

Some thoughts on the meaning of “expenditure” in the Income Tax Act

EC JANSEN VAN RENSBURG*

1 Introduction

In calculating a taxpayer’s taxable income under the Income Tax Act 58 of 1962 (“the act”), a deduction of his “expenditure ... actually incurred” is allowed against the taxpayer’s income.¹ The meaning of the word “expenditure” has in the past enjoyed relative little attention in our courts. However, this changed with *C:SARS v Labat Africa Limited*,² in which the supreme court of appeal ruled that the issuing of shares by a company as consideration for the acquisition of assets does not constitute “expenditure” for purposes of the act.³

From time to time companies issue shares⁴, rather than pay cash, as consideration for the acquisition of assets or the procurement of services. This gives rise to the question of whether these “share-based payments”⁵ may be regarded as “expenditure” in determining the income tax consequences of the transaction. The question was considered a number of times by the tax court before the supreme court of appeal ruled on it in the *Labat* case. This article will briefly refer to these decisions by the tax court, before exploring the legal nature of shares and the rights flowing from subscription agreements. The two main arguments in favour of regarding share-based payments as “expenditure”, and the response of the supreme court of appeal to these arguments, will then be analysed in order to draw some conclusions as to the meaning of the word “expenditure” in section 11 of the act in the context of share-based payments and also more generally.

It may be noted that, due to the insertion of section 24B into the act, the ambit of the supreme court of appeal’s decision is today less extensive than when the transaction in the *Labat* case took place.⁶ The decision, however, remains important

* Senior lecturer in Taxation Law, University of Stellenbosch.

¹ s 11(a). The other requirements for deductibility are not mentioned here.

² 2012 1 All SA 613 (SCA) per Harms AP with Lewis, Heher and Maya JJA and Plasket AJA concurring.

³ In this case the relevant section under consideration was s 11(gA), rather than s 11(a). There are also other sections in the act that refer to “expenditure”, eg par 20(1)(a) of the Eighth Schedule. However, the word “expenditure” is likely to have the same meaning under all these sections. See in this regard, in respect of s 11(a) and (gA), Cilliers “The *Labat* decision and the interaction between ‘expenditure’ and the ‘actually incurred’ requirement” 2011 *The Taxpayer* 226.

⁴ See n 24 below.

⁵ The terminology is used by De Swardt “Do share-based payments made for the procurement of services qualify as expenditure actually incurred?” 2008 *De Jure* 475 and is also, for the sake of brevity, used in this article.

⁶ S 24B(1) deems a company that acquires an asset as consideration for shares issued by the company to have incurred expenditure. It has been argued that the section will not apply where shares are issued in return for services. See n 7 below. Other sections may also override the principles discussed in this article, such as s 11(1A) and the corporate rules contained in s 41 to 47. These sections are not discussed in this article.

for those instances that are not covered by section 24B,⁷ as well as for a more general understanding of the meaning of “expenditure”.

2 South African case law on the deductibility of share-based payments

The question of whether share-based payments may constitute “expenditure” was first considered in *ITC 1783*,⁸ and subsequently in *ITC 1801*.⁹ In both these cases the taxpayer, a company, had acquired a business as a going concern and issued shares to the counter-party as consideration. And in both cases the taxpayer’s claim for a deduction in respect of the value of the shares were denied by the commissioner for the South African Revenue Service, since the commissioner argued that the taxpayer did not incur “expenditure”.¹⁰

In the first of the two cases, *ITC 1783*, the taxpayer’s claim¹¹ failed. The Gauteng tax court defined “expenditure” as “the spending of money or its equivalent eg time or labour and a resultant diminution of the assets of the person incurring such expenditure” and held that, since the issuing of shares does not reduce the assets of the issuing company, this does not constitute “expenditure” of the company and is thus not deductible.¹² The only authority given by the court was an extract from a text book.¹³ The authors of this text book, in turn, gave no authority for their view, although they contended that it was SARS’ practice to treat the issuing of shares as expenditure. This was denied by the commissioner’s representative at the hearing and no evidence was led by the taxpayer in this regard.¹⁴

The taxpayer’s claim,¹⁵ on the other hand, succeeded in *ITC 1801*, and the Gauteng tax court held that *ITC 1783* was “clearly wrong”.¹⁶ The commissioner appealed

⁷ It has been argued that s 24B(1) will not apply where shares are issued in return for services. See *eg De Swardt* (n 5) 478; Silke “Expenditure actually incurred?” 2005 *Tax Planning* 12 14, Brincker *Taxation Principles of Interest and other Financing Transactions* (2005) P-8 Issue 8 and P-13 Issue 7 and Burt “Issuing shares as consideration - Expenditure actually incurred?” 2004 *Tax Planning* 133 136. There is also a view that a deduction for share-based payments under s 11(a) or (gA) (had share-based payments been regarded as “expenditure”) might under certain circumstances have been preferable to a deduction under s 24B. See in this regard Editorial “No-brainer” 2011 *The Taxpayer* 181 182. A discussion of the application and wording of s 24B is beyond the scope of this article.

⁸ 66 SATC 373. In a prior case, that of *ITC 703* 17 SATC 208, a company was allowed a partial deduction in respect of the issue of its shares. However, since the question as to whether the taxpayer incurred “expenditure” was never considered by the court, it is of little assistance in the present query.

⁹ 68 SATC 57. A similar deduction was also subsequently allowed in *ITC 1822* 69 SATC 200, but since the reasoning in *ITC 1801* was accepted without further argument in par 21 of that case, the decision in *ITC 1822* will not be discussed here.

¹⁰ This was not the only ground on which these claims were denied, but the other grounds are not relevant to this discussion.

¹¹ The taxpayer in *ITC 1783* (n 8) claimed as a deduction under s 11(a) the part of the issue price pertaining to a business licence agreement. The licence was not assignable or transferrable and the taxpayer entered into a new licence agreement with the licensor.

¹² par 7.2. See also Brincker (n 7) par P-4 Issue 7.

¹³ *ITC 1783* (n 8) par 7.4 refers to “para 7.4 of *Silke on South African Income Tax* (‘Memorial Edition’)”.

¹⁴ *ITC 1783* (n 8) par 7.5. SARS issued a draft interpretation note entitled “Deductions: expenditure actually incurred: assets or services acquired in exchange for the issue of shares” 16-03-2004 after this judgment. See Silke (n 7) 14.

¹⁵ In this case the taxpayer claimed an allowance under s 11(gA) in respect of the acquisition of a trademark that was transferred to the taxpayer as part of the business it had acquired.

¹⁶ par 24. The arguments raised in *ITC 1801* (n 9) are discussed below.

against the decision to the North Gauteng high court, where the court upheld, in a short judgment, the decision of the Gauteng tax court.¹⁷ Again the commissioner appealed, this time to the supreme court of appeal, and the appeal succeeded.

