IN THE REVENUE APPEAL TRIBUNAL

(HELD AT MASERU)

RAT 02/2012/12

AND

RAT 02/2013/14

In the matter between:

X **APPELLANT**

AND

LESOTHO REVENUE AUTHORITY **1ST RESPONDENT**

THE COMMISSIONER GENERAL **2ND RESPONDENT**

JUDGEMENT

CORAM: **HON. N. MAJARA – PRESIDENT**

HON. J.T.M. MOILOA – MEMBER

MS P. LEBITSA – MEMBER

DATE OF HEARING: **VARIOUS DATES**

DATE OF JUDGEMENT: **31ST AUGUST 2016**

CASES:

1. Glen Anil Development Corporation Ltd v Secretary or Inland Revenue 37 SATC 319
2. Cape Brandy Syndicate vs IRC (1921) 1KB 64 at 71
3. CIR vs Simpson 1949 (4) SA 678 (A.D.) at 375
4. Partington vs The Attorney General 21LT 370 at 375
5. CIR vs George Forest Timber Co. Ltd 1924 A.D. 516 at 531 – 2
6. CIR vs DELFOS 1933 A.D. 242
7. Dibowits vs CIR 1952 (1) S.A. (A.D.)
8. Estate Regnalds & Others vs CIR 1937 A.D. @ 70
9. Corporation vs Main outs Against the Fund Compromising Proceeds of the Sale of the MV Jade Transporter 1987 (2) S.A. 547 (A)

Statutes:

1. Section 124 (3) of Income Tax Act, 1993
2. Section 115 of the Act
3. Section 118 of the Act
4. Section 123 (3)
5. Explanatory Memorandum, Income Tax Order, 1993 page 207

[1] The Appellant appeals against the Respondent's disallowance of Appellant's objection to its assessment for fringe benefits tax on the grounds that:

(a) The medical fringe benefits provided by the Appellant to its employees in 2005/2006, 2006/2007 and 2007/2008 tax years were exempt from fringe benefits tax as contemplated in **Section 124 (3) of Income Tax Act, 1993.**

(b) The 2nd Respondent was obliged to assess the Applicant for fringe benefits tax at the rate of 35%, as opposed to 40%, on the housing and other fringe benefits on the basis that the 2nd Respondent had given this concession to other tax payers during the period under consideration.

[2] The material facts on which the Appellant relies are as follows:

2.1 The Appellant is registered as a tax payer and was allocated identification number 101878-6

2.2 The Appellant employed the following number of non-casual employees:-

2005/2006 financial year – 39
2006/2007 financial year – 47
2007/2008 financial year – 62

2.3 It was a condition of the employee's employment with Appellant that all staff members must belong to Bank Med or be dependants of their spouses' medical aid scheme. This requirement of each employee of Applicant was stipulated in Appellant's Human Resources Manual 2006 to 2008 at paragraph 11.1 to 11.2. The spouses' other medical aid could be a different medical aid from Appellant's nominated medical aid scheme (Bankmed/Momentum).

2.4 Appellant's employees changed membership from Bankmed to Momentum Medical Aid in February, 2008.

2.5 Appellant's standard letter of employment which was used for appointment of all employees in the period 2005 and 2008 financial years stated that:

2.5.1 The employee is required to become and remain a member of Bankmed Medical Aid Scheme (2005/2006, 2006/2007 and 2007/2008 February financial years). With effect from February, 2008 Appellant's employees were transferred from Bankmed Medical Aid Scheme to Momentum Medical Aid Scheme to date.

2.5.2 The full amount of contribution is included in the employees' total remuneration package. Sometimes this methodology of employees' remuneration package is called "cost to company salary package".

2.5.3 Appellant deducts medical aid contributions (premiums) from the employees total remuneration package and pays it over to the medical aid scheme as an employer contribution.

