TUCK v COMMISSIONER FOR INLAND REVENUE
50 SATC 98

Division: Appellate
Judges: CORBETT JA, VAN HEERDEN JA, SMALBERGER JA, VIVIER JA AND BOSHOFF AJA
Date: 4 and 16 May 1988
Also cited as: 1988 (3) SA 819(A)

Income tax - Capital or revenue - Characterisation by determining the quid pro quo given by the taxpayer for the receipt-single receipt-Quid pro quo contained two elements, one of capital nature and other of revenue nature - Apportionment applied - In casu, 50/50 apportionment held appropriate.

Appeal, with leave granted by the court *a quo*, by taxpayer against the decision of the Transvaal Provincial Division overruling the Special Court's decision in his favour.

In September 1979 appellant, a registered pharmacist, retired after thirty years' service with Wyeth Laboratories(Pty) Ltd ('Wyeth'), a wholly-owned subsidiary of American Home Products Corp of New York ('American Home'). Since 1967 American Home has had a management incentive plan ('the Plan') for its employees and the employees of its subsidiaries. The Plan - a document of eight paragraphs - is administered by a committee, makes provision for awards from an award fund to select employees of various categories who 'contribute in a substantial degree to the success of the Company'. The awards are of three types, viz: Cash, contingent cash and contingent stock. A contingent stock award is made from a large block of unissued American Home shares kept for that purpose. The amount of the award is converted into a number of shares calculated in relation to the market price on the New York Stock Exchange at the end of the calendar year for which the award is made. No shares are delivered to the employee concerned: A contingent award account in his name is credited with the number of shares determined as above indicated. Subsequent dividends on these shares are also converted to shares and credited to the employee's contingent award account. Save where an employee dies and in one or two other specific instances not material to this report, the Plan provides that, subject to the provisions of paragraph VI(4)(*d*) thereof, the shares standing to the credit of an employee's contingent award account at the time of his retirement are thereafter to be delivered to him in ten approximately equal annual instalments.

The said paragraph VI(4)(*d*) of the Plan reads:

> 'no . . . delivery from a Contingent Award Account shall be made to any Employee after termination of employment unless he shall have to the date fixed for such payment or delivery(i) refrained from becoming or serving as an officer, director or employee of any individual, partnership or corporation, or the owner of a business, or a member of a partnership which conducts a business in competition with the Company or renders a service (including, without limitation, advertising agencies and business consultants) to competitors with any portion of the business of the Company, (ii) made himself available, if so requested by the Company, at reasonable times and upon a reasonable basis to consult with, supply information to, and otherwise cooperate with, the Company and(iii) refrained from engaging in deliberate action which, as determined by the Committee, causes substantial harm to the interests of the Company. If these conditions are not fulfilled, no further . . . delivery shall thereafter be made with respect to the Employee's Contingent . . . Stock Awards and all his rights with respect to his Contingent Award Account shall thereupon be forfeited.'

The first of the above-stated requirements is hereinafter for convenience referred to as the restraint. On the evidence the court found the remaining two requirements to be of lesser importance in the present case. As a precondition of receiving his annual instalment of shares, a retired employee is required each year to complete a questionnaire recording the details of any 'business entity' with which he may have become associated since his retirement.

Wyeth prospered during the period of appellant's association with it and it was common cause that appellant, who retired as managing director, had made a major contribution in achieving that prosperity. Over the years shares were in terms of the Plan credited to appellant's contingent award account. At the date of appellant's retirement, 7 675 shares had been so credited.

Appellant's initial annual instalment consisted of 668 shares. These were delivered to him during the 1981 tax year and, at the then dollar-rand exchange rate, represented R14 251. In his return of income for that year appellant averred that this constituted, as to one half, remuneration for services rendered and, as to the other half, recompense for complying with the aforementioned restraint. Claiming the latter half to be of a capital nature, he

included only R7 125 (being half of the abovementioned R14 251) as income.

During the 1982 tax year appellant received a further instalment of 826 shares from his contingent award account. Calculated at the rate of exchange then prevailing, the value of the award at the date of its delivery was R20 977. In his return for that year appellant, again advancing the same contentions, included half that amount (viz, R10 488) as income. This was, however, not accepted by the Commissioner who, in assessing appellant for the 1982 tax year, included the R20 977 as income and also issued an additional assessment upon appellant in respect of the 1981 tax year. In a letter of objection written by appellant's attorneys it was for the first time contended that, since the restraint constituted the dominating feature, no part of the receipts in issue constituted income. The 50/50 apportionment which had been claimed in the abovementioned returns of income was advanced in the alternative. The objection having been overruled, appellant successfully appealed to the Special Court.

The Special Court found that the restraint was the dominant reason for the delivery of the shares, applied the principles of sterilising an asset and, by implication, held that the whole of the sums in issue were of a capital nature. On appeal by the Commissioner to the Provincial Division, that court held that the dominant purpose of the Plan was to reward excellence in management and to encourage employees to render such service (*vide* 1987(2) SA at 223 - 4 and 49 SATC at 33); further, that the principles relating to sterilisation of assets had no application and that no part of the receipts in issue was of a capital nature (ibid at 224 and 34 respectively).

Before the Appellate Division it was - with principal reliance upon *CIR v Lever Bros* 1946 AD at 450 (14 SATC at 8 - 9) but also with citation from cases in delict and the criminal law dealing with causation - submitted by counsel for appellant that the causally relevant factor resulting in appellant's receipt of the shares was his compliance with the restraint; and that the whole of the sums in issue was therefore of a capital nature. In the alternative, counsel for appellant submitted that the receipt of shares was attributable at least in part to observing the restraint; that an apportionment was competent; and that, in the premises, a 50/50 apportionment was appropriate.

Held

(i) That the preferable criterion was that stated in *CIR v Lever Bros* 1946 AD at 450; 14 SATC at 8 - 9, namely: What work, if any, did the taxpayer do in order to earn the receipt in question; what was the *quid pro quo* which he gave for the receipt?

(ii) That, applying this test, the *quid pro quo* given by appellant was to be found in the Plan, which contained two dominant elements, viz: that of service and that of restraint.

(iii) That both elements were causally relevant factors, both were equally important, and the circumstance that chronologically the service preceded the restraint was irrelevant.

(iv) That the element of service was plainly of a revenue nature, while the element of restraint was equally plainly of a capital nature, and that accordingly appellant's main argument failed.

(v) That it was doubtful whether the principles of causation, as developed in the fields of delict and the criminal law, afforded appropriate criteria to characterise a taxpayer's receipt, but even on application of those principles, appellant's main argument would fail.

(vi) That, notwithstanding the absence of specific statutory provision, the principle of apportionment (previously applied in deduction cases) provided a sensible and practical solution where a taxpayer receives a single receipt and the *quid pro quo* contains two or more separate elements, one or more of which is of a capital nature.