The supreme court of appeal defined the word “expenditure” according to its ordinary meaning, that is:

“... the action of spending funds; disbursement or consumption; and hence the amount of money spent ... In the context of the act it would also include the disbursement of other assets with a monetary value. *Expenditure, accordingly, requires a diminution (even if only temporary) or at the very least movement of assets of the person who expends.*”¹⁸

The court concluded that, since the issuing of shares does not result in the diminution of the assets of the company, or a movement of assets from the company to the subscriber, it does not constitute “expenditure” of the company.¹⁹

3 *The legal nature of shares and the rights flowing from subscription agreements*

Shares are usually regarded as a complex of personal rights²⁰ and by issuing shares the company grants to the subscriber certain rights, for example the right to participate in the company’s distributions. However, these rights do not include a right of ownership in the assets of the company.²¹ Also, prior to their being issued, shares are not the property of the issuing company (or any other person)²² and the issuing of shares does not constitute the transfer by the company of its (or anyone else’s) property.²³

A company is not obliged to issue shares for cash.²⁴ When a company agrees to issue its shares for consideration consisting of assets, the contract is not a barter transaction²⁵ since the company does not agree to transfer property (or, indeed, anything) but rather agrees to create the complex of personal rights that comprises the share.²⁶ And despite the fact that the word “purchase” is often used to describe

¹⁷ *C: SARS v Labat Africa Ltd* 72 SATC 75.

¹⁸ par 12 – emphasis added.

¹⁹ par 14.

²⁰ Although the Companies Act 61 of 1973 was still in force at the time of the share-based payment in the *Labat* case, the new definition of “share” in s 1 of the Companies Act 71 of 2008 is unlikely to change any of the principles discussed in this article. See Cassim, Cassim, Cassim, Jooste, Shev and Yeats *Contemporary Company Law* (2011) 198, where the authors seem to support the view that the new definition of “share” in the Companies Act 71 of 2008 does not change the nature of shares as previously understood under the Companies Act 61 of 1973.

²¹ Cilliers, Benade, Henning, Du Plessis, Delpont, De Koker and Pretorius *Cilliers and Benade Corporate Law* (2000) 224 and Cassim *et al* (n 20) 198.

²² *Pilmer v Duke Group Limited (In Liquidation)* 207 CLR 165 par 20 and Oditah “Takeovers, share exchanges and the meaning of loss” 1996 *LQR* 424 426.

²³ Blackman, Jooste, Everingham, Yeats, Cassim, De la Harpe, Larkin and Rademeyer *Commentary on the Companies Act* (2002) par 5-255 Revision Service 6, 2009; *Ord Forrest Pty Ltd v Federal Commissioner of Taxation* 74 ATC 4034 4038, 4041 and 4046 and Oditah (n 22) 428.

²⁴ At the time when the taxpayer in the *Labat* case issued the relevant shares, the Companies Act 61 of 1973 applied. See *eg* s 93(2) which made it clear that shares could be allotted otherwise than for cash. Currently, s 40(1)(a) of the Companies Act 71 of 2008 provides that a board of a company may issue shares for adequate consideration and “consideration” is defined in s 1 as “anything of value”, which clearly includes consideration in kind.

²⁵ A barter transaction was defined in *Leonard Light Industries (Pty) Ltd v Wright* 1991 4 SA 628 (W) 633 as “a contract for the transfer by one person of property in a thing to another in return for a similar agreement by the latter”.

²⁶ *FCT v St Helens Farm (ACT) Pty Ltd* 146 CLR 336 350 and Blackman *et al* (n 23) par 5-255 Revision Service 6, 2009.

such an agreement, it is, at least technically, not a purchase and sale contract, since the company is neither a purchaser (it does not agree to pay a monetary amount), nor is it a seller (it does not agree to transfer goods to the counter-party).²⁷

It may sometimes be difficult to distinguish between those instances where a company has agreed to pay a monetary amount and those where it has agreed to issue shares, in return for the transfer of assets by the counter-party. In *Lace Proprietary Mines Ltd v Commissioner for Inland Revenue* the taxpayer agreed to transfer mineral rights in return for “£250,000, to be paid and satisfied by the allotment and issue to the seller of 1,000,000 shares of 5s each in the capital of the purchaser credited as fully paid-up”.²⁸ And in the *Labat* case, the taxpayer acquired the business “for a consideration of R120 000 000, discharged by the issue ... of 133 133 333 Acrem shares at an issue price of 90 cents per share”.²⁹ In both these cases³⁰ the court interpreted the contract to be one for the issuing of shares, and not for payment of a cash amount, since the company was in each case obliged to issue shares and not to pay the cash amount. Accordingly, by issuing shares under these contracts, the respective companies were discharging their duties as agreed under the contract; they were not settling a liability to pay a cash amount.³¹

It is sometimes argued that when a company issues shares for consideration in kind it has expended a monetary amount by way of set-off.³² Set-off takes place where parties are mutually indebted under obligations that are of a similar nature,³³ usually to pay money. In the current scenario, set-off would thus only be possible if the relevant contract created a duty on the company to pay the counter-party in cash, and for the counter-party to subscribe for the shares in cash. In this scenario, the cash amounts can be set-off and no cash needs to be exchanged. However, if the company’s duty under an agreement is to issue shares (as was the case in the *Labat* and *Lace Proprietary Mines* cases) and the counter-party’s duty is to transfer an asset (or to render services), clearly no such obligations to pay cash (or any other obligation of a similar nature) exists. Set-off, at least in the legal sense, thus does not take place when share-based payments are made.

Even so, it has been argued that share-based payments do have the same economic effect as set-off (the so-called “economic equivalent” argument); in other words, share-based payments are nothing but a “short cut” for the longer route under which the company could have issued shares for cash to the counter-party, and then used

²⁷ See the definition of a purchase and sale in De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1992) 313, the *Labat* case (SCA judgment) (n 2) par 3 and *Moosa v Lalloo* 1957 4 SA 207 (D) 219.

²⁸ 1938 AD 267 270.

²⁹ See the respondent’s heads of argument 10.3.1. At the time that the transaction in the *Labat* case took place, the taxpayer’s name was “Acrem Holdings Ltd”.

³⁰ the *Lace Proprietary Mines* case (n 28) 279 and the *Labat* case (SCA judgment) (n 2) par 3. The court in *ITC 1801* (n 9) did not dwell on this aspect; however, from par 14 to 17 one can deduce that the court was of the view that the taxpayer was liable to issue shares rather than pay a cash amount.

³¹ See also Blackman *et al* (n 23) par 5-262 Original Service 2002.

³² DM “Paying for goods or services by issuing shares” 2004 *The Taxpayer* 86-87. This was also argued on behalf of the taxpayer in the *Labat* case. See the respondent’s heads of argument 13.3.5 ff.

³³ Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract: General Principles* (2006) 550. See also *Ackermans Ltd v C:SARS; Pep Stores (SA) Ltd v C:SARS* 2011 1 SA 1 (SCA) par 8. There are also other requirements, which are not mentioned here.

the cash to pay the counter-party for the transfer of the assets.³⁴ However, this argument has been rejected in the *Labat* case and elsewhere³⁵ as not being relevant for tax purposes, since, in considering the tax implications of a transaction, our courts give effect to the transaction that was entered into³⁶ according to its legal nature. The fact that the same economic effect could have been achieved by entering into a transaction with a different legal nature is usually not relevant.

4 Arguments in favour of allowing a deduction

At least two arguments³⁷ are usually raised in favour of regarding share-based payments as “expenditure”. The first argument is that, on conclusion of the contract to make share-based payments, the taxpayer company has incurred a legal obligation and that this constitutes “expenditure” that was “actually incurred”. The subsequent issue of the shares, being merely a discharge of this obligation, is not relevant from a tax perspective.

