COMMISSIONER FOR INLAND REVENUE v PAUL 21 SATC 1

Division:	Appellate
Judges:	CENTLIVRES CJ, SCHREINER JA, STEYN JA, REYNOLDS JA AND BEYERS JA
Date:	8 and 24 May 1956
Also cited as:	1956 (3) SA 335(A)

Income Tax - Income - Acquisition of property larger than requirements of purchaser - Survey and subdivision of surplus and sale of lots so subdivided - Profits realized on sales - Finding by Special Court that acquisition was capital investment and circumstances of sales did not indicate change of intention - Finding reasonable on evidence accepted by Court - Such finding one of fact and not subject to appeal - Sections 7 and 81(1), Act 31 of 1941.

Appeal on a case stated by the Special Court for hearing income tax appeals under the provisions of section 81(1) (b) of the Income Tax Act, No 31 of 1941, as amended.

Respondent, who practised as a land-surveyor in partnership with others and derived income as well from director's fees, royalties, dividends and farming, had decided on his return from active service to acquire a small farm. In the course of his work as a land-surveyor he had come across some land which had taken his fancy and he approached the owner with a view to purchasing some 30 or 40 acres of the property.

The owner having refused to sell unless the whole property of 167 acres was purchased, respondent, who was unable to finance so large a purchase, induced his brother-in-law, who was also looking for a small holding, to join him in the purchase on a half-share basis, with the intention that each should select the portion he wished to retain and that the balance should be sold to the best advantage. An agreement to purchase was then entered into with the owner.

Before transfer was effected respondent inherited money which put him in a position to carry through the transaction without assistance. Under these circumstances his brother-in-law asked to be released from the transaction and by agreement with the owner the original sale was cancelled and a new sale of the whole property effected to the respondent.

Shortly after the respondent's acquisition of the property a friend asked him to sell to her 10 acres of the property. As this necessitated a survey of the portion to be sold, respondent also surveyed that portion of the property which he considered suitable for sale in small holdings and obtained permission for sale of such lots under the Private Townships Ordinance, No 10 of 1934(N).

During the succeeding five years respondent sold off 12 of these lots, 4 lots being sold in the year of assessment ended 30th June, 1952, and 3 in the succeeding year. In respect of that year the Commissioner for Inland Revenue included in respondent's taxable income the profit of £738 made by him on the sale of the 3 lots, on the ground that respondent had derived the profit from a scheme of profit-making undertaken for that purpose.

Respondent having appealed against the assessments made upon him on the ground that the profit made by him was an accrual of a capital nature, the Special Court for hearing income tax appeals allowed his appeal, finding as a fact that respondent had acquired the property as a capital investment with the intention of disposing of the surplus over and above his own requirements at a profit, if he could do so. Accordingly the Special Court held that respondent had established that he had not engaged in an income-earning activity in selling the plots as he had done. The Commissioner having appealed:

Held, dismissing the appeal with costs, that the finding of the Special Court was one of fact for the support of which there was ample evidence, and as such was not subject to appeal;

Held, further, that the fact that respondent had taken over the share of the property originally purchased by his brother-in-law and had had the balance of the property surveyed and subdivided for sale did not constitute sufficient evidence of a change of purpose to justify the assessments made.

H.J. May, Q.C. (with him *A.L. MacMillan*), for the appellant: Respondent's intention when purchasing the land was,

