REPORTABLE (85)

ZIMBABWE REVENUE AUTHORITY
v
MUROWA DIAMONDS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
UCHENA JA, KUDYA JA & MWAYERA JA.
HARARE: 29 OCTOBER 2021 & 12 SEPTEMBER 2023

S. Bhebhe, for the appellant

T. Zhuwarara, for the respondent

KUDYA JA:

[1] The delay in handing down this judgment is sincerely regretted.

[2] The appellant seeks the vacation of the whole judgment handed down by the Special Court for Income Tax Appeals (the court *a quo*) that was handed down on 23 December 2020. The court *a quo* set aside the amended income tax assessments issued to and the penalty imposed against the respondent by the appellant on 30 October 2017 for the 2014 tax year and on 1 November 2017 for the 2015 tax year.

THE FACTS

[3] The matter *a quo* was premised on a stated case. The appellant is a revenue collection statutory body corporate established in terms of the Revenue Authority Act [*Chapter 23:11*]. The respondent is a limited liability company registered under the laws of Zimbabwe. It operates a mining lease title issued on 28 March 2001 and amended on

11 September 2001. It has the exclusive mining rights to 28 diamond mining claims covering 23 716 hectares in the Masvingo Mining District. It sells the diamonds outside Zimbabwe.

[4] In October 2017, the appellant conducted a tax review of the self-assessment returns submitted by the respondent in respect of the 2010 to 2015 tax years. The appellant recomputed the income tax payable for the tax years ended 31 December 2014 and 2015. It added back to taxable income, thereby disallowing, the deductions in respect of mining royalties, which the respondent had paid pursuant to s 244 of the Mines and Mineral Act [*Chapter 21:05*]. The basis for the disallowance was that the royalties were of a capital nature and not of a revenue nature. The appellant reasoned that the royalties were of a capital nature because they were paid to secure an enduring benefit in respect of the diamond mining rights conferred upon the respondent by the Government of Zimbabwe (GOZ). On 30 October 2017 and 1 November 2017, the appellant issued two notices of additional assessments together with their respective additional assessments. The appellant also imposed 100 percent penalties for the resultant tax shortfall in the aggregate sum of US$2 558 692.50 for the 2014 tax year. The respondent objected to the additional assessments on 24 November 2017. The objection was disallowed by the appellant on 25 January 2018. The respondent appealed against the determination disallowing the objection to the Special Court on 9 April 2018. The appeal was successful.

THE CONTENTIONS *A QUO*

[5] Mr *Zhuwarara*, who appeared for the respondent *a quo*, contended that as the royalties were chargeable on the minerals or mineral products that had been disposed of in the year

of assessment, they would be deductible from taxable income pursuant to the general deduction formula, *viz*, s 15 (2) (a) of the Income Tax Act [*Chapter 23:06*]. He submitted that the appellant incorrectly added back the royalties to taxable income by treating them as being of a capital nature when, in law, they were of a revenue nature. He strongly contended that charging royalties would not result in the acquisition, establishment or improvement of the mining location from which minerals or mineral products would be won. Rather, they were paid *ad valorem* the disposed minerals. The purpose of the royalties was to preserve the respondent's right to dispose of the extracted minerals. He also submitted that the repeal of s 15 (2) (f) (iii) of the Income Tax Act with effect from 1 January 2014 did not abrogate the clear and unambiguous text of the general deduction formula or the effect of s 16 of the Income Tax, both of which remained extant.

[6] Mr *Bhebhe*, for the appellant, made the following contrary submissions. The general deduction formula predated the introduction of s 15 (2) (f) (iii) of the Income Tax Act. The latter provision was introduced into the Income Tax Act by s 8 of the Finance Act No. 10/2003 and took effect on 1 January 2004. The provision permitted a payer of royalties to deduct them from its taxable income. Section 7 (a) of the Finance Act No. 1/2014 repealed s 15 (2) (f) (iii) with effect from 1 January 2014. The deduction of royalties was removed by legislative diktat. Additionally, royalties constitute capital expenditure and are not deductible under the general deduction formula. The deductions done by the appellant in the two self-assessments returns were improper and therefore properly disallowed in the impugned additional assessments. The dollar for dollar penalty imposed by the appellant was in accordance with the moral turpitude and demonstrable lack of diligence of the taxpayer. In terms of s 46 of the Income Tax Act the incorrect

self-assessment return avoided the payment of the correct tax and was done with the intention of defrauding the fiscus. It could not properly be waived in any manner or form.