2.5.4 In terms of Appellant's remuneration policy as supported by Appellant's Human Resources Manual referred to earlier, the employee will be exempted from membership of Bankmed (and subsequently Momentum Medical Aid) if that employee produced proof that he or she is a registered dependant of a spouse (or life partner) with another medical aid scheme. Such proof was by way of a confirmation letter from such other medical aid scheme.

2.5.5 If the employee ceases to be registered as a dependant on another medical aid scheme member, that employee is compelled to be registered on Appellants medical aid scheme (Momentum Medical Aid).

2.6 The Appellant's employees who were not exempted from membership of the medical aid scheme but were obliged to become members of the medical aid scheme but were free to choose comprehensive or limited plan on the medical aid scheme according to their needs.

[3] Appellant contends that the benefit arising from payment of its employees' medical aid scheme contributions in the circumstances outlined above is an exempt fringe benefit in terms of **Section 124 (3) of the Income Tax Act, 1993.** Consequently Appellant did not pay fringe benefit tax in respect of the medical aid fringe benefit for the financial years 2005/2006 2006/2007 and 2007/2008. This then is the crux of the dispute between Appellant and Respondents. The correct meaning of "fringe benefit available to all non-casual employees on equal terms" found in **Section 124 (3) of the Act.**

[4] On 14 August 2008 Respondent assessed the Appellant for fringe benefits tax in the amount of M807,135.19. The following amounts related to the medical aid fringe benefit:

4.1	2005/2006 financial year	M251,830.93
4.2	2006/2007 financial year	M261,983.43
4.3	2007/2008 financial year	M212,334.92
	Sub Total	**M726,149.25**

[5] Respondent also assessed the Appellant for M80,986.01 because Appellant used the rate of 35% instead of 40% to calculate the fringe benefit tax on housing and other fringe benefits. The latter assessment from the Respondent was dated 14

August 2008. The total assessment of Appellant by Respondent therefore amounted to M807,135.29.

[6] The Appellant objected to the assessment in a letter dated 3rd September, 2008 on the following basis:

6.1 The medical fringe benefit is an exempt benefit as contemplated in **Section 124 (3) of the Act.**

6.2 In respect of the housing benefit, many other employers were advised by 1st Respondent to use the 35% rate instead of the 40% rate to calculate fringe benefit tax. In this regard Appellant articulated this position in its letter dated 3rd September, 2008. Accordingly Appellant contended that it was obliged to pay M80,986.01 later assessed by 2nd Respondent.

[7] The 2nd Respondent contended that the assessment was incorrect in a letter dated 18 September 2008. The basis of 2nd Respondent's contention was twofold:

7.1 The medical fringe benefit is not available to all non-casual employees of Appellant "on equal terms" as contemplated in **Section 124 (3) of the Act.**

7.2 The Fourth Schedule to the Act provides for fringe benefits tax to be calculated at a rate of 40%.

[8] The above differing positions of the parties herein constitute in a nutshell the crux of the dispute: the correct meaning of **Section 124 (3) of the Act** and in that subsection what the correct meaning of the phrase available to all non-casual employees "on equal terms" is.

[9] **Section 124 of the Act** provides as follows:

(1) "*A benefit by an employer to an employee consisting of the reimbursement or discharge of the employees' medical expenses is a medical fringe benefit.*

(2) *The taxable value of a medical fringe benefit is the amount of reimbursement or discharge.*

(3) *A medical fringe benefit available to all non-casual employees on equal terms is an exempt fringe benefit."*

9.2 **Section 115 of the Act** defines "medical expenditure" as follows:
"*… includes a premium or other amount paid for medical insurance,"*

9.3 **Section 118 of the Act** provides for exempt fringe benefits as follows:

"118, the following are exempt fringe benefits:

(a) A fringe benefit within ***Section 123 (3) or 124 (3);*** *and*
(b) A fringe benefit relating to exempt employment income; and
(c) A fringe benefit the value of which (after taking into account the frequency with which similar benefits are provided by the employer is so mall as to make accounting for it unreasonable or administratively impracticable."