in regard to the land surplus to his requirements, to engage upon an operation of business, an adventure in the nature of trade, or a venture to make a profit, whether by sale of the undivided surplus or after subdivision. The result of the venture was, in fact, an 'income' or 'profit'. The Special Court detailed the evidence on which it based its findings. Therefore questions of fact are open on appeal; see *Gramophone & Typewriter Ltd. v Stanley*, [1908] 2 K.B. at 95; *Edwards v Bairstow & another*, [1955] 3 All E.R. 48. The Special Court misdirected itself in finding that the idea of making profit was rebutted by the facts that respondent employed his firm to do the survey (for which it was paid) and estate agents to do the selling; see *Edwards'* case, *supra*; *Commissioner of Taxes v Hepker*, 1933 A.D. at 196;1 *Platt v C.I.R.*, 1922 A.D. 42; *C.I.R. v Stott*, 1928 A.D. 252;2 *Morrison v C.I.R.*, 1950(2) S.A. at 455-7;3 *C.I.R. v Richmond Estates, Ltd*, 1956(1) S.A. at 612.4 The instant case is one of separate intentions or purposes, neither dominant. There is no reported case in our law on two equal intentions; but see *C.I.R. v Levy*, 1952(2) S.A. at 421.5 As to what is a business venture, see *Page v Poxon*, 35 T.C. 545; *Bedford Investments Ltd. v C.I.R.*, 1956 Aus. and N.Z. I.T. reports 207 (reported in Butterworth's *Taxation Service*, vol. 6, pt. 6, latest current service; *Current Taxation*,
Feb., 1956, p. 105, same series). As to *Jones v Leeming*, [1930] A.C. 415, the word 'adventure' in reference to trade is qualified; see section 526(2) of the English Income Tax Act, 1952, re-enacting section 237 of the 1918 Act. But in our law 'venture' in the definition of 'trade' in section 7 of

Act 31 of 1941 is not qualified, nor was it qualified in section 7 of Act 40 of 1925. And the definition of 'income' in section 49 of Act 28 of 1914 was different from that of English law; see *Commissioner of Taxes v Booysens Estates Ltd*, 1918 A.D. at 594. 'Venture' in our law can be a single operation with the intention of making a profit whereas in English law it requires to be a trading operation, i.e. 'an operation in the nature of trade'. It follows that where, in English law, a profit in an adventure would attract tax, *ex hypothesi* such a profit would attract tax under our law, but the contrary is not the case. Therefore *Jones'* case, *supra*, cannot be applied in our law whereas *Edwards'* case, *supra*, being a case of 'venture' subject to tax in England, can be applied in our law, the English definition of 'venture' being narrower than ours. The English concept of 'an operation of business in the carrying-out of a scheme of profit-making' should not be applied in our law; cf. *Booysens'* case, *supra*; *Lace Proprietary Mines, Ltd. v C.I.R.*, 1938 A.D. at 275.6 If, in English law, there is, as a matter of a court's finding, no 'carrying out of a scheme of profit-making', the transaction is not taxable; see *Jones'* case, *supra*. That a profit can be derived from a single transaction which is not an 'operation of business in carrying out a scheme of profit-making, finds support in I.T. Case 641, 15 SATC at 235; *Stephan v C.I.R.*, 1919 W.L.D. at 9-10; *Morrison v C.I.R.*, 1950(2) S.A. at 454;7 *C.I.R. v Stott*, 1928 A.D. at 263;8 The general test is intention, but it is not necessarily conclusive; see *C.I.R. v Stott, supra*, at 264; *Marshall Industrials Ltd. v C.I.R.*, 1951(3) S.A. at 586;9 *Lace Proprietary Mines, Ltd. v C.I.R.*, 1938 A.D. at 275.10; Such expressions as 'operation of a business in the carrying out of a scheme of profit-making' or 'continuity' in the case of an individual, and/or 'capital productively employed' are merely aspects in ascertaining the intention or object with which an asset is purchased. The onus is on the taxpayer to show that the gain is not income; see section 78 of Act 31 of 1941; *Ochberg v C.I.R.*, 1931 A.D. 218;11 *Reliance Land & Investment Co.* (*Pty*.) *Ltd. v C.I.R.*, 1946 W.L.D. at 176-7;12 I.T. Case 556, 1946(1) P.H., T. 25. A 'venture' in our law is a transaction, such as a purchase and sale; see *Stephan's* case; *supra*, at 10. Therefore, in view of the qualification of the word in English law, *Jones'* case, *supra*, would be differently decided in our law. And cases such as *Martin v Lowry*(1926), 42 T.L.R. 233, and *Edwards'* case, *supra*, fall readily into the definition of 'venture' in our Act, without the restricting qualifications which have surrounded the word in English law. *Edwards'* case, *supra*, is particularly applicable to the instant case, as the Australian Commonwealth Income Tax and Social Services Contribution Assessment Act, 1936-53, sections 6, 26, has a wide definition of 'trade' and summarizes what our law is as laid down by this Court.