THE FINDINGS OF THE COURT *A QUO*

[7] The court *a quo* held that the royalty payable under Part XIV of the Mines and Minerals Act to the government by a miner is tax deductible because it falls into the ambit of revenue and not capital. It also found that the contemplated deduction disallowance specified in the Minister of Finance and Economic Development's 2013 National Budget Speech to Parliament and the resultant repeal of s 15 (2) (f) (iii) of the Income Tax Act did not alter the underlying revenue nature of the mining royalties in issue. The actions of the Minister and Parliament were negated by the overarching reach of the general deduction formula, which was unaffected by the two events. The court *a quo* reasoned that the source of the royalty determined its nature. It held that, as the royalty was paid from the income earned from the disposal of the won minerals and mineral products, it constituted an operational expense incurred in the production of income and not an operational expense incurred in the establishment, creation, acquisition or improvement of the mining location, mining equipment or mining infrastructure.

[8] The *ratio decidendi* of the court *a quo* is encapsulated in para. 25 of the judgment, which I reproduce below:

> "[25] Whilst it is paid in *lieu* of the right to mine, nonetheless, it does not bring into being an asset for the enduring benefit of a miner. It is an expense associated with the operation of a business for the purpose of earning income as opposed to a cost of performing the income-earning operations or of establishing or improving or adding to the income-earning machinery. So, I would set aside the respondent's assessment on this basis".

[9] The court *a quo* further held that it was not necessary to resort to extrinsic aids alluded to in s 15B (1) and (2) of the Interpretation Act [*Chapter 1:01*] where the text is clear and unambiguous. It therefore held that the deduction of the royalties was governed by the general deduction formula, which predated the repealed provision, and was therefore not affected by the interposition of the repealed provision.

[10] Aggrieved, the appellant appealed to this Court on the following grounds of appeal.

THE GROUNDS OF APPEAL

1. The court *a quo* erred in law in finding that royalties paid by the respondent in terms of section 244 of the Mines and Minerals Act [*Chapter 21:05*] are an allowable deduction in terms of section 15 of the Income Tax Act [*Chapter 23:06*];

2. The court *a quo* erred in law in finding as it did, or taken to have done, that the amendments to s 15 (2) (f) (iii) to the Income Tax Act [*Chapter 23:06*] in 2004, 2014 and 2019 did not alter the deductibility of royalties as a deductible expense for the relevant periods.

3. The court *a quo* erred in law in setting aside the penalty in circumstances where the appellant was empowered in terms of s 46 (1) of the Income Tax Act [*Chapter 23:06*] to levy such a penalty.

The appellant seeks the success of the appeal, the vacation of the judgment of the court *a quo* and its substitution by a dismissal of the respondent's appeal in the court *a quo*.

THE ISSUE

[11] Whether notwithstanding the repeal of s 15 (2) (f) (iii) of the Income Tax Act, royalties payable under s 244 of the Mines and Minerals Act constitute an allowable deduction under the general deduction formula, s 15 (2) (a) of the Income Tax Act.

THE SUBMISSIONS BEFORE THIS COURT

[12] Mr *Bhebhe* for the appellant submitted that the royalties were not deductible in the 2014 and 2015 tax years because of the repeal of s 15 (2) (f) (iii) of the Income Tax Act. The provision in question allowed the deduction of s 244 mining royalties between 1 January 2004 and 31 December 2013 before it was repealed on 1 January 2014. He contended that the court *a quo* manifestly erred in disregarding the clear intention of the legislature that derives from the repeal of the formerly permissive provision when it allowed the deduction of these royalties. He strongly contended that the logical effect of the repeal was that the royalties under consideration were no longer deductible. He also contended that the royalties constituted a non-deductible expenditure of a capital nature under the general deduction formula. He further submitted that it was therefore remiss of the court *a quo* to allow their deduction in these circumstances.

