BFH *v* Comptroller of Income Tax
[2013] SGHC 161

Case Number : Income Tax Appeal No 3 of 2013

Decision Date : 22 August 2013

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Sunit Chhabra and Tang Siau Yan (Allen & Gledhill LLP) for the appellant; Quek Hui Ling, Joyce Chee, Jimmy Goh and Pang Mei Yu (Inland Revenue Authority of Singapore (Law Division)) for the respondent.

Parties : BFH — Comptroller of Income Tax

Revenue Law – Income Taxation

22 August 2013 Judgment reserved.

Andrew Ang J:

Introduction

1 This appeal concerns the tax treatment of a $100m lump sum payment by BFH ("the Appellant") for a 20-year licence to provide certain telecommunications services and the right to use a particular bandwidth of the electromagnetic spectrum. The Appellant's case stands or falls on a single issue, *viz*, whether the $100m expenditure was capital or revenue in nature. With reference to the Income Tax Act (Cap 134, 2008 Rev Ed) ("the Act"), the key issue is thus whether the $100m expenditure is:

(a) of a revenue nature and deductible in the ascertainment of income under s 14(1) of the Act; or

(b) capital in nature and disallowed deduction by s 15(1)(*c*) of the Act.

Background

2 The Appellant is in the business of, *inter alia*, operating and providing mobile telecommunications systems and services in Singapore. Apart from the Appellant, there are two other such companies in Singapore (each commonly known and hereinafter referred to as a "telco").

3 The telecommunications industry in Singapore is regulated by the Info-communications Development Authority of Singapore ("IDA"), which licenses the operation of telecommunications systems and services and oversees the use of electromagnetic spectrum rights. Prior to 1 December 1999, this regulatory function was performed by the Telecommunications Authority of Singapore ("TAS").

4 In 2001, the Appellant paid approximately $100m to IDA for a 20-year grant of both a 3G Facilities-Based Operator Licence ("3G FBO Licence") and a right to use the electromagnetic spectrum at a frequency of 2100 Megahertz ("2100 MHz Spectrum Rights" or "3G Spectrum Rights"). For ease of reference, this $100m expenditure is hereinafter referred to as the "Relevant Expenditure". In order to determine whether or not the Relevant Expenditure qualifies as a deductible revenue expense in

the ascertainment of income for the purpose of income tax, it is necessary to understand the nature of and the circumstances leading to the Relevant Expenditure.

Evolution of the licensing regime

5 The IDA grants the telcos Facility-based Operator Licences ("FBO Licences") to run their telecommunications systems and services. However, FBO Licences, in and of themselves, serve no purpose: the telcos also require the use of the electromagnetic spectrum to transmit wireless telecommunications. To that end, the IDA grants to the telcos spectrum rights, defined in the relevant subsidiary legislation as the "right to use any specified part of the radio frequency spectrum": see reg 2 of the Telecommunications (Radio-communication) Regulations (R 5, Cap 323, 2000 Rev Ed). The IDA only grants spectrum rights to FBO Licensees.

6 Regulation 7 of the Telecommunications (Radio-communication) Regulations stipulates, non-exhaustively, the procedure for allocating spectrum rights. In short, spectrum rights can be allocated by any combination of the following methods:

(a) auction;

(b) tender; or

(c) allocation for a pre-determined fee or negotiated fee. Before 2001, the IDA (or TAS, as the case may be) allocated spectrum rights for a pre-determined fee. This fee was calculated on a cost-plus recovery basis and was payable annually.

Only the 900 and 1800 MHz frequencies ("900 MHz and 1800 MHz Spectrum Rights" or "2G Spectrum Rights") were allocated then.

7 The Appellant was assigned an FBO Licence in 1994 ("the 2G FBO Licence"). The 2G FBO Licence, originally granted by TAS, was to be valid for 25 years, from 1 April 1992. Under the terms of that licence, the Appellant was to pay an annual licence fee computed at 1% of the annual audited gross turnover, subject to a minimum of $100,000.

8 The onset of the new millennium and the emergence of new 3G technology heralded a sea change in IDA's policies. The IDA decided to regulate the operation of 3G services in a different manner in three respects. First, the IDA decided against allocating 3G Spectrum Rights for a pre-determined fee, choosing instead to allocate them by auction. Second, 3G Spectrum Rights were to be bundled together with the grant of a 3G FBO Licence. Third, operators would be charged an upfront fee without annual charges for the 3G Spectrum Rights and 3G FBO Licences.

9 The policy reasons for the shift towards an auction-based, lump sum payment system were discussed in parliamentary debates. In the *Singapore Parliamentary Debates, Official Reports* (8 March 2001) vol 73 ("the 8 March 2001 Parliamentary Debates") at col 409, the then Minister for Communications and Information Technology, Mr Yeo Cheow Tong ("the Minister"), explained that the auction process was the most efficient mechanism for a few reasons, including the fact that "3G technology [was] still unproven, no 3G system [was] operational yet, and therefore the true potential [was] not known to regulators". At col 408, the Minister clarified that the rationale for requiring an upfront lump sum payment without any royalty component was that operators would be "incentivised to roll out their systems as quickly as possible and to also roll out as many services as possible, in order to recoup their upfront investments as quickly as possible".

10 Initially, the reserve price of the auction was set at $150m. Notably, the Minister in *Singapore Parliamentary Debates, Official Reports* (22 February 2001) vol 72 at col 1421 stated: "The reserve price that we are establishing is only slightly higher than what we would be getting from a 2G licence". Subsequently, however, the reserve price was reduced to $100m. In the 8 March 2001 Parliamentary Debates at col 408, the Minister explained that as the market value of 3G licences had dropped considerably and there was a greater uncertainty over the business case for 3G, the IDA had decided to lower the reserve price to bring it in line with international levels then.

11 There were four lots of 3G Spectrum Rights bundled with 3G FBO Licences up for auction in 2001. However, the auction did not proceed as planned because the IDA only received three offers. Instead, each of the three telcos was allocated one 2100 MHz Spectrum Right bundled with a 3G FBO Licence, valid for 20 years, at the reserve price of $100m.

12 Soon after the allocation of the 3G Spectrum Rights and 3G FBO Licence in 2001, the IDA held another auction for six additional lots of 2G Spectrum Rights which were to be granted on top of any existing lots previously allocated to the three telcos. The IDA decided to allocate those additional lots by auction. However, successful bidders for the additional 2G Spectrum Rights were still required to pay annual 2G FBO licence fees. On 1 October 2001, the six lots were allocated between the three telcos at the reserve price of $120,000 each. [note: 1] Additionally, on 1 October 2002, the three telcos were re-granted certain 2G Spectrum Rights previously allocated to them before 2001. The three telcos were thereafter required to pay annual fees for those pre-existing 2G Spectrum Rights.