H.V.L. Bizzell, Q.C. (with him *D.J. Shaw*), for the respondent: The Special Court found that respondent intended to make a capital investment.

That was a finding of fact; see *C.I.R. v Hepker*, 1933 A.D. at 196;13 *C.I.R. v Levy*, 1952(2) S.A. at 421.14 Such finding is open to appeal only if it can be shown that it was a finding at which no reasonable person could arrive; see *Hepker's* case, ibid.; *Levy's* case, ibid.; *C.I.R. v Richmond Estates* (*Pty*.) *Ltd*., 1956(1) S.A. at 606-7;15 *Yates Investments* (*Pty*.) *Ltd. v C.I.R.*, 1956(1) S.A. at 615-16;16 *Edwards v Bairstow* (cited for appellant), at 48. It follows from the Special Court's finding, that respondent's intention in making the purchase of the whole piece of land, was to acquire and retain the portion which he wanted. No separate intention can be assigned to the purchase of the surplus. Respondent's purpose in realizing the surplus was to hold his capital assets for as little as possible. The whole transaction was an acquisition of capital; see *C.I.R. v Stott*, 1928 A.D. at 261;17 *Crowe v C.I.R.*, 1930 A.D. at 131;18 and contrast *Marshall Industrials, Ltd. v C.I.R.*, 1951(3) S.A. at 585-6;19 where a separate intention was found by the Special Court to exist. Alternatively, the dominant intention governs whether the transaction is an acquisition of capital or not; see *Levy's* case, ibid. The Special Court found that the dominant intention was to acquire a capital asset, not that there was an intention to engage in an operation of business in carrying out a scheme of profit-making, which is the hall-mark of income; see *C.I.R. v Lydenburg Platinums, Ltd*., 1929 A.D. at 145;20 *Stott's* case, *supra*, at 259-60; *C.I.R. v George Forest Timber Co., Ltd*., 1924 A.D. at 529.21 The origin of this phraseology is found in *Californian Copper Syndicate v Harris*(1904), 5 T.C. 159, 166. Although the test relating to carrying on trade may not be exactly the same as

the intention required in our law to stamp a gain as income, nevertheless the intention must be to deal with the asset in a way which is normally in the business sense regarded as an income-producing activity; see *Commissioner of Taxes v Booysens Estates, Ltd.*, 1918 A.D. at 594-5, 601; *C.I.R. v George Forest Timber Co., Ltd.*, 1924 A.D. at 516, 529 and 522;[22] approving the judgment in the court of first instance of Wessels, J., in *Booysens'* case, *supra*, at 582; *Overseas Trust Corporation v C.I.R.*, 1926 A.D. at 452.[23] The doubts expressed in *Lace Proprietary Mines, Ltd. v C.I.R.*, 1938 A.D. at 276;[24] are therefore without substance. See too the comment on *Jones v Leeming*, [1930] A.C. 415, in Gunn, *Commonwealth Income Tax*, 3rd ed., p. 192. The intention, ultimately, to realize at a profit assets which have been purchased is not sufficient to make the proceeds of realization income; see *Jones'* case, *supra*, at 419-20, 425. The decision applies in our law, because Case VI in Schedule D of the Income Tax Act of 1918, which was considered, requires only that there should be 'annual profits or gains'; cf. English Statutes 1918 (8 & 9 Geo. V) at 290, also quoted in *Jones'* case, *supra*,

