REPORTABLE

APPELLANT CONSENTED TO PUBLICATION
I.T.O. SEC 73(19) ON 20 OCTOBER 2011

CASE NO. TA 1 / 2011

IN THE SPECIAL COURT FOR HEARING INCOME TAX APPEALS IN TERMS OF SECTION 73 OF THE INCOME TAX ACT, ACT NO 24 OF 1981
Before the Honourable Mr. Justice Schickerling AJ *et* Kasuto (Assessor) *et* Karuaihe-Martin (Assessor)

CORAM: **SCHICKERLING A.J.**

Heard on: 18 October 2011
Delivered on: 18 October 2011

JUDGMENT

SCHICKERLING, A.J:

[1] On 28 July 2009 the Appellant noted and appeal in terms of section 73 of the Income Tax Act, 24 of 1981, ("the Act) against the Respondent's disallowance of Appellant's objection in terms of Section 71 of the Act. That objection is dated 15 June 2009 and it was delivered to the Respondent on 26 June 2009. The objection is against the Respondent's assessment of the Appellant for the income tax year 2008 and issued by Respondent on 9 March 2009.

THE FACTS:

[2] In his evidence in chief the Appellant in essence testified that: He holds a B Com Hon and MBL degree which he obtained though Unisa. On 15 November 2006 he signed a letter of employment.[1] Prior to being appointed by Metropolitan Life International Limited, as Executive

[1]Record: p. 2

Manager, he was the Managing Director of Metropolitan Namibia for plus minus 11 years and that given his field of expertise he was required to assist the other countries, Botswana and Lesotho to establish their offices. Immediately prior to his appointment by Metropolitan Life International Limited the latter company wanted him to take responsibility of the southern region which included Lesotho and Botswana. This was in addition to Namibia. To do this job his employer initially requested him to move to Cape Town on a permanent basis. He could not do so due to his personal circumstances and he had then agreed with Metropolitan to remain in Namibia. He was on the board of directors for Lesotho, Botswana and Namibia. Metropolitan Lesotho and Metropolitan Botswana were new companies and his main responsibility there was to up-skill management at these offices and increase performance, as opposed to Namibia where his main function was the training of staff. Within the structure of the Metropolitan Group one's total package is attached to a performance bonus. In terms of his letter of appointment his key responsibility areas were Botswana, Lesotho and Namibia and he was required to divide his time between Namibia, Botswana and Lesotho 40/30/30 respectively. He complied with this responsibility and to this extent he had spent a lot of time outside Namibia -in 2008 it was more than 60% outside of Namibia, to assist and establish the management of these companies (i.e. Botswana and Lesotho) - he had to ensure that the support functions which came from South Africa were properly implemented; This pattern, so he testified, continued until June 2010 more or less. He is no longer employed at Metropolitan International. Since the first request for a tax directive he has not once received any reason from the receiver as to why his objection was disallowed. Until date hereof he has no knowledge as to why his objection was refused.

[3] He maintained during his cross examination that in 2008 he spend most of his time outside Namibia, although Appellant conceded that he did not have the specific time, however testified that such time could be obtained from his travel documentation. He reiterated during cross

examination that until date hereof he has not received any reason(s) why the objection was disallowed. He conceded that the amount indicated as salary on his PAYE was for a fixed salary. The following question was however also posed to him during cross examination: “The services that you performed outside Namibia, the salary was paid by Metropolitan Namibia, is that correct?” His answer was: “Because it was an internal company it was paid by Metropolitan Namibia on behalf of Metropolitan International.” It was solicited under his cross examination that the “other income of N$240,000.00”, was his performance bonus.

[4] He reiterated in re-examination in reference to the dismissal of the objection that he never received any request for information from the Respondent at all and he also never received any request for discovery. In fact, so he testified there was never any indication from the Respondent that respondent did not believe what Appellant was saying; and at the time when the 60/40 clause was inserted into the conditions of employment he was not even aware of the fact that it may have tax consequences. It was only about a year later that he was advised by his consultants that he could apply for tax deduction.

[5] The Respondent has opted not to call any witness in rebuttal. There is no reason for me to disbelieve any part of the Appellant’s evidence and we accept same unqualifiedly I am satisfied as to the inherent credibility of his evidence.

