BLOCH v SECRETARY FOR INLAND REVENUE 42 SATC 7

Division:	Cape Provincial
Judges:	VOS J, GROSSKOPF J AND FAGAN J
Date:	6 August 1979; 5 February 1980
Also cited as:	1980 (2) SA 401(C)

Income tax - Capital or revenue - Private company formed to acquire a particular property and establish a residential township thereon - After acquisition of property, phenomenal rise in land values - When establishment of township had reached advanced stage, but before sale of any lots, all shares in company sold to single purchaser at very advantageous price - Shareholder's net profit resulting from such sale held to be capital accrual.

In determining appellant's taxable income for the year ended 28 February 1970 the Secretary included the sum of R21 292, being the profit made by appellant on the sale of his 10 shares in PDC(Pty) Ltd. His objection that the aforesaid sum was a capital accrual having been overruled, appellant appealed to the Special Court which, with the President dissenting, dismissed the appeal. Against that decision appellant appealed, on a case stated under s 86 of the Act, to the Provincial Division.

PDC (Pty) Ltd was incorporated on 23 November 1966 with a share capital of 200 shares of R1 each. All the shares were issued and only 4 of the 16 shareholders were not related, in some degree, to appellant, who himself was at all relevant times the managing director and main beneficial shareholder of a company conducting a substantial business as timber, hardware and builders' merchants.

PDC (Pty) Ltd (hereinafter referred to as the company) was formed with the object of acquiring an area of land, known as Sonnendal, and developing a residential township thereon. The diversity of its shareholding was such that no single shareholder could alone determine the direction of the development scheme. At the

first shareholders' meeting held on 9 February 1967 it was reported that R40 000 of the capital requirements of the company had been advanced by the shareholders and that bank overdraft facilities up to R35 000 had been arranged. A financial budget for the development was presented to this meeting.

The initial stages of establishing the proposed township were early put in train. On 14 February 1968 the Director of Local Government advised the company that the township had been approved by the Administrator. At a shareholders' meeting on 20 February 1968 it was resolved that only a limited number of residential sites should be sold each year and that certain building requirements be prescribed. It was further resolved that with a view to serving the separate interests of the shareholders in the development of the flat and business sites, six separate companies be registered to which the flat sites in the township could be transferred. In May 1968 a contract was concluded with the P municipality for the provision of municipal services to the township, and by letter dated 17 May 1968, the municipality was requested to proceed with the installation of services. An agreement for the installation of electrical services was concluded with Escom in December 1968.

In October 1968 an auction by the P Municipality of 49 erven situated near Sonnendal realized unusually high prices. By the end of 1968 a marked general upsurge in the property market had occured, and this continued into 1969. Offers of investment as 'partners' in the development of Sonnendal having been refused, the company received an offer to purchase its land at what was regarded by the shareholders as a phenomenal price. This latter approximated to 80c per square foot as against the shareholders' calculation of sales at 22c per square foot. On 21 May 1969 - by which time no residential site had yet been sold nor had any business sites been transferred to the abovementioned subsidiary companies - the aforesaid offer was accepted and the entire shareholding in the company was sold to a company named NBV Bpk for R572 000. This contract of sale was, with the agreement of the other shareholders, signed by appellant on their behalf. The profit made on the sale to NBV Bpk was shared by the members of the company in proportion to their shareholding after allowance for loan accounts. Appellant's net profit was the R21 292 in issue.

Owing to ill health, appellant himself gave no evidence before the Special Court, but evidence was given by two of the company's shareholders. They deposed that originally all the shareholders intended the township to be developed and that the profits made by selling off individual plots should accrue to the shareholders by way of dividends; but that the abovementioned striking increase in land values caused them to change their intention and to accept NBV Bpk's offer of R572 000 which they all felt was too good to reject.

The abovementioned evidence was accepted by the President of the Special Court but not by the remaining two members. The latter, although making no adverse findings regarding the demeanour or credibility of the witnesses, commented on the fact that only two shareholders had testified and that evidence regarding the initiation of the negotiations which culminated in the sale of the shares was lacking. (It was common cause at the hearing that it was appellant himself who first approached NBV Bpk.) Pointing out that no plots were in fact sold, and *inter alia* expressing the views that the only purpose of the company was to buy and make a profit on the sale of its sole asset Sonnendal, and that the boom in land prices had no bearing on the intentions of the shareholders, the majority of the Special Court came to the conclusion that appellant had 'failed to discharge the onus that he bought and held the shares as an investment or that he sold them to liquidate his investment and that he did not buy, hold and sell them in a scheme of money making'.