13 The 2G Spectrum Rights that were granted on 1 October 2001 and 1 October 2002 were due to expire on 31 December 2008. Thus, the IDA announced another auction exercise for 18 lots of 2G Spectrum Rights on 18 January 2008. Under the terms of this auction, each successful bidder that was an existing 3G FBO Licensee had to pay an annual licence fee (in addition to the upfront fees for the 3G FBO Licence already paid) if it wished to provide 3G services using the 900 MHz and 1800 MHz Spectrum Rights. These 18 lots were allocated between the three telcos at the reserve price of $300,000 each. [note: 2]

Technological explication

14 As mentioned above, spectrum rights are rights to use certain specified bandwidths of the radio frequency spectrum. Accordingly, 2G Spectrum Rights and 3G Spectrum Rights simply refer to the rights to use different parts of the radio frequency spectrum. The 900 MHz and 1800 MHz frequencies have been set aside for 2G use and the 2100 MHz frequency for 3G use. As the assigned frequency is a neutral medium upon which radio waves of that frequency are transmitted, there is nothing intrinsically special or unique about the respective frequencies that have been assigned. This was affirmed by the IDA in its letter dated 23 September 2009 addressed to all three telcos (at para 3): [note: 3]

> The 2G Spectrum Right and 3G Spectrum Right relate to rights to use different bandwidth of the radio spectrum. Although different services may be provided on different bandwidths of the radio spectrum, *the nature of the 2G Spectrum Right and 3G Spectrum Right is similar in that both constitute a grant of right to use specific allocated parts of radio frequency spectrum* (as set out in the relevant Spectrum Rights) to operate telecommunication system(s) for the purposes of providing services in relation to that Spectrum Right and as permitted under the applicable Facilities-Based Operator licences. *Payments made for use of 2G Spectrum Right and 3G Spectrum Right are also similar in that they are essentially payments for rights to use specified frequency bands of the radio spectrum*. [emphasis added]

15 Thus, the differences between 2G and 3G systems do not stem from the frequencies that have been set aside for each. Rather, the terms "2G" and "3G" refer to differences in the infrastructure and technology of mobile communication systems which, in turn, affect the *type* of services provided. In an information memorandum dated 8 March 2001, the IDA clarified the differences between 1G, 2G and 3G services as follows: [note: 4]

(a) First generation ("1G") mobile communication systems were introduced in the 1980s to offer simple wireless voice services based on analogue mobile technology.

(b) Second generation ("2G") systems are based on digital mobile technology and are able to support improved voice quality, higher capacity for mobile devices, simple non-voice services such as short messaging services as well as global roaming capabilities.

(c) Third generation ("3G") systems are expected to expand the frontiers of wireless technology by enabling, *inter alia*, global roaming across 3G standards high speed data transmission and multimedia applications such as internet and intranet access.

3G technology also continued to evolve even after the grant of the 3G FBO Licence, as mobile communications standards, operating systems and mobile devices continued to develop. [note: 5]

16 The distinction between 2G and 3G technology can be summed up in one word: speed. [note: 6] The greater download and upload speeds of 3G technology enabled a greater number of services to be provided, as is evident from the *ex facie* terms of the respective licences: [note: 7]

Schedule A to the 2G FBO Licence	**Schedule B to the 3G FBO Licence**
Voice telephony	Mobile telephony (*eg*, voice telephony, video telephony, *etc*.)
Voice messaging services Short messaging services	Messaging services (*eg*, SMS, EMS, MMS, voice messaging, video messaging, *etc*.)
International roaming services	International roaming services
Operator services	Operator services
Other value-added services	Other value-added services (*eg*, CLI, conference services, call forwarding, *etc*.) International simple resale Internet services Data services (*eg*, circuit switched & packet switched data *etc*.) Multimedia services (*eg*, short movie clips, *etc*.) Video services (*eg*, video streaming, video to IP-based devices, *etc*.) Mobile commerce Mobile location-based services

17 In fact, the 900 MHz, 1800 MHz and 2100 MHz frequencies can be used by both 2G and 3G mobile communication systems. This can be seen from the IDA's statement in relation to the 2008 auction for 2G Spectrum Rights that it would not restrict the technologies used on the 900 MHz and 1800 MHz frequencies to 2G technologies, as long as the spectrum was used to provide Public Cellular Mobile Telecommunication Services ("PCMTS"). [note: 8]

18 To reiterate for the sake of clarity, there is a crucial distinction between a spectrum right and a mobile communication system. A spectrum right is the right to transmit telecommunications at a certain frequency of the electromagnetic spectrum, whereas a mobile communication system, be it 2G or 3G, refers to the actual technology and infrastructure used to provide telecommunications.

Disputed tax treatment of the Relevant Expenditure

19 Returning to the issue in the appeal, the parties essentially disagree on the deductibility of the Relevant Expenditure for income tax purposes. The Comptroller of Income Tax (hereinafter "the Respondent" or "the Comptroller") did not allow the Relevant Expenditure to be deducted in the ascertainment of the Appellant's income on the ground that it constituted capital expenditure which was disallowed deduction under s 15(1)(*c*) of the Act. The Appellant disagreed and appealed to the Income Tax Board of Review ("ITBR") which dismissed the Appellant's appeal in its decision on 3 January 2013 ("the ITBR Decision"). The present appeal is against the ITBR Decision.

20 The ITBR held that the Relevant Expenditure secured to the Appellant an enduring benefit of a capital nature. [note: 9] In particular, it was of the view that the following enduring advantages pointed to its classification as a capital expense: [note: 10]

(a) The 3G FBO Licence allowed the Appellant to install 3G systems and to provide 3G services;

(b) The Appellant acquired the 2100 MHz Spectrum Rights for 20 years; and

(c) The 3G FBO Licence and the 2100 MHz Spectrum Rights enabled the Appellant to enlarge its customer base and even increase its revenue from the provision of wider services to its existing customer base, in addition to allowing the Appellant to protect its existing customer base by alleviating potential spectrum congestion.