The second argument is that, even if it is accepted that “expenditure” requires a diminution in the taxpayer’s assets, it can be said that when a taxpayer agrees to make a share-based payment, it forgoes its right to claim cash. And, since the right so forgone constitutes a diminution of the assets of the taxpayer, it constitutes “expenditure” by the taxpayer.

These arguments represent, in the words of Walton J, “a fascinating mixture of the undeniably correct with the obviously false”.³⁸ What follows is an attempt to identify which is which.

4.1 Expenditure equals the incurral of an obligation

The act allows for a deduction if a taxpayer has “actually incurred” “expenditure”.³⁹ The phrase “actually incurred” is usually understood to mean that the taxpayer must have an absolute and unconditional obligation to perform.⁴⁰ When it comes to the meaning of “expenditure”, it has been argued that the word refers to any type of performance (that has a monetary value⁴¹). Therefore, according to this argument in order for “expenditure” to be “actually incurred”, all that is required is that the

³⁴ DM (n 32) 87. It seems that this was the argument advanced by the high court in the *Labat* case (HC judgment) (n 17) 77-78 in favour of allowing share-based payments as deductions. The court in *ITC 1801* (n 9) referred with approval to the statement of DM mentioned earlier in this footnote and thus seems to have supported this argument too.

³⁵ the *Labat* case (SCA judgment) (n 2) par 15, the *Lace Proprietary Mines* (n 28) case 279 and *Lowry (Inspector of Taxes) v Consolidated African Selection Trust Ltd* 1940 AC 648 663 and 666.

³⁶ In the case of simulated transactions, the court will give effect to the real transaction.

³⁷ Other arguments that are sometimes raised are the economic equivalence argument previously mentioned and the argument that it is inequitable that the subscriber has to take the receipt of the shares into account in calculating its tax liability, but that the company cannot claim a deduction. See in this regard the argument of the master of the rolls mentioned in the *Lowry* case (n 35) 686. See also Ger “The problem of paying with shares” 2004 *De Rebus* 61 62 and Silke (n 7) 15. This argument was dismissed by the house of lords in the *Lowry* case 653 (n 35) and in the *Labat* case (SCA judgment) (n 2) par 16-17.

³⁸ *Shearer (Inspector of Taxes) v Bercain Ltd* 1980 3 All ER 295 305.

³⁹ See, eg, s 11(a) and 11(gA).

⁴⁰ See the cases referred to in the *Labat* case (SCA judgment) (n 2) par 7. The meaning of these words is not explored in this article.

⁴¹ See Burt (n 7) 133 and Burt “Issuing shares as consideration - II ITC 1801 vs ITC 1783” 2006 *Tax Planning* 47 48.

taxpayer has become unconditionally obliged to perform, irrespective of what that performance entails (provided that it has a monetary value).

This was the main argument accepted by the court in *ITC 1801*⁴² and by a number of authors.⁴³ Burt, for example, argues as follows: “[E]xpenditure will have been incurred if an unconditional legal obligation in terms of which some form of performance is due has been incurred, provided that the performance due has a monetary value. The incurral of the legal obligation as a fact cannot be affected by the means by which that obligation is discharged.”⁴⁴

The argument that expenditure refers to any type of performance with a monetary value was rejected by the supreme court of appeal in the *Labat* case.⁴⁵ The court ascribed separate meanings to the phrase “actually incurred” on the one hand and “expenditure” on the other. The words “actually incurred” refer to the fact that the taxpayer must be a debtor that is under an unconditional obligation to perform. The word “expenditure”, however, looks at the content of the performance, *ie* what the taxpayer is obliged to perform. In order for this performance to constitute “expenditure”, it should be a “diminution (even if only temporary) or at the very least movement of assets of the person who expends”.⁴⁶

In the *Labat* case the existence of an unconditional obligation to perform was never in issue⁴⁷ and the “actually incurred” requirement was thus clearly met. But the object of that obligation, being the performance consisting of the issuing of shares, did not constitute a diminution of the taxpayer’s assets, and the “expenditure” requirement was thus not met.⁴⁸

The judgment of the supreme court of appeal should not be read as affecting the timing of a deduction:⁴⁹ the effect of the judgment is not that a deduction can only be claimed once the taxpayer’s assets have actually diminished. Instead, once an unconditional obligation to perform exists, the taxpayer must claim the deduction, provided that the performance that he is obliged to perform (in future), will constitute a diminution or movement of his assets.

⁴² See especially par 7 and 20. See also the *Labat* case (SCA judgment) (n 2) par 6-7, from which it is clear that the court thought that this was the main basis for the decision in *ITC 1801* (n 9). De Swardt, in an article published before the supreme court of appeal’s judgment in the *Labat* case was handed down, did not regard this as the main basis for the decision in *ITC 1801* (n 9). See De Swardt (n 5) 482.

⁴³ See *eg* Ger (n 37) 61-62 and Ger “The problem of paying with shares resurfaces” 2012 *De Rebus* 48 49.

⁴⁴ Burt (n 7) 133 and Burt (n 41) 48. See also Burt (n 7) 134, where he argues: “The crucial question is ... whether the term ‘expenditure actually incurred’ envisages anything other than the incurral of an unconditional legal obligation in terms of which some form of performance is due, provided that the performance due has a monetary value”.

⁴⁵ It was also rejected by De Swardt in an article published before the judgment by the supreme court of appeal in the *Labat* case was handed down. See De Swardt (n 5) 481-482, with reference to Burger *The Tax Deductibility of Share-based Payments made as Consideration for Services Rendered* (2005 minor dissertation UP) 39 and 41. The dissertation was not accessible to the author of this article.

⁴⁶ par 12. See also Cilliers (n 3) 227.

⁴⁷ the *Labat* case (SCA judgment) (n 2) par 7.

⁴⁸ the *Labat* case (SCA judgment) (n 2) par 7, 8 and 14.

⁴⁹ See the *Labat* case (SCA judgment) (n 2) par 8, where Harms AP emphasises that “timing is not the question”. It has been said that the choice of wording adopted by Harms AP at the end of par 8 was perhaps not clear enough. See Emslie “Expenditure actually incurred” 2011 *The Taxpayer* 183 184-186 and Cilliers (n 3) 228 in this regard.

4.2 The “right forgone” argument

The second argument in favour of allowing a deduction accepts that “expenditure” requires a diminution in the taxpayer’s assets. However, according to this argument, a share-based payment does constitute a diminution in the company’s assets, in that, by issuing shares for a consideration in kind, the company is forgoing an asset, namely its right to issue the shares for cash.

Since the argument was raised in a number of cases decided in the United Kingdom, and also considered in other foreign jurisdictions such as Australia and Canada, much may be learned from these foreign views and case law. These sources are considered next.