[13] *Per contra*, Mr *Zhuwarara* for the respondent submitted that the court *a quo* correctly set aside the additional assessments issued by the appellant on 31 October 2017 and 1 November 2017. He contended that the repeal of s 15 (2) (f) (iii) at the dawn of the 2014 tax year did not automatically alter the essence of royalties as a deductible revenue expense incurred to earn income. He argued that the continued existence of the general deduction formula after the repeal of s 15 (2) (f) (iii) permitted the deduction of all revenue expenses whose deduction was not disallowed by s 16 of the Income Tax Act. He contended that royalties being deductions of a revenue nature and not of a capital

nature, which were also not precluded from deduction by s 16, were properly deductible under the general deduction formula. He relied on the *dicta* in *AS School & Ors v Zimbabwe Revenue Authority* SC 61/17 at p 11 for the proposition that the mere repeal of a permissive statutory provision would not necessarily erode the targeted rights as long as they continued to be preserved by an existing provision in the same or in a different enactment. He contended that as the royalties were payable for the right to dispose of won minerals or mineral products and not the right to mine these minerals, they constituted expenses defrayed to raise or earn income. He further argued that they did not constitute expenses incurred in securing the right to mine and were therefore not of a capital nature.

THE LAW

[14] The statutory provisions relevant to the determination of this appeal, which govern the allowable deductions of mining expenditure in general and mining royalties in particular during the 2014 and 2015 tax year were provided in s 2, 15 (1), (2) (a), (f) and (4), 16 and the Fifth Schedule of the Income Tax Act *[Chapter 23:06]* (the Act). Mining royalties were specifically mentioned in Part XIV of the Mines and Minerals Act [*Chapter 21:05*]. In tax law, s 15 (2) (a) of the Act is often referred to as the general deduction formula. This is because it is the general provision which underpins all allowable deductions. The other 34 subsequent paras (b) to (ll), unlike the general deduction formula, delineated specific deductions that were allowed a taxpayer under s 15 (2). The specific provision that related to mining operations was s 15 (2) (f). However, in terms of s 15 (4) of the Act, a taxpayer was obliged to choose a single provision to make its allowable deduction, where such a deduction could be made under more than one provision of the Act.

[15] In terms of s 2, a mining location carries the definition embodied in the Mines and Minerals Act. However, mining operations meant any operations for the purposes of winning a mineral from the earth or from a dump site. A tax is defined as "any tax or levy leviable under this Act". Trade is further defined as encompassing any trade, business, activity, venture or lease carried on, engaged in or followed for the purposes of producing income as defined in s 8 (1) of the Act and anything done for the purpose of producing such income.

[16] The general deduction formula stipulated that:

> "**15 Deductions allowed in determination of taxable income**
>
> (2) The deductions allowed shall be—
>
> (*a*) expenditure and losses to the extent to which they are incurred for the purposes of trade or in the production of the income except to the extent to which they are expenditure or losses of a capital nature;
>
> (*f*) (ii) where the taxpayer is a miner, any expenditure (other than expenditure in respect of which a deduction is allowable in terms of paragraph (*a*)), which is proved to the satisfaction of the Commissioner to have been incurred during the year of assessment by the taxpayer on surveys, boreholes, trenches, pits and other prospecting and exploratory works undertaken for the purpose of acquiring rights to mine minerals in Zimbabwe or incurred on a mining location in Zimbabwe, together with any other expenditure (other than expenditure referred to in paragraph (*a*) of the definition of "capital expenditure" in paragraph 1 of the Fifth Schedule) which, in the opinion of the Commissioner, is incidental thereto:
>
> (iii) ....
>
> [Subparagraph repealed by Act 1 of 2014]"

[17] Section 16 provided that:

> "**16 Cases in which no deduction shall be made**
>
> (1) Save as is otherwise expressly provided in this Act, no deduction shall be made in respect of any of the following matters—

(*d*) tax upon the income of the taxpayer or interest payable thereon, whether charged in terms of this Act or any law of any country whatsoever;"

[18] The provisions of the Fifth Schedule that are relevant to the determination of the appeal read as follows:

> "**FIFTH SCHEDULE (Section 15 (2) (f))**
> ALLOWANCES AND DEDUCTIONS IN RESPECT OF INCOME FROM MINING OPERATIONS AND OTHER PROVISIONS RELATING THERETO
> ***Interpretation***
> 1. (1) In this Schedule—
> " capital expenditure" means—
> (*a*) expenditure, in relation to mining operations (other than expenditure in respect of which a deduction is allowable in terms of subparagraph (ii) of paragraph (*f*) of subsection (2) of section *fifteen*)—
> (i) on buildings, works or equipment, including any premium or consideration in the nature of a premium paid for the use of buildings, works, equipment or land, but excluding—"
>
> ***Deduction not admissible in respect of income derived from carrying on of mining operations***
> 10. No deduction shall, as regards income derived from the carrying on of mining operations, be made in respect of the allowances or deductions referred to in paragraphs (*c*), (*d*), (*e*) and (*t*) of subsection (2) of section *fifteen*."