at 424. 'Annual' merely imports that the gains are 'recurrent or capable of recurrence'; see *Cunard's Trustees v I.R.C.*, [1946] 1 All E.R. at 163. This notion is, generally speaking, of equal force under the South African legislation, where recurrence is of importance in cases relating to individuals; see *Lydenburg Platinum, Ltd.* case, ibid.; *Yates Investments* (*Pty.*), *Ltd.* case, ibid. The fact that respondent made roads and cut up his land so as to sell it to the best advantage is beside the point; see *Platt v C.I.R.*, 1922 A.D. at 52; *C.I.R. v Stott*, *supra*, at 261, 263. As he was apparently obliged under Ord 10 of 1934(N), to obtain the Administrator's approval if he wished, in terms of section 1 read with section 9 of Ord 10 of 1934, as amended by Ord 19 of 1939(N), to subdivide, the fact that he applied for exemption under section 28*bis* shows nothing of significance.

May, Q.C., in reply. *Cur. adv. vult*. *Postea* (24th May).

CENTLIVRES CJ: This is an appeal on a case stated by the Special Court for hearing income tax appeals.

The respondent, who lives in Durban and practises as a land-surveyor in partnership with others, derives his income from that practice and from directors' fees, royalties, dividends, interest and farming. He was on active service during the recent world war for four or five years and after his return to Durban the partnership practice was virtually non-existent. He found himself in an unsettled state of mind and was undecided whether or not he would continue to practise his profession as a land-surveyor. He had acquired a liking for an open-air occupation and he decided to acquire a small farm. In the course of his work as a surveyor he came across some land in the neighbourhood of Hill Crest which greatly took his fancy. He approached the owner of the land with a view to purchasing 30 to 40 acres of this land and developing them as a small holding. But the owner was unwilling to sell 30 to 40 acres and insisted on selling a block of 167 acres. As the respondent was unable to purchase such a large area he induced a brother-in-law, who wanted about 30 acres for himself, to join him on a half-share basis in purchasing the 167 acres. In May, 1945, the respondent and his brother-in-law (according to the stated case) entered into a deed of sale to purchase the 167 acres and at that time each of them decided on the piece of land which he would retain for himself. They contemplated selling off the balance of the land to the best advantage. The judgment of the Special Court leaves one under the impression that only a preliminary arrangement was made by the respondent and his brother-in-law with the owner of the 167 acres and that no agreement was signed. I shall deal with this apparent conflict between the judgment and the stated case at a later stage.

Prior to October, 1946, the respondent unexpectedly came into money sufficient to enable him to finance the purchase of the property himself. His brother-in-law approached him and asked him whether he would not take over the property himself. He agreed to do so and, according to the stated case, the owner agreed to cancel the sale to the respondent and his brother-in-law and to resell the property to the respondent alone.

The stated case incorporates what it describes as the specific evidence of the respondent before the Special Court in regard to the intention with which the property was purchased and it apparently includes all the evidence given by the respondent on this point, i.e. his evidence in chief, cross-examination and re-examination. I reproduce here the following questions and answers:

'What were you going to do with the rest of the land, the other 107 acres odd? - Just sell it off; get rid of it to best advantage.

As far as the proposition for subdivision and selling off in lots, was this what you call an economic proposition from that point of view, that is, selling it off in lots? - At that time I never considered it an economic proposition and I would say that the land is not ideally suited to that purpose by a very long way. It is very remote from any other development and the access was very difficult. It was virtually right in the country.

When you first contemplated selling off the surplus land, did you intend to sell it as one piece or cut it up? - I hoped to sell it in one piece.

When you originally bought the property, did you want to get the whole 167-odd acres? - No

If you had been able to get just 30 acres you would have taken it? - Yes, I would have taken 30.

So at the time you bought the original property you intended to sell off the balance of this property? - Yes.

Then you must have had an intention of selling off the balance now between 30 and 40 acres and 167 acres - is that correct? - Yes, I intended to sell off that portion which I did not require for my own use.