9.4 The 4th Schedule to the Act provides that the tax rate for "trustees, minors, fringe benefits and electing non-residents" is:

"The applicable rate of 40%".

9.5 The explanatory Memorandum, Income Tax Order, 1993 page 207 explains:

> *"…This (Fourth) Schedule also lets out the rate of fringe benefits. The rate is 40% which equates to the general rate of corporate tax and the maximum marginal rate of resident individuals".*

9.6 The maximum marginal rate on resident individuals was amended from 40% to 35% with effect from 1st April, 2006.

[10] **Principles for Interpretation of Fiscal Statues:**

10.1 **Glen Anil Development Corporation Ltd vs Secretary of Inland Revenue 37 SATC 319** the Appellant Division of the Supreme Court of Appeal in South Africa confirmed that when interpreting fiscal statutes, one must limit oneself to the ordinary meaning of the words of the statute and not try to read in anything into the words:

> *"Counsel has… relied upon so called special rules laid down in several cases as being applicable to interpretation of fiscal legislation. In* ***Cape Brandy Syndicate vs IRC (1921) IKB 64 at 71*** *and referred to in* ***CIR vs Simpson 1949 (4) SA 678 (A.D.) at 965,*** *the rule was stated as follows by Rowlatt J:*
>
> *"It simply means that in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is*

to be head in, nothing is to be implied. One can only look fairly at the language used".

10.2 The same principle is stated by Lord Cairns in **Partington vs The Attorney General 21 LT 370** at 375 and referred to in **CIR vs George Forest Timber Co. Ltd 1924 A.D. 516** at 531 – 2 as follows:-

"If person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

10.3 In **CIR vs DELFOS 1933 A.D. 242, Wesrels C.J.,** however, after referring to the rule states by Lord Cairns in **Parington vs Attorney General** (supra) said the following at page 254:

"I do not understand this to mean that in no case in a taxing Act are we to give to a Section a narrower or wider meaning than its apparent meaning, for in all cases of interpretation we must take the whole statute into consideration and so arrive at the true intention of the legislature".

10.4 In **Dibowitz vs CIR 1952 (1) S.A. (A.D.)** at page 61 Centlivers C.J., after referring to the rule laid down Rowlatt J. in the Cape Brandy Syndicate case (supra) said, in part, the following:-

*"Apart from the rule that in the case of an ambiguity of a fiscal provision should be construed contra fiscum (**Estate Regnalds & Others vs CIR 1937 A.D. 57 @ 70)** which is but a specific application of the general rule that all legislation imposing a burden upon the subject should, in the case of an ambiguity, be construed in favour of the subject, there seems little reason why interpretation of fiscal legislature should be subjected to special treatment which is not applicable in the interpretation of other legislation. Indeed I do not think that the rule as stated in the CAPE Brandy Syndicate case (supra) is any different from the applicable in the interpretation of all legislation. However that may be, it is clear from the remarks of (Wessels C.J. in the DELFOS case (supra) that even in the interpretation of the legislature is of paramount importance, and, I should say, decisive".*

10.5 **In Summit Industrial Corporation vs Main Outs Against the Fund Compromising Proceeds of the Sale of the Sale of the MV Jade Transporter 1987 (2) S.A. 547 (A)** the Appellant Division confirmed that the general rule of interpretation of words in a statute must be given their ordinary, grammatical meaning unless doing so would lead to absurdity so glaring that it could never have been contemplated by the legislature.

10.6 In **Israelson vs CIR 1952 (3) S.A. 529 (A)** the Appellate Division confirmed that if the working of a taxation provision is capable of more than one reasonable information, one must follow the interpretation that favours the tax payer.

[11] **The Ordinary Meaning of "Equal Terms"**

11.1 The phrase *"equal terms"* is not defined in the Act. One must therefore determine its meaning by reference to ordinary, grammatical meaning of the words with the help of dictionaries.

11.2 We agree with Appellant that the dictionary meaning of the words must prevail unless it would lead to glaring absurdity which could never have been intended by the Legislature.

