THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 8 May 2012

STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Commissioner for the South African Revenue Service v Tradehold Ltd
(132/11) [2012] ZASCA (8 May 2012)

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Today the Supreme Court of Appeal (SCA) dismissed an appeal by the appellant and upheld an order of The Tax Court, Cape Town.

The respondent, an investment holding company incorporated in South Africa and listed on the Johannesburg Stock Exchange, successfully appealed to the Tax Court against an additional assessment raised by the Commissioner based on a taxable capital gain. The Commissioner averred that this tax arose as a result of a deemed disposal by the respondent of its shares in Tradegro Holdings Ltd, a holding company of the respondent, in terms of para 12(1) of the Eighth Schedule to the Income Tax Act 58 of 1962 (the Act).

In 2002, it was decided by the respondent's board of directors that all further meetings of the respondent, would be held in Luxembourg. This essentially entailed that the respondent would be effectively managed in Luxembourg, the respondent nevertheless remained a 'resident' of the Republic of South Africa, in terms of the Act. Subsequently, the Act was amended in 2003 and the respondent ceased to be

a resident. The respondent's only relevant asset was its 100 per cent shareholding in Tradegro Holdings.

The Commissioner contended that when the appellant relocated its seat of effective management to Luxembourg and when it ceased being a resident in terms of the Act, it was deemed to have disposed of its only relevant asset, namely its 100 per cent shareholding in Tradegro Holdings. This resulted in a capital gain being realised in an amount of R405 039 083 during the 2003 financial year.

On appeal to the Tax Court, the respondent contended that if there was a deemed disposal of the investment, the capital gain that resulted from that disposal was not taxable in South Africa but in Luxembourg due to the fact that at the time the capital gain arose, the respondent was deemed to be a resident of Luxembourg in terms of Article 4(3) of the Double Tax Agreement (DTA) entered into between South Africa and Luxembourg.

The issue before the SCA was whether the term 'alienation' as used in the DTA, included within its ambit gains arising from a deemed disposal of assets.

The SCA held that the term is widely cast and includes capital gains derived from the alienation of all property, and does not have a restricted meaning. It encompassed both actual and deemed disposals of assets giving rise to taxable gains. The SCA however, held that when the respondent relocated its seat of effective management to Luxembourg, and taking into account that the respondent ceased being a resident of the Republic during the salient taxable year of the capital gain, the provisions of the DTA became applicable and Luxembourg had exclusive taxing rights in respect of the respondent's capital gains. The appeal by the Commissioner herefore fell to be dismissed.

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