And you intended naturally to sell it off at a profit, being a land-surveyor, didn't you? - Well, I obviously intended selling it without a loss, or at a profit if I could.'

In 1947 a friend of the respondent asked him to sell her 10 acres of the property. In order to give transfer to her the respondent had to make an application for an exemption under the Private Townships Ordinance of 1934 as amended. The transfer also necessitated a survey of the property. The survey was not limited to the 10 acres under consideration; the respondent also surveyed that part of the property which he considered at that time suitable for development in small holdings. At a later stage a further subdivision took place. During the tax year

ending on 30th June in each of the following years he sold at a profit: 1 lot, 1948; 2 lots, 1949; 1 lot, 1950; 1 lot, 1951; and 4 lots, 1952, and 3 lots, 1953. During the last-mentioned tax year he made a profit of £758 on the sale of the three lots which he sold during that year and in respect of that year the Commissioner included that amount in the respondent's taxable income and income subject to super tax.

The respondent lodged an objection to the inclusion of the £758 in his taxable income and income subject to super tax and the objection having been disallowed he appealed to the Special Court. The ground of the objection was that the profit of £758 was an accrual of a capital nature.

The Special Court allowed the appeal and in the course of its judgment said that it accepted the evidence of the respondent and his brother-in-law concerning the circumstances in which the 167 acres were acquired by the respondent. It also accepted the respondent's evidence as to his motives in acquiring the land and his reasons for selling the surplus portion in lots. It concluded its reasons as follows (the appellant referred to therein is the respondent in this appeal):

'There seems no room for reasonable doubt that the appellant's intention in acquiring the property originally was what he has stated in evidence, and, that being so, we are unanimously of the view that he intended to make a capital investment. We are also satisfied that at all relevant times his object was to sell the surplus over and above his own requirements and to do so at a profit if he could. It seems to us that, had he been in a position to sell the surplus in one block in a single transaction, such a transaction would probably not have attracted the notice of the Receiver of Revenue. But the fact that he has seen fit to divide the land and to sell it in parcels, and to various people, over a number of years not unnaturally gives rise to the notion that he is making a business of it. It seems to us, however, that this idea is sufficiently rebutted by his own evidence and also by the facts that he employed his firm to do the survey and - at all events during the period now sought to be taxed - estate agents to do the selling.

On the whole, then, though the case is near the border line, we have come to the conclusion that the appellant has established that he has not engaged in an income-earning activity in selling these plots as he has done.'

Counsel for the Commissioner contended that two of the reasons given by the Special Court for holding that the notion that the respondent was 'making a business of it' was rebutted were unsound. Those reasons were 'the facts that he [the respondent] employed his firm to do the survey and - at all events during the period now sought to be taxed - estate agents to do the selling'. It may be conceded that those reasons are not sound but it does not follow from this that the notion referred to

was not rebutted by the respondent's evidence which was accepted by the Supreme Court.

There is no evidence to show that when the respondent bought the 167 acres he did so because he had decided to embark upon the business of a land-jobber. In the stated case it is said that five years after the respondent entered into the transaction with which I am now dealing, he, together with other persons, held a one-sixth interest in a joint venture in land which had been purchased with the object of developing and selling it. Apart from this venture and the 167 acres the respondent had not developed any land. Counsel for the Commissioner faintly contended that the fact that the respondent engaged in the joint venture was enough to show that five years previously when he bought the 167 acres he did so because he intended to carry on a business venture. It is sufficient to say that there is no substance in this contention.

