Case No 14/91

192/92

THE COMMISSIONER FOR INLAND REVENUE ..... APPELLANT

and

FRIEDMAN AND OTHERS N N O .....RESPONDENTS

JOUBERT, JA:

Case No 14/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE COMMISSIONER FOR INLAND REVENUE ..... APPELLANT

and

FRIEDMAN AND OTHERS N N O .....RESPONDENTS

Coram: JOUBERT, BOTHA, KUMLEBEN, J J A et

NICHOLAS, HARMS A J J A.

Date of Hearing: 18 May 1992

Date of Delivery: 5 November 1992

JOUBERT, JA:

J U D G M E N T

This an appeal against a judgment of McCREATH J in the Witwatersrand Local Division granting an application by the respondents in their capacities as trustees ("the Trustees") of the Phillip Frame Will Trust ("the Trust") for a declaratory order against the Commissioner for Inland Revenue ("the Commissioner") as appellant. The declaratory order was granted in terms of prayers 1 and 2 of the Notice of Motion, dated 22 November 1989. Prayer 1 provided as follows: "An order declaring that -

(a) The Phillip Frame Will Trust ('the Trust') created by the late Phillip Frame in terms of his Will dated 24 July 1974 is not a 'legal persona 'and therefore is not a person within the meaning of that word in the Income Tax Act No 58 of 1962 (as

amended) ('the Act') ; and

(b) therefore the Respondent was and is not entitled-

(i) to levy taxation on the Trust, in terms of the Act, or

(ii) to appoint applicants, in terms of section 95(1) of the Act, as the Trust's 'representative taxpayers'".

Prayer 2 sought an order for costs against the Commissioner. With leave of the Court a quo the Commissioner appeals to this Court. The judgment of the Court a quo, delivered on 29 October 1990, has been reported : Friedman and Others NNO v Commissioner for Inland Revenue : In re Phillip Frame Will Trust v Commissioner for Inland Revenue 1991(2) SA 340 (W).

The facts material to this appeal are not in dispute. They may be summarized as follows:

1. The late Phillip Frame in terms of clause 13 of his

Will, dated 24 July 1974, created the Trust in respect of the residue of his estate and the income derived therefrom. After providing in clause 16(a), (b), (c) and (d) for certain payments to be made by the Trustees from the income of the Trust, he directed them in clause 16 (f) to deal with the balance of the income (termed "Nett Income") as follows. Firstly, they were to decide and determine in what manner and to what extent the whole or any portion of the "nett income" was to be utilised by them for the maintenance, education and reasonable pleasures of his grandchildren born or to be born of his two daughters until each grandchild attained the age of 25 years. Secondly, the balance of the "nett income" not utilised by them for the aforementioned purposes was to remain undistributed by being accumulated and added to the capital of the Trust (Clause 16(f)). On the accepted interpretation

of the Will the undistributed trust income did not accrue to any potential income beneficiary of the Trust. According to Clause 16(g) a share of the "nett income" of the Trust was to "accrue" to a grandchild on attaining the age of 25 years subject to further directions not relevant to the present matter. Finally, upon a grandchild attaining the age of 50 years his or her share of the trust capital was to vest in and be paid over to him or her (Clause 17(a)).

2. For the tax years from 1984 onwards the Commissioner levied income tax on the undistributed trust income which had neither accrued to nor been received by any income beneficiary of the Trust. All the assessments in question were raised against the Trust and not against the Trustees. The Commissioner, however, in terms of sec 95(1) of the Income Tax Act 58 of 1962 ("the 1962 Act") treated the Trustees as the

representative taxpayers of the Trust.

3. In the judgment of the Court a quo (p 344 F) reference is made to a lacuna in the 1962 Act to create liability for income tax in respect of the undistributed trust income as described supra. This lacuna has been partially filled by amendments introduced by Income Tax Act 129 of 1991 with retrospective effect to the years of assessment which commenced on or after 1 March 1986. The amendments, however, do not affect the years of assessment prior to that of 1 March 1986, i.e. the undistributed trust income for the 1984, 1985 and 1986 tax years are not affected by the amendments introduced by the Income Tax Act 129 of 1991.

4. The legal dispute between the parties concerning the validity of the levy of income tax on the undistributed trust income for the 1984, 1985 and 1986 years of assessment accordingly has to be determined according to

the law as it stood before the passing of Income Tax Act 129 of 1991.

5. The parties are agreed that the income tax paid by the Trustees for the 1984 to 1986 years of assessment will be refunded to them should the appeal by the Commissioner fail.

At the commencement of the hearing of the appeal the Trustees were granted an order of amendment to substitute the following clause for clause 1(b)(ii) of their Notice of Motion dated 25 November 1989 viz.

"(ii) to treat the Applicants, in terms of section 95(1) of the Act, as the Trust's representative taxpayers in respect of any income of the Trust in any of the tax years in question which was not utilised in terms of Clause SIXTEEN (f) of the Will for the benefit of the testator's grandchildren but was added

to and formed part of the capital of the Estate."

Three issues fall to be decided.

First Issue. Does the 1962 Act impose on the Trust per se as a taxpayer any liability for income tax on its undistributed income which does not accrue to any potential income beneficiary ?

"Taxpayer" is defined in sec 1 as "any person chargeable with any tax leviable under this Act - - -." (My underlining).

The heading of sec 5 is "Levy of normal tax and rates thereof". The relevant provisions of sec 5(1) provide as follows:

> "- - - there shall be paid annually for the benefit of the State Revenue Fund, an income tax (in this Act referred to as the normal tax) in respect of the taxable income received by or accrued to or in favour of

(a) any person - - - - -

(b) any person - - - - -

(c) any person - - - - -

(d) any company during every financial year of such company."

(My underlining).

Sec 5(1) is the charging section which provides for the levy of income tax in respect of taxable income received by or accrued to any person or company during the years of assessment.

Various categories of incorporated associations and registered companies are included in the definition of "company" in sec 1.

"Person " is defined in sec 1 as including "the estate of a deceased person" for purposes of the 1962 Act. Sec 2(x) of the Interpretation Act 33 of 1957 assigns to "person" an inclusive meaning comprising "any company

incorporated or registered as such under any law" and "any body of persons corporate or unincorporate." This statutory definition does not mention a trust.

Is a trust a legal persona ? According to the Anglo-American law of trusts a trust has no legal personality. P. W. Duff, Personality in Roman Private Law, Cambridge University Press, 1938 at p 206:

> "Maitland showed [Collected Papers, vol 3 (1911) p 321-404)] that by vesting property in trustees, rather than in corporations or associations, English lawyers evaded many questions that have caused difficulty abroad."