4.2.1 Foreign views and case law

The Australian Taxation Office does not regard share-based payments as either an “outgoing” for purposes of section 8-1 of the Income Tax Assessment Act, 1997, or “expenditure” for purposes of section 73B⁵⁰ of the Income Tax Assessment Act, 1936.⁵¹ There is, however, limited Australian case law that deals with this question directly.⁵² The Australian Taxation Office’s view is thus mainly based on the argument that share-based payments constitute “no pecuniary detriment” to the company, a phrase borrowed from the house of lords’ decision in *Lowry (Inspector of Taxes) v Consolidated African Selection Trust Ltd.*⁵³

In the *Lowry* case, the taxpayer issued shares to its employees at par, which value was considerably less than the value at which the shares could have been issued in the market. It then claimed as a deduction in the calculation of its corporate income tax liability the difference between the par and market value of the shares – in other words, the premium it had forgone. The court, by a 3-2 majority, held that the premium forgone was not deductible. Viscount Caldecote LC phrased the issue to be resolved as follows: “I come back to the facts of this case, and I ask whether the issue of these shares in the manner adopted involved the respondent in any ‘distributions or expenses ... wholly and exclusively laid out or expended for the purposes of its trade.’”⁵⁴ He concluded that it did not: “Its capital was intact after the issue of the shares: *not a penny was in fact disbursed or expended*. Its trading receipts were not diminished, nor do I think it is a right view of the facts to say that the respondent gave away money’s worth to its *own pecuniary detriment*.”⁵⁵

⁵⁰ This section allows for a deduction in respect of research and development expenditure.

⁵¹ This is the equivalent of the general deduction formula (ss 11(a) and 23(g)) in the South African Income Tax Act 58 of 1962. Australian Taxation Office *TR 2008/5 Income Tax: Tax consequences for a company of issuing shares for assets or for services* [http://law.ato.gov.au/atolaw/view.htm?locid=%27TXR/TR20085/NAT/Australian Taxation Office%27&PiT=99991231235958 \(7-07-2012\)](http://law.ato.gov.au/atolaw/view.htm?locid=%27TXR/TR20085/NAT/Australian+Taxation+Office%27&PiT=99991231235958+(7-07-2012)+par+2+and+5) par 2 and 5.

⁵² See *TR 2008/5* (n 51) par 34-35 for a discussion of these cases.

⁵³ 1940 AC 648 (n 35).

⁵⁴ 657 – emphasis added. Contrary to the Australian Taxation Office, Canadian courts have rejected the decision in the *Lowry* case (n 35). See in this regard the decisions by the Tax Court of Canada in *Alcatel Canada Inc v The Queen* 2005 DTC 387 par 32 and *Trans Alta Corporation v The Queen* 2012 TCJ no 69 par 99. In both these cases a corporate taxpayer claimed deductions in respect of the issuing of shares to employees for full consideration (in the form of past services rendered by the employees). But compare this with the earlier decision by the federal court of appeal in *Placer Dome Inc v The Queen* 92 DTC 6402 6411, in which the *Lowry* case (n 35) was quoted with approval.

⁵⁵ 654 – emphasis added. The Master of Rolls worded the taxpayer’s argument as follows: “[The taxpayer] has remunerated its employee to its *own financial prejudice* by giving to its employee the power which it had itself of obtaining a monetary sum in respect of these shares” – emphasis added. See the *Lowry* case (n 35) 655.

Lord Russell of Killowen, who agreed with Viscount Caldecote LC, also noted that, if an employee is remunerated in kind, the value of the employer’s asset so transferred is deductible. But this, he held, is not what happened on the facts: “Here the respondents in my opinion parted with nothing; they transferred no asset of theirs to the servants ... [T]he respondents transferred neither money nor money’s worth to their servants; they merely elected not to obtain more than the nominal value of the shares ...”⁵⁶

The *Lowry* case was not referred to in any of the South African cases mentioned in this article. However, in *ITC 1801* reference was made⁵⁷ to the following three decisions from the United Kingdom:⁵⁸ *Osborne v Steel Barrel Co Limited*,⁵⁹ *Craddock v Zevo Finance Co Limited*⁶⁰ and *Stanton (Inspector of Taxes) v Drayton Commercial Investments Co Limited*.⁶¹ In all three cases the taxpayer had issued shares as consideration for the acquisition of assets: in the cases of *Osborne* and *Craddock* the assets acquired were held as trading stock, and in *Stanton* the assets were held on capital account. In the *Osborne* case the question was raised whether an amount could be included in the opening balance of the acquired trading stock and the question was decided by the court of appeal in favour of the taxpayer. In both the *Craddock* and *Stanton* cases⁶² it was accepted by Inland Revenue that an amount could be deducted,⁶³ but the method of calculating the deduction was disputed.

In the *Osborne* case, Lord Greene MR explained the “right forgone” argument as follows:

“It was strenuously argued on behalf of the crown that, if a company acquires stock in consideration of the issue of fully-paid shares to the vendor, that stock must, for the purpose of ascertaining the company’s profits, be treated as having been acquired for nothing... The argument really rests on a misconception as to what happens when a company issues shares credited as fully paid for a consideration other than cash. The *primary liability of an allottee of shares is to pay for them in cash*; but, when shares are allotted credited as fully paid, this primary liability is satisfied by a consideration other than cash passing from the allottee. A company, therefore, when in pursuance of such a transaction, it agrees to credit the shares as fully paid, *is giving up what it would otherwise have had – namely, the right to call on the allottee for payment of the par value in cash.*”⁶⁴

⁵⁶ 671.

⁵⁷ (n 9) par 11-14.

⁵⁸ Incidentally, Canadian courts have, on the strength of these UK cases, also allowed a deduction in respect of share-based payments. So, *eg*, did the Canadian federal court of appeal in *Teleglobe Inc v The Queen* 2002 FCA 408 and the exchequer court in *Tuxedo Holding Company Limited v The Minister of National Revenue* 1959 ExCR 390 allowed deductions for shares issued as consideration for the acquisition of assets. See also the Canadian cases referred to in n 54 above.

⁵⁹ 1942 1 All ER 634 (CA).

⁶⁰ 1944 1 All ER 566 (CA). The court of appeal’s decision in *Craddock v Zevo Finance Co Limited* 1944 1 All ER 566 (CA) was upheld by the house of lords in *Craddock (Inspector of Taxes) v Zevo Finance Co Ltd* 1946 1 All ER 523 (HL).

⁶¹ 1982 1 All ER 121 (CA). The court of appeal’s decision was upheld by the house of lords in *Stanton (Inspector of Taxes) v Drayton Commercial Investment Co Limited* 1982 2 All ER 942 (HL).

⁶² See the *Craddock* case (CA judgment) (n 60) 568D-F and the *Stanton* case (CA judgment) (n 61) 123d-e for Inland Revenue’s argument.

⁶³ The *Osborne* case (n 59) was not referred to by either the court of appeal or the house of lords in the *Craddock* case (n 60). In fact, Inland Revenue conceded in the latter case that the taxpayer did incur a “cost”. An alternative argument that no cost was incurred was raised by Inland Revenue and discussed in the *Craddock* case (CA judgment) (n 60), but this was not based on the view that a company does not incur any “cost” when it issues shares and is thus not discussed here.

⁶⁴ 637G-638A – emphasis added.

4.2.2 Calculating the deductible amount

If one accepts the “right forgone” argument as formulated by Lord Greene MR above, some thought should be given as to the method of calculating the deduction that the company may claim. In the *Osborne* and *Craddock* cases the shares were, according to the relevant agreement, issued at par. In both these cases the court accepted that a deduction equal to the par value of the shares were appropriate. However, in the *Stanton* case the shares were, according to the relevant agreement, issued at a premium.