11.3 The dictionary meaning of "equal" is as follows:

KERNERMAN ENGLISH LEARNER'S DICTIONARY

- *"of the same size, value amount etc."*
- *"being treated in the same way as others"*

WEBSTERS DICTIONARY:

- *"agreeing in quantity, size, quality, degree, value etc."*
- *"neither inferior nor superior, greater nor less, better nor worse"*

COLLINS DICTIONARY

- *"having identical privileges, rights status etc, all men are equal before law"*
- *"having uniform effect or application, equal opportunities".*

11.4 The dictionary of "*terms"* is as follows:-

CAMBRIDGE ADVANCED LEARNERS DICTIONARY & THESAURUS CAMBRIDGE UNIVERSITY PRESS

- *"the conditions which control an agreement, arrangement or activity"*
- *"terms of employment"*
- *"on equal terms (also on same terms)"*
- *"having the same rights, treatment etc"*
- *"the terms of an agreement, treaty or others arrangement are the conditions that must be accepted by all people involved in it…"*

11.5 **ENGLISH COLLINS DICTIONARY – ENGLISH SYNONYMS & THESAURUS**

The meaning of *"equal terms"* is explained as follows:

- *"on equal/the same terms"*
- *"in a situation in which two people or groups have the same advantages or disadvantages".*

[12] In our view the terms of all of the Appellant's employees that deal with medical aid benefits are identical.

12.1 The terms are as follows:

12.1.1 All employees are obliged to become members of the medical aid scheme.

12.1.2 Only members who can prove that they are a dependant on their spouses' medical aid scheme are exempt from joining.

12.1.2 Only members who can prove that they are a dependant on their spouses' medical aid scheme are exempt from joining.

12.1.3 The employees are free to choose the relevant plan on the medical aid scheme that suits their requirements.

12.1.4 The Appellant pays the full medical aid scheme contribution on a salary sacrifice basis.

12.1.5 A salary sacrifice scheme is a legally enforceable agreement in terms of which the employer and employee agree that the employee will give up a future entitlement to cash remuneration in exchange for a non-cash benefit. In this case in exchange for non-contributory medical aid membership.

12.2 We are satisfied that the terms on which the Appellant provides medical aid to its employees are contained in the letters of employment and the Human Resources Policy Manual.

12.3 We are satisfied that conditions (and terms) are identical in all instances. Appellant has established to our full satisfaction that it does not offer medical aid to different employees on different terms.

12.4 In our view the Appellant has established to our satisfaction that it makes the benefit available to all its employees and that all employees do not have to take up the full benefits.

[13] **BENEFIT AVAILABLE TO ALL EMPLOYEES: ALL EMPLOYEES DO NOT HAVE TO TAKE UP FULL BENEFIT**

13.1 The Act requires that the benefit must be available to all employees. Respondents contend that the Act requires that all employees must receive the same benefit. In our view this is not so. In our view the Act merely requires that the benefit must be available to all employees on equal terms.

13.2 Employees of Appellant who are registered as dependants on their spouses' medical aid scheme are exempt. But that fact does not make the benefit unequal between employees of Appellant because all employees who are dependant on their spouses medical aid are all exempt from Appellant's chosen medical aid scheme (Momentum Medical Aid Scheme).

13.3 All employees have the option of choosing a limited (and therefore cheaper plan) or the comprehensive option (and therefore more expensive plan) on the medical aid scheme. We agree with Appellant that the fact that not all employees choose the most expensive option plan available, does not imply that the option is not available to all employees have the right to choose between limited or comprehensive plans on the medical aid offers available to all employees on the scheme.

13.4 Appellant will pay the medical aid scheme contributions for all of the employees' dependants. The fact that some employees have few dependants than others does not imply in our view that there is a limit on

the number of dependants that the Appellant will cover in respect of certain employees but not in respect of others. In our view it is not the case.