See R. W. Ryan in his unpublished Cambridge doctoral thesis entitled The Reception of the Trust in the Civil Law (1959) at p 11: "A trust is certainly not a legal person". The position is the same in our law of trusts. See Commissioner for Inland Revenue v MacNeillie's Estate, 1961

(3) S A 833 (A) at p 840 G-H : "Neither our authorities nor our Courts have recognised it as a persona or entity. - - - It is trite law that the assets and liabilities in a trust vest in the trustee." Consult also Braun v Blann and Botha N N O and Another, 1984(2) S A 85) (A) at p 859 E-H : "In its strictly technical sense the trust is a legal institution sui generis - - - The Trustee is the owner of the trust property for purposes of administration of the trust but qua trustee he has no beneficial interest therein." It is clear therefore that a trust is not an incorporated company. Nor is a trust a body of persons unincorporate whose common funds are the collective property of all its members. There is also no basis for a submission that because the statutory definition of "person" in sec 1 of the 1962 Act was extended to include a deceased estate, it should by analogy be further extended to include a trust. The conclusion is inescapable that a trust is not a "person"

within the meaning of that word in the 1962 Act.

The answer to the First Issue is therefore No. In view of the nature of the Second and Third Issues such answer is, in my judgment, not by itself conclusive of the entire declaratory order as sought by the Trustees. The Second and Third Issues still remain for determination.

Second Issue. Is the Trust despite its lack of legal personality nonetheless for purposes of the 1962 Act a "taxable entity" that is liable as a "person" for income tax in regard to its undistributed trust income which does not accrue to any potential income beneficiary ?

The Second Issue is based on a contention advanced by Mr Levin on behalf of the Commissioner. According to The Shorter Oxford English Dictionary the word "entity" has the following meanings:

> "1. Being, existence, as opp. to non-existence; the existence, as dist. from the qualities or relations

of anything.

2. That which makes a thing what it is; essence, essential nature 1643.

3. Concr. An ENS, as dist. from a function, attribute, relation etc 1628.

4. 'Being' generally 1604."

The word "ENS" means:

"Philos

a. A being, entity, as opp. to an attribute, quality etc. 1614.

b. An entity as an abstract notion 1581."

Juridically it is well-known to refer to a natural person or a legal persona as a being in law. A "taxable entity" in the sense of a taxable being (as an abstract notion) other than a natural person or a legal persona would seem to be, juridically speaking, an extremely loose concept which would be of very little use in fiscal legislation. It is

accordingly by no means surprising to find that the Legislature does not avail itself of the expression "taxable entity" in the 1962 Act. A "taxable entity" can only be construed as such if it can be brought within the ambit of sec 5(1) as the charging section. The Legislature has not purported to do so. Moreover, I can find nothing in the 1962 Act which manifests an intention of the Legislature to regard a trust as a "taxable entity". Nor was Mr Levin able to refer to any authority or provision in the 1962 Act in support of his contention. In my view his contention is manifestly unsound and cannot prevail.

The answer to the Second Issue is accordingly No.

Third Issue. Was the Commissioner legally entitled to treat the Trustees in terms of sec 95(1) of the 1962 Act as representative taxpayers for the purpose of levying income tax in respect of the undistributed income of the Trust which

did not accrue to any potential income beneficiary ?

Before Union, there was legislation for the paying of tax on incomes in force in the Cape Colony and Natal, but not in the Transvaal and the Orange River Colony. The Income Tax Act 28 of 1914 introduced a general income tax, and it was followed by the Income Tax (Consolidation) Act, 41 of 1917; the Income Tax Act, 40 of 1925; the Income Tax Act, 31 of 1941; and the 1962 Act currently in force. All these Acts derived from the New South Wales Act of 1895, 59 Victoria C. 15, which the draftsman of the 1914 Act used as his model. (See Ingram, The Law of Income Tax in South Africa, 1933, pp 1 and 2).

The 1914 Act provided in sec 32(a) to (d) for the payment of the tax by "representative taxpayers". These provisions were based on secs 18 and 19 of the New South Wales Act (See Ingram's annotations to secs 48 and 49 of the 1925 Act). With some variation in wording, but

none of fundamental principle, these provisions were re-enacted in each of the succeeding Income Tax Acts, including the 1962 Act, which however defines "representative taxpayer", not in a separate section as in the previous enactments, but in the definition section (sec 1).

"Representative taxpayer" according to sec 1 means:

"(a) in respect of the income of a company, the public officer thereof:

(b) in respect of the income under his management, disposition or control, the agent of a person, including an agent appointed as such under the provisions of section ninety-nine, and for the purposes of this paragraph the term 'agent' includes every person in the Republic having the receipt, management or control of income on behalf of any person permanently or temporarily absent

from the Republic or remitting or paying income to or receiving moneys for such person;

(c) in respect of income the subject of any trust or in respect of the income of any minor or mentally disordered or defective person or any other person under legal disability, the trustee, guardian, curator or other person entitled to the receipt, management, disposal or control of such income or remitting or paying to or receiving moneys on behalf of such person under disability;

(d) in respect of income paid under the decree or order of any court or judge to any receiver or other person, such receiver or other person, whoever may be entitled to the benefit of such income, and whether or not it accrues to any person on a contingency or an uncertain event;

(e) in respect of the income received by or accrued to

any deceased person during his lifetime and the income received by or accrued to the estate of any deceased person, the executor or administrator of the estate of such deceased person,

but nothing in this definition shall be construed as relieving any person from any liability, responsibility or duty imposed upon him by this Act."

(My underlining).

This definition enumerates a limited number of "representative taxpayers" in relation to certain classes of income under their management and control but in respect of which they themselves have no beneficial interest.

In para (a) of the definition, the person represented is a company; in para (b) the principal of the agent; in the second part of para (c) any minor, or mentally disordered or defective person, or any other person under legal disability; and under (e) a deceased person or

the estate of any deceased person. It is only in the first part of para (c) - "in respect of income the subject of any trust" - and in para (d), that the person represented is not expressly or specifically referred to.