[6] The documentation contained in the dossier and also testified to by the Appellant confirms that on 1 November 2006 Metropolitan Life International; Registration No. 1991/005540/06 (Record 1) offered to the Appellant the position of *Executive Manager: Business Development South* as from 1 January 2007; The material terms of Appellant’s appointment was that he was required to be the Director of Namibia, Lesotho and Botswana, with the Managing Directors of these three companies reporting directly to him. The further terms of his employment read as follows:

"Your annual remuneration package will be multiplied by 2 for the purpose of performance bonus calculation with a 40% weighting for Namibia and 30% <u>each</u> for Lesotho and Botswana…

* *Namibia Lesotho and Botswana will become your new area of responsibilities;*

* *In Namibia, you will take responsibility for forming an asset management company and investigate the feasibility of micro lending operations;*

* *You will relinquish all line responsibilities in Namibia to the new MD;*

* *You will have to find another office in another building in Windhoek;*

* *You will have to spend a lot of time in Lesotho and Botswana to "up-skill" the management, enhanced performance and profit contributions to these two countries;*

* *You will remain an (sic) director of Metropolitan Namibia and Methealth Namibia, but also needs to become a board member of Lesotho and Botswana;*

* *<u>Your new key responsibility areas will require you to spend 40% of your time in Namibia and 30% in Lesotho and Botswana.</u>"*

[7] On 15 November 2006 the Appellant in writing accepted the offer and with effect from 1 January 2007, his employment with Metropolitan International, became effective.

[8] Towards the end of 2007/2008 financial year, more particularly on 5 September 2007 Metropolitan Life Limited; Registration No. 1949/032491/06 (Record: 3), there and then represented by a certain Bernard Du Toit the Senior Manager: Group People Services Administration addressed a letter to the Respondent's Mr. B Lottering, in which Metropolitan sought a tax directive from the Respondent. The Application for the tax directive reads as follows:

"We hereby support Mr. Fouché's application for a tax directive and advise the following as required:

1. *Mr. Fouché's employer is Metropolitan Namibia and the reference number is 0591399014.*

2. *This employer is situated in Namibia.*

3. *Mr, Fouché's full names and surname as follows: Richard Arnold Van Eck Fouché and his tax reference are 0967153011.*

4. *Mr. Fouché is resident in Namibia;*

5. *Mr. Fouché's key responsibilities require him to spend 40% of his time in Namibia and 30% in Botswana and Lesotho.*

6. *The attached certified copy of his appointment letter is submitted as proof that his new responsibilities is of a permanent nature."*

[9] A proper reading of the Appellant's terms and conditions of employment clearly confirms that he was required to spend 40% of his time in Namibia and 60% in total, divided equally between Lesotho and Botswana. To this extent the vast majority of his time would be expended on Botswana and Lesotho.

[10] The original of that application contains the following endorsement in the left top corner:

"Mr. Fouché is fully taxable on the income for services rendered in and outside Namibia for or on behalf of Metropolitan Namibia….2007/09/20"

[11] The signatory of this endorsement is however illegible.

[12] On the same date (i.e. 20 September 2007) the Respondent issued to *"Metropolitan Life Namibia (Pty) Ltd."* (Record: 4), Tax Directive No AB

134382. It is apparent that this tax directive is not addressed to either Metropolitan Life International Limited or Metropolitan Life Limited.

[13] Nonetheless, the directive inter alia reads as follows:

> *"Fully taxable on income for services rendered in and outside Namibia for or on behalf of Metropolitan Namibia."*

[14] It is apparent from the directive issued by the Respondent that no reasons were provided for its decision at all.

[15] On 6 December 2007, seventy one days after 20 September 2007 the Appellant there and then represented by a certain H. M. Van Alphen of Grant Thornton Neuhaus, writing requested the Respondent for a reconsideration of Directive No. AB 134382. The request *inter alia* reads as follows:

> *"From 1 January 2007, Metropolitan Namibia has appointed Mr. Fouché to the newly created position of Executive Manager: Business development South. This position will require him to be the executive director of Metropolitan Namibia, Metropolitan Lesotho and Metropolitan Botswana with the managing directors of these three businesses reporting directly to him.*
>
> *Although Mr. Fouché will be ordinarily resident in Namibia and will have an office in Windhoek, he is obliged to spend 60% of his time in Botswana, Lesotho and Cape Town.*
>
> *The above poses the question: Where is the income from employment taxed?*
>
> *For section 15(1)(f) of the Income Tax Act, 1981 to apply, four requirements have to be met:*
>
> *1) The taxpayer must ordinarily be resident in Namibia.*

2) He must be employed by an employer in Namibia and the income must be paid for services or work rendered for or on behalf of that employer.

3) The service must be rendered outside Namibia.

4) The service must be rendered or the work done "during any temporary absence of such person from Namibia.

From the aforegoing it is clear to me that the first three requirements are met and attention must be directed to the fourth requirement."

[16] The request goes on to quote certain portions from the judgment by Zietsman JP in *CIR v Whitfield*[2] and on the strength thereof certain submissions are made and it concludes as follows:

"In my view the income earned by Mr. Fouché in respect of services rendered outside Namibia should not be taxable in Namibia.

You are, therefore, kindly requested to reconsider the directive issued in this matter."