21 The ITBR also held that the Relevant Expenditure opened up a new field of trading for the Appellant and enlarged the core business structure of the Appellant's business as it allowed the Appellant to offer 3G services on a national scale to the public without utilising its current 2G spectrum. [note: 11] Additionally, the Relevant Expenditure was a one-time payment, suggesting that it was capital in nature. In this respect, the Relevant Expenditure differed from the "pay-as-you-use" arrangement under the 2G FBO Licence, which was more closely connected to the Appellant's income-earning activities and thus deductible. [note: 12]

The respective arguments

22 The Appellant submits that the ITBR Decision was erroneous because the ITBR did not give due regard to the purpose of the Relevant Expenditure and instead based its decision on the duration and manner of payment for the 3G FBO Licence and 2100 MHz Spectrum Rights. [note: 13] Essentially, the Appellant argues that the Relevant Expenditure was revenue in nature (and is thus deductible) for the following reasons:

(a) The Appellant's purpose in incurring the Relevant Expenditure was to acquire additional spectrum rights to protect its customer base and *maintain* its ability to continue to provide quality service to its customers and not to enhance its business or to open up new fields of trading. [note: 14]

(b) The Relevant Expenditure was consistent with this purpose since it was based on what the IDA would have ordinarily charged a 2G FBO Licensee for the 900 MHz and 1800 MHz Spectrum Rights. [note: 15]

(c) The Relevant Expenditure was merely for regulatory permission and conferred no proprietary rights or structural enhancement. Just like the 900 MHz and 1800 MHz Spectrum Rights (which parties agreed were mostly revenue in nature), the 2100 MHz Spectrum Right was used to provide telecommunications services in the course of the Appellant's existing business. [note: 16]

(d) That the Relevant Expenditure was paid as a lump sum is not determinative of whether it is revenue or capital in nature. In fact, the Relevant Expenditure was paid for an advantage similar to that obtained from payment of the annual 2G FBO licence fees and should thus be similarly treated as revenue for tax purposes. [note: 17]

23 To the contrary, the Respondent maintains that the Relevant Payment was capital in nature and is not deductible for the following reasons: [note: 18]

(a) The purpose of the Relevant Expenditure was the acquisition of the 3G FBO Licence and the 3G Spectrum Rights in order to enable the Appellant to provide 3G services, thus giving rise to an enduring benefit to the Appellant's business.

(b) The consequence of the Relevant Expenditure was a substantive enhancement of the Appellant's core business structure and the opening of a new field of trading in 3G services which hitherto could not be provided by the Appellant:

(i) The Appellant's capitalisation of the Relevant Expenditure as a "non-current asset" in its balance sheet also reflected its assessment that there would be future economic benefits flowing from the asset;

(ii) The cases cited by the Appellant on payments made to preserve a business or avoid a catastrophic event were distinguishable from the present case because the Appellant's business was not facing any crisis and, in any event, expenditure for the preservation of a business can be capital in nature;

(iii) There was no need for the Appellant to have acquired a proprietary interest in order for the Relevant Expenditure to be capital in nature; and

(iv) That the 3G FBO Licence and 3G Spectrum Right were not exclusive to the Appellant was no bar to the Relevant Expenditure being capital in nature.

(c) The Respondent's tax treatment of the Relevant Expenditure was reasonable and consistent with its treatment of the 2G annual payments given that the 2G annual payments, unlike the Relevant Expenditure, were dependent on the Appellant's turnover and were therefore

more closely connected with its income-earning operations rather than its core business structure.

(d) The fact that the Relevant Expenditure was a one-time non-refundable lump sum payment of $100m with a duration of 20 years pointed to it being a capital expenditure. This conclusion is also supported by the tax treatment of similar payments for 3G licences in other Commonwealth jurisdictions.

The applicable law

Deductibility under the Act

24 The income tax scheme under the Act is as follows: in ascertaining the net income of a person for any period chargeable with tax, the gross income derived by the person during that period is taken as a baseline. Against this, there are deductions for outgoings and expenses allowed by the Act, subject to the overriding condition that such outgoings or expenses are not the subject of statutory prohibition. Section 14(1) of the Act provides:

> For the purpose of ascertaining the income of any person for any period from any source chargeable with tax under this Act (referred to in this Part as the income), there shall be deducted all outgoings and expenses *wholly and exclusively incurred during that period by that person in the production of the income*, … [emphasis added]

25 Notwithstanding this, s 15 of the Act carves out certain categories of expenses or payments in respect of which deductions are *not* allowed, the most pertinent of which, as described in s 15(1)(*c*), is "any capital withdrawn or any sum employed or intended to be employed as capital except as provided in section 14(1)(*h*)". Section 14(1)(*h*) allows for deduction of capital expenditure as prescribed in subsidiary legislation "where the income is derived from the working of a mine or other source of mineral deposits of a wasting nature".

26 The net effect of these provisions in the present case is that the Appellant may only deduct the Relevant Expenditure in the ascertainment of its income if the Relevant Expenditure is found to be revenue in nature, as neither s 14(1)(*h*) nor the other exceptions in the Act are applicable here. The key question is thus whether the Relevant Expenditure should be characterised as capital or revenue in nature.

Case law on the capital-revenue distinction

27 Both parties accept that the applicable law on the capital-revenue distinction for income tax purposes is as stated in the High Court decision of *ABD Pte Ltd v Comptroller of Income Tax* [2010] 3 SLR 609 ("*ABD v CIT*"). In that case, Andrew Phang JA undertook a comprehensive review of the various tests intended to aid the court in ascertaining whether or not a specific item of expenditure is capital or revenue in nature before concluding that the "enduring benefit of the trade" test remained the main test (*ABD v CIT* at [69]). He cited Viscount Cave LC's holding in *British Insulated and Helsby Cables, Limited v Atherton* [1926] AC 205 ("*Atherton*") at 213–214:

> … But when an expenditure is made, ***not only*** *once and for all*, but *with a view to bringing into existence an asset or an advantage* ***for the enduring benefit of a trade*** , I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to *capital*. … [emphasis added in italics and bold italics]

28 More importantly, Phang JA endeavoured to lay down a composite and integrated approach in this area of the law comprising two related principles which may be summarised as follows (*ABD v CIT* at [71]–[75]):

(a) First, the general principle is that the court must look closely at the *purpose* of the expenditure and ascertain whether or not such expenditure created a new asset, strengthened an existing asset or opened new fields of trading not hitherto available to the taxpayer, in which case such expenditure would be capital and not revenue in nature. (I venture to suggest that although Phang JA referred to "trading", he probably meant "business" which is wider in scope than "trading" *per se*. In common parlance, the expressions are sometimes used interchangeably.)

(b) Second, the court looks at specific guidelines which elaborate on the first principle. In other words, the court now looks at the various tests to determine whether or not an item of expenditure has created a new asset, strengthened an existing asset, or opened new fields of trading. In particular, the court should have regard to the following guidelines (bearing in mind that the categories of guidelines are not closed):

(i) The *manner* of the expenditure: a one-time expenditure, as opposed to recurrent expenditures, would tend to suggest that the expenditure is capital in nature, although this factor is not conclusive; and

(ii) The *consequence* or *result* of the expenditure: if the expenditure strengthens or adds to the taxpayer's existing core business structure, it is more likely to be capital in nature. The concept of a "core business structure" refers to the permanent (but not necessarily perpetual) structure of the taxpayer's business which is utilised for the generation of profits. However, where the expenditure is for "assets" which are themselves the stock-in-trade of the business (or which comprise the cost of earning that income itself), such expenditure is more likely to be revenue in nature.