The real question in this case is whether no reasonable person could have arrived at the finding of the Special Court that the respondent 'intended to make a capital investment'. cf. *Morrison v Commissioner for Inland Revenue*, 1950(2) S.A. 449 (A.D.),25 and *Commissioner of Taxes v Levy*, 1952(2) S.A. 413 (A.D.) at 421.26 In effect the finding of the Special Court was that the respondent did not purchase the property for the speculative purpose

of making a profit on reselling that portion of the property which he did not require for a small holding for himself. If the question I have posed is answered in the negative this appeal must fail, for, under section 81(1) of Act 31 of 1941 there is no right of appeal from a Special Court on a question of fact. The question whether a person bought a property for a specific purpose is a question of fact and in no sense a question of law - *Ochberg v Commissioner for Inland Revenue*, 1931 A.D. 215;27 at 227; *Commissioner of Taxes v Hepker*, 1933 A.D. 192;28 at 196; *Levy's* case, *supra*, at 421, and *Yates Investments* (*Pty*.) *Limited v Commissioner for Inland Revenue*, 1956(1) S.A. 612 (A.D.)29 at 616.

In my opinion there was ample evidence on which a reasonable person could find that the respondent did not purchase the property for speculative purposes. I need not recapitulate the facts which I have set out above in support of my view. Counsel for the Commissioner relied on the finding of the Special Court that

> 'at all relevant times his' (the respondent's) 'object was to sell the surplus over and above his own requirements and to do so at a profit if he could'

and contended that as this showed that one of the objects which the respondent had in mind was to sell the surplus land at a profit, the profit so made is taxable. I think that the answer to this contention is simple: it would be contrary to human nature for any person to intend to sell an

asset at a loss; when circumstances are such that he decides to sell, he naturally endeavours to get the best price possible. The evidence read as a whole shows that the respondent bought the whole of the 167 acres because he wished to carve out of those acres a small holding for himself of about 30 to 40 acres and not because he had a speculative purpose of reselling the surplus land at a profit. In this connection I may again refer to *Levy's* case, *supra*, at 421, where this Court held that, although a taxpayer bought shares in a company which owned land, hoping that the land and therefore the shares would appreciate in value, it could not interfere with the decision of a court, which corresponds to our Special Court, that the taxpayer was really interested in obtaining a good revenue. Applying this to the present case, what the respondent was really interested in was to obtain a small holding and not to make a profit. That, to use the language of *Levy's* case, *supra*, at 421, was the respondent's main or dominant purpose.

Counsel for the Commissioner relied on the case of *Bedford Investments Ltd. v Commissioner for Inland Revenue*, reported in vol. 6, part 6, of Butterworth's *Taxation Service* at 207. He contended that that case was of assistance because the Court held that, where a taxpayer bought land with the intention of retaining a portion and selling the remainder, the profit on the sale of those portions of the land which the taxpayer did not require was taxable. In that case a company was incorporated in New Zealand on 19th January, 1953, to purchase certain land there. On the date of its incorporation a minute recorded that the purchase was

> 'with the intention that the company subdivide the land and sell several of the allotments and raise sufficient finance to enable it to retain at least one allotment as a cheap permanent investment'.

In holding that the company was liable to pay income tax on the profits it made in selling the allotments McGregor, J., in dismissing an appeal from an assessment made by the Commissioner, said at 209:

'It seems to me that the appellant has derived a profit from the sale of land and that such profit is derived from the carrying out of a scheme entered into or devised for the purpose of making a profit. The intention of the company is apparent to my mind from the minute of the 19th January, and such intention was to subdivide and sell the greater portion of the land to enable the appellant to retain at least one allotment as a "cheap investment". It seems to me that a cheap investment can be described as one acquired at less than the ordinary market value. The result is therefore normally a gain to such investor, and the appellant contemplated such a gain by the sale of the allotments which it decided to sell at a price in excess of the proportionate cost price of such allotments.'

I do not think that the case of *Bedford Investments Ltd*. is of any real assistance to the Commissioner. Apart from the fact that a company may carry out an isolated transaction as a profit-making scheme whereas it may not be so in the case of an individual (*vide Yates Investments* (*Pty*.) *Ltd. v Commissioner for Inland Revenue, supra*, at 616), the evidence in the New Zealand case as to the intention of the buyer of the property is so different from the evidence in the present case that that case cannot be regarded as being in any way helpful in arriving at a conclusion in the present case.