In para (d) of the definition the representative taxpayer is a "receiver" who is well-known in our law and the law of England. He is a person who is appointed by the court to protect and preserve, in the interests of parties or litigants, property including income which is the subject-matter of litigation until its resolution, e.g. the management of a business, the liquidation of a partnership, the division of a joint estate etc. He is an officer of the court, not the agent or the trustee of the parties who cannot control him and he is answerable to the court for his conduct and administration. See Boehm v Goodall, [1911] 1 Ch D 155 at p 160, Gillingham v Gillingham, 1904 T S 609 at p 613,

Banks v Clements N O, 1920 E D L 187 at p 194, Johnson v Johnson and Another, 1935 C P D 325 at p 328, Revill v Revill, 1969 (1) S A 325 (C) at p 326 C-327 H. Kerr, On the Law and Practice as to Receivers, 13th ed., p 5 133, 145. According to para (d) the receiver to whom income of the subject-matter of litigation is paid by order of the court pending the resolution of the dispute is a representative taxpayer "whoever may be entitled to the benefit of such income, and whether or not it accrues to any person on a contingency or an uncertain event." It does not appear that the meaning or applicability of para (d) has ever been considered by a South African court and it may be that the true meaning of the words emphasized could be ascertained only in the light of a knowledge of the law and practice in the law of New South Wales in 1895 relating to the decrees or orders referred to. In regard to the interpretation of para (c), para (d) can I think be ignored.

Para (c) of this definition requires closer examination:-

(i) It deals with two classes of income, viz "income the subject of any trust" and "income of any minor or mentally disordered or defective person or any other person under legal disability". A "trustee" is the designated "representative taxpayer" of the first class of income whereas the "representative taxpayers" of the second class of income are guardians or curators. See Estate Smith v Commissioner for Inland Revenue, 1960(3) S A 375 (A) at p 378 F-H where the wording of sec 69(c) of Income Tax Act 31 of 1941, which is in all respects identical with that of paragraph (c), was examined.

(ii) The notion "income the subject of any trust" signifies that the income is subject to or charged

with a trust. Both in common parlance and in legal literature such income is referred to as trust income. The latter expression, however, does not signify that the income belongs to a trust in ownership, since a trust does not possess legal personality as indicated supra under the First Issue.

(iii) "Trust" is not defined in the 1962 Act. It must therefore be given its common law meaning, viz an entity whose assets and liabilities vest in its trustee for purposes of administration, as explained supra under the First Issue.

(iv) In sec 1 s.v. "Trustee" the following definition is provided for trustee:

> "in addition to every person appointed or constituted as such by act of parties, by will, by order or declaration of court or by

operation of law, includes an executor or administrator, tutor or curator, and any person having the administration or control of any property subject to a trust, usufruct, fideicommissum or other limited interest or acting in any fiduciary capacity or having, either in a private or in an official capacity, the possession, direction, control or management of any property of any person under legal disability."

An identical definition of "trustee", which was included in sec 1 of Income Tax Act 31 of 1941, was carefully considered in Estate Smith's case (supra) at p 378 H- 381 G.

This statutory definition of "trustee" while it includes "any person having the administration or control of any property subject to a trust" (i.e. the trustee of

trust property) is also widely extended to encompass a number of persons who would not ordinarily be regarded as trustees, e.g. executors, administrators, tutors and curators who administer or control res alienae the ownership of which does not vest in them for purposes of administration. See Huldigingsbundel Daniel Pont (1970) at p 166. Furthermore, reference is also made to certain relations of property subject to a usufruct (res usufructuaria), fideicommissum (res fideicommissaria) or other limited interest which are not ordinarily considered to be relations of trusteeship. In Estate Smith's case (supra) at pp 379 G-H, 381 C-D it was correctly held that a trustee, as statutorily defined, qualifies as a representative taxpayer only if the income in question is trust income (which is owned by the trustee for purposes of administration of the trust).

It is convenient to recapitulate the main

principles for levying income tax on trust income as canvassed thus far. They are the following:

1. Sec 5(1), as the charging section, provides for the levy of income tax on income received by or accrued to any person or company during the year of assessment.
2. A trust which lacks legal personality is neither a person as defined nor a company.
3. A trust is not per se liable for income tax on its undistributed income which does not accrue to any potential income beneficiary (First Issue).
4. Nor is a trust a taxable entity that is liable as a "person" for income tax in regard to its undistributed income which does not accrue to any potential income beneficiary (Second Issue).
5. A trustee is the designated representative taxpayer in respect of trust income owned by him qua trustee without any beneficial interest therein for purposes of

administration of the trust.

I turn to analyse the notion of a "representative taxpayer" with special regard to the position of a trustee.

According to sec 90 income tax is payable by a representative taxpayer or by a real taxpayer who received the income or in whose favour it accrued or who is legally entitled to the receipt thereof. See Thorne and Another NNO v Receiver of Revenue, 1976(2) S A 50 (C) per VAN WINSEN J at p 51 A-B: "It seems to me that the Act contemplates two capacities in which a person becomes liable for income tax, i.e. in his personal capacity and in his representative capacity". The personal capacity refers to a real taxpayer while the representative capacity relates to a representative taxpayer.

Sec 95(1) imposes on a "representative taxpayer" in his representative capacity liabilities in

regard to income. It provides as follows:

> "Every representative taxpayer shall as regards the income to which he is entitled in his representative capacity, or of which in such capacity he has the management, receipt, disposal, remittance, payment or control, be subject in all respects to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially and shall be liable to assessment in his own name in respect of that income, but any such assessment shall be deemed to be made upon him in his representative capacity only".
>
> (My underlining).

The representative capacity of a "representative taxpayer" confers on him a representative

function to represent someone. That he represents a "person" appears unmistakenly from the following sections, viz.

(i) Sec 95 (2) in dealing with a "representative taxpayer":

"Any abatement, deduction, exemption or right to set off a loss which could be claimed by the person represented by him shall be allowed in the assessment made upon the representative taxpayer in his capacity as such."

(ii) Sec 95 (3):

"Any tax payable in respect of such assessment shall, save in the case of an assessment upon the public officer of a company, be recoverable from the representative taxpayer, but to the extent only of any assets belonging to the person whom he represents which may be in his possession or under

his management, disposal or control."

(iii) Sec 96(1):

"Every representative taxpayer who, as such, pays any tax shall be entitled to recover the amount so paid from the person on whose behalf it is paid, or to retain out of the moneys that may be in his possession or may come to him in his representative capacity, an amount equal to the amount so paid." (My underlining).

A "representative taxpayer" represents someone for purposes of assessment and payment of income tax viz a "person". The taxable income on which the income tax is levied is that of the represented person, i.e. the real taxpayer, who is primarily liable for payment of the income tax.

Support for some of the aforegoing is provided by the judgment in Mount Moreland Town Lands Board v C I R

1929 A D 73.

The facts briefly were that the appellant board been constituted a body corporate by a statute which provided inter alia that all amounts accruing to the board should be vested in the board for the benefit of certain erfholders and that after payment of certain sums the balance should be appropriated amongst the erfholders in such manner as might be determined at a meeting of erfholders. The Commissioner for Inland Revenue levied an assessment in a nominal amount of R100 on the board in respect of its income for the year ending 30 June 1923. The board objected to the assessment, but the Special Court confirmed it. A number of questions of law were stated for submission to the Natal Provincial Division, the third of which was -

> "Whether the trust income is taxable as a whole in the hands of the said board in its capacity as a representative taxpayer, or

whether it is taxable separately in respect of each erfholder benefiting ?"