(vii) That, in the absence of any other acceptable basis of apportionment, in the present case a 50/50 apportionment would be fair and reasonable.

(viii) That, having regard to the Commissioner's attitude in the court *a quo* that the whole of the receipt was taxable, the costs in that court should be awarded to the taxpayer.

Appeal accordingly allowed with costs. For the orders made by the Special Court and the court *a quo* the following order substituted, viz:

> 'The appeal is allowed and the matter is remitted to the Commissioner for re-assessment upon the basis that only 50 per cent of the receipt in respect of the American Home shares constituted taxable income in the hands of the appellant.'

The respondent to pay the costs of the appeal to the court *a quo*.

R S. Welsh QC for the appellant: The main question is whether the accrual and receipt of the shares were of a capital nature. The first alternative question is whether the accrual and receipt were at least partly of a capital

nature and, if so, whether there should be an apportionment. The second alternative question is whether the provisions of s. 7A(4A), read with s. 5(10), of the Income Tax Act 1962 are applicable. The Transvaal Income Tax Special Court found in favour of the appellant on the main question. The Transvaal Provincial Division found in favour of the Commissioner on the main question and also on the question arising

under s. 7A(4A). Neither court dealt with the question of a possible apportionment. Wyeth Laboratories(Pty) Ltd is a wholly-owned subsidiary of American Home Products Corporation (a United States corporation). The appellant became Wyeth's sales manager in 1949 and its managing director and general manager in 1951. He retired in September, 1979. During the 30 years of his service with Wyeth, his 'contingent award account' was credited with certain shares in American Home, in terms of the 'management incentive plan'. By the time of his retirement, 7 675 shares in American Home had been so credited. It is, however, quite clear from the provisions of the Plan that at the time of his retirement, the appellant had no rights to his 'contingent award account', except 'to receive the contingent award at the time and in the form determined by the committee [of American Home], subject to the fulfilment of the conditions prescribed herein'. The conditions on which the shares credited to the appellant's 'contingent award account' were to be delivered to him after his retirement are set out in para VI(3)(*b*) and para VI(4)(*d*) of the Plan, the most important of these being that the appellant refrain from any activity in competition with American Home or any of its subsidiaries. The appellant would not have received, or become entitled to receive, any of the shares which had been credited to his 'contingent award account' if he had not complied with the conditions set out in para VI(4)(*d*) of the Plan. It is clear from the evidence that the appellant did comply with those conditions; that he had to satisfy American Home Products Corporation from year to year after his retirement that he had so complied; that his compliance was not a mere formality, since he was a skilled man with long service and experience whose competition could well injure the interests of Wyeth or American Home Products Corporation; that he turned down offers to compete; and that the condition relating to non-competition was the dominant feature of para VI(4)(*d*) of the Plan and affected the actual conduct of the appellant after his retirement.

The management incentive plan is expressly stated, in para I thereof to be 'designed to provide for awards to selected salaried employees in executive, administrative, technical, professional or other important capacities, who individually, or as members of a group, contribute in substantial degrees to the success of the company, thus affording to them a means of participating in that success and an incentive to contribute further to that success.'

Furthermore, para IV of the Plan (1/15) provided that 'the individuals eligible to receive awards under the plan shall be such employees as the committee shall determine each year.' It is clear that the committee would never have made any 'awards' to the credit of the appellant's contingent award account prior to his retirement if he had not been a salaried employee of Wyeth and if he had not 'contribute[d] in a substantial degree to the success of the company' and that the purpose of such 'awards' was to afford to the appellant 'a means of participating in that success and an incentive to contribute further to that success'. It is also clear, however, that if, prior to his retirement, the appellant had entered into competition with Wyeth or rendered any service to its competitors with any portion of its business, or if he had engaged in

deliberate action which caused substantial harm to its interests, no awards would ever have been made to him. The mere fact that the provisions of para VI(4)(*d*) of the plan are expressed to be applicable only 'after termination of employment' does not mean that the appellant was free to compete with Wyeth prior to his retirement. On the contrary, if he had so competed, his conduct would almost certainly have amounted to a breach of contract on his part entitling Wyeth to dismiss him. See Lee and Honoré *The South African Law of Obligations* 2ed para 347 at 117 - 118 (especially footnote 3); *Premier Medical and Industrial Equipment*(*Pty*) *Ltd v Winkler & another* 1971(3) SA 866(W) at 867H - 868C; *Freight Bureau*(*Pty*) *Ltd v Kruger & another* 1979(4) SA 337(W) at 340 - 341C; *Uni-Erections v Continental Engineering Company Ltd* 1981(1) SA 240(W) at 252G. It is also clear that the mere making of the 'awards' to the appellant prior to his retirement did not confer upon him any enforceable legal rights against either Wyeth or American Home and did not result in the 'accrual' to him of any 'amount, in cash or otherwise', within the meaning of the definition of 'gross income' in s. 1 of the Income Tax Act, 1962. There could, in truth, never have been any 'accrual' of any 'amount' to him unless, after his retirement he had complied with the conditions set out in para VI(4)(*d*) of the plan. Those conditions were conditions not only of delivery of the shares to the appellant but also of his entitlement to receive delivery and thus of the accrual to him of any 'amount, in cash or otherwise'. The court below did not take due account of these important factors.

What this court really has to determine is the causally relevant factor which resulted in the accrual to and the receipt by the appellant of the shares in question. It has been held that it is necessary to determine the 'originating cause' of amounts being received as income, for the purpose of determining the 'source' of that income. *Commissioner for Inland Revenue v Lever Brothers & another* 1946 AD 441 at 450.1 It is also necessary, for the purpose of determining whether the accrual and receipt of any particular amount are or are not of a capital nature, to determine the causally relevant factor which resulted in the accrual to and the receipt by the taxpayer of the amount in question. That is essentially the nature of the inquiry on which the court embarks in all such cases. The court examines all the relevant circumstances, including the nature of the taxpayer's activities and the character of the transactions which have given rise to the accrual and receipt under consideration. It is clear that the making of the original 'awards' to the credit of the appellant's contingent award account, prior to his retirement, was a *conditio sine qua non* to the accrual to and the receipt by the appellant of the shares which were ultimately delivered to him

in instalments after his retirement. The court below seems to have regarded that as conclusive in favour of the Commissioner. There is, however, high authority for the view that a *conditio sine qua non* is not necessarily a causally relevant factor and that 'generally in law you seek the fact that actually produces the result or positively contributes to its production and not a fact that only provides the occasion or opportunity for the result to be produced' (*per* Schreiner P