[17] There is nothing on record to indicate that the Respondent ever responded to this request at all and on the 26th of September 2008 the Respondent lodged his *"Self Assessment Return of Income,: Individual Business and/or Farmers"* with the Respondent. The self-assessment return was accompanied by the following documentation: (i) An Employee's Tax Certificate by Metropolitan Namibia, (ii) A Return of Payment issued by Canocopy (Pty) Ltd; (iii) Annual Financial Statements of the Appellant for the period ending 29 February 2008; (iv) Annual Financial Statements of Café Brazza Partnerships for the period ending 29 February 2008; (v) Financial Statements of Pumba Investments for the year ending 29 February 2008; (vi) Annual Financial Statements of Okaseka Farming Partnership for the year ended 29 February 2008, and Financial Statements of Leeben Farming for the year ended 29 February 2008.

[2] 1993 (2) SA 236 (E), 55 SATC 158

[18] Apart from the above, the Appellant's Self-Assessment Return was accompanied by a document headed: "Tax Computation". This document is as follows:

	Total Employment	40% Namibia	30% Botswana	30% Lesotho
Basic salary	586,989	234,796	176,097	176,097
Tax value housing allowance	72,472	28,989	21,742	21,742
Travelling allowance	78,000	31,200	23,400	23,400
Performance bonus	240,000	96,000	72,000	72,000
GROSS REMUNERATION	977,461	390,984	293,238	293,238
EXPENDITURE	(95,615)	(38,246)	(28,684)	(28,684)
Pension fund – Metropolitan	55,298	22,119	16,589	16,589
Motor vehicle expenses	40,317	16,127	12,095	12,095
- wear and tear allowance	67,194			
- repair and maintenance	-			
- insurance	-			
- fuel	-			
	67,194			
40% private use	(26,878)			
TAXABLE INCOME	881,846	352,739	264,554	264,554

[19] The Tax computation further records the following:

"Motor vehicle: capital expenditure

Make: Toyota Land Cruiser station wagon

Cost of vehicle *201,583*

Section 17(1)(E) claim (year 3 of 3) *67,194*

Note to the computation:

Please refer to the attached letter setting out the conditions of employment of Mr Fouché ad the reasoning as to why the taxpayer is of the opinion why only that income attributable to his services in Namibia is taxable in Namibia."

[20] I am satisfied that the Appellant's Self-Assessment Return of Income, corresponds in all respects with the supporting documentation referred to above and the Tax Computation which accompanied same.

[21] It is apparent from the record that eventually on the 9th of March 2009 the Respondent finally assessed the Appellant for the financial year 2008. Although the Respondent's assessment of the Appellant was not included in the record filed by the Respondent, the letter dated 15 June 2009 by the Appellant's auditors *inter alia* records as follows:

> *"In terms of section 71 of the Income Tax Act, Act 24 of 1981, as amended, ("the Income Tax Act"), we hereby object to the income tax assessment for the 2008 year of assessment issued on 9 March 2009 to Mr. R A V E Fouché ("the taxpayer")"*

[22] Before I proceed I deem it necessary to briefly deal with the provisions of section 71 of the Income Tax Act. Section 71 of the Act governs the time and manner for lodging objections against assessments by the Receiver of Revenue. Section 71 of the Act provides as follows:

> *"(1) Objections to any assessment made under this Act may be made within 90 days after the date of the issue of the notice of assessment, in the manner and under the terms prescribed by this Act by any taxpayer who is aggrieved by any assessment in which he or she is interested.*
>
> *(2) No objection shall be entertained by the Minister which is not delivered at his office or posted to him in sufficient time to reach him on or before the last day appointed for lodging objections, unless the Minister is satisfied that reasonable grounds exist for delay in lodging the objection.*
>
> *(3) Every objection shall be in writing and shall specify in detail the grounds upon which it is made.*
>
> *(4) On receipt of a notice of objection to an assessment the Minister may reduce or alter the assessment or may disallow the objection and shall send the taxpayer notice of such alteration, reduction or disallowance, and record any alteration or reduction made in the assessment.*

(5) Where no objections are made to any assessment or where objections have been allowed or withdrawn, such assessment or altered or reduced assessment, as the case may be, shall, subject to the right of appeal hereinafter provided, be final and conclusive."