The Provincial Division concluded that -

"The Acts incorporating the board, and the facts of this case establish that the board is the trustee of one trust for the benefit of the erfholders as a class, and the whole of the income of this trust fund is, therefore, taxable in the hands of the appellant board in its capacity as a representative taxpayer."

STRATFORD J A said at 80 - 81:

"In challenging this conclusion on appeal to this Court it was contended for the appellant that the provisions of secs. 16 and 18 of the 1887 Law

clearly showed that, though the dominium of the property was vested in the board for the purpose of administration, these two sections made the erfholders the sole beneficiaries of the corpus as well as the revenue to be derived therefrom. In supporting this contention counsel relied upon the earlier history of this property and on the fact that, apart from the special power to expend sums upon roads and, on the direction of a resolution of erfholders in regard to other matters, no other person or persons had any interest whatever in such revenue. From this it was inferred that the board was in effect the trustee for each individual erfholder, it being claimed that such trustee stood in the same relation to the erfholders as if they as joint holders of a property had entrusted it to the management of an agent or manager

appointed by them. The argument is thus advanced for the purpose of applying the provisions of secs 74, 75 and 76 of the Income Tax Act 41 of 1917 and in particular to entitle the appellant to claim the privilege set out in the proviso to sec 75. Dealing first with sec 74, it will be noticed that 'representative taxpayer' is defined in each sub-section 'in respect of income,' from which it appears to be contemplated, particularly if one has regard to what follows, that the representative must not only represent the real taxpayer, but also must represent him in respect of a specific sum which he holds or controls on such taxpayer's behalf. Then follows sec 75, the provisions of which are in agreement with this view. It provides, in the first portion, that the representative 'as regards the income to which

he is entitled in his representative capacity or of which he has the management, receipt, disposal, remittance, payment or control' shall be personally responsible for the amount of the tax as if the income were his own, the liability not to exceed, however, the amount he has in hand.

Then comes the proviso which appellant invokes :-

> 'Provided that nothing herein contained shall in any case where the representative taxpayer acts as agent or trustee or in any other capacity for several persons, prevent him from claiming that each agency or trust or other capacity shall be treated separately for the purpose of claiming any exemption or deduction provided by this Act.'

From this passage it would seem that a trustee such as the board cannot claim to be a representative

taxpayer of each erfholder within their meaning unless it can be shown that he holds or controls a specific sum on behalf of such person."

From these passages the following two propositions can be extracted :-

1. The "representative taxpayer" must represent a real taxpayer.
2. He must represent him in respect of a specific sum which he holds on the real taxpayer's behalf.

Those propositions apply equally under the 1962 Act. So applying them to the facts of the present case, it is clear that the trustees do not, in respect of undistributed income, represent any taxpayer. It is also manifest that they do not represent potential beneficiaries as a class. Such a class is not a "real taxpayer" - it is not a taxpayer at all : it is not a "person", and income is neither received by, nor accrues to it. It is only when

income is distributed to beneficiaries that there arises a direct representative relationship between the trustees and each beneficiary.

As indicated supra, sec 5(1) as the charging section provides for the levy of income tax upon "persons" and "companies" as real taxpayers by whom taxable income is received or to whom taxable income accrued. The question that arises in the present matter is who is the "person", or real taxpayer, that is represented by the Trustees as "representative trustees" in respect of the undistributed trust income. Three possibilities were suggested during argument which may be disposed of forthwith. It obviously cannot be the Trust since it does not qualify as a "person" or "taxable entity" as shown supra. It would be futile to suggest that the Trustees as "representative taxpayers" represent themselves as trustees of the undistributed trust income. Furthermore, there is no provision in the 1962

Act which independently of the charging provisions of sec 5(1) imposes a levy on trustees qua trustees in respect of trust income. The undistributed trust income, moreover, did not "accrue" to the Trustees on their own behalf or for their own benefit in accordance with the accepted meaning given to the word "accrue" in revenue statutes. See Minister of Finance and Another v Law Society, Transvaal, 1991(4) S A 544 (A) at p 557 C-D. Finally, it cannot be said that the unascertained potential income beneficiaries qualify as representees or real taxpayers since the undistributed trust income neither accrued to them nor was received by them. I agree with the submission by Mr Welsh on behalf of the Trustees that a trustee can be taxed only as a representative taxpayer where the trust income has accrued to a beneficiary but has not been received by him. That, however, is not the position in the present matter.

According to our common law an agent or

representative cannot represent a non-existent principal. See Mc Cullogh v Fernwood Estate Ltd, 1920 A D at pp 207, 208, Sentrale Kunsmis Korporasie (Edms) Bpk v N K P Kunsmisverspreiders (Edms) Bpk, 1970(3) S A 367 (A) at p 384 G-H, 390 B, LAWSA , vol 1 s.v. Agency and Representation, para 111. There can be no representation of a person not yet in existence except in the case of a contract concluded for a company to be formed as provided for in sec 35 of the Companies Act 61 of 1973, formerly sec 71 of the Companies Act 46 of 1926. The curator ad litem is no exception to this rule of the common law since he is appointed for procedural purposes to represent the contingent interests of unborn issue, not to act in their stead. See Ex Parte Sadie, 1940 A D 26 at p 30, Wolman & Others v Wolman, 1963(2) S A 452 (A) at p 459 F-H. It follows that in the present matter the Trustees cannot as "representative taxpayers" represent the unascertained trust beneficiaries.

Moreover, under the 1962 Act "income" is indissolubly bound up with some "person" who receives it or to whom it accrues. Without such person there cannot be income as contemplated by the 1962 Act. Accordingly where trust income has not accrued to trust beneficieries, it is not "income" within the contemplation of the 1962 Act.

In the light of the aforegoing the appeal cannot succeed.

In the result the following orders are granted:

1. The appeal is dismissed with costs, which include the costs of two counsel.

2 In the light of the amendment granted in this Court the following order is substituted for the order of the Court a quo :

(a) The Phillip Frame Will Trust ("the Trust") created by the late Phillip Frame in terms of his will

dated 24 July 1974 is not a "legal person" and therefore is not a "person" within the meaning of that word in the Income Tax Act 58 of 1962 as amended ("the Act");

(b) the Respondent was and is not entitled

(i) to levy taxation on the Trust, in terms of the Act

(ii) to treat the Applicants, in terms of sec 95(1) of the Act, as the Trust's representative taxpayers in respect of any income of the Trust
in any of the tax years in question (1984 to 1986) which was not utilised in terms of Clause Sixteen (f) of the Will for the benefit of the testator's grandchildren but was added to and formed part of the capital of the Estate.