[19] Section 244 of the Mines and Minerals Act provided that:

> "**244 Royalty**
> (1) Subject to this Part, the miner of a registered mining location <u>shall pay royalty</u> on all minerals or mineral-bearing products won from such location which have been disposed of by him or on his behalf, whether within or outside Zimbabwe, during any month, at such rate per unit of mass as may be fixed in terms of section *two hundred and forty-five.*"

In terms of s 251, a miner was mandated to render to the appellant a monthly return in the prescribed form in respect of the mineral resources won from its mining location during the preceding month. The miner was required to render separate returns, showing the output and full details of the disposal of the minerals or mineral bearing products on the one hand and a return with similar details for precious stones on the other, won from its mining location. The miner was however obliged to pay the royalty due to the mining commissioner. Criminal and civil sanctions were provided for the failure to render the return or to pay the assessed royalty. Section 253 of the Mines and Minerals Act, empowered the appellant to issue the civil sanction prohibiting the offending <u>miner from disposing of any mineral resources won</u> from the particular mining location to which the failure related "or from any other location which is being worked by the miner, whether or not the miner has failed to pay any royalty due in respect of the other location, until all outstanding royalty has been paid or until an arrangement has been made which is acceptable to the Commissioner-General or officer for the payment of such royalty". A deliberate defiance of the prohibition order attracted a further criminal sanction. (my emphasis)

Section 254 conferred on the State President both the absolute power to remit the payment of any royalty payable, prospectively or retrospectively. It also preserved those continuing royalty remissions that had been "granted or ordered before the 1st January, 1970, in respect of any period extending beyond the 31st December, 1969."

It is noteworthy that, under the definition section (s 5) of the Mines and Mineral Act, "disposal" denoted the sale, donation or other alienation of the mineral resource and is deemed to take place at the dispatch of the mineral resource from the mining location.

[20] The construction of fiscal legislation, in general, and of the general deduction formula, in particular has been the subject of the decisions of many superior courts the world over. It is premised on the text, context and purpose of both the particular provision (s) and the architectural design of the statute under consideration. See *Commissioner for Inland*

Revenue v Simpson 1949 (4) SA 678 (A), *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 264, *Grey v Pearson* (1857) 10 ER 1216 at 1234 and Tapera & Majachani: *Unpacking Tax Law and Practice in Zimbabwe*, 2020 ed, Matrix Tax School, Harare at p 9. This approach is further entrenched in s 15B (1) and (2) (f) of the Interpretation Act [*Chapter 1:01*], which encourages the use of extrinsic materials in the interpretation of statutes to either confirm the ordinary meaning of a provision or determine its meaning where the ordinary meaning is incongruent, inconsistent or repugnant with the context and object of the enactment.

[21] The interpretation of the general deduction formula has also been traversed in numerous court decisions. The import of s 15 (2) (a) of the Income Tax Act is to allow deductions of a revenue nature and disallow those of a capital nature. The differences between the two deduction categories is premised on whether the deduction relates to the creation, acquisition or improvement of the business income earning structure or to its income earning capacity. The former would constitute capital expenditure while the latter would be regarded as revenue expenditure. This position was articulated in *CIR v George Forest Timber Co Ltd* (1924) 1 SATC 20 in the following manner:

> "Money spent in creating or acquiring an income producing concern must be capital expenditure. It is invested to yield a future profit while the outlay did not recur, the income does. There is a great difference between money spent in creating or acquiring a source of profit and money spent on working it. The one is capital expenditure, the other is not. The reason is plain; in the one case it is spent to enable the concern to yield profit in the future, in the other it is spent in working the concern for the present production of profit."