[23] It follows that a taxpayer who wants to object to an assessment by the Minister must take the following steps:

(i) *He must object to the assessment within 90 days from the date of issue of the notice of assessment* (not the date of receipt). Since the objection must be made within 90 days, section 4 of the Interpretation of Laws Proclamation, 1920 (Proclamation 37 of 1920) applies. The 90 days must be reckoned excluding the first day and including the last day and where the last day falls on a Sunday or public holiday, also excluding such Sunday or public holiday. Generally, the objection will be of no force and effect unless it is delivered to the Minister within the period prescribed for lodging such an objection or within the extended period as may be allowed by the Minister.[3]

(ii) *An objection that does not reach the Minister on/before the last day appointed for the lodging of objections may no longer be considered by the Minister, unless the taxpayer satisfies the Minister that reasonable grounds exists for the delay in lodging the objection.*[4] The section clearly implies that the Minister may extend the period within which the objection must be delivered when he is satisfied that reasonable grounds exist for the delay in delivering the notice of objection. To that extent the Minister has a discretion which must be exercised judicially having regard to the reasons for the delay in lodging any objection. It follows that any decision by the Minister in the exercise of such discretion will also be subject to objection and appeal; and the onus to provide reasonable grounds for the failure to deliver

[3]See Section 71(2)
[4]Section 71(2)

his/her/its objection to an assessment within the 90 day period lies on the objector.[5]

(iii) *Every objection must be in writing and must specify in detail the grounds upon which it is made.*[6] The grounds for the objection must be set out clearly and completely because in any litigation arising from the objection, particularly any appeal, the taxpayer will be restricted to these grounds and no provision is made for the Minister to agree to an amendment of the grounds.

(iv) *On receipt of a notice of objection, the Minister <u>may</u> reduce or alter the assessment or may disallow the objection and <u>shall</u> send the taxpayer notice of such alteration, reduction or disallowance, and record any alteration or reduction made in the assessment.*[7] Here too, it is apparent that the Minister has discretion to reduce or alter an assessment or to disallow the objection. This is borne out by the word 'may' in the first part. This discretion must however similarly be exercised judicially. If he allows it, either wholly or partially, he must reduced or alter the assessment. Either way he is compelled to send to the taxpayer notice of such alteration, reduction or disallowance, and record any alternation or reduction made in the assessment. It is respectfully submitted that such notice must be notice in writing.[8]

(v) *Where no objections are made to any assessment or where objections have been allowed or withdrawn, such assessment or altered or reduced assessment, as the case may be, shall, subject to the right of appeal be final and conclusive.* Such an assessment is final and conclusive against both the Minister and the taxpayer.[9] Should the Minister disallow the objection in part or

[5]Section 72
[6]Section 71(3)
[7]Section 71(4)
[8]Section 1 read with Section 67(2) of the Income Tax Act, 1981
[9]*Miller v CIR (SWA) 1952 (1) SA 474 (A); Kahn v CIR, 1925 EDL 343*

whole, section 73 provides a right of appeal against this decision to a special Court for hearing income tax appeals.[10]

[24] I accept for purposes hereof that the Respondent's assessment of the Appellant was issued on 9 March 2009.

[25] The Appellant's written objection is dated 15 June 2009 and was delivered to the Respondent on 26 June 2009. *Prima facie* the objection was delivered late and some 19 days out of time. I shall later return to the objection in question.

[26] Despite late delivery of the objection, the Respondent nonetheless dealt with the objection and on the 29th of June 2009 it addressed a letter to the Appellant. In this letter the following is stated:

> *"I refer to your letter dated 15 June 2009 in which you objected to the assessment for the tax year ender 28 February 2008.*
>
> *Please be informed that your objection has been disallowed and the amount is therefore due and payable.*
>
> *In terms of section 73 of the Income Tax Act, 1981, (Act 24 of 1981) as amended (the Act), you may appeal against the disallowing of the objection and such appeal must be lodged within 30 days from the date of this notice. Such appeal must be I writing and shall be based on the grounds reflected in your objection of the assessment.*
>
> *The Act has been amended to make provision that the taxpayer has the choice of appealing to either a Tax Tribunal or the Special Court of Appeal. You are thus herewith requested to inform the receiver of Revenue, together with your notice of appeal, whether the case should be heard by the Tax tribunal or the Special Court of Appeal.*
>
> *You will thereafter be duly informed when such notice of appeal will be heard."*

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It is apparent that not a single reason was provided by the respondent for the refusal of the Appellant's objection.

[27] On 28 July 2009 the Appellant, represented by certain Cameron Kotze of Ernst & Young, served and filed Appellant's notice of Appeal. It reads as follows:

> ***"R A V E FOUCHÉ***
> ***0967153 – 01 – 01***
> ***Notice of appeal to Special Court for hearing Income Tax Appeals***
>
> *We refer to your letter dated 29 June 2009 and hereby lodge an appeal to the Special Court for hearing Income Tax Appeals against the disallowance of our objection in terms of section 73 of the Income Tax Act 24 of 1981 ("the Income Tax Act'")*
>
> *Our grounds of our appeal are as follows:*
>
> - *The provisions of section 15(1)(f) of the Income Tax Act 24 of 1981 ("the Income Tax Act") deeming that the income from services rendered during a temporary absence from Namibia by a person ordinarily resident in Namibia, is of a Namibian source, cannot apply to the taxpayer in the present case.*
>
> - *The letter of appointment makes it clear that the taxpayer is expected to spend time outside Namibia on an ongoing and permanent basis every month and that these absences from Namibia are not temporary for the purposes of section 15(1)(f) of the Income tax Act;*
>
> - *The income from the services rendered in Botswana and Lesotho will not be taxable in Namibia due to the fact that the income is not sourced in Namibia and the deeming provisions in section 15(1)(f) will not be applicable.*
>
> *Please advise the writer of the date set for hearing this appeal in terms of section 73(9) of the Income Tax Act."*