(c) The Respondent is ordered to pay the costs of the application including the costs of two counsel.

C P JOUBERT J A.

KUMLEBEN J A concur.

NICHOLAS A J A

192A/92

LL Case No 14/1991

IN THE SUPREME COURT OF SOUTH AFRICA

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In the matter between:

THE COMMISSIONER FOR INLAND REVENUE Appellant

and

FRIEDMAN AND OTHERS NNO Respondent

CORAM: JOUBERT, BOTHA, KUMLEBEN JJA, NICHOLAS et HARMS AJJA

HEARD: 18 MAY 1992

DELIVERED: 5 NOVEMBER 1992

JUDGMENT

BOTHA JA:-

I have had the advantage of reading the judgment of JOUBERT JA. With respect, I am unable to agree with his conclusion that the income in issue was not taxable in the hands of the respondents as trustees of the testamentary trust. In my judgment it was, and the appeal should be allowed, for the reasons following.

At the outset, with a view to the arguments which were addressed to this Court, it is necessary to comment briefly on the unamended paragraph 1 of the trustees' notice of motion, which is quoted in the judgment of JOUBERT JA (and in accordance with which the Court a quo granted its declaratory order). The terms of the notice suggest that the question whether or not the trust is a "person" within the meaning of the Income Tax Act is decisive of the broad issue whether the trustees are liable to tax in respect of the income of the trust. The suggestion

entails two suppositions: that the trustees cannot be liable to tax on any ground other than that the trust is a "*person*" as envisaged by the Act; and that this applies to all the income of the trust. In this Court, however, it became clear that the notice of motion was not to be read in this way. In response to a request by the Court, conveyed to counsel on both sides prior to the hearing of the appeal, to submit argument on a number of questions relating to the two suppositions I have mentioned, supplementary heads of argument were filed and applications were made on behalf of the trustees to place further facts before the Court on affidavit and to amend the notice of motion. These applications were granted (the amendment appears from the judgment of JOUBERT JA). In consequence of these developments, and of the ensuing debate in this Court, the suppositions under discussion require to be

qualified, as follows. As to the first, the outcome of the appeal does not depend solely on the question whether or not the trust qualifies as a "person" in terms of the Act. In regard to that question, counsel for the trustees accepted, in express terms, that it was open to this Court to consider whether the trustees were liable to tax in respect of the trust income on any basis at all, and, if it decided that they were, on a basis other than that postulated in the question, that the appeal would nevertheless be allowed and the order of the Court a quo replaced by an order dismissing the application to it. As to the second, the relief sought by the trustees is confined to that portion of the net income of the trust, referred to in clause 16(f) of the will, which was not utilised by the trustees for any of the purposes mentioned therein and was accordingly added to and formed part of the capital of the estate, in

terms of that clause. It was assumed, on behalf of the trustees, and not placed in issue on behalf of the Commissioner, that that portion of the income had not accrued to the ultimate beneficiaries. Such portion was referred to in argument as "the undistributed income of the trust"; in regard to it, the potential and ultimate beneficiaries were unascertained and indeterminate.

Having regard to what has been said above, and on the overall view I take of the matter, some aspects of it may be disposed of in a few words. Firstly, counsel for the Commissioner did not contend that a trust is a "legal persona"; I accept that it is not. Secondly, I do not find it necessary to consider whether the Act leaves room to work with the concept of a "taxable entity" other than a "person"; assuming that it does, I assume further that a trust does not qualify as such. And thirdly, I accept that

a trust is not a "person" within the meaning of that word in the Act.

I turn to the fundamental issue, which is whether the trustees are liable to tax in respect of the undistributed income of the trust (the latter phrase being used in the sense indicated above). The answer to this issue must be sought in the following provisions of the Act: section 1 - the definitions of "taxpayer", "representative taxpayer", and "trustee"; section 5(1) - the so-called charging section; section 90 - dealing with the payment and recovery of tax; and sections 95(1), (2), (3) and 96(1) - dealing with representative taxpayers. I shall consider these provisions in turn, and in the sequence indicated.

The relevant definitions contained in section 1 are quoted in full in the judgment of JOUBERT JA and I do not propose to quote them again.

The definitions of "taxpayer" and "trustee" are not controversial. In regard to the latter, it is clear that the trustees in the present case fall squarely within its terms; counsel representing them rightly did not contend to the contrary. It is paragraph (c) of the definition of "representative taxpayer" that calls for consideration, the all-important words in it being:

> "in respect of income the subject of any trust ....., the trustee....."

These are wide and unqualified words. They contain no hint that the Legislature intended to differentiate between trust income which has accrued to the trust beneficiaries and trust income which has not so accrued. To find such an intention on the part of the Legislature it would be necessary to read limiting words into the definition, which the Legislature has chosen not to express. No such implication

arises from the context of paragraph (c) as a whole. Counsel for the trustees argued that the suggested limitation was to be found in the notion of representation which is implicit in the expression "representative taxpayer": a trustee is able to represent beneficiaries who have become entitled to receive the income, but when the income has not accrued to any beneficiary, there is no one who can be represented. Counsel postulated the existence of a "real taxpayer" as an indispensable prerequisite for the notion of a "representative taxpayer". In my view the argument is unsound, for the reasons following.

In the first place, I do not consider that the word "representative" provides a warrant for limiting the phrase "representative taxpayer" to cases where there is in existence a person represented who is himself liable to tax. The concept of representation does not justify such a limitation,

either linguistically or notionally. It is common, for example, to speak of someone who is "representing" a company yet to be formed, or of a curator who is "representing" unborn heirs under a will. As a matter of law we know, of course, that it is impossible for someone to enter into a valid contract as agent for a non-existent person, but there is no reason to project that principle of law onto the Legislature's use of the word "representative" in relation to a taxpayer in terms of the Act.

Counsel derived his use of the phrase "real taxpayer" from the remarks of STRATFORD JA in Mount Moreland Town Lands Board v Commissioner for Inland Revenue 1929 AD 73 at 80, where he referred to the definition of "representative taxpayer" in the 1917 Act as appearing to contemplate that the representative must not only represent a real taxpayer, but must also represent him in respect of a specific sum.