In supporting the conclusion of the majority of the Special Court, it was also submitted in the Provincial Division by counsel for the Secretary that the company was to all intents and purposes the appellant's company, that it should be so regarded, and that after October 1968 appellant had entered into a profit-making scheme with the property (or his shares in the property-owning company) as his stock-in-trade.

Held

(i) That appellant had to show that the shares in issue were an item of fixed capital in his hands; that this entailed his establishing on a balance of probabilities that his dominant intention or purpose in acquiring and holding shares was to hold them more or less permanently so as to produce income.

(ii) That the majority of the Special Court had required of appellant too high a standard of proof since intention may *inter alia* be deduced as a matter of probability from the objective circumstances of the case.

(iii) That the one-man company and profit-making scheme submissions advanced by the Secretary's counsel were in conflict with the evidence and unacceptable; and, further, that the circumstance of appellant having made the initial approach to NBV Bpk (the purchaser of the shares) was not inconsistent with an intention to realize his investment at the best possible price.

(iv) That the findings of the majority of the Special Court that the boom in land prices had no bearing on the intentions of the shareholders was a finding which, on the evidence, could not reasonably be made.

(v) That the only reasonable conclusion that could be drawn from the evidence was that arrived at by the President, namely, that the appellant and the other shareholders entered upon the project with the object of investing their capital and sold their shares as a realization of their investment.

Appeal accordingly upheld with costs. Assessment set aside and matter referred back to the Secretary to make a further assessment on the basis that the amount of R21 292 represented receipt of a capital nature.

D V Shaw QC (with him *D A Ipp*) for the appellant.
P H Tebbutt (with him *I G Farham*) for the respondent.

GROSSKOPF J: This is an appeal on a case stated under s 86 of the Income Tax Act 58 of 1962 ('The Act') against a decision of the Special Court for hearing income tax appeals within the area of jurisdiction of the Cape Provincial Division of the Supreme Court. The point at issue is whether a surplus on the sale of ten shares in a private company Parow Development Corporation(Pty) Ltd ('the company') was a capital gain or a revenue profit. The president of the Special Court (Van Winsen J) held that it was a capital gain. The other two members held, however, that the appellant had failed to discharge the onus that he bought and held the shares as an investment, or that he sold them to liquidate his investment, or that he did not buy, hold and sell them in a scheme of money-making. The appellant now appeals against this decision.

The facts are as follows. The appellant was at all relevant times the managing director and main beneficial shareholder of A Bloch Timber and Hardware(Proprietary) Limited, a company which carries on a substantial business as timber, hardware and builders' merchants in Parow. Mr I S Israel, a second cousin of appellant who conducted an attorney's practice in Parow at offices next door to the appellant's business, was interested in a township in Parow called Northgate. Near Northgate was an area of land which became known as Sonnendal. Northgate had been divided into 37 residential stands which had been sold individually to members of the public. A company called Cumfy Homes(Pty) Limited, in which Mr Israel was a 50 per cent shareholder, had developed most of the stands by building houses on them.

The development of the 37 stands at Northgate was rapidly nearing completion and Mr Israel was consequently looking for additional stands on which to build houses. The land known as Sonnendal was owned by National Portland Cement Company, and Mr Israel had conducted a long series of negotiations with that

firm from early 1964 with a view to the acquisition of the land. Mr Israel daily discussed business with the appellant, and also discussed the possibility of developing Sonnendal on similar lines to that which had been followed in the case of Northgate. Mr Israel was keen to acquire an agency appointment for the sale of stands at Sonnendal and also to have stands available for development by Cumfy Homes. The appellant, for his part, was keen that some of the stands be developed by, or channelled to, other builders who purchased building materials from him. This was in accordance with a practice of his to look after the interest of certain speculative builders by locating stands for them in the hope that this would encourage them to purchase goods from him.