See also *SZ (Pvt) Ltd v ZRA* HH 142/20 at 12 where the Court stated that:

> "The distinction between revenue and capital expenditure has been stated in such cases as *Atherton v British Insulated & Helsby Cables Ltd* [1925] TC 155, *CIR* v *George Forest Timber Company* 1 SATC 20, *New State Areas Ltd* v *CIR* 1946

> AD 610 and *D Bank Ltd* v *Zimbabwe Revenue Authority* 2015 (1) ZLR 176 (H). The main principle derived from these cases is that the money spent in creating or acquiring a source of profit constitutes capital expenditure while the money spent in working it or which is incurred as part of the cost of performing the income producing operation constitutes revenue expenditure."

[22] One of the tests that is used to determine whether or not expenditure is of a capital nature is the enduring benefit test. This test was articulated by the House of Lords in *British Insulated and Helsby Cables Ltd* v *Atherton* [1926] AC 205 (HL), where it was held that an expenditure incurred for the purpose of creating an asset or an advantage for the enduring benefit of trade, constituted capital expenditure and not revenue expenditure. See also *D Bank v Zimra* 2015 (1) ZLR 176 (H) at 187G-188B.

THE APPLICATION OF THE LAW TO THE FACTS

[23] Mr *Bhebhe* impugns the finding of the court *a quo* that the royalties payable to the mining commissioner constituted expenditure of a revenue nature, which was properly deductible in the respondent's self-assessment returns. He submitted that the royalties constituted non-deductible capital expenditure. Mr *Zhuwarara*, on the other hand, supported the court *a quo*'s finding.

[24] The reasoning of the court is captured in paras. 21 to 23 of its judgment. It stated that:

> "[21] Royalties are recognized across the globe as compensation for the extraction of a mineral resource. They are a payment to the owner of the mineral resource in return for the right to remove that mineral from the land: see OTTO *et al*: *Mining Royalties: A Global Study of Their Impact on Investors, Government, and Civil Society*, 2006 ed., World Bank, at p 41 - 42. In Zimbabwe, and in terms of s 2 of the Mines and Minerals Act, the rights to all minerals is vested in the President. Royalties are a form of tax. In my view, it would be anomalous for a miner to pay this kind of tax in terms of Part XIV of the Mines and Minerals Act (as read with s 37A of the Finance Act [*Chapter 23:04*]) but then not be able to deduct it when he

computes his other tax obligation in terms of Part III of the Income Tax Act. This would seem to amount to double taxation.

[22] As shown above, s 15 of the Income Tax Act allows for deductions to be made to the taxable income of a taxpayer in general. In respect of persons earning income from mining operations and other trade in particular, s 15(1)(c) says that such deductions are only to be claimed in respect of the income to which they relate. Thus, the deductions may be restricted. Nonetheless, it is permissible to make them. A miner can make them. He must just be careful not to mix the deductions in respect of mining operations with those of his other trade, if any. Then in respect of a trade or the production of an income in general, s 15(2)(a)(i) says the deductions allowed are in respect of expenditure and losses to the extent that they are of a capital nature.

[23] To regard a mining royalty as expenditure of a capital nature, as the respondent does, is rather stretching it too far. I disagree with such classification. A royalty payment by a miner in terms of Part XIV of the Mines and Minerals Act cannot be deemed to be money spent in creating or acquiring a source of profit. It is hardly the cost of performing the income-earning operation or the cost of establishing or of improving or adding to the income –earning plant or machinery. It is hardly such a cost as intended to procure an advantage for the enduring benefit of the appellant's business. Examples of costs incurred by a taxpayer which are in the nature of capital expenditure include such expenses incurred in acquiring fixed assets, share capital, an income-producing unit, goodwill, intellectual property, and the like: TAPERA & MAJACHANI, *ibid*, at p 151. Of course, no exhaustive list can ever be provided."

[25] Mining royalties were payable to the mining commissioner in this country in terms of s 79 of the Mines and Minerals Act No. 16 of 1935 and s 139 of the Mines and Minerals Act No. 18/1951. There were no specific sections under which the royalty payable was deductible in the corresponding Income Tax Ordinance of Southern Rhodesia No. 20 of 1918 and the Income Tax Act No. 16/1954. The term was not and has never been statutorily defined in Zimbabwe. In the United States, a royalty is defined as a fee imposed by local, state or federal governments on either the amount of minerals produced at a mine or the revenue or profit generated by the minerals sold from the mine[1]. Another online blog, Investopedia asserts that:

[1] Minerals Make Life American National Minerals Association Blog 22 October 2021 aburke@nma.org.