In my view these remarks, when read in their context, were no more than a convenient way of addressing the problem that was to be resolved in that case, with reference to its particular facts; they cannot properly be construed as laying down a principle of general application. That this is so is clear, in my opinion, from the judgment of CENTLIVRES JA in Bell's Trust v Commissioner for Inland Revenue 1948 (3) SA 480 (A) at 492. In that case the Court was concerned with the apportionment of the undistributed profits of a company to its shareholders, one of whom was a trust, to which CENTLIVRES JA referred in the following terms:

> "... the Trust as a registered shareholder representing unascertained beneficiaries";

and, after pointing out that in the Mount Moreland case supra the beneficiaries under the trust were ascertained, he went on to say:

> "So too in the present case where the

> beneficiaries are, in respect of undistributed profits unascertained, the taxpayer is the registered shareholder as representing these unascertained beneficiaries."

The words I have emphasized demonstrate that the representation of unascertained beneficiaries is a familiar and unobjectionable concept in the field of tax legislation. For clarity I should add that I do not regard the actual decision in either the Mount Moreland case supra or the Bell's Trust case supra as having a bearing on the present case; I have referred to them merely to show that counsel's argument concerning a "real taxpayer" is not well-founded.

There is a further, and in itself compelling, reason for rejecting counsel's argument on this point. It is to be found in paragraph (d) of the definition of "representative taxpayer", which I quote with emphasis on the important words:

> "in respect of income paid under the decree or order of any court or judge to any receiver or other person, such receiver or person, whoever may be entitled to the benefit of such income, and whether or not it accrues to any person on a contingency or an uncertain event."

The significance of these words is self-evident. Counsel for the trustees sought to avoid the impact of them by arguing that, since in this instance it was considered necessary to provide expressly for the eventuality of the income not accruing to an ascertained beneficiary, it must be presumed that the Legislature, by omitting a similar provision in paragraph (c), intended such eventuality to be excluded in the case of a trustee. I cannot agree. The kind of case addressed in paragraph (d) is not one of everyday occurrence and it is readily understandable that the Legislature wished to clarify the ambit of its operation. But there is nothing obscure in the case addressed in the words of paragraph (c):

"income the subject of any trust". It is so common an occurrence for a trustee to receive and hold trust income on behalf of unascertained and indeterminate beneficiaries, that such an eventuality is directly conveyed by the very words used; there was no need to spell it out. Moreover, I am unable to think of any reason why the Legislature would wish to ordain that a trustee should be a representative taxpayer when he receives trust income accruing to a beneficiary, but not when the income does not so accrue. In truth, such an arrangement relating to the taxation of trust income would be so devoid of reason as to be absurd. I do not believe that the Legislature could have contemplated it. The point about the wording of paragraph (d), then, is that it is wholly destructive of counsel's argument that the idea of representation contained in the expression "representative taxpayer" connotes the existence of a "real

taxpayer" who is being represented. With the substratum of the argument gone, it must be accepted that a trustee can represent indeterminate beneficiaries, and so effect can be given to the plain meaning of paragraph (c). I do not consider that this conclusion, or the reasoning on which it is based, is detracted from by pointing to the source of the definition of "representative taxpayer" in our income tax legislation.

In my judgment, therefore, it is not open to doubt that the definition of "representative taxpayer" applies to the trustees in the present case, in respect of the undistributed income of the trust.

I turn to section 5(1). It levies an income tax "in respect of the taxable income received by or accrued to or in favour of ..... any person", as enumerated in paragraphs (a), (b) and (c) (and

"any company" as mentioned in paragraph (d)). If the language of the section is taken at its face value, the income in question in this case was "received by" and "accrued to" the trustees. Accordingly, having regard to the views expressed above, I agree fully with the following passage at 362 of Honoré's South African Law of Trusts 4th ed, by Honoré and Cameron, writing after publication of the judgment of the Court a quo:

> "It was however the clear intention of the legislation that income the subject of a trust should be taxable in some person's hands. Nor is that person far to seek. Where income is assessed neither to the beneficiary nor the donor but to a trust as such the person to whom the income accrues for tax purposes is the trustee, in whom the rights and liabilities in a trust normally vest. Since the trust income accrues to the trustee, who is a natural or juristic person, he is prima facie taxable on it."

Counsel for the trustees argued, however, that the trustees could not be brought within the

provisions of section 5(1), because they did not receive the trust income for their own benefit and the income did not accrue to them on their own behalf. The argument was founded on the judgment in Minister of Finance and Another v Law Society, Transvaal 1991 (4) SA 544 (A) at 557C, where GOLDSTONE JA said, with reference to the words "received by or accrued to":

> "Those words in a revenue statute, over many years, have been judicially interpreted to describe a receipt by, or an accrual to, the taxpayer on his own behalf or for his own benefit: Meyerowitz and Spiro on Income Tax paras 138-44; Geldenhuys v Commissioner for Inland Revenue 1947 (3) SA 256 (C) at 265-6; Secretary for Inland Revenue v Smant 1973 (1) SA 754 (A) at 764B-C."

For ease of reference I shall refer to the statement embodied in this passage as "the benefit formula". At first blush it certainly supports the argument. I am nevertheless of the view that it cannot avail the

trustees, for the reasons which follow.

The benefit formula is based on the two cases cited by GOLDSTONE JA, Geldenhuys supra and Smant supra (as is the passage in Meyerowitz and Spiro to which he refers). In order to appreciate the ambit of the benefit formula it is necessary to consider what the issues were and what was decided in the two cases. In the Geldenhuys case supra the taxpayer was a widow who held a flock of sheep as usufructuary, the owners being her children, who had been appointed heirs under a mutual will. She sold the sheep and invested the proceeds. With regard to her farming activities she was liable under section 14 of the 1941 Act to income tax in respect of all amounts received for which livestock had been disposed of by her during the year of assessment. In issue was the correctness of the decision of the Commissioner pursuant to this provision to levy tax

on the proceeds of the sale of the sheep. The Full Court decided that the proceeds should not have been included in the taxpayer's taxable income. STEYN J delivered the main judgment. The salient points of his reasoning (at 265-7) may be summarized as follows. He held that

> "the proceeds did not accrue to her personally. The proceeds accrued to the heirs."

With reference to the definitions of "income", "taxable income" and "gross income", he held that in the latter the words "received by or accrued to or in favour of any person" relate to the taxpayer, and that the words "received by" must mean "received by the taxpayer on his own behalf for his own benefit". With regard to section 14, he said that it did not purport to create a new definition of "taxable income", and that

> "in the determination of a farmer's taxable income we continue to be concerned with

> amounts received by or accrued to him, i e such amounts as are received by him for his own benefit."