The appellant's son, Isaac, who had recently obtained a B Comm degree, prepared two feasibility studies relating to a proposed development of the Sonnendal land. These studies were based on assumptions that the land would be subdivided and stands sold over a varying number of years at varying prices.

Following on the preparation of these feasibility studies and other investigations carried on by Mr I S Robinson, a land surveyor, and Mr Selwyn Myers, an expert in township development, the appellant in his capacity as a trustee of a company to be formed, purchased the property known as Sonnendal for R70 000,00 in October 1966. The contemplated company was, in fact, incorporated on 23 November 1966, with a share capital of 200 R1 shares. As mentioned above, the company was called Parow Development Corporation(Pty) Ltd. On 23 January 1967, at a meeting of directors of the company, its 200 shares were allotted to the following persons:

A Bloch	The Appellant	10 shares
Miss R Bloch	Daughter of the Appellant	10 shares
M Bloch	Son of the Appellant	10 shares
Mrs B Limon	Daughter of the Appellant	10 shares
I Bloch	Son of the Appellant	10 shares
S Kushlick	Brother-in-law of the Appellant	10 shares
Mrs I Myers	Niece of the Appellant	20 shares
Mrs J Kushlick	Sister of the Appellant	20 shares
Mrs M Friedman	Niece of the Appellant	10 shares
R Kaplan	Second cousin of the Appellant	10 shares
S T Bloch	Brother of the Appellant	10 shares
A Fine	Father-in-law of the Appellant	10 shares
H D Rabkin	No relation of the Appellant	15 shares
I A Robinson	No relation of the Appellant	10 shares
S Aaron	No relation of the Appellant	15 shares
Cumfy Homes (Pty) Limited		20 shares
	Total	200 shares

By reason of the diversity of shareholding no individual alone had the power to determine the direction of the development scheme which the company had decided to embark upon.

It seems clear that the development of the property was tackled expeditiously. On 29 November 1966 (ie even before the meeting mentioned above) Mr Robinson addressed a report concerning the proposed scheme of development to the Town Clerk of Parow. Notice of the application for permission to establish a township on the aforesaid land was published on 10 March 1967. On 7 September 1967, the Director of Local Government of the Cape Provincial Administration stipulated certain requirements in respect of such township plan. In November 1967 negotiations took place between the company and the Parow Municipality concerning the installation of services. On 16 November 1967 the municipality informed the company that the roads of the proposed township and its stormwater and sewerage systems could be constructed at an estimated cost of R103 000. The conditions for the establishment of the township were accepted by the company on 10 January 1968, and on 14 February 1968 the Director of Local Government advised the company that the township had been approved by the Administrator. In May 1968 a contract was concluded with the Parow Municipality for the provision of municipal services to the township. By letter dated 17 May 1968 the municipality was asked to proceed with the installation of services as a matter of urgency. Negotiations also proceeded with Escom for the installation of electrical services in the township, which culminated in an agreement concluded in December 1968.

While the development of the township was proceeding, the members of the company met from time to time to consider its affairs. The first shareholders' meeting was on 9 February 1967. It was reported at this meeting that R40 000 of the capital requirements of the company had been advanced by the shareholders, and that bank overdraft facilities had been arranged for an amount up to R35 000. A financial budget relating to the proposed development was presented. This budget was based on the selling prices of the plots less the development expenses. I should add that it was common cause that the company was a land-jobbing company and would have to pay tax in respect of sites sold by it.

At a meeting of the shareholders on 27 November 1967 the expected profit on the development was again considered in the light of the conditions recommended by the Townships Board. At this meeting Mr Robinson reported that final approval of the layout plan could be expected by the end of January 1968, and that

the company would be in a position to pass transfer of the sites by August 1968.

At a meeting on 20 February 1968 Mr Myers advised the shareholders of the Administrator's approval of the township. The further development of the project was discussed, and the members agreed that only a limited number of residential sites should be sold each year, and that certain building requirements should be laid down to ensure that only houses which were aesthetically and architecturally satisfying would be built in the township. The shareholders in fact

refused to allot a certain number of plots to Mr Israel for his company, Cumfy Homes, as it was felt that the prices would rise later and that it was therefore not in the interests of the company to sell too many plots early on. It was further decided to register six separate companies to which the flat sites could be transferred. In this way the separate interests of the shareholders in regard to the development of the flats and business sites could be catered for.

