellant's holding company by allocating 10% to the CSOT, 10% to the Employee Share Ownership Trust, 21% to the National Indigenisation and Empowerment Fund and 10% to Strategic Equity Partners.

Whose implementation plan was it?

Mr *Matinenga*, on the one hand, contended that the appellant was obligated by the indigenisation legislation to incur the US$10m payment made to the CSOT while Mr *Magwaliba*, for the respondent, made the contrary contention that as the appellant did not submit any indigenisation implementation plan to the Minister, the disbursement in question constituted a donation made outside the indigenisation legislative requirements and for which it was precluded from claiming a deduction by the provisions of para 4 (1) (a) of the Twenty-Second Schedule to the Income Tax Act.

It was common ground that the indigenisation implementation plan belonged to the appellant's holding company and not the appellant. This is apparent from the headings and contents of annexures 2 to 5 to the Statement of Agreed Facts. In Annexure 2 and 3, the holding company cast itself as the sole Zimbabwean based operating natural resources company in the AH Group to which the indigenisation legislation applied. While the definitions of the Group in both the Trust Deed[15] and the Heads of Agreement[16] incorporated the appellant and sought to project the indigenisation implementation plan to it, I agree with Mr *Magwaliba* that it was a separate and distinct taxpayer from its holding company. It was for that reason precluded from deducting what would either have been a loan or a donation to the holding company designed to defray the purported indigenisation implementation plan expenses of the holding company. See *GC (Pvt) Ltd v Commissioner –General, Zimra* 2015 (2) ZLR 116 (H). In any event, the computation of the US$142m, which amount was used to allocate the 51% equity interest to the indigenous partners included the net asset value of three other local subsidiaries of the holding company whose combined value far outweighed that of the appellant. Indeed, the figures and formula utilised in Annexure 2 to the statement of agreed facts showed that the appellant's net asset value included in the US$142m was a mere US$13 005 000. Again, the flow charts pertaining to the original and revised empowerment plans further demonstrated that the appellant would remain a wholly owned subsidiary of the 51% indigenised holding company.

I, therefore, agree with the submission made by Mr *Magwaliba* that the appellant could not rely on an indigenisation implementation plan that did not relate to it to claim the deduction in question.

Was the US$10m payment of a revenue or capital nature?

Initially, the appellant relied on s 15 (2) (a) of the Income Tax Act, the general deduction formula, in claiming the deduction of the US$10m disbursement but had correctly gravitated towards para 4 (1) (a) of the Twenty-Second Schedule to the Income Tax by the time of objection. It seems to me that in respect of special mining lease operations the general deduction formula is ousted by the provisions of the Twenty-Second Schedule by virtue of s 15 (2) (ff), which provides that:

[15] Clause 1.1.2 of the Trust Deed.
[16] Clauses 4.2 as read with 2.1.4 and 2.1.5 and 1.4 of the Heads of Agreement.

"(2) The deductions allowed shall be—

(*ff*) in respect of special mining lease operations, the allowances and deductions for which provision is made in the Twenty-Second Schedule in lieu of the allowances and deductions provided for under the other paragraphs of this subsection;"

Para 4 (1) (a) of the Twenty-Second Schedule to the Income Tax Act provides that:

"***General deductions allowed in determining taxable income***

4. (1) Subject to subsection (1) of section *sixteen* and paragraph 6, for the purpose of determining the taxable income of the holder of a special mining lease for a year of assessment, there shall be deducted from income attributable to his special mining lease operations in that year the amount of any—

(*a*) expenditure and losses, other than of a capital nature, incurred in that year wholly and exclusively for the purpose of special mining lease operations carried out by him; and" (underlining my own for emphasis)

The appellant contended that the payment was of a revenue nature while the respondent contended that it was of a capital nature. The distinction between revenue and capital nature has been subjected to judicial scrutiny and application in such cases as *CIR* v *George Forest Timber Co Ltd* (1924) 1 SATC 20 (A), *New State Areas Ltd* v *Commissioner for Inland Revenue 1946* AD 610, *Commissioner for Inland Revenue* v *Genn & Co. (Pvt) Ltd* 1955 (3) SA 293 (A), *D Bank Ltd* v *Zimra* 2015 (1) ZLR 176 (H) at 187E and 194B-196B and *DEB (Pvt) Ltd* v *Zimra* HH 664/2019 at p 18. In the *New State Areas Ltd* case, *supra,* at page 620-621 WATERMEYER CJ distinguished the two in the following manner:

"The problem which arises when deductions are claimed is therefore, usually whether the expenditure in question should properly be regarded as part of the cost of performing the income earning operations or as part of establishing or adding to the income-earning plant or machinery."

The distinction was espoused in *Joubert: the Law of South Africa*, First Reissue Part I at para 240 thus:

"The Income Tax Act does not define what expenditure constitutes capital expenditure, perhaps because the revenue or capital nature of expenditure can be ascertained only by reference to the facts and circumstances of a particular case. Eventually, it must be established whether the expenditure in question can be regarded as part of the cost of performing the income earning operations or as part of the cost of performing the income earning operations or as part of the cost of establishing or improving or adding to the income earning capacity of the business. Expenditure will be of a revenue nature only if it is so closely linked to the taxpayer's income earning operations as to form an integral cost of these operations. Expenditure will be of a capital nature if it is linked to the income earning structure of the taxpayer which allows him to generate income."

In *DEB (Pvt) Ltd, supra* at p 18 of the cyclostyled judgment I saw the distinction as one between enhancing the efficacy of a capital asset and sweating it to produce income.

In the present case, the US$10m disbursement was not designed to establish, improve or add to the income earning capacity nor did it generate any income for the appellant. In my view, in the letter of objection, the appellant's case, and in both written and oral submissions the appellant effectively averred that the purpose of making the disbursement was to preserve the special mining lease operations. These are defined in section 2 of the Income Tax Act in the following manner:

> "special mining lease operations" means any mining operations, or exploration operations or development operations as defined in paragraph 1 of the Twenty-Second Schedule, carried out in or in relation to a special mining lease area pursuant to the special mining lease."

Exploration operations and development operations are defined, *seriatim*, in para 1 of the Twenty-Second Schedule:

> ""exploration operations" means any operations carried out in Zimbabwe for or in connection with exploration for minerals, and includes
> (*a*) geological, geophysical, geochemical, paleontological, aerial, magnetic, gravity or seismic surveys; and
> (*b*) the study of the feasibility of any special mining lease operations or development operations to be carried out or of the environmental impact of such operations"

> "development operations" means operations carried out in Zimbabwe for or in connection with the development of a special mining lease area, and includes—
> (*a*) the sinking of shafts; and
> (*b*) the installation of machinery, implements, utensils and other articles required for special mining lease operations; and
> (*c*) the construction and erection of—
> (i) facilities for the production, treatment, storage, gathering and conveyance of minerals; and
> (ii) offices, residential units, schools, hospitals, nursing homes or clinics for use by persons employed in or in connection with mining operations and by their families; and
> (*d*) the construction of roads in or to the special mining lease area;

The nail in the coffin of the appellant's argument is delivered by the definition of "capital expenditure" in the Schedule under consideration. It is defined as follows:

> ""capital expenditure" means exploration expenditure or development expenditure or both, as the context requires"

In the premises, I agree with Mr *Magwaliba* that the US10m disbursement designed as it was to preserve the income earning structure was expenditure of a capital nature and not of a revenue nature.

Again, I would have dismissed the appeal on the basis that the disbursement was of a capital nature.