Phang JA further cautioned that while the specific facts are important in applying the various guidelines under the second principle, the underlying principle remains the *purpose* of the expenditure (detailed in the first principle above), *viz*, that the expenditure must have either created a new asset, strengthened an existing asset, or opened new fields of trading for the taxpayer (*ABD v CIT* at [75(b)]). In other words, the categorisation of an expenditure as being of capital or income nature is not just a factual inquiry but an integrated one whereby the applicable legal rules and principles are applied to the facts at hand (*ABD v CIT* at [7] and [38]).

29 Phang JA's statements in *ABD v CIT* are entirely consistent with the two Court of Appeal decisions cited to me by the Appellant, namely, *T Ltd v Comptroller of Income Tax* [2006] 2 SLR(R) 618 ("*T Ltd v CIT*") and *Comptroller of Income Tax v IA* [2006] 4 SLR(R) 161 ("*CIT v IA*"). In *T Ltd v CIT*, one of the issues was whether interest incurred on a loan, which was taken out for the purchase of land for a proposed development, was a capital or revenue expense. The Court of Appeal held that as interest was derivative in nature, its categorisation as a capital or revenue expense depended on the *purpose* for which the loan was employed (*T Ltd v CIT* at [24]). Shortly thereafter, the Court of Appeal in *CIT v IA* held that certain expenses incurred in connection with a loan for developing property were revenue expenses and deductible against the taxpayer's income, given that the *purpose* of the taxpayer in entering into the loan was to acquire trading stock for the production of income.

30 Having regard to these authorities, I agree with the Appellant that the purpose of the expenditure is indubitably the fundamental inquiry in differentiating between capital and revenue

expenses. However, in relation to the Appellant's argument that the ITBR did not give due regard to the purpose of the Relevant Expenditure (see [22] above), it should be noted that in ascertaining the purpose of the taxpayer in entering into a transaction, the court must, often as a matter of practical necessity, look to certain specific guidelines and factors for assistance, depending on the factual matrix at hand. When the court does consider such complementary guidelines, it cannot be said that it is adopting a formalistic approach and ignoring the underlying purpose of the taxpayer. Such specific guidelines are simply a means to an end. Indeed, this was the approach taken not only in *ABD v CIT* but also in *CIT v IA* where the Court of Appeal laid down a reasoned approach towards ascertaining the purpose of the taxpayer that included more specific tests and guidelines (see *CIT v IA* at [79]).

31 In the present context, another important point that should be remembered is that the purpose of the expenditure must be *objectively* ascertained by the court. As the Court of Appeal stated in *CIT v IA* at [39]:

> ... whilst the *avowed* purpose for the taking of a loan will be accorded due consideration by the court, the *purely subjective* assertions by the taxpayer are *not conclusive*. If, in other words, the *objective facts* tell a different story, the court is then free to disregard such assertions ... [emphasis in original]

Thus, little weight will be placed on bare assertions unsupported or contradicted by objective facts.

32 In regard to the requisite *purpose* of expenditure qualifying for deduction under the Act, it is apposite to distinguish between *purpose* on the one hand and what, to facilitate the distinction, we shall call *intention* on the other hand. When one asks "what is the purpose of this?" one is looking for an answer taking the form of a teleological explanation. On the other hand, the enquiry into intention does not necessarily call for a teleological explanation. Take the example of a man running across the road. An enquiry into intention could lead to several different acceptable answers: the man intends the physiological movements of the muscles in his legs; the man intends to cover the ten metres from his current position to get to the other side of the road, and so on. However, purpose is a different enquiry: the running man does not want to be late for an important job interview, or the running man is trying to keep fit, *etc.* Put simply, an enquiry as to purpose focuses on the ultimate end, while an enquiry as to intention does not necessarily have such a focus. I shall return to this distinction when I examine the Appellant's avowed purpose later.

Appellate review of ITBR decisions

33 Appellate intervention in an ITBR decision is only justified when the decision is *ex facie* erroneous in law or the facts are such that no tribunal, acting judicially and properly instructed as to the relevant law, could have come to the determination under appeal (*Edwards (Inspector of Taxes) v Bairstow and another* [1956] AC 14 at 36, cited in *Pinetree Resort Pte Ltd v Comptroller of Income Tax* [2000] 3 SLR(R) 136 at [16]). Under this test, the Appellant has a heavy burden to discharge (*Mount Elizabeth (Pte) Ltd v Comptroller of Income Tax* [1985–1986] SLR(R) 950 at [17]).

Key issue: whether the Relevant Expenditure was capital or revenue in nature

34 Before delving into the specific guidelines to determine whether the Relevant Expenditure was capital or revenue in nature, I should first reiterate the factual background. The Appellant is a mobile telecommunications provider. What the Appellant was acquiring through the Relevant Expenditure was an intangible right for 20 years to use a certain part of the electromagnetic spectrum as well as a licence to develop and operate a 3G telecommunication network (*ie*, the 3G Spectrum Rights and the

3G FBO Licence). The question is whether this expenditure created a new asset, strengthened an existing asset, or opened new fields of trading hitherto not available to the Appellant. Having considered the parties' arguments on appeal, I shall now discuss the major points of contention.

Manner of the Relevant Expenditure

35 The fact that the Relevant Expenditure constituted a lump sum, one-time payment of $100m instead of recurrent annual payments, is indicative but not determinative of its capital nature: *ABD v CIT* at [75] ([27] *supra*). The Appellant does not dispute this general principle but argues that in the present circumstances the manner of payment was irrelevant.

36 According to the Appellant, the purpose of the Relevant Expenditure cannot be inferred from the manner of payment because the payment structure was decided by the government for policy reasons (see [9] above) and the Appellant had no choice in the matter. [note: 19] I disagree that the lump-sum manner of payment was not capable of indicating the capital nature of the Relevant Expenditure just because it was required by the government. The most that can be said about the mandatory payment structure is that given a choice the Appellant might not have opted to pay a lump sum. However, the fact remains that the Appellant *did* incur the Relevant Expenditure as a lump sum.