[28] On 14 October 2009 the Respondent acknowledged receipt, in writing, of the notice of appeal and on 26 September 2011 Respondent served and filed its Notice of Set Down of the Appeal.

[29] The normal position, it would seem, is that income earned outside Namibia is not taxable in Namibia. The deeming provisions of Section 9(1) however introduce certain exceptions to this general rule.

[30] The question in this appeal *inter alia* is what meaning should be ascribed to the words '*during any temporary absence of such person from Namibia'.* This is a legal issue which I and I alone may determine

[31] The evidence in my view clearly establishes that the Appellant is employed by Metropolitan Namibia (Pty) Ltd; he is ordinarily resident in Namibia; and is remunerated for his services rendered by his employer Metropolitan Namibia, this remuneration includes (on a pro rata basis) remuneration for services rendered to Metropolitan Botswana (30%) and Metropolitan Lesotho (30%); In terms of the Appellant's letter of appointment he is required to physically render his services in each of the specified countries outside Namibia; In Namibia his serves is limited to forming an asset management company and investigate the feasibility of a micro lending operation. In Lesotho and Botswana on the other hand, the Appellant's responsibilities include the up-skill of management and the enhancement of profit contributions and establishment of offices for those companies; To this extent the Appellant, in terms of his conditions of employment is obliged to spend 40% of his time within Namibia and 60% of his time in Botswana and Lesotho jointly to be divided between the latter two companies on a 30/30/ basis; The services so rendered to Metropolitan Botswana and Metropolitan Lesotho were rendered outside of Namibia are reflected in his tax

computation, attached to his self assessment and apportioned on that basis.

[32] In terms of the Appellant's objection it is submitted that Namibia has a source-based tax system in terms whereof any income earned from a Namibian source or a deemed to be income earned from a Namibian source is taxable within Namibia; unless a double taxation agreement overrides the provisions of the Act; the source of income for services rendered is the place where the services are rendered and not where the service contract as such was signed or payment was received. For this proposition reliance is placed on *COT v Stein* (1958 FC).

[33] I understand Mr. Heathcote's argument to be the following: the general rule is that income earned from a source outside Namibia is not taxable within Namibia. To this general rules, section 15 creates certain exceptions in that in terms of the section certain receipts or accruals are, by virtue of that section deemed to constitute receipts and accruals of a Namibian source; One of those provisions is section 15(1)(f) of the Act. It reads as follows:

> *"(1) An amount shall be deemed to have accrued to any person from a source within Namibia if it has been received by or has accrued to or in favour of such person by virtue of-*
>
> *(f) any service rendered or work or labour done by such person outside Namibia, during any temporary absence of such person from Namibia, if such person is ordinarily resident in Namibia and such service is rendered or such work or labour is done for or on behalf of any employer by whom such person is employed in Namibia, whether the payment for such service or work or labour is or is to be made by a person resident in or out of Namibia and wheresoever payment for such service or work or labour is or is to be made;"*

[34] He argues that “ordinary residence” is not defined by the Act; and the question whether a person is ordinarily in a country is one of fact.[11]

[35] In *Commissioner for Inland Revenue v Kuttel*[12] the Appellate Division found that the term “ordinarily resident” is narrower that the term “resident” and hence, the natural and ordinary meaning of “ordinarily resident” was “the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration”.

[36] He submits that in respect of “Source of Income’, it is generally only income from a Namibian source that is subject to normal tax and persons carrying on business in Namibia are not taxed on their worldwide income. The term ‘source’, so the argument goes is not defined in the Act, but it has been held not to be a legal concept, but something which a practical man would regard as a real source of income. Ascertaining of the actual source of income is a practical hard matter of fact.[13]

[37] Mr. Heathcote submits that It is important to contextualise section 15(1)(f) within the Act. Firstly, it is a deeming provision. This in itself, so he submits, acknowledges that the Appellant would not, based on the source rule, pay income tax for services rendered outside Namibia. Secondly, it is by invoking the deeming provision that the Receiver may be entitled to receive tax from the Appellant which it would not otherwise have been entitled to. Thirdly, the invocation of the deeming provision is only possible if all the jurisdictional requirements in section 15(1)(f) of the Act are present. The absence of a crucial jurisdictional fact (in this case “temporary absence”) prohibits the Receiver from invoking the deeming provision. In such

[11]Cohen v Commissioner of Inland Revenue; 1946 AD 174, at 179
[12]1992 (3) SA 242 (A) at 247J – 248A
[13]Rhodesia metals Ltd (In Liquidation) v Commissioner for Taxes, 1938 AD 282

circumstances the normal source rule determines the outcome of this appeal.