The New Zealand case bears some resemblance to the case of *Marshall Industrials Limited v Commissioner for Inland Revenue*, 1951(3) S.A. 581 (A.D.).30 In that case the taxpayer company decided to obtain a controlling interest in another company and for this purpose bought a large parcel of shares, all of which were not required for that purpose. The shares that were not required for this purpose were sold at a profit. The Special Court found that the taxpayer company intended, in the process of obtaining the controlling interest, to acquire and sell shares so as to make a profit and this Court, holding that that finding was a finding which could reasonably be reached, dismissed the appeal.

Counsel for the Commissioner also relied on the fact that the respondent sold and is still selling the surplus land in lots. The evidence shows that he originally intended to sell the surplus land in one piece and that only

when a friend of his asked him to sell her 10 acres did he proceed to divide the surplus land into lots. But, be that as it may, I know of no case where a taxpayer, who owns a capital asset and subdivides it and sells the subdivisions at a profit, has been held on that account alone to be taxable on such profit. (When I speak of a capital asset I mean, of course, an asset of a fixed and not floating capital nature.) That the mere fact that the surplus land was subdivided into lots does not produce this result is clear from the case of *Commissioner for Inland Revenue v Stott*, 1928 A.D. 252.31

Counsel for the Commissioner relied on the averment in the stated case that the respondent and his brother-in-law entered into a deed of sale in May, 1945, to purchase the 167 acres and that when the respondent inherited money he voluntarily released his brother-in-law from his obligation. He contended that in law the respondent could have held his brother-in-law to the transaction which they had entered into and as he did not do so he acquired still more land than he required for his purpose, the only reasonable inference being that he did so because he wished to make a profit out of the surplus land. There was thus (so the argument proceeded) a change of intention on the part of the respondent at that time.

I have drawn attention to the fact that the averment in the stated case is in apparent conflict with the statement in the judgment that no

agreement was signed by the respondent and his brother-in-law. In *W.F. Johnstone and Company Limited v Commissioner for Inland Revenue*, 1951(2) S.A. 283 (A.D.);32 it was held by this Court that where there is a conflict between the stated case and the judgment of the Special Court in relation to a finding of fact, the latter must prevail over inconsistent statements of fact in the stated case, save, perhaps, in exceptional cases. Counsel for the Commissioner suggested that the Court might exercise its powers under section 81(1) of the Act as amended and remit the matter to the Special Court with instructions to give a finding whether the respondent and his brother-in-law did or did not sign an agreement. In my view there is no need to remit the case for, assuming that the stated case sets forth the facts correctly, I do not agree with the inference which counsel sought to draw therefrom. There may have been many reasons of a family nature why the respondent voluntarily released his brother-in-law from his obligation. There may have been other reasons as well. The respondent may, for instance, have felt that it was only right to release his brother-in-law, who had entered into the transaction for no other reason than to accommodate him, from the risk of not recovering all the capital invested in so much of the land as he did not want for himself or of recovering it only after inconvenient delay in disposing of land which, at that time at any rate, did not seem to present an attractive proposition to buyers. He may further have thought that the disposal of the land would be facilitated if possible complications arising from co-ownership were removed. With such considerations in mind, a reasonable person may well, on the evidence before him, have come to the conclusion that the acquisition of the other half-share in the property did not affect the respondent's original dominant purpose in such a way as to attract liability for income tax. Even if such a conclusion were open to attack, it is not a conclusion which this Court could set aside, more particularly where an examination of the evidence shows that it was never suggested to the respondent that he had changed his intention when he agreed to release his brother-in-law.

The appeal is dismissed with costs.

STEYN, J.A., and BEYERS, J.A., concurred in the judgment of CENTLIVRES, C.J.