Accordingly, the words "disposed of" in the section can only mean "disposed of" for his, the farmer's, benefit. Consequently the proceeds in question did not represent an amount for which livestock had been "disposed of" by the taxpayer within the meaning of section 14. In the concurring judgment of HERBSTEIN AJ (at 269) it was held that the expression "received by" meant that the money must be received by the taxpayer in such circumstances that he becomes entitled to it; that the words "accrued to or in favour of" indicate that the amount which accrues must accrue to the person who is to be charged; that, though the usufructuary received the purchase price of the sheep she did not become entitled to the money, which remained the property of the remainder-men; and that it never became part of her "gross

income". OGILVIE THOMPSON AJ agreed with the views expressed in both judgments.

It will be seen from the above analysis that in the reasoning of the learned Judges the requirement of benefit or entitlement on the part of the taxpayer was linked to the words "received by". It was not coupled with "accrue to". There was no room for doing that, since the income in question did not in fact accrue to the taxpayer at all, but to the heirs. To the extent that reference was made to the expression "accrue to" in both judgments, in relation to the taxpayer, it may be said that it was implicit in the reasoning that income that was "received by" the taxpayer not for her own benefit, or in her own entitlement, could not be thought to have "accrued to" her. On the facts of the case, that assumption was no doubt a valid one. But this observation leads me directly to point to the vital feature of that

case, which distinguishes it fundamentally from the situation in the present one. There, the income in question which was received by the taxpayer vested in ownership in the heirs, to whom it thus accrued; here, the income in question which was received by the taxpayer (i e the trustees) did not vest in or accrue to anyone else; it vested in the trustees as owners and thus accrued to them.

In Smant's case supra the facts relevant for present purposes may be stated briefly. The taxpayer had entered into a contract with a company, referred to as "Media", under clause 5(1) of which he was entitled to receive certain payments. He then ceded his right to receive those payments to one Plank. Despite the cession, he continued to receive the payments from Media, retaining them, with the consent of Plank, in reduction of a debt due by Plank to him. The issue was whether the taxpayer was

liable to income tax in respect of the payments so received and retained by him. HOLMES JA, in delivering the judgment of the majority of the Court, said (at 764A-C):

> "As to the cession, in the particular circumstances of this case I consider that it divested the taxpayer of his right to receive future payments under clause 5(1) before they accrued to him, and vested that right in Plank ..... The position is, therefore, that the latter payments (which are the ones in question in this case) never accrued to the taxpayer, and he was antecedently obliged to transmit them to Plank if he received them from Media, and he did not receive them for his own benefit. In the result, they never formed part of his gross income, and are not taxable."

It is clear that in this case, too, it was held that the income in question had not accrued to the taxpayer at all, and that the requirement "for his own benefit" was applied only to his receipt of the income. It is also clear that this case is distinguishable from the present one on the same grounds

as mentioned above in regard to the Geldenhuys case supra: the income had accrued to another person, whereas here there is no other person involved and the income accrued to the trustees themselves.

Reverting to the benefit formula, it follows from what has been said above that, in my respectful opinion, it goes further than is warranted by the authority of the cases referred to, to the extent in which it postulates a requirement of benefit to the taxpayer in relation to income which accrues to him, over and above and independently of the requirement relating to the receipt of the income. In the vast majority of cases in practice this will not give rise to problems. But generalizations often do not cater for exceptional cases. An example of a case which is not catered for in the benefit formula is to be found in Ochberg v Commissioner for Inland Revenue 1931 AD 215, in which a

taxpayer had been allotted shares in a company in which he already held practically all the shares and where, so it was found, he had not been benefited by the transaction. It was held by the majority of the Court (at 225-9) that he was nevertheless liable to tax in respect of that income. In the present matter we are dealing with a situation which can be regarded as peculiar. The trustees did not receive the income in question for their own benefit, but it did accrue to them; they acquired the ownership of it, but not beneficially for themselves; they hold it as representatives of the potential ultimate beneficiaries, but these are unascertained and indeterminate. This kind of situation was not adverted to in the benefit formula, which consequently does not preclude us from considering the issue under discussion as a matter of principle.

In Commissioner for Inland Revenue v Genn &

Co (Pty) Ltd 1955 (3) SA 293 (A) at 301B-302A SCHREINER JA discussed the question whether borrowed money is received by or accrues to a taxpayer within the meaning of the definition of "gross income", or of section 12(f) of the 1941 Act. That question does not, of course, bear directly on the issue in the present case, but since I have found valuable guidance in the remarks of the learned Judge, I propose to quote rather extensively from them:

> "It certainly is not every obtaining of physical control over money or money's worth that constitutes a receipt for the purposes of these provisions. If, for instance, money is obtained and banked by someone as agent or trustee for another, the former has not received it as his income. At the same moment that the borrower is given possession he falls under an obligation to repay. What is borrowed does not become his, except in the sense, irrelevant for present purposes, that if what is borrowed is consumable there is in law a change of ownership in the actual things borrowed.
>
> It may be accepted, on the authority of the majority judgments in Ochberg v. Commissioner for Inland Revenue, 1931 A.D.

> 215 at pp 225 to 229, that the presence or absence of a benefit to the taxpayer from something that passes into his possession does not provide a proper test in applying the definition of 'gross income'. But the Court was there dealing with a case where the shares issued to the taxpayer became his own in full ownership, without any accompanying obligation to return them. The transaction was of a type in which benefit was notionally possible, to the extent at least that what before the transaction did not belong to him became, as a result of it, his property absolutely. The question whether anything is 'received' by a taxpayer, although it is only on loan, was not in issue or considered, and the case is not authority for the view that, in deciding that question, no regard should be paid to the fact that a borrowing, by its very nature, involves a correspondence between what is obtained and the obligation to repay or redeliver."

When SCHREINER JA referred to a trustee, in the expression "as agent or trustee of another", it is clear from the context, in my view, that he was referring to a trustee who was acting on behalf of an existing "principal", as in the case of an agent. The significance of his remarks about a trustee of ...

that kind, and his ensuing observations about the position of a borrower, in relation to the issue in the present case, becomes apparent when one places into contrast the position of a trustee who receives money on behalf of unascertained beneficiaries (and thus, in effect, non-existent "principals"). In the former case (the one dealt with by the learned Judge), the money received by the trustee belongs to the person represented and therefore it cannot be said to be "his" (the trustee's) income. In the latter case (like the one we are dealing with) the money received by the trustee does not accrue to anyone else and it is difficult to see how it can be anything but "his" income. In the case of a borrower, he is on receipt of the money under an immediate obligation to repay it; in our case, the trustee has no such obligation when he receives the money, nor whilst he is holding it, until such time

as the beneficiaries are ascertained and the money accrues to them. The money received by a borrower does not become his, except in the sense that, being a consumable, ownership passes by operation of law, which is irrelevant for tax purposes; in our case, the money received by the trustee becomes his because by law ownership of trust property invariably, even if not consumable, vests in the trustee; no reason suggests itself why that should be irrelevant for tax purposes. The taxpayer in Ochberg's case supra received the shares in full and absolute ownership, without any accompanying obligation to return them; in our case the trustee does not receive the income beneficially for himself, but he is nonetheless under no obligation to restore it to anyone, unless and until it accrues to the beneficiaries.