[38] Relying on *Commissioner of Inland Revenue v Whitfield*[14] Mr Heathcote argues that the Appellant's absences from Namibia, having regard to the terms and conditions of his employment are not *"temporary absences from Namibia"* as contemplated by section 15(1)(f) of the Act.

[39] Mr. Strauss for the respondent tried to counter this argument inter alia by relying on ITC 235 (1932) 6 SATC 262 (U) and ITC 445 (1939) 11 SATC 86 (U.) He was however constrained to concede that on the facts both cases were entirely distinguishable from the matter which I have to decide. In both those cases the services in question were rendered to the employer as such.

[40] The first question is what meaning should be given to the words: *"temporary absences from Namibia"* as contemplated by section 15(1)(f) of the Act.

[41] The same question arose in Income Tax Case No 1170 34 (1972) SATC 76. Although the facts of that case is distinguishable from the matter I must decide, Watermeyer J, in his judgment, in reference to the South-African equivalent of section 15(1)(f) of the Act, quoting *The Shorter Oxford English Dictionary,* held that the word *'temporary"* could mean either *'lasting for a limited time'* or *'not permanent'.*[15]

[42] In the very same case, Watermeyer JP also stated that it was in his opinion not possible to lay down any hard and fast rule with regard to a time of absence which should be regarded as temporary, and that each case, must be decided on its own facts and circumstances.

[14] 1993 (2) SA 236 (EC)
[15] See footnote 11 below

[43] This very question arose in *Commissioner for Inland Revenue v Whitfield,*[16] Zietsman JP referring to the above quote, stated:

> *"If one accepts that the term as used in the section means 'lasting for a limited time', I do not think it can be said that Whitfield's regular, ongoing absences from the Republic in accordance with his working contract, can be said to be absences lasting for a limited time."*

[44] In the *Whitfield*-case Whitfield was permanently resident within the Republic of South-Africa and had fixed property in East London; employed by a South-African company at a basic salary of R590 per month; a company motor vehicle, and further benefits such as membership of a medical aid and pension fund. Most of his income was derived from commissions on sales concluded for and on behalf of his employer. In addition thereto the company delegated to him the areas of Lesotho, Transkei and Ciskei in which he could negotiate sales. To that extent he acted as an agent for his employer and the commissions earned on sales in these areas (i.e. 80% of his total income for the three tax years in question) were paid to him by his employer in South-Africa. He also negotiated sales for his employer in the Republic of South-Africa on which he also earned commissions. The Receiver of Revenue in his assessment of Whitfield had decided that in terms of section 9(1)*bis* of the South-African Income Tax Act, he was liable to be taxed in the Republic of South-Africa on commission earned by him in Lesotho, Ciskei and Transkei and against this assessment he appealed.[17]

It goes without saying that the facts in the matter before us are almost identical to the Whitfield case.

[45] Section 9(1)(d)*bis* of the South-African Income Tax Act read as follows:

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[16] 1993 (2) SA 236 (E); 55 SATC 158
[17] At 237 H – 238 C

"(1) An amount shall be deemed to have accrued to any person from a source within ***the Republic*** *if it has been received by or has accrued to or in favour of such person by virtue of-*

9(d)bis any service rendered or work or labour done by such person outside ***the Republic****, during any temporary absence of such person from* ***the Republic****, if such person is ordinarily resident in* ***the Republic*** *and such service is rendered or such work or labour is done for or on behalf of any employer by whom such person is employed in* ***the Republic****, whether the payment for such service or work or labour is or is to be made by a person resident in or out of* ***the Republic*** *and wheresoever payment for such service or work or labour is or is to be made;"*

[46] A comparison between section 15(1)(f) of the Act and Section 9(1)(d)*bis* reveals that save for the Words "Namibia" and "The Republic" both sections read exactly the same.

[47] In his judgment Zietsman JP stated as follows:

"For section 9(1)(d)bis to apply, four requirements must be present. They are:

(1) the taxpayer must have been ordinarily resident in the Republic;
(2) he must have been employed by an employer in the Republic and the income must be for services rendered or work done for or on behalf of that employer;
(3) the services must have been rendered for or the work done outside the Republic; and
(4) the service must have been rendered or the work done 'during any temporary absence of such person from the Republic."[18]

[48] In as much as section 15(1)(f) of the Act reads exactly the same, the same requirements as stated by Zietsman JP are in point on section 15(1)(f) of the Act.