37 The Appellant also argued that since the quantum of the Relevant Expenditure was based on what the IDA could have collected from the 2G FBO licence fees, which were revenue in nature, the Relevant Expenditure should similarly be regarded as a revenue expense. [note: 20] To this end, the Appellant relied on the following statement by Millett LJ in *Vodafone Cellular Ltd and others v Shaw (Inspector of Taxes)* [1997] STC 734 at 739:

> … Where a lump sum payment is made in order to commute or extinguish a contractual obligation to make recurring revenue payments then the payment is prima facie a revenue payment. [note: 21]

38 The problem with this argument is that Millett LJ's statement applies to the specific situation of a payment made to get rid of or replace an extant liability. Here, the Relevant Expenditure was neither incurred in lieu of the 2G FBO licence fees nor based on an aggregate of what the IDA could have collected from the 2G FBO licence fees. The Minister's statement that the figure of $150m was "only slightly higher than what we would be getting from a 2G licence" (see [10] above) is not evidence that the reserve price for 3G was pegged to or benchmarked against 2G rates. Taken at face value, the Minister's statement was a mere factual observation that the initial reserve price of $150m was only slightly higher than what the IDA would have charged for a 2G licence. [note: 22]

Consequence or result of the Relevant Expenditure

39 The consequence or result of the Relevant Expenditure was the strengthening or enhancement of the profit-making business structure of the Appellant. The advantage of being able to use a certain part of the electromagnetic spectrum designated for 3G services as well as to develop and operate a 3G telecommunication network strengthened and enhanced the Appellant's existing telecommunication systems, which constituted the permanent structure of the Appellant's business that was used for the generation of profits.

40 The nature and duration of the spectrum rights and licence obtained by virtue of the Relevant Expenditure are consistent with the "enduring benefit of the trade" test enunciated by Viscount Cave

LC in *Atherton* (see [27] above) (and which Phang JA also referred to as the "main test" in *ABD v CIT* at [69]). It is clear that in order for an expense to be properly characterised as capital in nature, it should bring into existence an asset or an advantage of a permanent (but not necessarily perpetual) character. "Enduring" or "permanent" merely means that the asset or advantage acquired must have "enough durability to justify its being treated as a capital asset"; "permanent" is not synonymous with "everlasting" (*Henriksen (Inspector of Taxes) v Grafton Hotel, Limited* [1942] 2 KB 184 at 196). The rights conferred upon the Appellant by virtue of the Relevant Expenditure in this case, being valid for 20 years, are of a permanent character capable of giving rise to an enduring benefit of the trade.

41 The Appellant's argument that recurring payments for regulatory permission do not result in the acquisition of a permanent interest and hence, as a general statement, are revenue in nature [note: 23] was not convincing in the least. I do not think that the cases cited by the Appellant, namely, *Mohanlal Hargovind of Jubbulpore, Messrs v Commissioner of Income Tax, Central Provinces and Berar, Nagpur* [1949] AC 521 and *Commissioner of Taxation of the Commonwealth of Australia v Citylink Melbourne Limited* (2006) 228 CLR 1, stand for any general principle that the periodicity or length of term would be a decisive factor in determining whether an expenditure was capital or revenue in nature. Indeed, the real inquiry lies in the intrinsic nature and purpose of the payment; as Lord Reid commented in *Regent Oil Co Ltd v Strick (Inspector of Taxes)* [1966] AC 295 ("*Regent Oil*") at 317:

> ... for practical purposes I would not think that the fact that another payment will have to be made after 20 years if the situation does not change in that time would prevent the first payment from being regarded as made once and for all.
>
> *If the asset which is acquired is in its intrinsic nature a capital asset, then any sum paid to acquire it must surely be capital outlay. And I do not see how it could matter that the payment was made by sums paid annually.* … [emphasis added]

All this simply leads us back to the fundamental distinction between –

> … the cost of creating, acquiring or enlarging the permanent (which does not mean perpetual) structure of which the income is to be the produce or fruit and the cost of earning that income itself or performing the income-earning operations. …

(Commissioner of Taxes v Nchanga Consolidated Copper Mines Ltd [1964] AC 948 at 960).

42 In this case, the Relevant Expenditure provided the Appellant with growth potential for its business in that additional spectrum capacity was acquired. This increased the capacity of the Appellant's telecommunication systems to accommodate not only more customers but also new services. [note: 24] As the Appellant stated, the 3G Spectrum Rights were "valuable to provide growth potential for the Appellant's business in providing the additional spectrum for its on-going business as a provider of mobile telecommunications services". [note: 25] While the Appellant was adamant that the Relevant Expenditure was for the purpose of maintenance of its existing business [note: 26] and had *nothing* to do with any increase in market share or customer base, [note: 27] this argument does not hold water. The Appellant's first witness, its Executive Vice President (Networks) ("AW1") tellingly said in cross-examination:

> ... I say that at point in time, in order for us to continue to protect our customer base and to protect---to maintain our---er, market share, we have to bid for the 3G licence in order to continue to provide the service so that---er, so that we can have the customer base be

protected or else *as more and more customer come in, then we will have congestion* [*sic*]. ... [emphasis added] [note: 28]

Moreover, the Appellant in its response to the IDA's consultation paper entitled "Framework for Third Generation (3G) Cellular Network Deployment and Services Offering in Singapore" had stated that "existing operators will require the additional spectrum to meet growth requirements and the delivery of new services". [note: 29] The effect of the Relevant Expenditure was thus the acquisition of growth potential in terms of the number of customers and type of services that the Appellant's network could sustain.

43 I would also dismiss the Appellant's argument that its intention behind incurring the Relevant Expenditure was solely for the use of additional spectrum. [note: 30] This same contention was raised before the ITBR, which found great difficulty with it. Such a contention totally ignores the vast potential offered by the 3G FBO Licence. The fact that most of the 3G services were already available on the Appellant's 2G network in 2001, except video telephony, multimedia services, video services and enhanced messaging services [note: 31] (see [16] above for a tabular comparison), does not diminish the *potential* offered by the 3G FBO Licence to develop and provide innovative 3G data services. As highlighted by the Respondent, the Appellant itself had requested for a licence to provide 3G services from the IDA because it wanted an "ability to generate returns from the provision of 3G services to customers", thereby recognising the business potential of 3G services. [note: 32] It cannot be the case that the 3G FBO Licence was only acquired by the Appellant because it "came together" with the 3G Spectrum Rights. [note: 33]

44 In fact, the Relevant Expenditure also provided the Appellant with the opportunity and right to develop a 3G telecommunications network and to offer 3G services which, in turn, meant new and innovative services and greater speeds for the Appellant's customers. [note: 34] This opportunity strengthened or enhanced the core business structure of the Appellant. I say this bearing in mind the following facts which the Appellant was careful to highlight in its submissions: the scope and quality of 3G services that can be provided depends on the technology and equipment available [note: 35]; most 3G services in 2001 were already available and could in fact be provided on the Appellant's existing 2G network; and it was not until 2009, with the advent of smart-phones and the relevant technology and infrastructure, that the new 3G services became commercially viable. [note: 36] These facts merely indicate that the Relevant Expenditure was one condition amongst others that had to be met before the Appellant was able to bring about an enhancement of the Appellant's telecommunications network. In other words, the 3G FBO Licence was a *necessary*, although not *sufficient*, condition for the development and growth of the Appellant's telecommunications business and services. As stated by the Appellant itself, the 3G FBO Licence was a "regulatory prerequisite in order to establish and operate a 3G mobile services system". [note: 37] Without the 3G FBO Licence, it would have been unlawful for the Appellant to establish or develop the 3G network that constitutes its core business structure. [note: 38] The Appellant's argument that the leap from 2G to 3G was not revolutionary (as compared to the leap from 1G to 2G) was thus neither here nor there. The bottom line is that the greater speeds attainable by virtue of 3G technology and infrastructure had the net practical effect of allowing a more diverse suite of services to be provided to end-users.