> "Mineral royalties also called mineral rights: are paid by mineral extractors to property owners. The party that wants to extract the minerals will often pay the property owner an amount based on either revenue or units, such as barrels of oil or tons of coal."

The OECD Glossary of Tax Terms at www.oecd.org defines mineral royalties as follows:

> "Mineral royalties: regular payment, usually based on the volume or price of minerals extracted, made by mining enterprises to national states or other owners of mineral resources as consideration for the right to exploit particular mineral resources."

The scope and purpose of a mineral royalty in South Africa are captured in a White Paper entitled *A Minerals and Mining Policy for South Africa* published in October 1998, at p13 thus:

> "The mineral rights owner is compensated by the exploiter of the minerals for the depletion of the non-renewable resource through the payment of royalties. It is generally accepted that in principle royalties are charged on production or revenue."

Again, Boadway and Keen, wrote in the *Economic Analysis* of August 2013, in an article entitled *Mining Taxation-The South African Context* at p13 that:

> "The rationale for a mineral royalty is the payment to the resource owner (typically the State) by the extractor in return for the right to mine. The Mineral and Petroleum Resources Royalty Act No. 28/2008 provides for the compensation to the State (as custodian) for the permanent loss of non-renewable resources."

[26] In the Zimbabwean context, a mineral royalty payable in terms of s 244 of the Mines and Minerals Act constitutes a fee paid by the holder of a mining right to the mining commissioner for the right to dispose the mineral resources from a mining location. The royalty is payable on the value (*ad valorem*) of the mineral resources extracted from the mining location.

[27] It is common cause that in the 2014 National Budget Speech to Parliament on 19 December 2013, the Minister of Finance and Economic Development tabled the following proposal:

> "Mineral Royalty
>
> 1088. Minerals are a depleting resource; hence, Government levies a royalty as compensation for extraction rights.
>
> 1089. Government has already emphasized that the contribution of the mining sector to the fiscus is minimal, compared to other countries in the region. This is exacerbated by the generous deduction of royalties and other numerous expenses incurred in the extraction of minerals.
>
> 1090. In order to enhance the contribution of the mineral resources to the fiscus, I propose to disallow royalty as deductible expense against taxable income.
>
> 1091. This measure takes effect from 1 January 2014."

[28] It was further common cause that the proposal was effected by the repeal of s 15 (2) (f) (iii) of the Income Tax Act by s 7 (a) of the Finance Act No. 1/2014. The repealed provision stipulated that:

> "(iii) where the taxpayer is a miner as defined in subparagraph (ii), the amount of any royalty paid during the year of assessment in terms of s 245 of the Mines and Minerals Act [*Chapter 21:05*];
>
> [Subparagraph inserted by Act 10 of 2003]"

[29] The main basis for Mr *Bhebhe*'s submission is that prior to 1 January 2014, mining royalties were deductible under the specific provisions of s 15 (2) (f) (iii) and not under the general deduction formula. He contended that the repeal of that provision on 1 January 2014 coupled with the Minister of Finance's National Budget proposal evinced the legislature's clear intention to disallow the deduction of mineral royalties from the respondent's income during the 2014 and 2015 tax years. His alternative submission was

that the royalties constituted a capital expense to the respondent and could not be properly deducted under the general deduction formula.

[30] Mr *Zhuwarara*, on the other hand, submitted that the repeal of s 15 (2) (f) (iii) did not affect the efficacy of the general deduction formula and could not therefore have precluded the respondent from deducting the royalties as long as they constituted revenue expenditure. He argued that the royalties were an allowable deduction as they were not capital expenses.