Was the payment expenditure or losses incurred in that year wholly and exclusively for the purpose of the special mining lease operations carried out by him

The basis for the appellant's contention that the expenditure was incurred in that year wholly and exclusively for the purpose of its special mining lease operations was simply that it was by operation of law required to pay US$10m to the CSOT for the procurement of an indigenisation licence. Despite the wording upon which the respondent dismissed the objection in the main, which was to the effect that the dominant purpose for making the disbursement was to procure compliance with indigenisation legislation rather than to conduct special mining operations, I agree with both counsel that the decision reached was actually that the payment was neither incurred wholly and exclusively for the special mining lease operations nor in compliance with the mandatory requirements for indigenisation. Otherwise the explicit wording in the main would be self-defeating regard being had to the fact that the appellant's motivation for complying with the indigenisation legislation would have been to preserve and conduct special mining lease operations.

The main reason which militates against the contention advanced by the appellant that the payment of the US$10m to the CSOT was by operation of law is that the payment was, in terms of clause 3.1.2 of the Trust Deed made as a donation to the Trustees and was to be used by them to further the 25 trust objects specified in clause 5 of the trust deed. These objects mirror the requirements prescribed for such Trusts in s 14B (3) of the Indigenisation and Economic Empowerment (General) Regulations SI 21/2010, which was introduced by the Indigenisation and Economic Empowerment (General) (Amendment) Regulations, 2010 (No. 2) SI 116/2010. While clause 5.3 of the Heads of Agreement recorded that the US$10m donation was part of the Indigenisation Implementation Plan, it again prescribed that it was to be used, "*inter alia, (*for) funding community projects." Other documents such as the revised empowerment proposal of 5 June 2012, annexure 3 to the Statement of Agreed Facts, the minutes between the respondent's investigators and the appellant's public officer of 12 November 2012 and the newspaper article covering the report by the Minister of Indigenisation

to the Parliamentary Committee on Indigenisation of 3 April 2014 treated the payment as a donation[17].

The common law definition of "a donation" was provided by MARAIS J in *Welch* v *Commissioner for the South African Revenue Service* [2004] 2 All SA 586 at para 26 to be synonymous with "a gratuitous disposal of property prompted by motives of sheer liberality or disinterested benevolence". The disbursement was not made for the purposes of buying equity in the appellant nor did it contribute towards the empowerment credits of the appellant. In terms of clause 5.2 of the Heads of Agreement, the Trust was required to subscribe, at par value, for the community shares, in the equity of the appellant. The funding mechanism was to be by way of "notional vending finance", NVF, availed by the appellant with a coupon rate of 10% compounded monthly in arrears repayable by the CSOT through the forfeiture of future dividends payable during the envisaged 10 year tenure of the NVF structure. The US$10m disbursement was not made for any consideration and snugly fits into the common law definition of "a donation". In any event, being an *ex gratia* payment, a donation by its very nature cannot be incurred as an expense under the provisions of para 4 (1) (a) of the Twenty-Second Schedule to the Income Tax Act.

I would therefore agree with the contention made by Mr *Magwaliba* in para 16.6 of his written heads of argument that:

> "The legal obligation of the appellant or even its holding company was not to make a donation to a Community Trust. It was to comply with the indigenisation legislation by disposing 51% of the shareholding to indigenous partners."

The provisions of the Indigenisation Act and its Regulations did not require the appellant to make any donation in order to be indigenous compliant. I would, for these reasons, have dismissed the appeal.

Costs

I do not find the grounds of appeal frivolous and would in terms of s 65 (12) of the Income Tax Act make no adverse order of costs against the appellant. Rather, I will direct each party to bear its own costs.

Disposition

It is ordered that:

[17] Annexure C1 and C2 pp 101-105 of the respondent's case.

1. The appeal be and is hereby is dismissed in its entirety.
2. The amended assessment issued by the Commissioner on 2 September 2015 be and is hereby confirmed.
3. Each party shall bear its own costs.

Gill Godlonton and Gerrans, the appellant's legal practitioners

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