The court of appeal⁶⁵ in the *Stanton* case held as deductible the credit which the company gave when it credited its shares a fully paid,⁶⁶ rather than the value of the shares themselves. In support of this argument, the court referred to the following statement by Lord Greene MR in *Craddock*:

“The fallacy if I may respectfully so call it which underlies that argument is to be found in the assertion that where a company issues its own shares as consideration for the acquisition of property, these shares are to be treated as money’s worth as though they were shares in another company altogether, transferred by way of consideration for the acquisition. This proposition amounts to saying that consideration in the form of fully paid shares allotted by a company must be treated as being the value of the shares, not more and no less.”⁶⁷

However, on appeal, the house of lords disagreed and held as deductible the value of the shares themselves⁶⁸ (which the court found to be equal to the agreed issue price stipulated in the agreement). In the *Stanton* case, however, legislation dealing with corporate tax on capital gains was under consideration, which allowed for a deduction equal to the “consideration” that was “given”, rather than a deduction equal to the taxpayer’s “cost”.⁶⁹ And, since the concepts of “cost” and “consideration” are quite different, as discussed later, care should be taken when applying the judgments in the *Stanton* case to legislation which does not use similar concepts.

In *ITC 1801* the court found it unnecessary to decide the proper basis of valuing the “expenditure”, but considered the value of the deduction to be either of the following: the agreed issue price of the shares (based on the house of lords decision in the *Stanton* case), or the value of the shares issued (based on the *Lace Proprietary Mines* case).⁷⁰

If, however, the argument is accepted that, in the case of share-based payments, a company’s “expenditure” is based on the fact that it has forgone its right to receive cash for these shares, it is difficult to follow the argument that, in order to value that “expenditure”, it is the value of the shares that is relevant. Instead, this “right forgone” should be determined.

⁶⁵ In the court *a quo*, *Stanton (Inspector of Taxes) v Drayton Commercial Investment Co Ltd* 1980 3 All ER 221 231-232, the chancery division held that the consideration given was the shares themselves and that their value should be objectively determined.

⁶⁶ It held that the deductible amount is equal to the value of the credit which the company is providing; or “the benefit of an agreement by [the taxpayer company] (i) to issue and allot the shares and (ii) to credit them as fully paid” the *Stanton* case (CA judgment) (n 61) 126c-d. See also the *Stanton* case (HL judgment) (n 61) 949g, where Lord Roskill held that the court of appeal had regarded as deductible the taxpayer’s “right to require payment” of the agreed issue price.

⁶⁷ the *Craddock* case (CA judgment) (n 60) 569.

⁶⁸ the *Stanton* case (HL judgment) (n 61) 945g-h, 947d-e and 952d. See also the discussion in Venables “Acquisition cost of assets obtained for an issue of shares” 2006 *CTR* 27 of the *Stanton* case (n 61).

⁶⁹ This distinction was highlighted in the *Stanton* case (chancery division judgment) (n 65) 231, where the court held that the cost to the taxpayer company of the capital assets acquired by it was different from the consideration which it gave.

⁷⁰ *ITC 1801* (n 9) par 17.

4.2.3 Attaching weight to the United Kingdom case law

How much weight should be attached to the cases from the United Kingdom mentioned above in considering the deductibility of share-based payments under South African law? When considering those foreign cases, it should be borne in mind that the tax base of corporate income tax in the United Kingdom differs from that of South Africa. In the United Kingdom, a company is taxed on its “profits”,⁷¹ the determining of which is to a large extent based on commercial accounting principles.⁷² There is thus no need for a “general deduction formula” under the United Kingdom legislation; instead, all the taxpayer’s costs that are relevant for determining its profits are taken into account,⁷³ unless there is a specific prohibition against the deduction of a particular cost. In South Africa, on the other hand, a company is taxed on the difference between its gross accruals and receipts⁷⁴ and only those deductions that are allowed under the act, as interpreted according to the usual legal principles.⁷⁵ Put differently, a South African company can deduct only those costs that are allowed under either the general deduction formula,⁷⁶ or a specific provision provided for under the act.

In light of this, it is not surprising that the question of whether share-based payments constitute “expenditure” was not considered in the *Osborne, Craddock* or *Stanton* cases. And for this reason the supreme court of appeal in the *Labat* case was of the view that the findings in these cases were not relevant in deciding whether share-based payments constitute “expenditure” under the South African act.⁷⁷ However, for purposes of calculating the profits of a company for United Kingdom corporate income tax purposes, the “cost to the trader”,⁷⁸ of trading stock acquired by it is taken into account. And “cost” is arguably a concept that has similarities with that of “expenditure”.⁷⁹ Therefore, the *Osborne* case, which considers whether a share-based payment constitutes “cost”,⁸⁰ is worth a second look. The *Craddock* and *Stanton* cases, on the other hand, do not take the matter much further, since the

⁷¹ Currently, this is provided for under s 35 of the Corporation Tax Act, 2009. The concept of “profits” was defined in *Gresham Life Assurance Society v Styles* 1892 AC 309 321 as follows: “Profits are ascertained by setting against the income earned the cost of earning it.” And in *Russell v Aberdeen Town and Country Bank* (1887) 2 TC 321 327: “The profit of a trade or business is the surplus by which the receipts for the trade or business exceed the expenditure.”

⁷² *Tiley Revenue Law* (2005) 418.

⁷³ See *Tiley* (n 72) 418 and the *Lowry* case (n 35) 691.

⁷⁴ Provided that these receipts (and accruals) fall within the meaning of “gross income” in s 1 of the act and are not exempt in terms of the act.

⁷⁵ *Broomberg* “The legacy of UK tax law in South Africa” 2008 *BTR* 291 297. See also *Sub-Nigel Ltd v CIR* 1948 4 SA 580 (A) 588 where Centlivres JA held: “At the outset it must be pointed out that the Court is not concerned with deductions which may be considered proper from an accountant’s point of view or from the point of view of a prudent trader, but merely with the deductions which are permissible according to the language of the Act.”

⁷⁶ s 11(a) and 23(g).

⁷⁷ par 10 and 11. The high court of Australia also regarded these cases as not helpful in the *Pilmer* case (HC judgment) (n 22), since, according to the high court, these cases dealt with the calculation of “profit” under income tax legislation and the *Pilmer* case (HC judgment) (n 22) dealt with a claim for damages rather than tax (par 61).

⁷⁸ the *Craddock* case (CA judgment) (n 60) 570.

⁷⁹ Refer in this regard to the Afrikaans term “onkoste”. See also *Silke* (n 7) 15 n 16. And *Collins English Dictionary* (2000) “cost” <http://www.credoreference.com.ez.sun.ac.za/entry/hcengdict/cost> (10-07-2012) regards the words “cost” and “expenditure” as synonyms. See also the description of “profits” in n 71 that refers to both “cost” and “expenditure”.

⁸⁰ Although the appeal court also used the word “consideration” in its judgment, it clearly was concerned with the “cost” to the taxpayer.