On 6 June 1968, the company resolved to grant an option to Mobil Oil Southern Africa(Pty) Ltd to purchase the service station site for the sum of R40 000.

Towards the end of 1968 a change occurred in the property market generally. On 15 October 1968 the Parow Municipality conducted an auction sale of 49 erven in Plattekloof, situated near the company's property, and prices ranging from R6 750 to R13 800 were realized for these erven. These prices were extraordinarily high and excited a great deal of press publicity. Furthermore, in 1969 certain large property dealing companies such as Glen Anil and Corlett Drive entered the market in the Parow/Bellville area for the purchase of large tracts of ground either in the form of undeveloped land or land already developed as a township. This was an entirely new development in land -dealing, the opportunity for which had not previously existed. It was, moreover, expected that the Building Societies Act would shortly be amended so as to enable building societies to enter the market for the purchase and development of land. All these factors led to a phenomenal increase in land prices in the area.

When the demand for land increased towards the end of 1968, an approach to the company by Corlett Drive to
acquire the entire township was refused, as Corlett Drive was offering shares (and not money) and the shareholders preferred to conduct the development themselves. An approach was also directed towards appellant and Aaron by officials from the Trust Bank who indicated that they had R17 000 000 to invest and wished to become 'partners' in the development of the company's property. This was rejected as it was felt that the shareholders did not wish to share the development of Sonnendal with others.

On 24 March 1969 the shareholders of the company held an informal meeting to discuss a letter from the Nasionale Bouvereniging in which the latter expressed an interest in purchasing the township at a purchase price which was arrived at as follows:

R4 000 for each residential stand;
R1,50 per square foot for each flat site;
and R3,00 per square foot for the business site.

The price of R4 000 for each residential stand was equivalent to approximately 43 cents per square foot. This was a net price, ie not subject to deductions in respect of services, endowment contributions, agents' fees, et cetera, and was accordingly regarded as a fantastic offer. The prices in respect of the flats and business sites were similarly regarded as being phenomenal. In fact, the prices were so high in comparison with what the shareholders would have received

had the land been developed and the plots sold off as originally anticipated, that it was felt by all the shareholders that they could not refuse this offer. Whereas the shareholders had based their calculations on sales at 22 cents per square foot, the net price offered by Nasionale Bouvereniging was equivalent to something like 80 or 90 cents per square foot if the company was selling the land.

On 21 May 1969 the appellant entered into an agreement with Nasionale Bouvereniging Versekeraars Beperk whereby the company's entire shareholding was sold to the said Nasionale Bouvereniging Versekeraars Beperk for an amount of R572 000. The other shareholders agreed to the appellant signing this agreement on their behalf.

The agreement for the sale of the company's shareholding also provided for the sale of its shareholding in the six subsidiary companies referred to above. These companies had been incorporated for the purpose of developing the flats and business sites in the township. At the time of the agreement none of these sites had, however, been transferred to any of the subsidiary companies.

At the time of the aforementioned agreement for the sale of the company's shares, viz 21 May 1969, none of the residential sites of the company had been sold, nor had any agents been appointed to proceed with the sale of the residential stands.

The profit made on the sale of the shares of the company was shared by its members in proportion to their shareholding after allowing for loan accounts with the company. The appellant received a net profit of R21

292,00, being his share of the total profit.

The Secretary for Inland Revenue ('the Secretary') in the determination of the appellant's liability for normal tax for the year of assessment ended 28 February 1970, included in the income of the appellant the aforementioned share profit of R21 292. Against this assessment the appellant lodged objection and appeal on the ground, shortly, that the profit on the sale of the shares constituted a capital profit. This appeal was dismissed by the Special Court - hence the present appeal.

In my view this appeal raises the following questions:

(a) What did the appellant have to prove in the Special Court?

(b) On what respects did the Special Court find against him?

(c) On what basis can we interfere with the Special Court's finding?

When these questions have been answered, there remains the final one - is interference warranted in the circumstances of the present case?