[14] We accept and therefore find as a proven fact that the same medical benefits are available to all employees on the same terms even if all employees do not elect to make full use of the benefit. We do not agree that Appellant discriminates between employees in relation to its offering of medical aid to its employees.

[15] **ACT REQUIRES APPELLANT TO PROVIDE A BENEFIT TO ALL EMPLOYEES ON EQUAL TERMS**

Section 124 does not require that the employee receive the same benefit; or the same amount; or a benefit of the same value. Both during the formal evidence of Appellants witnesses Mrs Van Dijk (AW1) and Mrs De Koker (DW2) and during oral submission to us Respondents approach and oral submissions equated *"benefit on equal terms"* to *"benefit of same amount".* We do not agree with Respondent. Plainly the Act does not say so and such is not the ordinary grammatical meaning of those words as used in the Act.

In our view the words used in **Section 124 (3)** must be given their ordinary grammatical meaning. In our opinion where a benefit is provided on equal terms it means that the same conditions are attached to the granting of the benefit – not that the same benefit or the same amount is given to all employees. The words *"term"* and *"amount"* do not have the same meaning. The Act uses the word *"terms"* in **Section 124 (2).** The two words are clearly in our view not intended to mean the same thing. We found no dictionary definition that defined the word *"term"* with reference to an *"amount".* On the contrary we found that dictionaries define the word "*term"* with reference to *"conditions"*. The difference in our

view between *"the same terms"* and *"on terms"* is not ambiguous in our opinion; it means available on same conditions".

[16] In the result we uphold Appellants objection to Respondents assessments in respect of:

• 2005/2006 in the amount of	M251,803.93.
• 2006/2007 in the amount of	M261,983.43.
• 2007/2008 in the amount of	M212,334.92
Total objection allowed	**M726,149.28**

[17] **APPEAL ON SCHEDULE FOUR ASSESSMENTS**

We now turn to the second leg of the appeal which is in relation to the Fourth Schedule, assessments made by Appellant for housing fringe benefits tax at the rate of 35% instead of 40% in respect of the years 2005/2006.

[18] 18.1 It is common cause that the Fourth Schedule to the Act prescribed 40% tax on housing fringe benefit tax up until 31st March, 2006. It is common cause that with effect from 1st April, 2006 the tax rate for this fringe benefit was changed to 35%.

18.2 It is contended by Appellant that up to 31st March, 2006 other companies in similar circumstances as Appellant offering this fringe benefit were advised and permitted by Respondent to charge it at 35% as opposed to 40% prescribed by the Fourth Schedule during that period. Appellant contends that it was led to believe by Respondent that all companies in Lesotho

similarly circumstanced were permitted to apply the 35% tax rate instead of 40% tax rate. Appellant's contention continues that it is both unfair and discriminatory to demand from Appellant only that it pays the 40% rate in respect of the tax years prior 1st April, 2006. It is common cause that the total shortfall amount of housing fringe benefit under this head is M80,986.01. Respondent has stood his ground that in terms of the prescript of Fourth Schedule the hosing fringe benefit is calculated at 40% until 31 March, 2006.

18.3 Before us Respondents did not persist to resist Appellant's objection to their being assessed in this amount of M80,986.01. in the circumstances Appellant's objections and appeal on this amount is upheld.

[19] **CONCLUSION**

In the result Appellant's objection and appeal on being assessed for medical aid fringe benefit in the amount of **M726,149.28** is upheld. Also Appellants objection on having benefit in the amount of **M80,986.01** is upheld. Accordingly the total amount of Appellant's objection/appeal allowed in this appeal is **M807,135.29.**

J.T.M. MOILOA

MEMBER

I agree

N. MAJARA

PRESIDENT

I agree

PULENG LEBITSA

MEMBER

For Appellants :	**Adv. Nina Keyser**
	With her, Mr D.P. Molyneaux
	Instructed by Webber Newdigate
For Respondents :	**Adv. Henk Louw**
	With him Mr M. Dichaba
	Instructed by Mei & Mei Attorneys