SCHREINER, J.A.: I agree with the conclusion reached by the Chief Justice and in general with the reasons set out in his judgment. What the Special Court, in effect, found was that the dominant purpose of the respondent in acquiring the 167 acres was to obtain for himself a small farm of 30 to 40 acres. To effect this purpose he had, in view of the owner's attitude, to buy the whole of the 167 acres; otherwise he would have bought only the 30 to 40 acres. These are findings of

fact which a reasonable person could arrive at and they must therefore stand. Once that is the position the fact that the respondent decided that, in the absence of a purchaser for the whole of the surplus, the best plan was to cut it up and sell the portions could not by itself convert that surplus into the floating capital of a land-jobbing business.

Clearly the fact that his brother-in-law was at one stage prepared to take half the property off his hands did not change the nature of the transaction entered into by the respondent. But it is suggested that the position was altered when the brother-in-law asked to be allowed to drop out, now that the respondent had sufficient funds of his own, and the respondent acceded to his request. Since the respondent could apparently have kept his brother-in-law to his bargain the proper inference, so it was argued, is that the respondent at that stage started an enterprise in the nature of trade, at least in relation to the portion acquired from the brother-in-law. And, if this was so, it was further argued that the part of the surplus which the respondent had retained for himself should have been treated as the floating capital of a land-jobbing business, either on the ground that his acquisition of his brother-in-law's portion showed that throughout he was engaged in a profit-making venture in the nature of trade, or on the ground that, even if this was not so, he had changed

his intention so as to render himself liable on the lines of the cases *Commissioner for Inland Revenue v Lydenburg Platinum Ltd.*, 1929 A.D. 137;33 and *Commissioner for Inland Revenue v Richmond Estates (Pty.) Ltd.*, 1956(1) S.A. 602 (A.D.).34

There is no direct finding of the Special Court on the purpose of the respondent in acquiring his brother-in-law's portion, but the accepted fact that it was the brother-in-law who suggested that he withdraw, the respondent merely falling in with his suggestion, goes to show that the respondent was not at that stage embarking upon a profit-making enterprise. The only cross-examination of the respondent which could be thought to bear on the matter consists of the following question and answer:

> 'Then you must have had an intention of selling off the balance now between 30 to 40 acres and 167 acres - is that correct? Yes, I intended to sell off that portion which I did not require for my own use.'

I shall assume in the Commissioner's favour - it is not easy on the record to do so - that the word 'now' in the above passage refers to the stage at which the respondent was getting back his brother-in-law's portion. Even on that assumption there was clearly no foundation for the conclusion that the respondent was venturing afresh into a land-jobbing speculation. It is not altogether surprising, therefore, that the Special Court did not deal specifically with the respondent's state of mind when he agreed to take over his brother-in-law's portion.

Since there is no ground for supposing that there was a profit-making venture in respect of the brother-in-law's portion, the respondent's acquisition of that portion casts no doubt on the finding that the respondent's original plan was not to engage in land-jobbing; nor does it support the suggestion that there was a change of intention in regard to the surplus of the respondent's half-share of the 167 acres, assuming that such a change of intention might have affected his liability to tax.

REYNOLDS, J.A., concurred in the judgment of SCHREINER, J.A.

Footnotes

1 6 SATC 87. 2 3 SATC 253. 3 16 SATC 377. 4 20 SATC 355. 5 18 SATC 127. 6 9 SATC 349. 7 16 SATC 377. 8 3 SATC 253. 9 17 SATC 378. 10 9 SATC 349. 11 5 SATC 93. 12 14 SATC 47. 13 6 SATC 87. 14 18 SATC 127. 15 20 SATC 355. 16 20 SATC 245. 17 3 SATC 253. 18 4 SATC 133. 19 17 SATC 378. 20 4 SATC 8. 21 1 SATC 20. 22 1 SATC 20. 23 2 SATC 71. 24 9 SATC 349. 25

16 SATC
377. 26
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127.
275 SATC 93.
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87. SA 29 C 245
30 17 SATC 378.
31 3 SATC 253.
32 17 SATC 235.
33 4 SATC 8.
34 20 SATC 355.