Ultimately, the question is one as to the intention of the Legislature. Where a taxpayer

receives income which accrues to another existing person, it is easy to see why the Courts recognized the need to interpret the words "received by", by cutting down their ostensibly wide meaning, and to restrict their ambit of operation by means of the requirement of receipt "for his own benefit". In such a case, the obvious person to whom the Legislature would look, for tax purposes, is the one to whom the income accrues, and the Legislature could not have intended that the one who merely receives it without benefit for himself should (also) be liable to tax. But where there is no other existing person to whom the income can accrue, and the income in fact accrues to the recipient of it, albeit not beneficially for himself, the position is quite different, in my judgment. In this situation I can perceive no sensible reason for surmising that the Legislature did not intend to hold liable to tax the person by

whom the income is received and to whom it also accrues. To hold that such a person is liable to tax does not involve changing the meaning of "received by", as interpreted by the Courts; it simply involves declining to read any similar limiting notion into the expression "accrued to". With regard to the facts of this case, I am firmly of the view that there is no justification for a restrictive interpretation of the expression "accrued to", so as to exclude the trustees from liability to tax in terms of section 5(1), in respect of the undistributed income of the trust. It is common cause that they are liable to tax as representative taxpayers in respect of the income of the trust which has accrued to the beneficiaries. In my view it would be wholly irrational to hold that they are not likewise liable in respect of the undistributed income of the trust. I am unable to ascribe such an intention to the

Legislature. In particular, I cannot agree with the view that such income is not "income" within the contemplation of the Act.

But counsel for the trustees had another string to his bow, concerning section 5(1). He argued that since this was the charging section, it could not be construed as applying to representative taxpayers. I do not agree. In my opinion the question whether or not a particular taxpayer is brought home under the provisions of the section, whether as a taxpayer in his own right or in a representative capacity, falls to be decided with reference to the wording of those provisions as such, and without antecedently assigning any particular significance to the fact that they constitute the charging section. To be sure, most categories of representative taxpayers do fall outside the section, for instance those contemplated in paragraphs (a),

(b) and (e) of the definition of "representative taxpayer", as well as most of those contemplated in paragraph (c) itself. But that is so, as I see the position, because in each instance the income in question does not qualify as income "received by" or "accrued to" the person concerned, reading the former expression in its restricted sense and the latter in its ordinary sense. In the present case, however, the undistributed income of the trust was income "accrued to" the trustees, within the meaning of section 5(1), as I have attempted to show. I see no warrant for not applying the section to the trustees.

I turn to the other sections mentioned earlier. Of these, sections 90 and 95(1) can be disposed of briefly. I need say no more about them than that I can find nothing in them which is inconsistent with the views I have expressed above.

There remains for consideration sections 95(2) and (3) and 96(1). Counsel for the trustees relied strongly on them, in support of his contention that a representative taxpayer requires to have some determinate person whom he represents (the "real taxpayer" again). The sections now being considered are fully quoted in the judgment of JOUBERT JA, but for ease of discussion I quote again section 95(2):

> "Any abatement, deduction, exemption or right to set off a loss which could be claimed by the person represented by him shall be allowed in the assessment made upon the representative taxpayer in his capacity as such."

In essence, the argument is this: the words "the person represented by him" show that, if there is no such person, there can be no representative taxpayer. I do not agree. The fallacy in the argument, in my view, is that it seeks to elevate a mere supposition into a substantive requirement. The provision pre-

supposes that a person represented exists, but if no such person is to be found, it does not follow that there can be no representative taxpayer (as defined); it simply means that the provision can find no application in that particular situation. It requires no straining of interpretation to read the reference to a person represented in the sense of "if there is one". That kind of supposition is common in legislative provisions. In fact, it is demonstrated in the first part of section 95(2) itself. The reference to "any abatement, deduction", etc does not signify that if there is no abatement, deduction etc which can be claimed, there is no representative taxpayer. In the same way, if regard is had to the whole of the situation dealt with, i e any abatement, deduction, etc which could be claimed by the person represented, and it appears that it cannot be applied to a given case because a person represented cannot

be identified, the result is merely that the provision does not come into operation in that case. In effect, counsel's argument amounts to this, that the reference to "the person represented" must be taken to qualify the meaning of "representative taxpayer". That will not do. The Legislature has itself defined "representative taxpayer". According to the plain meaning of the definition (as I have found) a trustee who receives trust income on behalf of unascertained and indeterminate beneficiaries falls within the definition. The provisions of section 95(2) do not require the definition to be qualified, for the reasons explained above. And the same considerations apply to sctions 95(3) ("the person whom he represents") and 96(1) ("the person on whose behalf it is paid").

I conclude, therefore, that the trustees in the present case were correctly assessed to tax in

respect of the undistributed income of the trust. I would add that this conclusion is in conformity with what has been regarded as axiomatic in income tax law for more than half a century - see, for instance, ITC 10, 1 SATC 113 (1923); ITC 37, 2 SATC 65 (1925); ITC 400, 10 SATC 102 (1937); and this has been reflected in the legal literature and in the practice of the Revenue department, until recently. The practice, which is a matter of common knowledge (and the acceptance of its correctness), had become well established before the passing of the 1962 Act. The earlier statutory provisions in question were re-enacted in substantially the same form in the 1962 Act. In Ex parte Minister of Justice : In re R v Bolon 1941 AD 345 at 359 TINDALL JA cited the principle enunciated in various English cases that -

> "when a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is

> adopted in framing a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them."

(See also S v Theron 1984 (2) SA 868 (T) at 877C-878C.) On my interpretation of the provisions in question there is no need for me to invoke this rule of construction. I refer to it merely to make the final point that the conclusion reached in this judgment appears to me to be an entirely satisfactory one.

I would therefore allow the appeal with costs and set aside the order of the Court a quo, substituting for it an order dismissing the application with costs, the costs in both instances to include the costs of two counsel.

A S BOTHA JA

HARMS AJA CONCURS