Page 103 of 50 SATC 98

in *Mathenjwa v The King* (1970 - 1976) Swaziland Law Reports 25 at 29 (Swaziland Court of Appeal)). See also 87 SALJ(1971) 145 at 147; *Cullerne v The London and Suburban General Permanent Building Society*(1890) 25 QBD 485 at 488 - 9; *Sefton v Tophams Ltd* 1 AC 50 at 67 - 8; *Rabinowitz & another NNO v Ned-Equity Insurance Company Ltd & another* 1980(1) SA 403(W) at 428 - 9; *Commissioner for Inland Revenue v Shell Southern Africa Pension Fund* 1984(1) SA 672(A) at 679B - H.2 In the present case, if the appellant had not, after his retirement, complied with the conditions laid down in para VI(4)(*d*) of the plan, the shares in question would never have accrued to him and he would never have received them. The original 'awards' which were made, prior to his retirement, to the credit of his contingent award account were in the nature of what a witness picturesquely described (from his own experience) as 'a piece of paper' and 'a sort of monopoly money'. They merely 'provide[d] the occasion or opportunity for the result [the ultimate accrual and receipt of the shares] to be produced'. It was the appellant's compliance with the conditions laid down in para VI(4)(*d*) of the plan which was the causally relevant factor that resulted in the accrual to and the receipt by the appellant of the shares. The decided cases which were referred to by the courts below dealt with payments made in consideration of legally enforceable restraints of trade. See *Income Tax Case 772*(1953) 19 SATC 301; *Taeuber & Corssen*(*Pty*) *Ltd v Secretary for Inland Revenue* 1975(3) SA 649(A);3 *Income Tax Case* 1338(1980) 43 SATC 171; and of *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1985(2) SA 668(T);4 1987(2) SA 123(A).5 There is, however, no practical difference between a payment of money by A to B in consideration of B's undertaking not to compete with A for a defined future period, on the one hand, and a payment of money by A to B at the end of a defined past period in consideration of B's having in fact refrained from competition during that period, in terms of an arrangement such as that which is embodied in paras VI(3) (*b*) and VI(4)(*d*) of the plan, on the other hand. In both cases there is a 'sterilization' of B's working capacity.

In the alternative, the accrual to and the receipt by the appellant of the shares were attributable, at least in part, to the appellant's compliance with the conditions laid down in para VI(4)(*d*) of the plan. This court has approved of the principle of apportionment in relation not only to expenditure but also to deemed income (under s. 7(3) of the Act), despite the absence of any statutory provision authorizing an apportionment. See *Ovenstone v Secretary for Inland Revenue* 1980(2) SA 721(A) at 740E - F;6 *Secretary for Inland Revenue v Guardian Assurance Holdings*(*SA*) *Ltd* 1976(4) SA 522(A);7 *Borstlap v Sekretaris van Binnelandse Inkomste* 1981(4) SA 836(A) at 849E - G;8 *Commissioner for Inland Revenue v*

Page 104 of 50 SATC 98

Nemojim (*Pty*) *Ltd* 1983(4) SA 935(A) at 951B - E and 958G.9 In making an apportionment, the court seeks an essentially practical solution to the problem arising out of dual or multiple causation with a view to the avoidance of inequity or anomaly. The court seeks to do what is fair and reasonable in all the circumstances (whether the apportionment be in favour of the Commissioner or of the taxpayer). The evidence shows that it is impossible to make any precise mathematical apportionment between the respective values of the *conditio sine qua non* (the original 'awards') and the *causa causans* of the accrual and receipt (the appellant's compliance with the conditions laid down in para VI(4) (*d*) of the plan. The courts do not, however, reject claims for damages on this basis; and there is no reason why a more rigorous rule should be applied to apportionments. If an apportionment has to be made, at least 50 per cent of the value of the shares should be held to be of a capital nature.

P J J Marais for the respondent: Gedurende die tydperk wat appellant in diens van 'n maatskappy genaamd Wyeth Laboratories(Pty) Ltd ('Wyeth') was, is 'n totaal van 7675 aandele in Wyeth se houermaatskappy, American Home Products Corporation ('American Home') aan appellant toegeken. Hierdie toekenning is kragtens die bepalings van 'n sogenaamde 'Management Incentive Plan' ('die skema') gedoen. Kragtens die bepalings van die skema sou die toegekende aandele in American Home oor 'n periode van 10 jaar ná appellant se aftrede aan hom gelewer word, op voorwaarde, onder andere, dat geen lewering van aandele sou plaasvind tensy appellant voor die datum van sodanige lewering homself daarvan weerhou het om met American Home en sy volfiliale in kompetisie te tree. Gedurende die jaar van aanslag geëindig 28 Februarie 1982 is 826 van die toegekende aandele in American Home aan appellant gelewer. Die prys van die aandele was destyds $32 elk op die New Yorkse Aandelebeurs, en die totale rand ekwivalent van die aandele was R20 977. Laasgemelde bedrag is deur appellant as die waarde van die betrokke ontvangste in sy opgawe ten aansien van die 1982-jaar van aanslag getoon. Die Transvaalse Inkomstebelasting Spesiale Hof het bevind dat bogemelde ontvangste, synde vergoeding vir die sterilisasie van 'n (inkomsteproduserende) bate, van 'n kapitale aard was en gevolglik nie belasbaar was nie. Op appèl na die Volbank van die Transvaalse Afdeling van die Hooggeregshof is bevind dat die ontvangste van die aandele van inkomste-aard was en gevolglik belasbaar is. Dit blyk dat die kernvraag is of die strekking van die vereiste gestel in klousule VI(4)(*d*) van die skema, naamlik dat geen lewering van aandele sou plaasvind ' . . . unless he shall have to date fixed for such . . . delivery(i) refrained from becoming or serving as an officer, director or employee of any individual, partnership or corporation, or the owner of a business, or a member of a partnership which conducts a business in competition with the company or renders a service . . . to competitors with any portion of the business of the company . . . ', sodanig is dat dit gesê kan word dat die aandele as skadevergoeding vir die inperking van

appellant se handelsvryheid aan hom toegeval het. Wat in die onderhawige geval opval, is dat indien die betrokke ontvangste nie *skadevergoeding* ('compensation')

Page 105 of 50 SATC 98

vir die inperking van handelsvryheid was nie (met ander woorde, nie was 'to fill a hole in fixed capital' nie), dit *vergoeding* ('reward') vir appellant se uitmuntende diens was. In die bekende beslissings wat relevant tot die huidige aangeleentheid is, was die geskilpunt, anders as in die onderhawige geval, telkens of die *skadevergoeding* ('compensation') wat ter sprake was, betaal en ontvang was 'to fill a hole in the profits of a taxpayer or to fill a hole in his fixed capital assets'. Sien onder andere *Burmah Steamship Co Ltd v Inland Revenue Commissioners* 1931 SC 156 (16 TC 67); *Glenboig Union Fireclay Co Ltd v Inland Revenue Commissioners* 1921 SC 400 (12 TC 427); *Commissioner for Inland Revenue v Illovo Sugar Estates Ltd* 1951(1) SA 306(N);[10] *Taeuber & Corssen*(*Pty*) *Ltd v Secretary for Inland Revenue* 1975(3) SA 649(A).[11]