45 Thus, from a practical and business point of view, the Relevant Expenditure was incurred with the purpose of strengthening and enlarging the Appellant's existing profit-making telecommunications systems, as well as providing avenues for growth of its business. In other words, the 3G Spectrum Rights and the 3G FBO Licence improved the *core business structure* of the Appellant. As the

Appellant's witnesses testified before the ITBR, the reason that the Appellant paid $100m was to "ensure that [the Appellant's] existing business could evolve". [note: 39] The Appellant nevertheless argued that the Relevant Expenditure did not open up a "new field of trading" because the 3G network was not a new business but was part and parcel of its existing telecommunications business. [note: 40] This was an overly semantic characterisation with no merit. I do not for one moment think that Phang JA, when using the expression "new field of trading", intended thereby to exclude expenditure incurred for the expansion of the scope of a taxpayer's existing business. According to the Appellant, the 2G and 3G networks were "seamless" to the consumer because a consumer using the Appellant's services does not choose to be on the 2G or 3G network, and is also not charged differently depending on which network he is on. [note: 41] However, I noted that AW1's testimony, which the Appellant used as a basis for concluding that the 2G and 3G networks were "seamless", only addressed the situation where a single normal voice call could be made partly over a 3G network and partly over a 2G network. [note: 42] AW1's testimony did not address the new services provided by 3G networks that were previously not available. Whether the availability of such new services was the result of expansion of the scope of the Appellant's existing business or the result of the opening of a new field of business is purely a semantic question. The fact is that the Relevant Expenditure enabled the development and provision of a whole new suite of data and multimedia services of a quality and range hitherto unknown to the market (and the IDA). The Appellant itself recognised the potential of 3G systems to *revolutionise* mobile telecommunications systems when it stated in its response to the IDA's consultation paper entitled "Framework for Third Generation (3G) Cellular Network Deployment and Services Offering in Singapore": [note: 43]

> 4.1 Whilst the path to 3G systems is an evolutionary one, *the potential of 3G is revolutionary. 3G has the potential to revolutionise the way consumers view mobile operators and services*. The success of 2G systems has created an environment characterised by improved quality, innovative services development and extensive roaming. This has resulted in customers now seeking to demand broadband capabilities and a desire to integrate fixed, mobile and satellite networks which will produce a seamless full function service operating at fixed line network quality and speeds.
>
> ...
>
> 4.4 When compared to the current 2G systems, 3G should provide the following benefits:
>
> - capacity for seamless global roaming;
> - ability to use the same terminal for all applications and in all environments e.g. home, office, outdoor, shopping centres, vehicle, MRT etc;
> - flexible control over a broad range of services; and
> - availability of entirely new mobile services.
>
> [emphasis added]

46 It is irrelevant that the other two telcos acquired the same rights as the Appellant so that the Appellant obtained no relative or competitive advantage by virtue of the Relevant Expenditure. [note: 44] The focus of the capital-revenue distinction is the effect of the expenditure on the taxpayer in terms of its assets or business and not the *relative* effects of similar expenditure on different

taxpayers. Put another way, a capital expenditure may enhance (in absolute terms) the Appellant's core business structure or scope even though similar expenditure on the part of its competitors results in the telcos maintaining their respective market shares. The ITBR was making essentially the same point when it stated at para 128 of its decision that:

> … there is always the possibility that the overall size of the market may also have increased, so that while relevant market shares *in percentage* may be preserved, in *absolute terms* the subscribership of the Appellant may nonetheless have risen … [emphasis added]. [note: 45]

47 It is thus irrelevant (and also inaccurate, as I have stated above) to say that the Appellant's *intention* was to protect its existing business and market share. As I have already said, while a running man may intend to get to the other side of the street, this does not in any way address the ultimate teleological question of the *purpose* of the running man. The protection of the Appellant's existing business and market share was indeed an intended step but this does not address the ultimate purpose of the Relevant Expenditure, which was to improve the core business structure of the Appellant. As Lord Morris of Borth-y-Gest stated in *Regent Oil* ([41] *supra*) at 332:

> ... The fact that a payment must in prudence be made does not show that it is of income rather than of capital nature. Nor is the inquiry in any way advanced by saying that a payment was necessarily made in the course of the process of marketing or was made in conformity with the accepted or customary pattern of trading. ...

48 Given the preceding discussion, I do not find convincing the Appellant's argument that the Relevant Expenditure was analogous to cases in which expenditure to preserve a business or to avoid a catastrophic event for a business were considered as revenue in nature. Generally speaking, those cases addressed situations where the expenditure was necessary in order to overcome or avert some obstacle or difficulty that would prevent the taxpayer from carrying on its existing business in the same way that it had before.

49 In *Morgan (Inspector of Taxes) v Tate & Lyle Ld* [1955] AC 21, the House of Lords found that expenditure in conducting a propaganda campaign against the threat of nationalisation of the sugar refining industry was deductible for tax purposes. Lord Morton of Henryton, having stated that the only purpose of the expenditure was to prevent the seizure of the business and assets of the company, nevertheless found (at 39) that it was deductible because "[i]f the assets are seized, the company can no longer carry on the trade which has been carried on by the use of these assets". Thus, the expenditure was incurred "to preserve the very existence of the company's trade". In *Mitchell (HM Inspector of Taxes) v BW Noble, Limited* (1927) 11 TC 372, money paid to get rid of a director to save the company from scandal was found to be deductible because it was an expense incurred to preserve "the status and reputation of the Company" (at 421). Lord Hanworth MR's characterisation of the payment (at 420–421) is instructive:

> … It is a payment made in the course of business, dealing with a particular difficulty which arose in the course of the year, and was made not in order to secure an actual asset to the Company but *to enable them to continue, as they had in the past, to carry on the same type and high quality of business* unfettered and unimperilled by the presence of one who, if the public had known about it, might have caused difficulty to their business and whom it was necessary to deal with and settle with at once. [emphasis added]

50 Other cases cited by the Appellant tended to show that apart from expenditures incurred to preserve profit-generating assets of the taxpayer, expenditures incurred to *remove* some obstacle or impediment to the taxpayer's continued business operations could also be considered deductible. In

Harrods (Buenos Aires), Ltd v Taylor-Gooby (HM Inspector of Taxes) (1964) 41 TC 450, the taxpayer company, as a foreign company carrying on business in Argentina, was liable to a "substitute tax" chargeable annually on the company's capital. Non-payment of the tax would result in sanctions which would effectively put the company out of business. Diplock LJ thus held (at 469) that the cost of the tax was deductible because it was "a payment which the company is compelled to make if it has a business establishment in the Argentine at all, and it must have a business establishment if it is to carry on its trade". In *Lawson (Inspector of Taxes) v Johnson Matthey Plc* [1992] 2 AC 324, the taxpayer company had a subsidiary which became insolvent. The situation was such that the taxpayer could not continue to trade unless further capital was injected into the subsidiary to enable it to carry on its business. The House of Lords thus held (at 334) that a payment of £50m made by the taxpayer company to its subsidiary was deductible because it "did not bring an asset into existence and did not procure an advantage for the enduring benefit of the trade" but "removed once and for all the threat to the whole business of the taxpayer company constituted by the insolvency of [the subsidiary]".