Inland Revenue had conceded beforehand that the taxpayer had incurred “cost”. Also, as previously noted with reference to the *Stanton* case, it should be noted that the United Kingdom corporate tax on capital gains legislation⁸¹ that was considered in that case allowed for a deduction if “consideration” was “given”, rather than whether “cost” or “expenditure” was incurred by the taxpayer. It can probably be argued that a company does give consideration when making share-based payments,⁸² since the company is recompensing the counter-party.⁸³ Legislation that employs wording such as “consideration given” (as was the case in *Stanton*), or cases that consider the tax treatment of the shares in the hands of the subscriber, such as the *Lace Proprietary Mines* case⁸⁴ and *Ochberg v CIR*,⁸⁵ thus do not take the enquiry into whether the taxpayer has “expended” something any further.⁸⁶ The incurral of “cost” or “expenditure”, on the other hand, focuses not on whether the counter-party has been recompensed, but whether the giver has expended an amount and case law dealing with whether a taxpayer had incurred “costs” is thus more comparable.

In the *Lowry* case, on the other hand, the meaning of the word “expenditure” was directly considered. However, the *Lowry* case was not regarded as relevant by any of the other United Kingdom cases mentioned above.⁸⁷ The reason for this may lie in the fact that the majority in *Lowry*, on the facts, regarded the shares as having been issued at no premium;⁸⁸ it did not regard the shares as having been issued at a premium, consisting of a consideration in kind⁸⁹. Put differently, the *Lowry* case deals with the question of whether, if shares are issued at less than market value, the reduction could be allowed as a deduction, rather than with the question of whether the actual issue of the shares could give rise to a deduction. However, some of the

⁸¹ par 4(1)(a) of Schedule 6 to the Finance Act 1965.

⁸² As was accepted by the supreme court of appeal in the *Labat* case (SCA judgment) (n 2) par 10. See also Brincker (n 7) P-3 Issue 5.

⁸³ The word “consideration” is defined in *Merriam-Webster’s Dictionary of Law* (1996) “consideration” <http://www.credoreference.com.ez.sun.ac.za/entry/mwldlaw/consideration> (10-07-2012) as “something (as an act or forbearance or the promise thereof) done or given by one party for the act or promise of another”. And *Oxford English Dictionary Online* (2012) “consideration, n.” <http://www.oed.com/view/Entry/39602?redirectedFrom=consideration> accessed on 10/07/2012 as “6. Law. Anything regarded as recompense or equivalent for what one does or undertakes for another’s benefit; especially, in the law of contracts, ‘the thing given or done by the promisee in exchange for the promise’ (Langdell 1880 § 45). It may itself be a promise.”

⁸⁴ But see *ITC* 1801 (n 9), where the court seemingly used the *Lace Proprietary Mines* case (n 28) to support the argument that the consideration given by a company when making share-based payments could be regarded as the market value of the shares issued as at the date of their issue.

⁸⁵ 1931 AD 215.

⁸⁶ Incidentally, the Australian Taxation Office is of the view that an issue of shares does not constitute “expenditure” under the Australian income tax legislation, but that it does constitute “property ... given” under the Australian CGT legislation, found in Part 3-1 of the Income Tax Assessment Act, 1997. The Australian Taxation Office argues that, in the second instance, the applicable provision looks at whether the counter-party receives something that becomes his “property”, rather than whether the taxpayer company is transferring something that is its property. *TR* 2008/5 (n 51) par 80.

⁸⁷ The *Lowry* case (n 35) was mentioned only by the court of appeal in the *Osborne* case (n 59), but was considered not to be relevant. See the *Osborne* case (n 59) 637H.

⁸⁸ See *eg* Anon “Income tax deductions: business expenses. Difference between market and par value of stock issued to employees at par held not deductible by corporation” 1941 *Harvard Law Review* 510 and the *Trans Alta Corporation* case (n 54) par 99.

⁸⁹ The services rendered by the employees to whom the shares were issued were not regarded as consideration for the issue of the shares by the majority. The minority seemed to have disagreed. See the *Lowry* case (n 35) 676 and 689.

statements made by the majority are quite wide and suggest that the majority might not have regarded share-based payments as such as “expenditure”.⁹⁰

4.2.4 Views of South African authors and the supreme court of appeal in the *Labat* case

In an article written before the supreme court of appeal’s judgment in the *Labat* case, in which he criticised the judgment in *ITC 1783*, Ger argued along the same lines as the appeal court in the *Osborne* case.⁹¹

“[B]y issuing shares *in lieu* of paying in cash for the licence, it could be said that the taxpayer was indeed reducing its assets. It was *giving up the right it would otherwise have had to claim payment in cash for the shares* it issued in exchange for the licence. The notion of expenditure should include all economic sacrifices associated with acquiring an item and should not be restricted to mere cash outlays⁹² as implied in the reasoning of Goldblatt J [in *ITC 1783*].”

De Swardt, in another article published before the supreme court of appeal’s judgment in *Labat*, argued that the “primary right” of a company to receive a cash subscription price could be regarded as “a *personal right* against the allottee that would have been enforceable had the subscription agreement not provided for the subscription price to be settled in kind” and thus an asset of the company.⁹³ He argued further that, when a company issues shares for a consideration in kind, it gives up that personal right, and there is, accordingly, a diminution in its assets.⁹⁴

Unfortunately, since the supreme court of appeal regarded the United Kingdom cases as unhelpful, it never considered this argument and we, accordingly, do not have the supreme court of appeal’s direct view in this regard.

4.2.5 Is this “right” an “asset”?

What is regarded as a person’s “assets” depends on the context in which it is used, but it is often viewed as the person’s patrimonial rights (and the objects of these rights) and may include his statutory rights.⁹⁵ A person’s patrimonial rights are regarded as the subjective rights to patrimonial objects which that person holds;⁹⁶ in other words, it is the claims that a person (being a legal subject) has to legal objects with economic or material value as against other persons.⁹⁷ A number of different types of subjective rights are recognised, one of which is a “personal right”, the object of which is a performance.⁹⁸ A “performance” is, in turn, regarded as “an act

⁹⁰ DM (n 32) 87.

⁹¹ Ger (n 37) 62 – emphasis added.

⁹² It is noteworthy that Goldblatt J did not hold that “expenditure” is limited to an outlay of cash. See the wide definition of “expenditure” that was given by Goldblatt J (n 8) at par 7.2.

⁹³ De Swardt (n 5) 484 – emphasis added.

⁹⁴ See also De Swardt (n 5) 487, where the author argues that the company’s expenditure lies “in the forfeiture of the subscription price due by the subscriber”.

⁹⁵ *Benoni, Brakpan and Springs Board of Executors, Building Society and Trust Co Ltd v Commissioner of Inland Revenue* 1921 TPD 170 173 and Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The Law of Property* (2006) 9 and 24.

⁹⁶ Van der Merwe “Things” XXVII *LAWSA* par 195. Although it should be borne in mind that the word “property” will have a different meaning depending on the context in which it is used. See Badenhorst *et al* (n 95) ch 1 in this regard.

⁹⁷ Badenhorst *et al* (n 95) 9; Van der Vyver “The doctrine of private-law rights” in Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 201 214 and Du Plessis *An Introduction to Law* (1999) 145.