The answer to the first question may be simply stated - the appellant had to prove that the profit on the sale of the shares fell within the expression 'receipts or accruals of a capital nature' as used in the definition of 'gross income' in s 1 of the Act. To prove this he had to show that the shares were an item of fixed capital in his hands. This turns on the purpose with which he acquired and held them. The essence of fixed capital, as distinct from floating capital, is ''n element van permanentheid, in dié sin dat daar 'n bedoeling is om dié betrokke

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bate min of meer permanent te hou met dié doel dat dit inkomste moet voortbring' (*SBI v Aveling* 1978(1) SA 862(A) at 880[1]). The purpose with which a taxpayer acquires or holds an asset is a question of fact. *Vide CIR v Paul* 1956(3) SA 335(A) at 341;[2] *African Life Investment Corp v SIR* 1969(4) SA 259(A) at 268, 274; [3] *Barnato Holdings Ltd v SIR* 1978(2) SA 440(A) at 453.[4]

If the taxpayer has mixed purposes, it is his 'dominant purpose' which is decisive. (*Commissioner of Taxes v Levy* 1952(2) SA 413(A) at 420-1;[5] *CIR v Paul*(*supra*)). Where there are mixed purposes, it may be difficult to determine whether a particular purpose is 'dominant' in the sense in which this expression has been used in the cases. See e.g *African Life Investment Corp* case(*supra*) at 269E-270A;[6] *Durban North Traders Ltd v CIR* 1956(4) SA 594(A) at 604,[7] *Barnato Holdings* case(*supra*) at 455F-H.[8] What is clear, however, is that a taxpayer need not exclude any thought of possibly selling the asset in question before it can be considered an item of fixed capital. (*Vide Levy's* case(*supra*).)

In the present case we are dealing with the profit on the sale of the appellant's shares. To show that this was a receipt of a capital nature, the appellant therefore had to show that his dominant purpose in holding the shares was to hold them more or less permanently so as to produce income. This onus had to be discharged on the
ordinary basis applied in civil cases, ie a balance of probabilities. I emphasize this because, as I shall indicate, the majority members of the court seem in my view to have required too high a standard of proof of the appellant.

This brings me to the actual findings of the Special Court. The final conclusion in the judgment is 'that the appellant has failed to discharge the onus that he bought and held the shares as an investment or that he sold them to liquidate his investment and that he did not buy, hold and sell them in a scheme of money-making'.

This appeal is one upon a case stated, and, as laid down in *SIR v Rile Investments*(*Pty*) *Ltd* 1978(3) SA 732(A) at 742 - [9]

> '. . . the appellant is confined to the general ground that the determination of the Special Court was "erroneous in law" and is bound by each of the findings of fact of the Special Court, as set forth in the stated case (which includes the court's judgment), unless he can show that it is erroneous in law in the sense that there was no evidence to support the finding or it is one that could not reasonably have been reached on all the evidence'.

Mr Shaw, who appeared for the appellant, contended that the Special Court made no findings of fact which preclude this court from coming to the same conclusion as the President. I shall assume without deciding that the court's conclusion, quoted above, amounted to a finding of fact that the evidence was insufficient to prove that the

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appellant had a dominant purpose to buy, hold and sell the shares as an item of fixed capital. The question then is whether this is a conclusion which could reasonably have been reached on all the evidence.

The appellant himself did not give evidence. This was because of ill health. No adverse inference was accordingly drawn (or could be drawn) from his failure to give evidence, although such failure necessarily reduced the quantum of evidence available to establish his state of mind. Evidence was, however, given by two of the other shareholders, Messrs Israel and Aaron, that all the shareholders had originally intended to develop the township and to sell off the individual plots and to make their profit in the form of dividends received from the company. According to these witnesses, the increase in land values in the area caused them

to change their intention and to dispose of their equity by accepting Nasionale Bouvereniging's offer which they all felt was too good to reject. According to the Statement of Case, 'this evidence was not accepted in the majority judgment of the Court'. It may be convenient at this stage to consider what support there is for these witnesses in the evidence, and what the court's reasons were for rejecting their evidence.