In hooftrekke is respondent se submissies dat: in gevalle waar skadevergoedingsbetalings ter sprake is, is die betrokke partye se bedoeling van belang ten einde vas te stel of die betrokke ontvangste inderdaad as skadevergoeding vir die inperking van handelsvryheid gegee en ontvang is; daar geen aanduiding is dat dit Wyeth of American Home se bedoeling was dat die aandele in die huidige geval as skadevergoeding vir die inperking van appellant se handelsvryheid gegee is nie; ook die appellant die aandele blykbaar nie deurgaans as skadevergoeding vir die inperking van sy handelsvryheid beskou het nie; selfs indien die partye se bedoeling geen rol speel nie en daar slegs op die praktiese uitwerking van klousule VI(4)(*d*) van die skema gelet moet word, dit nie gesê kan word dat die nakoming van die vereistes van die gemelde klousule die *causa causans* van die toevalling van die aandele was nie; hierdie nie 'n aangeleentheid is waar 'n toedeling gemaak kan word nie; die bepalings van art 7A(4A) van die Inkomstebelastingwet 58 van 1962 nie van toepassing is nie.

Of die partye se bedoeling 'n rol speel: Juis omdat in die 'gewone' gevalle waar skadevergoeding vantevore ter sprake was, die bedoeling aanwesig was om die ontvanger te vergoed, hetsy 'to fill a hole in profits', hetsy 'to fill a hole in capital', het hierdie aspek nie dikwels pertinent ter sprake gekom nie. Sien tog *Taeuber & Corssen*(*Pty*) *Ltd v SIR* (*supra* op 663E);[12] *ITC* 1341, 43 SATC 215 op 220 - 1; *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1987(2) SA 123(A) op 139E.[13] Op sterkte van bogaande uitsprake: (1) is die bedoeling en doel waarmee 'n betaling of voordeel gemaak of gegee word, van deurslaggewende belang by die beantwoording van die vraag of 'n betrokke betaling of voordeel 'n skadevergoedingsbetaling of-toekenning is, al dan nie. Soos in gevalle waar bepaal moet word of 'n betrokke uitgawe in die voortbrenging van inkomste aangegaan is en daar gelet word beide op 'the purpose of the expenditure and what it actually effects' (*per* Corbett AR in *Commissioner for Inland Revenue v Nemojim* 1983(4) SA 935(A) op 947F),[14] net so behoort by moontlike skadevergoedingsontvangstes ook na beide elemente ondersoek ingestel te word; (2) is dit in die onderhawige geval nie voldoende om slegs op die *effek* van die nakoming van die vereistes gestel in klousule VI(4)(*d*) van die skema te let nie, maar

Page 106 of 50 SATC 98

moet daar ook ondersoek omgestel word na die bedoeling waarmee en die doel waarvoor voordele ingevolge die skema gegee en ontvang is; (3) is dit gevolglik nie voldoende om, soos appellant blykbaar wil doen, slegs te kyk na 'the causally relevant factor which resulted in the accrual to and receipt by the appellant of the shares in question' nie, en om te sê 'the practical result is exactly the same as it would have been if the sanction for non-compliance had been not forfeiture of the benefits but legal proceedings for an interdict or for damages' nie. So 'n benadering sou heeltemal enige bedoeling wat die partye mag gehad het negeer, en kom neer op 'n bloot meganiese ondersoek na die effek van klousule VI(4)(*d*) van die skema. Dit blyk ook dat die hof *a quo* wel deeglik aan die bedoeling en doel waarmee die aandele aan appellant toegeken en gelewer is, aandag geskenk het. Die hof *a quo* meld met verwysing na die *Taeuber & Corssen* - saak dat: '(i)t has to be borne in mind that the real question is: '. . . whether it was intended to compensate for the temporary loss of part of appellant's income-producing structure" '. Dit blyk dan ook dat die hof *a quo* op sterkte van die antwoord waartoe dit op hierdie aspek raak, tot sy uiteindelike bevinding raak.

Die partye se bedoeling: Die appellant kon in sy getuienis geen bydrae lewer ten aansien van die vasstelling van Wyeth of American Home se bedoeling met die skema nie. Indien na die bepalings van klousule 1 ('Purpose') van die skema gekyk word ten einde die bedoeling vas te stel is geen aanduiding te vind dat dit enigsins die bedoeling was om enigiemand vir die inperking van handelsvryheid te vergoed nie. Die hof *a quo* bevind dan ook so ('n verwysing na die *Taeuber & Corssen*-saak). Verder blyk dit ook uit die 'Notice of Annual Meeting and Proxy Statement' van 1985, *sub voce* 'Management Incentive Plan' dat die doel met die skema slegs was om aansporingsvergoeding aan bestuurslui en werknemers te laat toekom. Sover as wat dit die appellant se bedoeling aanbetref, blyk dit ook nie asof hy deurgaans ernstig onder die indruk was dat die aandele inderdaad vergoeding vir die inperking van sy handelsvryheid was nie. Gevolglik het die appellant nie bewys dat dit die bedoeling met en die doel van die toekenning en lewering van die aandele was om hom vir die inperking van sy handelsvryheid te vergoed nie.

Of die nakoming van die vereistes van klousule VI(4)(*d*) van die skema die *causa causans* van die ontvangste was: Indien die bedoeling waarmee en die doel waarvoor betaling of afgifte gemaak is, nie ter sake is nie en bloot op die kousaal-relevante faktor gelet moet word ten einde te bepaal of die ontvangste van kapitale aard was, is dit uit klousule 7 duidelik dat 'n werknemer, na toekenning van aandele, reeds 'n reg verwerf het, alhoewel dié, reg

klaarblyklik voorwaardelik is. Die blote feit dat appellant 'n werknemer van die American Home-groep was, het hom in die posisie geplaas om hierdie voorwaardelike reg te verwerf. 'n Werknemer se uitstaande diens is die faktor wat daartoe aanleiding gegee het dat hy bogemelde voorwaardelike reg verwerf het. Appellant se weerhouding van kompetisie is slegs die gebeurtenis of faktor wat bogemelde voorwaardelike reg in 'n onvoorwaardelike reg omskep het. Dit is gevolglik nie korrek, soos appellant aan die hand doen, dat die toekenning van die aandele '. . . merely 'provide (*d*)' the occasion or opportunity for the result [the ultimate accrual and receipt of the shares] to be produced' nie

en dat '(i)t was the appellant's compilance with the conditions laid down in para VI(4)(d) of the plan which was the causally relevant factor that resulted in the accrual to and the receipt by the appellant of the shares' nie.