51 The above cases merely demonstrate that the expenditure incurred to overcome or avert some catastrophic obstacle or difficulty so that the taxpayer could continue to *carry on its existing trade* is deductible for income tax purposes. In none of those cases was there created any asset or advantage of an enduring nature.

52 In our present case, the Relevant Expenditure was not incurred merely to enable it to continue its existing trade in the same way that it had done in the past. [note: 46] There was no obstacle or difficulty that was impeding or threatening to impede the Appellant's existing business, let alone an impending "catastrophic event". [note: 47] Indeed, as the ITBR noted in [128] of its decision, there was no evidence that "the Appellant's market share or customer base was facing a crisis and has been preserved by virtue of the launch of the 3G system". [note: 48] If anything, the Appellant only faced a restriction on expansion. The purpose of the Relevant Expenditure was to enhance the profit-making structure of the Appellant and its income-generating capacity. The Appellant may have incurred the Relevant Expenditure with the intention of keeping up with its competitors but, as stated above at [32], intention (in the sense I have used it) is not the determinant separating capital and revenue expenses. Rather, the determinant is purpose and, as I have already held, the Relevant Expenditure was incurred with the purpose of strengthening and enlarging (in absolute terms) the Appellant's existing profit-making telecommunications systems and providing avenues of growth.

Relevance of tax treatment of 2G FBO licence fees

53 Although not explicitly pursued as a separate line of argument, one recurring theme throughout the Appellant's case was that because the Inland Revenue Authority of Singapore treated payments for the 2G Spectrum Rights and 2G FBO Licence as revenue expenses, the Relevant Expenditure should similarly be treated as revenue in nature. According to the Appellant, these payments deserve the same tax treatment because they are of the same nature and purpose; [note: 49] the differences between them relate only to the scope of services available and the manner of payment, both of which are inconsequential to their fundamental purpose. In particular, the Appellant relies on the IDA's letter to the telcos which (see [14] above) states that:

> … Payments made for use of 2G Spectrum Right and 3G Spectrum Right are also similar in that they are essentially payments for rights to use specified frequency bands of the radio spectrum. [note: 50]

54 A few preliminary observations are in order before I address the Appellant's arguments on this

point. The Comptroller is not empowered to make binding determinations of law concerning the provisions of the Act (see *Comptroller of Income Tax v ACC* [2010] 2 SLR 1189 at [30]). The Comptroller's treatment of earlier payments as being revenue in nature (and hence deductible) does not bind the Comptroller to treat future payments as revenue, even if the subsequent payments are identical in all material respects to the earlier payments. The simple reason is that the Comptroller could have been wrong in law to treat the earlier payments as being revenue in nature. Putting it another way, there is simply no room, with regard to the Comptroller, for doctrines such as (or akin to) estoppel to operate.

55 In any case, I do not accept the Appellant's argument that the 2G payments and the Relevant Expenditure are identical in nature and purpose. While the underlying subject matter of both payments concerned spectrum rights and rights to develop mobile telecommunications services, the character and manner of use of the advantages gained under the respective payments are different.

56 The Appellant argues that the payment structure for the 3G FBO Licence and 3G Spectrum Rights was changed by the government for the policy reason of incentivising telcos to roll out 3G services as soon as possible (see [9] above) and that this policy reason did not "change either the nature of the payment or what the payment was paid for". [note: 51] In other words, the Appellant was buying the same "thing" that it bought with the 2G FBO licence fees, just with a different payment structure.

57 This argument is untenable. Taken at its highest, it assumes that if the *subject* of two different payments is the *same*, they must be treated similarly in terms of deductibility in the ascertainment of income. This is a misplaced assumption. In the High Court of Australia decision in *Sun Newspapers Ltd v The Federal Commissioner of Taxation* (1938) 61 CLR 337, Dixon J held as follows (at 363):

> … the cases which distinguish between capital sums payable by instalments and periodical payments analogous to rent payable on revenue account illustrate the fact that ***rights and advantages of the same duration and nature may be the subject of recurrent payments which are referable to capital expenditure or income expenditure according to the true character of the consideration given*** , that is, whether on the one hand it is a capitalized sum payable by deferred instalments or on the other hire or rent accruing *de die in diem*, or at other intervals, for the use of the thing ...
>
> There are, I think, *three matters to be considered*, ***(a) the character of the advantage sought*** *, and in this its lasting qualities may play a part*, ***(b) the manner in which it is to be used, relied upon or enjoyed*** *, and in this and under the former head recurrence may play its part, and* ***(c) the means adopted to obtain it*** *; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment*.
>
> [emphasis added in italics and bold italics]

58 The true subject of the respective payments is not the underlying allocated portions of the electromagnetic spectrum but the *rights* that have been granted by the IDA with respect thereto. As has already been stated, there is nothing inherently remarkable about the electromagnetic spectrum which comprises the entire range of wavelengths of electromagnetic radiation. Electromagnetic radiation is a natural phenomenon. It makes absolutely no sense to speak of charging for electromagnetic waves of a certain wavelength. This is in sharp contrast with the transmission rights that pertain to specific identified portions of the electromagnetic spectrum: such rights are human constructs. Properly speaking, it is the *right* to transmit electromagnetic waves of a certain

wavelength (or photons of a certain frequency) for which payment is made. Thus, the bare fact that the 2G and 3G Spectrum Rights pertain to the same natural phenomena (albeit at different wavelengths or frequencies) is irrelevant.