The factors which support this evidence are set out in the dissenting judgment of the President, and it is not necessary to repeat them in detail. Briefly they are that the money invested in the company was that of the shareholders, supported by overdraft facilities. The shareholding was limited to 17 shareholders, and no individual shareholder could determine the direction of the development scheme. The shares of an individual shareholder were not readily saleable. The conduct of the shareholders displayed an intent to develop the property as a township and earn income for the company (and dividends for themselves) from the sales of plots. This conduct commenced with the drawing-up of feasibility studies and continued with the active steps taken to promote the proclamation and development of the township. The minutes of the company's meetings fully bear out that the intention mentioned above existed.

Towards the end of 1968, conditions in the market changed. These changes support the reason given by the witnesses for selling the shares.

I turn now to the reasons advanced by the majority for not accepting the abovementioned evidence. At the outset I should state that no adverse findings were made on the demeanour or credibility of these witnesses. The court was influenced rather by the objective circumstances of the case in holding that the *ipsi dixerunt* of these witnesses was not sufficient to discharge the onus resting on the appellant.

The approach of the majority was that the only purpose of the company was to buy and make a profit on the sale of its sole asset. In these circumstances, they held, the onus is not easily discharged that the shares were held as an investment, and that the shareholders did not intend to profit from their purchase in any other way. With respect, it is difficult to see why this should be so. Once the company's

sole asset was sold, which would occur over a period of time, the shares would become valueless. This does not mean that the shares were not held for the purpose of earning dividends while the company was operating actively.

In its discussion of the evidence, the majority minimized the importance of the feasibility studies. By themselves these studies may reasonably be considered unimportant, but they are at least a consistent part of a total picture. Then the court comments on the fact that no plots were in fact sold (save the service station site) and that no efforts were made to sell plots. This factor by itself can, however, hardly cast serious doubt on the alleged intention of the shareholders to sell off the plots. There was evidence that the shareholders wished to extend the period of sale in order to take advantage of rising prices. Moreover, the township conditions prohibited the sale or transfer of erven until services were provided. By May 1969 these were not yet completed.

Then the court stated that the evidence of the boom in land prices, and the Building Society Act, did not in its opinion have any bearing on the intentions of the shareholders. This view seems to be in conflict with the Statement of Case which refers to 'an entirely new development in land dealing, the opportunity for which had not previously existed' and to 'a phenomenal increase in land prices in the area'. The prices offered by Nasionale Bouvereniging were, according to the Statement of Case, regarded as 'a fantastic offer' and 'phenomenal'. Moreover the Statement of Case records that 'the prices were so high in comparison with what the shareholders would have received had the land been developed and the plots sold off as originally anticipated that it was felt by all the shareholders that they could not refuse this offer'. Having regard to these facts, I must accept that the Special Court could not reasonably have found that the boom in land prices did not have any bearing on the intentions of the shareholders.

The court then expressed the view that the financial relationships between shareholders and company were more akin to venture than investment. The significance of this distinction is not clear to me. I accept that the shareholders engaged in a joint venture. However, this took the form of a company in which they invested their money and the question before the court was to determine the purpose with which they held shares in this company. To describe the scheme as a 'venture' does not in my view assist in answering this question. The concept of a 'venture' is again mentioned in the penultimate paragraph of the judgment. In my view the same comment applies.

The court also expressed the view that there was evidence that the shareholders did not wish to sell any of the land until they could realize their investment - not only the shares but also their loan accounts. I understand this to mean that the township was to be kept intact until the total investment could be realized. I do not know what the evidence is to which the court refers - no such evidence appears from the Statement of Case. In any event, the court does not base any finding upon such evidence, or indicate what weight is to be given to it.

The court commented on the fact that the appellant and most of the other shareholders did not give evidence about their intentions. This is, of course, true, but in the circumstances of this case it seems most unlikely that the appellant's intention would have differed from those of the witnesses who did give evidence. In any event, his intention may be deduced as a matter of probability from the objective circumstances of the

case. As I have already said, no adverse inference can be drawn from the appellant's failure to testify.

Finally the court commented on the fact that the appellant did not bring evidence on the circumstances of the sale of the shares in question - by whom and when negotiations were started. It is common cause that it was the appellant who approached the Nasionale Bouvereniging (and not vice versa) with a view to their offering to buy the township, culminating in the sale of the shares. This feature by itself does not, of course, necessarily indicate that the appellant had any purpose other than to realize his investment at the best possible price. I accept nevertheless that, although no adverse inference can be drawn from the appellant's failure to give evidence, there is a lacuna in the evidence on this aspect which must tend to weaken the case for the appellant.