Of 'n toedeling met betrekking tot die ontvangste gemaak kan word: Uit die beslissings waarin 'n toedeling ten aansien van uitgawes aangegaan deur 'n belastingpligtige, gemaak is, blyk dit dat in al hierdie gevalle 'n duidelike tweeledige doelstelling ten aansien van die betrokke uitgawe aanwesig was. Sien in hierdie verband *Secretary for Inland Revenue v Guardian Assurance Holdings*(*SA*) *Ltd* 1976(4) SA 522(A) op 534A;15 *Borstlap v Sekretaris van Binnelandse Inkomste* 1981(4) SA 836(A) op 849H - 850A;16 *Commissioner for Inland Revenue v Nemojim* (*supra* op 951C).17 Dit sal ook nodig wees alvorens 'n toedeling ten aansien van 'n ontvangste soos di, in die huidige geval gedoen kan word, dat die ontvangste ten minste ook bedoel moes gewees het 'to fill a hole in capital assets'. Appellant het, soos hierbo betoog, nie bewys dat daar so 'n doelstelling met die toekenning en lewering van die aandele aanwesig was nie, en gevolglik ook nie dat so 'n doelstelling een van meerdere doelstellings was nie. Hierdie is gevolglik 'n geval, soos in die vooruitsig gestel deur Trollip AR in *Ovenstone v Secretary for Inland Revenue* 1980(2) SA 721(A) op 740E18 waar ' . . . insufficient evidence is adduced to enable the Court to effect (an apportionment)'.

Die bepalings van art 7A(4A) gelees met art 5(10) van die Wet: Op sterkte van die oorwegings uiteengesit deur die hof *a quo*, hierdie bepalings nie in die huidige geval van toepassing is nie.

Welsh QC in reply.

Cur adv vult.

Postea (16 May).

CORBETT JA: During the year of assessment ended 28 February 1982 the appellant, Mr N R Tuck, received 826 shares in American Home Products Corporation, of New York ('American Home'), in terms of what was called a 'management incentive plan'. The value of the shares at the date of receipt, in March 1981, was R20 977. In assessing appellant to income tax for the 1982 tax year respondent, the Commissioner for Inland Revenue, included this amount of R20 977 in appellant's taxable income. Appellant objected to this inclusion and, his objection having been disallowed, appealed to the Transvaal Income Tax Special Court. The Special Court (presided over by Melamet J), having heard evidence and argument, held that the amount of R20 977 constituted a receipt of a capital nature and that it was, therefore, not taxable. The court accordingly allowed the appeal, set aside the assessment and referred the matter back to the respondent for re-assessment. Respondent appealed to the Transvaal Provincial Division ('TDP'), which allowed the appeal with

costs and substituted an order dismissing the appeal and confirming the assessment. With leave of the TDP appellant now appeals to this court and seeks the restoration of the order of the Special Court.

The essential facts are not in dispute and may be summarized as follows. In 1949 appellant, a registered pharmacist, entered the employ of a company called Wyeth Laboratories(Pty) Ltd ('Wyeth') as sales manager. In 1951 he was appointed managing director and general manager of the company and he continued in that position until his retirement in September 1979 at the age of 65 years.

Wyeth was incorporated in South Africa in 1947 as a wholly-owned subsidiary of American Home. It manufactures certain pharmaceutical products and nutritional foods and markets these products in South Africa. In its first year of operation after appellant had joined the company Wyeth registered sales to the value of about £100 000 and a pre-tax profit of £12. Under appellant's management, however, the company prospered and by 1979 its sales had risen to R13 311 000 and its pre-tax profit to R3 362 000.

Appellant played a prominent role in the pharmaceutical industry. He served upon a number of pharmaceutical commissions and committees. Mr Trollip, an attorney with considerable experience of the pharmaceutical industry, who gave evidence before the Special Court, stated that, of all the people he met in the industry, he regarded appellant 'as probably the outstanding personality'. Appellant's particular strengths were his knowledge and experience in the marketing sphere and the very good relationships that he had been able to build up over the years with the various public authorities concerned with the pharmaceutical industry.

In 1967 American Home introduced the aforementioned management incentive plan ('the Plan') for its employees and the employees of its subsidiaries in different parts of the world. The Plan is set forth in a printed document, which was attached to the letter of objection and marked '1A' and which forms part of the case dossier. I shall refer to this document as 'Annexure 1A'. Annexure 1A, which is headed as follows - 'American Home Products Corporation Management Incentive Plan' is divided into eight paragraphs. Paragraph I, headed 'Purpose', reads as follows: 'The

Management Incentive Plan ("the Plan") is designed to provide for awards to selected salaried employees in executive, administrative, technical, professional or other important capacities, who individually, or as members of a group, contribute in a substantial degree to the success of the Company, thus affording to them a means of participating in that success and an incentive to contribute further to that success'. As appears from the remainder of Annexure 1A, the Plan is administered by a committee (para III), which each year determines the individual employees eligible to receive awards under the Plan and the awards to be made from a fund known as the Award Fund (para IV). In each year the Award Fund is determined by the board of directors of American Home, on the recommendation of the committee, in accordance with a formula, which is related to the financial success of the company's business operations. There are three types of award: (i) a cash award, (ii) a contingent cash award and(iii) a contingent stock award (paras II and V). In this case only the third of these, the contingent stock award, is of relevance.

A contingent stock award is made from a large block of unissued

Page 109 of 50 SATC 98

American Home shares kept for this purpose, known as the Corporation's Common Stock (para V). Where a contingent stock award is made the amount of the award is converted into a certain number of shares, regard being had to the market price of such shares on the New York Stock Exchange at the end of the calender year for which the award is made. At that stage, however, no shares are delivered to the employee concerned; American Home merely credits a contingent award account in his name with the award of the number of shares so determined. Moreover, pending delivery, no particular shares are earmarked for the account of the employee, nor does he have the rights of a stockholder in respect thereof. Nevertheless, the company annually determines the dividends which would have been paid on the shares credited to each contingent award account and the account is further credited with shares equivalent to the total amount of the dividend (para VI(3)).

Leaving aside the case of an employee who dies or is discharged from the employ of the company or whose employment is terminated for some other reason prior to retirement (for which eventualities the Plan makes special provision - see para VI(4)(*a*), (*b*) and(*c*)), the shares standing to the credit of an employee's contingent award account at the time of his retirement are delivered to him after his retirement in ten(approximately) equal annual instalments. Such delivery is, however, made subject to the ex-employee having, up to the date of delivery, complied with certain conditions. This is provided for in para VI(4)(*d*) of the Plan, the relevant portion of which reads as follows: '(*d*) No . . . delivery from a Contingent Award Account shall be made to any Employee after termination of employment unless he shall have to the date fixed for such payment or delivery(i) refrained from becoming or serving as an officer, director or employee of any individual, partnership or corporation, or the owner of a business, or a member of a partnership which conducts a business in competition with the Company or renders a service (including, without limitation, advertising agencies and business consultants) to competitors with any portion of the business of the Company, (ii) made himself available, if so requested by the Company, at reasonable times and upon a reasonable basis to consult with, supply information to, and otherwise cooperate with, the Company and(iii) refrained from engaging in deliberate action which, as determined by the Committee, causes substantial harm to the interests of the Company. If these conditions are not fulfilled, no further . . . delivery shall thereafter be made with respect to the Employee's Contingent . . . Stock Awards and all his rights with respect to his Contingent Award Account shall thereupon be forfeited.'