[31] The general deduction formula constitutes a catch-all provision for all allowable deductions that are not of a capital nature. The mere fact that an allowable deduction could be made under another provision of the Act would not prevent a taxpayer from relying on the general deduction formula. This position is postulated by the bracketed opening words of s 15 (2) (f) (ii) of the Act which state that:

> "where the taxpayer is a miner, any expenditure **(other than expenditure in respect of which a deduction is allowable in terms of paragraph (*a*))**, which is proved to the satisfaction of the Commissioner to have been incurred during the year of assessment by the taxpayer..." (my emphasis)

The same position is further envisaged by the provisions of s 15 (4) of the Act, which provides that:

> "(4) Where in respect of any amount, a deduction would but for this subsection be allowable under more than one provision of this Act and whether it would be so allowable in respect of the same or different years of assessment, the taxpayer shall not be entitled to claim that such amount shall be deducted more than once and, where the deduction would but for this subsection be allowable under more than one provision of this Act in respect of the same year of assessment, the taxpayer shall elect under which one of those provisions he wishes to claim such amount as a deduction."

Section 15 (4) recognizes that an allowable deduction can be based on more than one provision of s 15 (2) or of any other section of the Act. The only thing that it does is to prevent a taxpayer from double dipping. A taxpayer is precluded by this subsection from deducting the same amount twice where an allowable deduction can be claimed under two or more provisions of the Act.

[32] We agree with Mr *Zhuwarara* that the mere repeal of s 15 (2) (f) (iii) of the Act, which specifically provided for the deduction of royalties from the respondent's income, did not necessarily mean that royalties could not be deducted under the general deduction formula, provided that they did not constitute expenditure of a capital nature.

[33] There is a dearth of authority on whether mineral royalties are expenses of a revenue nature or expenses of a capital nature. This is because the tax legislation in most jurisdictions specifically provides for the tax treatment to be accorded to mining royalties. The question of whether royalties are revenue or capital expenses is dealt with in a perfunctory manner in Gunn: *Commonwealth Income Tax Law and Practice*,7th ed (1963), at para. [1595] thus:

> "Royalties are an allowable deduction, being an outgoing necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income. Payments in the nature of instalments of purchasing money should be distinguished from income payments such as royalties."

A useful guideline for determining the nature of expenditure is provided by SCHREINER JA in *Commissioner of Taxes* v *Genn & Co (Pty) Ltd* 1955 (3) SA 293 (A) at 299G thus:

> "In deciding how the expenditure should properly be regarded the court clearly has to assess the closeness of the connection between the expenditure and income earning operations, having regard both to the purpose of the expenditure and to what it actually effects."

[34] The mining location or the mineral rights constitute the capital asset that produces the income. The minerals and the mineral products constitute the fruit won from the "belly of the earth". They can also be regarded as the income derived from the mining location or the mining rights. To determine whether the royalty payable constitutes income expenditure or capital expenditure regard must be had to the purpose for which royalties are paid. If they are paid to gain access to the mining location or to exercise the mining, rights, as asserted by the Minister of Finance in his 2013 National Budget proposals they would be closely connected to the income producing structure. They would fall into the ambit of capital expenses and would not be deductible. However, if they are paid to enhance the earning of income, they would fall into the category of revenue expenses and would be deductible.

[35] The purpose for royalty payable, as demonstrated in para. 25 and 27 (sub paras. 1088 and 1089 of the National Budget Speech) above, is generally to compensate the State for depleting non-renewable resources. The architectural scheme evinced by ss 244 (1) and 253 of the Mines and Minerals Act is, however, premised on the disposal of the minerals and mineral products. A failure to pay the royalty due is penalized by a prohibition from disposing of the minerals and mineral products. The miner is not prohibited from accessing the mining location or from exercising its mining rights and extracting the mineral resources. The royalty payable in this scheme of things is not closely connected with the income producing asset. Rather, it is closely connected with the mining fruits produced by that asset. The royalties are therefore paid to enable the miner to earn income from its mining location. The royalty payable in terms of s

244 (1) of the Mines and Minerals Act would in these circumstances be revenue expenditure and not capital expenditure.

[36] We agree with Mr *Zhuwarara* that the royalty payable was properly abated by the respondent from its income in the self-assessment returns for the 2014 and 2015 tax years. The court *a quo* thus correctly reversed the appellant's decision to add it back to income. The appeal is unmeritorious and ought to be dismissed.

COSTS

There is no reason for a departure from the general rule that costs must follow the result.

DISPOSITION

Accordingly, it is ordered that:

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the respondent's costs on the ordinary scale.

UCHENA JA: I agree

MWAYERA JA: I agree

Kantor & Immerman, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners