



BUSINESSDAY

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A review of the Government Gazette and new developments in law

Court rules points benefit is taxable

IN THE first case applying the principles that arose in *C:SARS v Brummeria Renaissance (Pty) Ltd*, judgment was delivered in the Cape Tax Court recently in Case No 12244, in a superb judgment notable for the clarity of judicial reasoning.

The case before the Cape Tax Court dealt with a holiday time share exchange company. Membership of the taxpayer's time share scheme was such that members were entitled to "space bank" (or deposit) their occupation rights at the time share resorts with the taxpayer, in return for which they were credited with points on the taxpayer's internal computer system. Members of this company's time share resorts could then accumulate points and either trade up for higher grade holidays at different resorts or use the points they had to take holiday breaks of less than a week at other resorts. Members of this scheme had a three-year period in which to utilise their points, and the taxpayer itself paid nothing for the occupation rights that are space

banked with it by its members.

The taxpayer company then provided members of its permanent staff with the opportunity to visit various resorts by allocating employees points which they could use to visit a variety of resorts within the scheme. These employees' points are only valid for one year, and if not used within that year, they are forfeited.

Because members of the scheme would of course take precedence, the rights of occupation which were given to employees were those that would expire if they were not exercised at all. The taxpayer's argument was that this was an opportunity for employees to acquire better product knowledge of the time share schemes. Employees had to pay their own transport costs to the resort and for meals and for whatever amenities they used. Employees could not convert points into cash when terminating their employment.

The taxpayer then having analysed the seventh schedule of the Income Tax Act, determined that the cash equivalent of the taxable



benefit granted to its employees in the form of exchangeable points was nil. SARS was of the view that the allocation of free points to employees was a benefit and must be subject to fringe benefits tax. It ought to have been calculated as part of employees' remuneration for the purposes of paying pay-as-you-earn (PAYE) tax under the fourth schedule. The commissioner assessed the taxpayer for additional PAYE liability in the 2002 to the 2006 years of assessment, imposed a statutory penalty of 10%, and interest for the late payment of those PAYE amounts. Before the court, the taxpayer argued that it does not provide its employees with accommodation – it was allocating points to the employees.

The taxpayer relied on the judg-

ment of the Cape High Court in *Stander v CIR*. In that case, the taxpayer had received an overseas trip as a prize and the commissioner had wanted to include the value of the prize in the employee's taxable income. The court held that the employee had only won the prize, he had not received property on which a monetary value could be placed in his hands.

Because of the conditions applicable to the enjoyment of Stander's overseas trip, the overseas trip had no value in his hands to bring it within the scope of paragraph (c) of the "gross income" definition.

In the *Brummeria Renaissance* case, the Supreme Court of Appeal

held that these views expressed in *Stander's* case were contrary to what the court had previously held in the *Peoples Stores* case. Judge Cloete said that it did not follow that if a receipt or accrual could not be turned into money, that it had no money value. The test to be applied was objective, not subjective. The court held that the passages quoted from the *Stander* case incorrectly reflected the law. The appeal court said that if that were the law, the right to live in a house rent-free or to drive a motor vehicle without paying for it, could be rendered tax-free by limiting the right to exercise the benefit to the recipient only. The court's judgment was based on the fact that if a right has a money value, the fact that it cannot be alienated

does not negate that value.

In the case in question, the court stipulated that the right to accommodation is a benefit for which an employee would have had to pay if he or she had not been given it for nothing.

The taxpayer further argued that the purpose of the provision of the accommodation to employees was not for that of a holiday, but for the purpose of performing the duties of their employment. This was to get to understand what time share resorts offered so that employees in the taxpayer's call centre could encourage and make alternative suggestions to members of the scheme. The court held that it was the employee who enjoyed the benefit of the temporary accommodation for the purposes of a holiday.

The court said: "The fact that employees have to report back to the taxpayer on conditions at resorts visited is clearly but a convenient by-product of what is mostly an enjoyable experience for employees."

Helpfully in this judgment, the learned judge dealt with the penalty levied by the commissioner. The court held that as the imposition of the penalty was based on the exercise of a discretion by the commissioner, the court was entitled on appeal to exercise its own original discretion.

This it did and reduced the penalty by half. With regard to the interest, the court held that interest is money paid for delaying payment of money due. There were no grounds on which the levy of interest could be remitted.

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