In order to ascertain whether there has been compliance with these conditions, former employees to whom shares have been awarded under the Plan are required each year to complete a questionnaire giving details of any 'business entity' with which the former employee may have become associated since his retirement. And it is only after receiving and considering the completed questionnaire that the committee determines the eligibility of the ex-employee to receive his annual instalment of shares.

In terms of this Plan shares in American Home were over the years of his employment awarded to appellant and credited to a contingent award

Page 110 of 50 SATC 98

account in his name. At the time of his retirement his account stood at 7675 shares. In his first year of retirement, during April 1980, he received delivery of 668 shares as an initial annual instalment. When submitting his income tax return for the 1981 tax year, appellant enclosed a letter, in which he explained the origin of the 668 shares and stated that at current stock exchange prices and rates of exchange as between the US dollar and the rand the total value of the shares as at the date of delivery was R14 251. The letter went on to submit that the shares were received partly as remuneration for services rendered and partly as payment for being restrained from competing with the company or doing anything causing harm to the company; and that half of the amount received was in respect of services rendered and half in respect of the restraint, and that the latter receipt was one of a capital nature. The letter concluded by contending that accordingly only half the amount received, viz R7 125 was taxable. This was the amount reflected as taxable income in appellant's return in respect of the receipt of the 668 shares. Appellant appears to have been assessed at that stage upon this basis for the 1981 tax year.

In the following year the appellant received a further instalment of 826 shares to the value (at the time of delivery) of R20 977 and again in his return of income for the 1982 tax year appellant reflected half this amount, viz R10 488, as income for the year. A letter accompanied his return in which he referred to the earlier letter submitted with his 1981 return and repeated the submissions in the 1981 letter as to why only half the value of the shares

was shown as income.

On this occasion, as I have indicated, the respondent did not accept this apportionment of the receipt relating to the shares, but included the full value of the shares in his assessment of appellant's taxable income. Furthermore he raised an additional assessment in respect of the 1981 tax year. In the letter of objection written on appellant's behalf by his attorneys in regard to the 1982 assessment the following was stated:

> 'We point out that our client claimed only 50% of the value of the shares to be in respect of a restraint and the balance was submitted to be remuneration for services rendered and therefore taxable. In doing this, our client was motivated with the idea of being reasonable to the Inland Revenue Directorate. We submit, however, that on principle, since the essential and dominating nature of the transaction was the restraint, no part of the award was of a revenue nature or taxable.
>
> In the alternative, it is submitted that the award to our client was partly in respect of services rendered and partly in respect of a restraint and that an apportionment is competent. A fair and reasonable apportionment would require that more than 50% of the value of the receipt would be of a capital nature, but we have had some difficulty in finding a formula to quantify the amount. Accordingly, we suggest that, as originally returned by our client, a fair and reasonable apportionment would be on a 50/50 basis.'

Succinctly put, the judgment of the Special Court was to the effect that the dominant reason for the delivery of the shares to the appellant in the year under consideration was appellant's compliance with the first of the conditions stated in para VI(4)(*d*), which was described by Melamet J as 'the restraint undertaking'. The payment was consequently for the sterilization, in part or in whole, of an asset of appellant's, viz the right to trade freely, and was thus a payment of a capital nature and not taxable.

The judgment of the court *a quo* has been reported (see *Commissioner for Inland Revenue v Tuck* 1987(2) SA 219(T)19). In terms thereof the

TPD held that, on the contrary, the dominant purpose of the Plan was to reward excellence in management and to spur on employees to continue to render such service (see pp 223J - 224A); and furthermore that since the Plan did not indicate that allottees of shares were given their shares as a *quid pro quo* for restricting their freedom to compete (at most it indicated a free choice to compete with the risk of a forfeiture of shares), the principles relating to the sterilization of an asset did not apply and the receipt was consequently not of a capital nature (see p 224C - H).

On appeal to this court appellant's counsel, Mr *Welsh*, advanced two main contentions: (i) that the causally relevant factor which resulted in the receipt by appellant of the shares in issue was appellant's compliance with the restraint of trade provided for in para VI(4)(*d*) of Annexure 1A and that consequently the receipt was wholly of a capital nature; and(ii) that, alternatively, the receipt of the shares was attributable at least in part to appellant's compliance with the restraint and that there should accordingly be an apportionment of the receipt as between income and a capital receipt.

In support of the first of these contentions, Mr *Welsh* referred to the dictum of Watermeyer CJ in the case of *Commissioner for Inland Revenue v Lever Bros & another* 1946 AD 441 at 45020 with reference to the source of income, viz -

> ' . . . that the source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income, and that this originating cause is the work which the taxpayer does to earn them, the *quid pro quo* which he gives in return for which he receives them. The work which he does may be a business which he carries on, or an enterprise which he undertakes, or an activity in which he engages and it may take the form of personal exertion, mental or physical, or it may take the form of employment of capital either by using it to earn income or by letting its use to someone else. Often the work is some combination of these'.

On the basis of this dictum Mr *Welsh* argued that, though the making of the original awards was a *conditio sine qua non* of the receipt of the shares by the appellant, the real causally relevant factor was appellant's compliance with the restraint condition; and that consequently the whole of the receipt was of a capital nature. In this connection he referred to a statement by Mr Justice Schreiner sitting as President of the Swaziland Court of Appeal in the case of *Mathenjwa v R* (1970 - 1976) Swaziland Law Reports 25, at 29. Having referred to a decision of the Rhodesian Court of Appeal, Schreiner P stated:

> 'I am in respectful agreement with the view expressed . . . that *causa sine qua non*, or what has been called 'but for' cause, is not a cause in the law of culpable homicide. Indeed generally in law you seek the fact that actually produces the result or positively contributes to its production and not a fact that only provides the occasion or opportunity for the result to be produced.'