[18] At 238 C - E

[49] In dealing with Counsel for the Appellant's argument in the *Whitfield*-case Zietsman JP stated as follows:

> *"Mr. Lowe, on behalf of the Appellant, has submitted that the word 'temporary' in the section must be contrasted with the word 'permanent'… that income earned by a person employed by a South-African company in respect of work done outside the Republic is not taxable in South-Africa only if such person's absence from the Republic can be said to be permanent. The difficulty with this argument is that the section applies to persons ordinarily resident in the Republic and it would seem to me to be a contradiction in terms to say that a person ordinarily resident in the Republic is permanently absent from the Republic. Mr. Lowe seeks to counter this difficulty by submitting that the permanent absence from the Republic must be read as referring only to work done by the person concerned. He submits that a person can have his home in the Republic and be ordinarily resident in the Republic, but perform all of his work outside the Republic. He will then be ordinarily resident in the Republic, but perform all his work outside the Republic. He will then be ordinarily resident in the Republic but permanently absent therefrom as far as his working life is concerned. Mr. Lowe concedes however that if his argument is correct it will follow that if such person does any work at all in the Republic his absence from the Republic to do work elsewhere will have to be regarded as temporary and not permanent. He submits accordingly that if a person working for a company in the Republic, and resident in the republic, works outside the Republic for all 52 weeks of the year his income earned outside the Republic will not be taxable in the Republic. However if he works outside the Republic for 51 weeks of the year and does work in the republic for one week of the year, all of the income he earns both within and outside the Republic will be taxable in the Republic. I have difficulty with these submissions and with the rather illogical result that will be achieved if such submissions are held to be correct.*[19]
>
> *If the words 'during any temporary absence from the Republic" in the section had been omitted there would have been no difficulty in interpreting the section. It would then mean that a person ordinarily resident in the Republic, and employed by an employer in the Republic, would be taxed on all income earned by him whether the work he did was done within or outside the Republic. This is however not the position. The*

[19] At 238G – 239C

Legislature has chosen to include the word 'during any temporary absence from the Republic" while at the same time making the section applicable only to residents ordinarily resident in the Republic. Some meaning must be given to the words and it seems to me accordingly that the Legislature had two different situations in mind. The one situation is that of a person ordinarily resident in the Republic who performs work outside the Republic during a temporary absence from the Republic. The other situation is that of a person ordinarily resident in the Republic and who performs work outside the Republic during an absence from the republic which must be held to be other than temporary, although it could never be permanent because of the requirement that he must be ordinarily resident in the Republic."[20]

[50] Referring to the general position to which I have referred above, Zietsman JP comes to the following conclusion:

"Where there is uncertainty or ambiguity in the wording of the various subsection to section 9(1), the Special Court, in my opinion, correctly held that the contra fiscum interpretation should be adopted.

I have difficulty in accepting the interpretation sought to be placed upon the section by the Appellant. The Special Court gave some meaning to the section and concluded that, because Whitfield's absences from the Republic while earning the income in question were in accordance with

> *'a fixed and permanent modus operandi on (his) part in terms of which a substantial period of time, as a regular pattern, is set aside by him for visits to the neighbouring territories for the purposes of engaging in the income-earning activities',*

his absences were not temporary absences from the Republic in terms of the section."

[20] At 239D - G

[51] I am respectfully of the view that everything which Zietsman JP stated and held in the Whitfield-case applies in point to the matter which I have to decide.

[52] The evidence shows that both the Botswana and Lesotho company within the Metropolitan Group, bears a proportionate portion of the Appellant's salary. The mere fact that Metropolitan Namibia pays the full salary is in itself not indicative that the requirement of section 15(1)(f) is met. Each case depends on its own facts and one must also have regard to the inter-company relationship to determine which company within the group of companies pays for what portion of his income.

[53] There can, in my view, be no question that his division of time between Namibia, Lesotho and Botswana is 'part of a fixed and permanent *modus operandi* on his part in terms of which a substantial period of time as a regular pattern, in fact 60% of his time, is set aside by him for visits to the neighbouring territories of Lesotho and Botswana for the purposes of engaging in the income-earning activities there.

[54] In the result the fourth jurisdictional requirement as stated in the Whitfield case, does not apply to the Appellant and he cannot be caught by the deeming provisions of section 15(1)(f).

[55] We find that the Respondent was wrong when it included in its assessment of the Appellant, the income received for his services rendered in Botswana and Lesotho, in that same should have been excluded from his assessment.

[56] The only issue which remains is that of costs. In terms of Section 73(17) the court shall not make an order for costs save where it is held that the Minister's claim is unreasonable.