⁹⁸ There is also a view that the object of a personal right is not the performance by the debtor, but the economic aspect of the debtor. Refer in this regard to Van der Vyver (n 97) 230.

in the form of delivering something, doing or not doing something which one person can require a particular other person to perform”.⁹⁹ A right to claim “performance” may arise from, among other things, a contract, or legislation.¹⁰⁰

Applying this to share-based payments, it should be borne in mind that, as discussed earlier, before a company agrees to issue shares, the shares do not form part of the property of the company (or anyone else); in other words, the company does not hold any subjective rights in respect of these shares. Entering into a subscription agreement does not change this position, but it does have the result that the company now has an asset, being its personal right to receive the subscription consideration. If the parties agreed that the consideration is in kind, the company’s only right is the right to that in-kind consideration; it has no right (enforceable or otherwise) to a cash amount.¹⁰¹ It is true that, due to the principle of capital maintenance, a company under the Companies Act 61 of 1973 (which applied when the transaction in the *Labat* case took place) could not issue par value shares at less than the nominal value of the shares and only if the full consideration had been received.¹⁰² Also, a subscription agreement may provide that an in-kind consideration should be of a certain value, and, if the value of the in-kind consideration turned out to be less than the issue price, the directors could insist that the subscriber makes up the balance.¹⁰³ However, if there is no indication that the value of the in-kind consideration is less than either the nominal value of the shares¹⁰⁴, or a value that was agreed upon, neither of the above provides a company with a right (either contractually, or statutorily) to payment of a cash amount.¹⁰⁵ And since it was never suggested in the South African

⁹⁹ Badenhorst *et al* (n 95) 23. See also Van der Merwe *et al* (n 33) 2-3.

¹⁰⁰ Van der Merwe *et al* (n 33) 5-6 and Badenhorst *et al* (n 95) 24.

¹⁰¹ No authority could be found for regarding as a *naturalia* of a subscription agreement that the subscriber may always pay in cash for shares. And in any event, a *naturalia* may be excluded by the parties to a contract. Accordingly, even if such a *naturalia* does exist, the contract will have to be interpreted to ensure that the parties, by stipulating only the in-kind consideration, did not intend to exclude this *naturalia*. See Blackman *et al* (n 23) par 5-253 Original Service 2002, where it is stated: “Finally, even if it can be said that, where a company offers to accept non-cash consideration for shares, it, in a sense, ‘is giving up what it would otherwise have had – namely the right to call on the allottee for payment of the par value in cash’, it certainly does not give up any right that it had against the subscriber to be paid in cash; for the subscriber never agreed to pay cash for the shares”. And at par 5-255 Revision Service 6, 2009: “The company’s primary right is to be paid in cash, and it gives up that right when it accepts non-cash consideration in satisfaction of the issue price. But, as noted above, in doing so the company does not give up a right that it had against the subscriber, unless the subscriber had originally agreed to pay cash.”

¹⁰² ss 81 and 92 of the Companies Act 61 of 1973. The Companies Act 71 of 2008 does not contain an equivalent prescription. Under s 40(5) of the new act, a company may issue shares, despite not having received the consideration in full, although the shares will be held in trust pending receipt of the full consideration. However, as required by s 40(1) – (3), the directors are still under a duty to issue shares for “adequate consideration”. The determination of what constitute “adequate consideration” must be taken place before the issue of the shares and can only be challenged on the limited grounds set out in the act.

¹⁰³ Blackman *et al* (n 23) par 5-255 Revision Service 6, 2009.

¹⁰⁴ That was the position under the Companies Act 61 of 1973. For the position under the Companies Act 71 of 2008, see n 102 above.

¹⁰⁵ See Blackman *et al* (n 23) par 5-253 Original Service 2002 where it is stated: “Finally, even if it can be said that, where a company offers to accept non-cash consideration for shares, it, in a sense, ‘is giving up what it would otherwise have had – namely the right to call on the allottee for payment of the par value in cash’, it certainly does not give up any right that it had against the subscriber to be paid in cash; for the subscriber never agreed to pay cash for the shares”. And at par 5-255 Revision Service 6, 2009: “The company’s primary right is to be paid in cash, and it gives up that right when it accepts non-cash consideration in satisfaction of the issue price. But, as noted above, in doing so the company does not give up a right that it had against the subscriber, unless the subscriber had originally agreed to pay cash.”

cases discussed in this article (and also not in the *Osborne* case) that the shares were issued at less than par value, or that the in-kind consideration was agreed to be of a certain value, these scenarios are not relevant to this article.

The “right” of a company to receive cash as consideration for the issuing of its shares is thus not a personal right (or any other type of subjective or statutory right) of the company.¹⁰⁶ The reason why Lord Greene MR referred in the *Osborne* case to the company’s “right” to issue shares for cash probably lies in the fact that the word “right” is not consistently used to refer to a person’s patrimonial rights.¹⁰⁷ So, for example, it may be said that a company has the “right” (meaning capacity or power) to raise capital by issuing shares, and that this may take the form of issuing shares for cash. Such a “right”, however, is not an “asset” of the company in the legal sense of the word.¹⁰⁸

To conclude, if the word “asset” in the supreme court of appeal’s definition of “expenditure” is given its legal meaning, share-based payments will not diminish the taxpayer’s assets, since the “right to issue shares for cash” does not constitute an “asset”.

4.2.6 Should the word “asset” be restricted to its legal meaning?

It may, however, be argued that the word “asset” should not be given its legal meaning and that, instead, a “diminishing of assets” should also refer to any opportunities forgone or economic sacrifices made by the taxpayer.¹⁰⁹

There is, indeed, authority for the proposition that the supreme court of appeal does not always restrict itself to the legal meaning of “asset” (as patrimonial rights) when it comes to income tax matters. In *Commissioner, South African Revenue Service v Brummeria Renaissance (Pty) Ltd* the court considered the meaning of the word “amount” in the definition of “gross income” in the act¹¹⁰ in the context of interest-free loans. The word has been defined to mean “the value of every form of *property* earned by the taxpayer whether corporeal or incorporeal which has a money

¹⁰⁶ See *Oditah* (n 22) 437.

¹⁰⁷ *Secretary for Inland Revenue v Kirsch* 1978 3 SA 93 (T) 94; *Van der Vyver* (n 97) 215 and *Du Plessis* (n 97) 136-137.

¹⁰⁸ See *eg Smith v Secretary for Inland Revenue* 1968 2 SA 480 (A) 491 where the court found that the “right” of an auditor to practise his profession is not a form of property since it refers to the “right” (meaning power or capacity) to enter into certain contracts. See also the statement by Lord Romer in the *Lowry* case (n 35) 691 and 692: “It must, of course, be conceded that [the premium foregone] never formed part of the assets of the company. It was, nevertheless, a sum that could have been made an asset had the directors decided to issue the 6000 shares to the public at the market price. The company, therefore, had the *power* of acquiring such a sum. *I have never consciously committed, and I trust that I may never commit, the great sin in a lawyer’s eyes of confusing property with power.* If a man has a general power of appointment over a sum of money, the sum does not strictly speaking form part of his assets. Should he release the power voluntarily, his assets will be in no way diminished. He will not have parted with a farthing ...” – emphasis added. See also the statement by Lord Russell of Killowen in the same judgment at 671: “*The power* of a limited company to issue and allot shares is not an asset of the company ...” – emphasis added. *Oditah* also notes: “The [company’s] *capacity* to issue shares is not an asset in any meaningful sense” – emphasis added. See *Oditah* (n 22) 437.

¹⁰⁹ To adopt Ger’s terminology. See *Ger* (n 37) 61. For a similar interpretation of “expenditure”, see the taxpayer’s argument in *ITC 1839 72 SATC* 61 par 25 and the *Ackermans* case (n 33) par 7: “all actual, quantifiable diminutions or prejudicial effects suffered by the taxpayer’s patrimony.”