Mr *Welsh* also relied upon certain other authorities, particularly the judgment of this court in *Commissioner for Inland Revenue v Shell Southern Africa Pension Fund* 1984(1) SA 672(A)21 where the issue was whether a lump sum payment from a pension fund to the widow of a deceased member (where such payment was in the discretion of the

committee administering the fund) was a lump sum benefit which became recoverable 'in consequence of or following upon' the death of the member within the terms of para(*e*) of the definition of 'gross income' in s. 1 of the Income Tax Act 58 of 1962. This court (*per* Nicholas JA) held that the problem was one of causation, viz whether, in a case where a lump sum becomes recoverable as a result of the exercise by the committee of its discretion, there is the required causal connection between the recoverability and the death of the member. In the course of his judgment Nicholas JA stated (at 679B - F):22

> 'It is clear that the death of the member is a *conditio sine qua non* to the recoverability of the lump sum: but for the death, there can be no pension granted to an eligible widow or eligible dependant, and hence nothing which is commutable under rule 37(3). A *conditio sine qua non* is not, however, necessarily a causally relevant factor. (See Hart and Honoré *Causation in the Law* at 107, 121 - 2.) As Denning J pointed out in *Minister of Pensions v Chennell* [1947] 1 KB 250 at 255 - *in fine*, the latest event in a train of physical events is not necessarily 'caused by' the first event. The learned Judge said at 254 that 'the test of causation is to be found by recognizing that causes are different from the circumstances in or on which they operate. The line between the two depends on the facts of each case' and observed at 256 that an intervening cause or extraneous event may be so powerful a cause as to reduce what has gone before to part of the circumstances in which the cause operates.
>
> The paradigm of the present case is an occurrence A (the death of a member) which initiates a chain of events leading to the final result B (the recoverability of the lump sum benefit), one of the intervening events being occurrence C (the exercise by the committee of its discretion).
>
> The question is whether the intervening cause C, which contributes to bring about the result B, is of such a kind that it isolates the original cause A so as to relegate it 'to the status of a merely historical antecedent or background feature'.'

It was held that the decision of the committee did constitute the intervention of 'an independent, unconnected and extraneous causative factor or event' (679H)23 which isolated the death of the member from the final result; and that, therefore, the lump sum did not become recoverable in consequence of or following upon the death of the member.

The question of causation, especially in the field of delict, has been considered by this court in a number of recent cases (see eg *Da Silva & another v Coutinho* 1971(3) SA 123(A), at 147D - 148E; *Minister of Police v Skosana* 1977(1) SA 31(A), at 33A - B, 34F - 35D, 43E - 44F; *Standard Bank of South Africa Ltd v Coetsee* 1981(1) SA 1131(A), at 1138G - 1139C; *S v Daniëls en 'n ander* 1983(3) SA 275(A), at 324F - 325E, 331B - 333G; and *Siman & Co*(*Pty*) *Ltd v Barclays National Bank Ltd* 1984(2) SA 888(A), at 914F - 915B). I do not propose to canvass fully the discussion of this question in these judgments. Suffice it to say that it is generally recognized that causation in the law of delict gives rise to two distinct enquiries. The first, often termed 'causation in fact' or 'factual causation', is whether there is a factual link of cause and effect between the act or omission of the party concerned and the harm for which he is sought to be held liable; and in this sphere the generally recognized test is that of the *conditio sine qua non* or the 'but for' test. This is essentially a factual enquiry. Generally speaking no act or omission can be regarded as a cause in fact unless it passes this test. The second enquiry postulates that the act or omission is a *conditio sine qua non* and raises the question

as to whether the link between the act or omission and the harm is sufficiently close or direct for legal liability to ensue; or whether the harm is, as it is said, 'too remote'. This enquiry (sometimes called 'causation in law' or 'legal causation') is concerned basically with a juridical problem in which considerations of legal policy may play a part. One of the factors which may cause the link between the act or omission and the harm to become too tenuous (resulting in the harm being too remote) is the intervention of some independent, unconnected and extraneous causative factor or event, generally termed a *novus actus interveniens*. (See generally 8 LAWSA paras 47 - 9.) The *Shell* case(*supra*) was an instance of such a *novus actus interveniens*.

It follows from this that a *conditio sine qua non* may in fact be a legally relevant cause provided that it passes the test of constituting causation in law, but generally speaking a fact which is not a *conditio sine qua non* cannot constitute a cause in law (there may be exceptions - see *Skosana's* case(*supra*) at 35C - D).

I am not sure that it is appropriate to apply the principles of causation, as developed particularly in the criminal law and the delictual field, when considering the problem as to how, from the income tax point of view, a taxpayer's receipt should be characterized, ie whether as income or as capital. In the *Shell* case(*supra*), the court was directed to these principles of causation by the particular wording of para(*e*) of the definition of 'gross income'. In a case such as the present, however, it seems to me that most problems of characterization could appropriately be dealt with by applying the simple test indicated by Watermeyer CJ in the passage quoted from his judgment in the *Lever Bros* case(*supra*) viz by asking what work, if any, did the taxpayer do in order to earn the receipt in question, what was the *quid pro quo* which he gave for the receipt?

The *quid pro quo* given by appellant in this case is to be found in the Plan. In my opinion, it has two main elements. Firstly, there is the element of service given to the company, Wyeth, over the years, which so contributed to the business success of American Home as to earn appellant annual awards of shares which were credited to his contingent award account in terms of the Plan. It is conceded by Mr *Welsh* that this element is of a revenue nature. Secondly, there is the element of restraint of trade, flowing from condition(i) in para VI(4)(*d*) of the Plan, compliance with which is a pre-requisite to appellant receiving his annual instalments of shares over a ten-year period. There

are, of course, two other conditions in para VI(4)(*d*), but on the evidence condition(i) appears to have been the most important one. It is conceded by Mr *Marais*, who appeared on behalf of the respondent, that the restraint of trade element is of a capital nature.

It seems to me that it would be totally unrealistic to say that in this case the *quid pro quo* given by the appellant for the receipt of the shares was solely his compliance with condition(i) of para VI(4)(*d*). It is true that had he failed to comply with condition(i) appellant would have received nothing. But equally had he not given service of a particular quality over the years he would have received nothing. And we are, of course, *ex hypothesi* concerned with the situation where there has been compliance;

otherwise there would have been no receipt to characterize. The mere fact that the one element, viz the service, occurred chronologically before the other, viz the compliance with the condition, cannot, in my view, alter the basic conclusion that the *quid pro quo* given by appellant for the receipt of his shares comprised both elements, viz service and compliance with the restraint.

In my opinion, it would be equally unrealistic to say that the *quid pro quo* given by appellant was solely his excellent service during the years of his employment. This was initially the contention put forward on behalf of the Commissioner, but in oral argument before us Mr *Marais* did not appear to press the point with any enthusiasm.

Reverting to Mr *Welsh*'s argument, I am of the view that even if one applies the principles of legal causation referred to above, one reaches the same conclusion. Appellant's excellent service was obviously a *conditio sine qua non* of the ultimate receipt of the shares and thus qualifies as a cause in fact. Appellant's compliance with condition(i) was obviously a contributory cause in fact, but in my view it did not introduce an independent, unconnected and extraneous causative factor of such significance as to relegate the excellent service to the status of a mere historical antecedent or background feature. The service and the restraint condition were part and parcel of the same scheme and it rested with appellant as to whether the restraint condition was complied with or not. Both were, in my opinion, causally relevant factors. Appellant's main argument cannot, therefore, succeed.