59 The Appellant's argument for parity of treatment due to congruence between 2G and 3G Spectrum Rights fails for the simple reason that the *man-made* rights are in actuality dissimilar (see [8] above). I reiterate the key differences: firstly, the 3G Spectrum Rights were inseparably bundled with a concomitant 3G FBO Licence. The right to operate 3G telecommunications equipment was thus indissolubly linked to the right to transmit electromagnetic waves of a specified wavelength. Secondly, the telcos were charged a one-time upfront fee for the 3G Spectrum Rights and FBO Licence, rather than a component recurrent annual licence fee for 2G Spectrum Rights computed at 1% of turnover. Thirdly, the 3G Spectrum Rights and FBO Licence were sold at the auction reserve price and, unlike 2G Spectrum Rights, were not administratively allocated. Fourthly, the 3G FBO Licence (inseparable from the 3G Spectrum Rights) envisaged the provision of a greater range of services than the 2G FBO Licence. The foregoing constitute sufficient differences to warrant different tax treatment. They also fortify my conclusion (at [52] above) that the Relevant Expenditure, in contrast to prior 2G-related expenditures, was incurred with the purpose of strengthening and enlarging the Appellant's existing profit-making telecommunications systems and providing avenues of business growth.

Consistency with tax treatment of cellular licence fees in other jurisdictions

60 It is instructive to see how other tax jurisdictions have dealt with similar expenditure. In the United Kingdom, s 146(a) of the Income Tax (Trading and Other Income) Act 2005 (c 5) had to be specifically amended so that, pursuant to s 147 of the Income Tax (Trading and Other Income) Act 2005, expenditure incurred for the acquisition of 3G licences was treated as revenue in nature. In other words, but for such amendment no deduction was allowable.

61 In Australia, s 40.30(2)(f) of the Income Tax Assessment Act 1997 had to be enacted to provide that "spectrum licences" were depreciating assets; the notional decline in value of spectrum licences thus became allowable depreciation pursuant to s 40.25 of the same. It goes without saying that if the expenditure was deductible as being of a revenue nature, there would have been no need for such new statutory provision.

62 In Malaysia, r 4 of the Income Tax (Deduction for Cost of Spectrum Assignment) Rules 2007 also had to specifically provide that "the cost of spectrum assignment" was deductible (albeit amortised over 12 years).

63 The common thread throughout these three common law jurisdictions (with tax laws similar to ours) is that specific legislation was needed to make clear that expenditure relating to 3G licences was deductible either as a revenue expense or as depreciation allowances.

64 The conclusion is clear: but for statutory intervention, such expenditure would not have been deductible as income expenditure nor would it have qualified for depreciation allowance. Under the existing statutory scheme in Singapore, no depreciation allowance is permitted for the Relevant Expenditure. Neither has there been any amendment to the Act to permit the Relevant Expenditure to be taken as a revenue expense.

65 In South Africa, case law confirms that lump sum 3G expenditures are capital, and not revenue, in nature. *Income Tax Case No 1726* (Gauteng Tax Court) concerned an appellant telecommunications company which had successfully applied for a licence allowing the appellant to construct, operate and

maintain the national cellular radio telephony service (equivalent to Singapore's 3G FBO Licence). The licence fee comprised two components: an initial basic cellular licence fee of R100 million payable prior to the commencement of commercial operations, and an ongoing annual licence fee of 5% of the net revenue of the licensee. The court held that the lump sum payment was capital in nature for two reasons: first, because the licence conferred an advantage of an enduring nature; and second, because the lump sum payment was more closely connected with the income-earning structure rather than the income-earning operations of the appellant. The payment was incurred to acquire the right to, and lawfully commence the operation of the appellant's income-earning structure, and was not a cost incurred in the actual performance of the appellant's income-earning operation. The court, however, did hold that the annual licence fee component, over and above the capital sum paid upfront, was revenue in nature and deductible. *Income Tax Case No 1772* (Gauteng Tax Court) confirmed (in *obiter*) the foregoing propositions, and further held that the appellant in that case had rightfully conceded that the lump sum component of expenditure for a licence entitling the appellant to use radio stations in appropriate frequency bands (equivalent to Singapore's spectrum rights) was capital in nature.

Conclusion

66 For the reasons above, I conclude that the ITBR was entitled to arrive at its decision that the Relevant Expenditure was capital in nature and thus not deductible under s 14(1) of the Act. It is thus not necessary to deal with the further question whether the Relevant Expenditure was "wholly and exclusively incurred in the production of the income" within the meaning of the same section of the Act. The appeal is dismissed with costs.

[note: 1] NHG, pp 592, 595, 596, 606–620.

[note: 2] NHG, p 646.

[note: 3] NHG, p 342.

[note: 4] NHG, p 500.

[note: 5] Appellant's Case at [28].

[note: 6] NHG, p 105.

[note: 7] Respondent's Case, p 90.

[note: 8] NHG, pp 642–643.

[note: 9] NHG, p 41 at [76].

[note: 10] NHG, p 45 at [84].

[note: 11] NHG, p 54 at [107].

[note: 12] NHG, p 45 at [85]; p 51 at [99].

[note: 13] Appellant's Case at [123]–[127], [147], [155].

[note: 14] Appellant's Case at [155], [164], [182(a)].

[note: 15] Appellant's Case at [162], [163], [182(b)].

[note: 16] Appellant's Case at [156], [182(c)], [205].

[note: 17] Appellant's Case at [194].

[note: 18] Respondent's Case at [25].

[note: 19] Appellant's Case at [170]–[172].

[note: 20] Appellant's Case at [193]–[196].

[note: 21] Appellant's Case at [196].

[note: 22] NHG, p 52.

[note: 23] Appellant's Case at [208].

[note: 24] NHG-12, pp 1024–1025.

[note: 25] Appellant's Case at [57].

[note: 26] Appellant's Case at [62], [155].

[note: 27] Appellant's Case at [119].

[note: 28] NHG, p 131.

[note: 29] NHG, p 1026.

[note: 30] Appellant's Case at [164], [182].

[note: 31] Appellant's Case at [42], [135(d)], [155], [156].

[note: 32] Respondent's Case at [53]–[56]; NHG, p 1024.

[note: 33] NHG-3, p 223.

[note: 34] NHG-2, p 105.

[note: 35] Appellant's Case at [39(b)], [44(c)], [46], [60], [62], [135(c)].

[note: 36] Appellant's Case at [37], [46].

[note: 37] Appellant's Case at [17].

[note: 38] Respondent's Case at [64]; NHG-2, p 199.

[note: 39] NHG, p 225.

[note: 40] Appellant's Case at [125].

[note: 41] Appellant's Case at [59].

[note: 42] Appellant's Case at [59].

[note: 43] NHG, pp 1022–1023.

[note: 44] Appellant's Case at [72], [136(b)].

[note: 45] NHG, p 65.

[note: 46] Appellant's Case at [51], [184].

[note: 47] Appellant's Case at [73], [141], [57].

[note: 48] NHG, p 65.

[note: 49] Appellant's Case at [21], [45].

[note: 50] Appellant's Case at [212].

[note: 51] Appellant's Case at [195].