¹¹⁰ 2007 6 SA 601 (SCA); see s 1 of the act.

value”.¹¹¹ The supreme court of appeal held that the “right to retain and use loan capital for a period of time, interest free” constitutes an “amount”, notwithstanding the fact that this “right” is not “property” in the legal sense of the word.¹¹²

On the other hand, other recent authority on the meaning of “expenditure” suggests that courts will not readily accept too wide a definition of “asset” in this context. In the *Ackermans* case,¹¹³ the taxpayer had agreed to transfer its business as a going concern and, as consideration, the counter-party (“the purchaser”) agreed to both pay a monetary amount and to assume some liabilities of the taxpayer. The result was that the taxpayer had received less money for its assets than it otherwise would have had, had it not also assigned its liabilities. The taxpayer claimed as a deduction part of the monetary amount it had forgone by agreeing to the reduced monetary purchase price.¹¹⁴ In support of its claim, it argued that “expenditure” includes all “actual, quantifiable diminutions or prejudicial effects suffered by the taxpayer’s patrimony”. It further argued that “expenditure” was not limited to those instances where there is a legal obligation owed to another, since the concept “is an economic or commercial concept, rather than one related to strict law or obligations”.¹¹⁵

The argument was rejected by the supreme court of appeal in a judgment that was handed down not long before the supreme court of appeal’s decision in the *Labat* case. The supreme court of appeal in the *Ackermans* case held that a taxpayer can incur “expenditure” only if it has incurred a “liability to pay”.¹¹⁶ And since the taxpayer never incurred a liability to pay the purchaser to assume the liabilities, no “expenditure” has been incurred.

That there are similarities between the arguments raised by the respective taxpayers in the *Labat* and *Ackermans* cases becomes apparent if one rewords the taxpayer argument in the *Ackermans* case as follows: the taxpayer had the “right” to sell its business assets for cash. By entering into the above-mentioned agreement, in terms of which it accepted as consideration both cash and the assumption of its liabilities by the purchaser, it had partly forgone this “right”. The forgoing of a “right” constitutes a diminution in the taxpayer’s assets and thus “expenditure”.

By rejecting this argument, the supreme court of appeal in the *Ackermans* case is thus by implication also rejecting the argument that where the “asset” that is being “expended” is the opportunity to earn a monetary amount, it will constitute “expenditure”.

5 Conclusion

Although the question of whether share-based payments constitute “expenditure” is likely to be regarded as settled after the supreme court of appeal’s decision in the

¹¹¹ *Lategan v Commissioner of Inland Revenue* 1926 CPD 203 209 – emphasis added. The definition was accepted by the appeal court in *Commissioner for Inland Revenue v People’s Stores (Walvis Bay) (Pty) Ltd* 1990 2 SA 353 (A) 363I-364C and *Cactus Investments (Pty) Ltd v Commissioner for Inland Revenue* 1999 1 SA 315 (SCA) 319G-H. In the *Brummeria* case the supreme court of appeal also accepted this definition at par 11 and 16.

¹¹² See Jansen van Rensburg “*Commissioner, SARS v Brummeria Renaissance (Pty) Ltd: Does the judgment benefit an understanding of the concept ‘amount’?*” 2008 *Stell LJ* 34 44-48.

¹¹³ (n 33).

¹¹⁴ The deduction was claimed under s 11(a) of the act. Only that part of the reduced monetary amount, which related to liabilities that were still contingent when the transaction took place, was claimed as a deduction.

¹¹⁵ *ITC 1839* 72 SATC 61 par 25 and the *Ackermans* case (n 33) par 7.

¹¹⁶ par 8. The word “pay” should not be read to be limited to payment of a monetary amount.

Labat case, the case will have more general implications for the way in which the word is understood in the act.

The case confirms that the phrase “expenditure ... actually incurs” connotes two, separate requirements. The words “actually incurs” are important from a timing perspective, since, until such time as the taxpayer is unconditionally and absolutely obliged to perform, no deduction is allowed. The word “expenditure”, on the other hand, does not affect the timing of the deduction: it looks at the performance that is due, and if this performance will constitute a diminution of the assets of the taxpayer, a deduction may be claimed (provided other applicable requirements are met).

The case is also important, since it is the first decision by this court in which a definition of the word “expenditure” is attempted. That having been said, the court did not set out to comprehensively define each of the concepts mentioned in the definition. Importantly, the court did not attempt to define the word “asset” in its definition. However, the implications of the judgment, as read with the supreme court of appeal’s judgment in the *Ackermans* case, is that where a taxpayer enters into a transaction, which does not oblige it to diminish its assets in the legal sense of the word, and only results in the taxpayer forgoing the opportunity to earn a monetary amount, it is unlikely to constitute “expenditure” under the act.

SAMEVATTING

BESINNING OOR DIE BETEKENIS VAN “ONKOSTE” IN DIE INKOMSTEBELASTINGWET

In *C:SARS v Labat Africa Limited* 2012 1 All SA 613 (HHA) is bevind dat ’n maatskappy wat bates verkry deur middel van die uitreiking van aandele, geen “onkoste” vir doeleindes van die Inkomstebelastingwet 58 van 1962 aangaan nie. Hierdie beslissing steun op die gewone omskrywing van “onkoste”, ingevolge waarvan daar ’n vermindering in die bates van die belastingpligtige moet wees. Aangesien die uitreiking van aandele nie ’n vermindering in die bates van die maatskappy teweegbring nie, gaan die maatskappy geen “onkoste” aan nie. In die uitspraak word die argument van die belastinghof in *ITC 1801* (68 SATC 57) dus verwerp.

In laasgenoemde beslissing het die hof aanvaar dat die maatskappy wel “onkoste” aangegaan het, aangesien die maatskappy ’n onvoorwaardelike verpligting aangegaan het (om aandele uit te reik). Die hoogste hof van appel het egter bevind dat, alhoewel die aangaan van ’n onvoorwaardelike verpligting daarop dui dat die “werklik aangegaan”-vereiste nagekom is, dit nie ’n aanduiding daarvan is dat die “onkoste”-vereiste nagekom is nie. ’n Alternatiewe argument wat in *ITC 1801* geopper is en wat deur die Engelse hof aanvaar word, is weens verskille in die bewoording van die twee lande se belastingwetgewing nie deur die hof oorweeg nie. Ingevolge hierdie argument het ’n maatskappy ’n primêre reg om kontant te ontvang by die uitreiking van aandele. Indien die maatskappy dus ooreenkom om ’n bate anders as geld te ontvang, doen die maatskappy afstand van hierdie reg en is daar wel ’n vermindering in die bates van die maatskappy. By nadere oorweging van hierdie argument blyk dit egter dat ’n maatskappy, uit ’n regsoogpunt, geen “reg” op kontant het wat opgegee word nie.

In die lig van die beslissing in *Ackermans Limited v C:SARS; Pep Stores (SA) Limited v C:SARS* 2011 1 SA 1 (HHA), is dit onwaarskynlik dat die hof sal aanvaar dat ’n belastingpligtige “onkoste” aangegaan het bloot op grond daarvan dat die belastingpligtige ooreengekom het om vergoeding anders as geld te aanvaar.