I turn now to the alternative argument. In this regard Mr *Welsh* pointed out, with reference to certain decided cases, that, despite the absence of statutory authorization, this court had in the past approved of the principle of apportionment in dealing with the deductibility of expenditure which was partly of a capital nature and partly not (see *Secretary for Inland Revenue v Guardian Assurance Holdings*(*SA*) *Ltd* 1976(4) SA 522(A), at 533E - 34A;[24] *Borstlap v Sekretaris van Binnelandse Inkomste* 1981(4) SA 836(A), at 849E - G;[25] and *Commissioner for Inland Revenue v Nemojim*(*Pty*) *Ltd* 1983(4) SA 935(A), at 951B - D);[26] and also with regard to deemed income under s. 7(3) of the Income Tax Act, where there were elements of both gratuitousness and consideration (*Ovenstone v Secretary for Inland Revenue* 1980(2) SA 721(A), at 740B - F).[27] Counsel contended that there was no reason why the principle of apportionment should not be extended to the case where a receipt, having regard to its *quid pro quo*, contained both an income element and an element of a capital nature. Counsel for the respondent did not appear to dispute this as a proposition of law.

There is, so far as I am aware, no authority for this proposition in our case law. Nevertheless, for reasons similar to those stated in the cases quoted in the previous paragraph, it seems to me that in a proper case apportionment provides a sensible and practical solution to the problem which arises when a taxpayer receives a single receipt and the *quid pro*

quo contains two or more separate elements, one or more of which would characterize it as capital. It could hardly have been the intention of the legislature that in such circumstances the receipt be regarded wholly as an income receipt, to the disadvantage of the taxpayer, or wholly as a capital receipt, to the detriment of the *fiscus*. And it is of some interest to note that the solution of apportionment in cases of this nature has been adopted in England (see *Tilley v Wales* (*Inspector of Taxes*) 1943 AC 386, at 393 - 4, 398; *Carter v Wadman* (*H M Inspector of Taxes*) (1946) 28 TC 41, at 52 - 3) and in Australia (see *McLaurin v Federal Commissioner of Taxation*(1961) 8 AITR 180 at 191).

The problem in this case is to establish an acceptable basis of apportionment. The appellant has all along suggested apportionment on a 50/50 basis; and this was Mr *Welsh's* suggestion to us. Having regard to the inherent nature of the receipt and its origin in the Plan, it is not possible to find an arithmetical basis for apportionment (cf *Commissioner for Inland Revenue v Rand Selections Corporation Ltd* 1956(3) SA 124(A), at 131;[28] the *Nemojim* case(*supra*) at 958),[29] but I do not think that this should constitute an insuperable obstacle. Mr *Marais* submitted in argument that appellant had failed to adduce all relevant evidence in this regard and suggested, by way of example, that a highly-placed executive in American Home could have told the Special Court how the company regarded the relative importance of the service and restraint elements. I do not think that this submission is sound. The Plan and the actions of the company speak for themselves and I doubt whether the evidence of such an executive, if admissible, could have added anything of substance.

It is obvious from the Plan that both elements are important factors in the *quid pro quo* which the employee provides in return for receiving the shares. If the employee does not provide the requisite service, he does not qualify for an award; if he fails to comply with the restraint, he forfeits the award. The importance attached by the company to the service appears from para I of Annexure 1A which indicates that the very purpose of the Plan is to reward service which has contributed to the success of the company and to provide an incentive for such service in the future. At the same time how seriously the company regards the restraint condition is illustrated by the

evidence of Kernick, who forfeited all right to the shares credited to his contingent award account when he left the service of Wyeth to join a South African company which produced a commodity, which was not manufactured by Wyeth, but was manufactured by other overseas companies in the group, and who did not have his rights to this contingent award account reinstated when he rejoined the American Home group some three years later; and by the fact that each year a potential recipient of shares has to first complete and remit to the company a questionnaire, designed to check whether he has complied with the restraint or not, before he receives his shares. The duration of the restraint is also an indication of the importance attached to this element by the company. It is not possible to infer that the one element is more important than the other and in all the circumstances I consider that a 50/50 apportionment would be fair and reasonable.

It follows that the appeal should be allowed and the matter remitted to the respondent for reassessment in the light of this judgment. The success of the appeal naturally carries with it the costs of appeal. There are no costs to be considered as far as the hearing before the Special Court is concerned. As to the costs in the court *a quo*, Mr *Marais* very fairly conceded that appellant should be awarded these costs. This concession was, in my view, correctly made. As I have shown, the appellant submitted his original return on the basis of a 50/50 apportionment of the receipt in issue; and when objecting to the respondent's assessment he put forward such an apportionment as an alternative contention. Had the respondent not insisted upon the viewpoint that the whole receipt was taxable, I have no doubt that no litigation would have ensued. It is true that the Special Court judgment gave the appellant more than he was entitled to, but in his notice of appeal respondent made no mention of an apportionment: his attitude was still that the whole rceipt was taxable. Had he at that stage conceded that he was only entitled to a 50/50 apportionment it seems probable that appellant would not have contested the appeal. The appellant would after all have got what he had asked for all along. It, therefore, seems appropriate that respondent should bear the costs of the appeal to the court *a quo*.

The appeal is allowed with costs and there is substituted for the orders made by the Special Court and the court *a quo* the following order:

'The appeal is allowed and the matter is remitted to the Commissioner for re-assessment upon the basis that only 50 per cent of the receipt in respect of the American Home shares constituted taxable income in the hands of the appellant.'

The respondent is to pay the costs of the appeal to the court *a quo*.

Van Heerden JA, Smalberger JA, Vivier JA and Boshoff AJA concurred.

_____

Footnotes

1 14 SATC 1 at 8-9.
2 46 SATC 1 at 8-9.
3 37 SATC 129.
4 47 SATC 34.
5 49 SATC 11.
6 42 SATC 55 at 77.
7 38 SATC 111.
8 43 SATC 195 at 208.
9 45 SATC 241 at 259-260 and 267.
10 17 SATC 387.
11 37 SATC 129.
12 Ibid at 139-140.
13 49 SATC 11 at 27.
14 45 SATC 241 at 256.
15 38 SATC 111 at 125.
16 43 SATC 195 at 208-9.
17 45 SATC(*supra*) at 259.
18 42 SATC 55 at 77.
19 49 SATC 28.
20 14 SATC 1 at 8-9.
21 46 SATC 1.
22 Ibid, at 8-9.
23 Ibid, at 9.
24 38 SATC 111 at 124-5.
25 43 SATC 195 at 208.
26 45 SATC 241 at 159-260.
27 42 SATC 55 at 76-7.
28 20 SATC 390 at 400.
29 45 SATC(*supra*) at 267.