In his argument for the Secretary, Mr *Tebbutt* raised some points which were not dealt with, explicitly at any rate, in the judgment of the Special Court. Thus he contended that the active role taken by the appellant in the company's affairs, and the fact that the company consisted largely of friends and relatives of the appellant's, led to the conclusion that the company was to all intents and purposes the appellant's company and should be regarded as such. This contention does not seem to me to be borne out by the evidence. Although the appellant clearly played a leading role in the conduct of the company's affairs, the Statement of Case does not indicate that the other shareholders were in effect mere puppets of his. Indeed, the minutes of the company's meetings, which are attached to the statement, indicate an active participation by at least a number of the other shareholders. I do not think I need therefore consider what the implications would have been had the company in effect been a one-man company. This feature, even had it existed, would admittedly not have been decisive of the purpose with which the appellant bought and held his shares in the company.

Mr *Tebbutt* also argued in the alternative, rather faintly it seemed to me, 'that after October 1968 the appellant "crossed the Rubicon" and decided to enter into a profit-making scheme with the property (or his shares in the property-owning company) as his stock-in-trade'. (I quote from the written heads of argument.) Suffice it to say that there is no evidence to support this contention save the single fact that it was the appellant who approached the Nasionale Bouvereniging with a proposal to buy the company. This fact, as I have indicated, is not inconsistent with an intention to realize the appellant's investment at the best possible price. I do not think therefore that there is any warrant for holding that the appellant's intention changed in 1968.

When the admitted facts, as set out in the Statement of Case, are

considered with the comments of the majority of the court and of the Secretary's counsel, it seems to me that the appellant made out a strong case based on the evidence of two fellow-shareholders supported by the probabilities arising from objective circumstances and the course of dealing of the company. The majority of the members of the court and Mr *Tebbutt* mentioned certain aspects which tend to throw some doubt on the acceptability of the evidence relating to the purpose with which the appellant, and other taxpayers, held the shares in the company. I find it impossible to say that this doubt could not reasonably have been entertained. This is, however, a far cry from finding that an onus has not been discharged on a balance of probabilities. In my view the true and only reasonable conclusion from the evidence set out in the Statement of Case contradicts the finding of the majority (Cf *Edwards* (*Inspector of Taxes*) *v Bairstow & another*(1955) 3 All ER(HL) 48 at 57 - a formulation which has often been followed in our courts). In other words, I consider that the only reasonable conclusion that could be drawn from the evidence is that arrived at by the President, viz that the appellant and the other shareholders entered upon the project with the object of investing their capital, and sold their shares as a realization of their investment.

It follows that the appeal must be upheld with costs, including the costs of two counsel. The order of the Special Court is set aside, and substituted with the following:

The assessment by the Secretary in respect of the appellant's liability for normal tax for the year ending 28 February 1970 is set aside and the matter is referred back to the Secretary to make a fresh assessment on the basis that the amount of R21 292 represents a receipt of a capital nature.

VOS J: I agree. I wish to question one point however. In *SBI v Aveling* 1978(1) SA 862 at 880, 10 fixed capital is described as something held with an element of permanency and which will produce income for the holder. What about a house, or a motor car? If these are used by the owner to live in or to drive in they do not produce income, but only economic utilities. Yet they are normally capital goods. Other examples are paintings and antique furniture. Hence, with respect, I would prefer to say that capital is that which is held with an element of permanency and with
the object that it should produce an economic utility for the holder.

FAGAN J: For the reasons given by Grosskopf J, I agree that the appeal should be allowed.

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Footnotes

1 40 SATC 1 at 17-18.

2 21 SATC 1 at 8.
3 31 SATC 163 at 174, 181.
4 40 SATC 75 at 90.
5 18 SATC 127 at 135-6.
6 31 SATC(*supra*) at 175-6.
7 21 SATC 85 at 97.
8 40 SATC(*supra*) 92-3.
9 SATC 135 at 146.
10 40 SATC 1 at 17-18.