[57] Mr Heathcote submitted that the disallowance of Mr. Fouché's objection by the Minister in terms of section 71(4) of the Act, should be held by

this Honourable Court as being unreasonable in terms of section 73(17) of the Act.

[58] He relied for this proposition on *Mostert v The Minister of Justice 2003 NR 11 (SC)*, where Strydom CJ at page 28 paragraph G, held as follows in relation to what constitutes reasonable conduct: *"(H)aving sound judgment; moderate; ready to listen to reason; not absurd; in accordance with reason.*"

[59] Mr. Heathcote submits that it is clear that this is a dispute about a February 2008 assessment, which arose way before that, already when the directive was sought; that until date hereof not a single reason for the refusal of the directive, the assessment or the refusal of the objection was given; appellant is citizen who lodged his assessment; who wants to reason with the Respondent; he has given the respondent case-law for his proposition; despite this not a single reason is provided; this is not how the taxpayer should be treated.

[60] It needs to be said that the procedures provided for by the Act are there to ensure speedy resolution of objections and to ensure compliance with the provisions of Article 18 of the Namibian Constitution which provides as follows:

> *"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."*

[61] What should typically happen, particularly in light of the provisions of Article 18 is this: Once a taxpayer lodges his self-assessment, the Receiver of Revenue should properly apply his/her mind in scrutinizing and considering the self assessment; Should it become apparent that further information is required, such request should be addressed to the

taxpayer; should the Receiver be of the opinion that an additional charge may be levied; notice of such possibility should be given to the taxpayer and he/she/it should be afforded an opportunity to make representations why the charge should not be imposed; If written submissions are made it must similarly be properly considered. Whenever oral submissions are made, it should be properly recorded and it should similarly be properly considered; Should the Receiver, after submissions come to the conclusion that such additional charge may be levied, notice thereof as well as the reasons should be provided to the taxpayer; Should the taxpayer object to such assessment the Receiver of Revenue must properly consider the grounds of objection and if the objection is refused, reasons for such refusal must be provided. It is not difficult to conceive that such approach will enhance a relationship of trust between the Receiver and taxpayers, generally.

[62] The history of the matter currently before us unfortunately points to a high-handed approach on the part of the Respondent towards the Appellant.

[63] The tax directive was sought as early as 5 September 2007; The response was abrupt and bold: *"Fully taxable on income for services rendered in and outside Namibia for or on behalf of Metropolitan Namibia."* No reason for such decision was given despite the request having been accompanied by the Appellant's letter for employment. When this was followed up by a request to reconsider dated 6 December 2007, comprehensively dealing with decided case-law; respondent plainly did not respond; here too no opportunity was afforded to the Appellant or his representatives to make submissions; The same approach is followed as regards the Appellant's self-assessment: No notice is given to make any representations to the receiver and by this time it had on file all authority on which the Appellant relied for the calculation in terms of the tax schedule; No notice is given to the Appellant that an additional charge may be levied. All the Appellant received was an assessment, with no reasons whatsoever; When Appellant subsequently objected,

against and motivated with case law, the Respondent's response is again bold and short" "…your objection is disallowed…"; no reasons are given at all. Despite the objection having been lodged as early as 15 June 2009 and the Appeal on 28 July 2009, it has taken the Respondent another more than two years to enroll this matter.

[64] If this is an indication of a general approach towards taxpayers I would be extremely concerned. This is not in compliance with Article 18 of the constitution or Common law principles reaffirmed by the article. It is simply not the manner in which the Respondent is supposed to conduct itself as against taxpayers, particularly in a constitutional dispensation.

[65] We find that the Respondent's conduct in all the circumstances are most unreasonable.

In the result the following order is issued:

1. The Appeal succeeds with costs, including the costs consequent upon the employment of two instructed counsel and one instructing counsel.

2. It is declared that the deeming provision contained in section 15(1)(f) of the Income Tax Act, No. 24 of 1981, is not applicable to the income received by the Appellant for services rendered outside Namibia on behalf of his employer for year ending February 2008.

3. The Respondent's assessment of the Appellant on 9 March 2009 is hereby set aside.

4. Receiver of Revenue is ordered to revise the Appellant's income tax assessment for the year ended 29 February 2008, on the basis that only 40% of his income received from his employer should be taken into

consideration for determining his tax liability when his gross income is determined.

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SCHICKERLING AJ

I CONCUR:

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KASUTO (Assessor)

I CONCUR:

_____

KARUAIHE-MARTIN (Assessor)

ON BEHALF OF THE APPELLANT:	**ADV. HEATHCOTE**
Assisted by	**ADV VAN ZYL**
Instructed by:	**VAN DER MERWE-GREEFF**
ON BEHALF OF THE RESPONDENT:	**MR STRAUSS**
Instructed by:	**GOVERNMENT ATTORNEYS**