**COMMISSIONER FOR INLAND REVENUE v STOTT**
**3 SATC 253**



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| **Division:** | Appellate |
| **Judges:** | SOLOMON CJ, DE VILLIERS, WESSELS, CURLEWIS AND STRATFORD JJA |
| **Date:** | 17 March 1928 |
| **Also cited as:** | 1928 AD 252 |

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*Income tax - Income - Profit derived from sale of property - Sale in pursuance of scheme of profit - making or realisation of capital assets - Carrying on business - Inference from facts and question of law - Intention with which property acquired - Conclusive unless subsequent change of intention established - Section 6, Act 41 of 1917.*

Appeal from a decision of the Natal Provincial Division.

Appellant, who carried on business as a land surveyor and architect, had derived profit during the years of assessment under consideration from the sale of certain plots of land into which he had cut up certain two properties acquired by him under the following circumstances.

The first property consisted of an area of about 50 acres at Ifafa on the South Coast of Natal, purchased by appellant in the year 1920. At that time appellant was anxious to acquire a seaside residence, having recently disposed of one he had owned at Winkelspruit on that coast. The property acquired was larger than appellant required for residential purposes, but the property was only for sale in the one block. Appellant built a cottage on the site and thereafter cut up about half the property into small lots, which he proceeded to sell. During the years 1922, 1923, and 1924 he derived substantial profits from those sales.

The second property consisted of a small fruit farm on the Bluff at Durban. When purchased by appellant in 1921 this property was subject to a long lease. Appellant, when acquiring the property had some intention of making his home there if it proved to be suitable. The tenant defaulted, and being dissatisfied with the land, he let it to a second tenant with a reservation allowing him to sell portions of the land if he so desired. He had trouble with his second tenant and thereupon surveyed the farm, cut it up into lots and placed the property in the hands of agents for sale. From the sale of these plots appellant derived substantial profits during the years 1923 and 1924.



Prior to the purchase and sale of these properties appellant, whose profession gave him opportunities for so doing, had from time to time purchase properties, some of which he had sold and others of which he had retained and let to tenants. In the year 1923, after the purchase of the properties at Ifafa and the Bluff, appellant purchased a property called "Woody Glen" which was tenanted by a large community of natives. These natives were in fear of ejection, and applied to appellant, who, as the son of a missionary, was well known to them, for assistance. Appellant purchased the farm, cut it up into lots and sold it to the natives. During the year 1924 appellant derived a small profit from the sale of certain of these lots.

The profits derived by the appellant from the sales of lots at Ifafa, the Bluff and Woody Glen were included by the Commissioner for Inland Revenue in the taxable income of the appellant for the years 1922, 1923 and 1924, on the grounds that appellant had embarked upon a scheme of profit - making by cutting up and selling in plots the properties acquired by him.

Appellant lodged objection and appeal to these assessments, but the Special Court for hearing income tax appeals by a majority judgment (G.J. MARITZ, President, dissenting) confirmed the assessments made in so far as they related to the profit realised on the lots sold at Ifafa and the Bluff.

Thereupon appellant required a case to be stated to the Natal Provincial Division of the Supreme Court, submitting for determination the following question of law:-

> "Were the proceeds of the sale of lots on the Bluff and Ifafa properties gross income of the appellant within the meaning of section 6 of Act 41 of 1917?"

This question the Natal Provincial Division (DOVE - WILSON, J.P., TATHAM and MATTHEWS, JJ.) answered in the negative, holding that the *onus* of proving that profits realised by the sale of land were other than accruals of a capital nature rested upon the Commissioner, and that the facts proved did not establish that the properties had been acquired with the intention of trading with them at a profit.

The Commissioner appealed.

*Held*, dismissing the appeal, that the facts found by the Special Court did not support an inference that the lots had been sold in pursuance of a scheme of profit - making and therefore the amounts realised constituted in the hands of the appellant accruals of a capital nature.

*Per* WESSELS, J.A.: Whether or not a business is carried on is an inference from facts, and that inference is a matter of law. The primary intention with which property is acquired is conclusive as to the nature of the receipt arising from the realisation of that property unless other factors intervene which show that it was sold in pursuance of a scheme of profit - making.

**WESSELS JA** said that as had been pointed out in the court below, the procedure was under Act 40 of 1925 but the obligations of the taxpayer were to be determined by the repealed Act 41 of 1917 inasmuch as the sales were effected after the Act of 1917 came into operation, but before the Act of 1925 was gazetted. That was clear from the terms of sec 73 of the Act of 1925.

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Though the Court was concerned only with the proceeds of the respondent's Bluff and Ifafa properties, yet in order to determine whether those proceeds were gross income or accruals of a capital nature, it had to consider all the land transactions of the respondent as found in the stated case, for the solution of the question depended upon whether he was carrying on the business of a landjobber or engaged in a scheme for profit - making in regard to those transactions. The following were the essential facts necessary for the determination of the question at issue:-

1. The taxpayer was an architect and a surveyor practising at Pietermaritzburg, and his occupation gave him opportunities of judging the value of land.

2. He had three classes of investments; stock, mortgages and land. If his funds permitted, he utilised money in the acquisition of land.

3. His land investments were as follows:

(a) His first investment in land was made some 30 years ago. He bought land on the north coast of Natal, let it and subsequently sold it at a profit.

(b) He bought a farm in Vryheid district which he had let for five years, and he had one or two town properties from which he received rent.

(c) He bought two acres at Winkelspruit, Natal, as a seaside residence. The place became congested, and he decided to move away. In 1918 he cut the property up into five lots and sold them.

(d) In August, 1920, he wanted another seaside residence. He bought 50 acres of land at Ifafa. The block was sold as a whole. He bought it for £990, and at once chose a site on which he erected a cottage. His primary intention in buying the block was to build a seaside residence there. In April, 1921, he was asked to sell 30 acres. He replied that he had no desire to sell, but if the applicant was prepared to pay him £3,000 he would sell the whole block for that amount. Later on he surveyed half of the block in lots and sold these at a profit. In each of the years 1922, 1923 and 1924 he realised a profit of £706 on the lots sold.

(e) In March, 1921, the taxpayer bought a small fruit farm at the Bluff. There was a long lease on the farm at the time it was bought. The lessee failed to pay the

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rent. The taxpayer relet the farm subject to his right to cut it up and to sell it in lots. The second tenant also caused trouble. He then cut up the farm in lots and sold these at a profit of £623 in 1923 and £624 in 1924.

(f) In 1924 the taxpayer bought the farm "Woody Glen," in extent 1,800 acres at 23s. per morgen. The land was bought to assist natives living on it who were in fear of being ejected. Half of the farm was stony and valueless. A portion was cut up into lots and these were sold to the natives at £3 per acre. The profit on this sale was £16 for 1924. The Special Court found that this farm was bought primarily from philanthropic motives to assist the natives.

Upon these facts the majority of the Special Court found that as regards the farm on the Bluff and the land at Ifafa the enhanced value at which the respondent sold the land was a profit upon which income tax was payable. The reasons given by the Special Court for this finding were:

1. That "by putting his brains into it and organizing a trade in the selling of the lots, he converted his original intention in buying in such a way as to bring it within the scope of a profit - earning undertaking."

2. By cutting up the properties into small lots and selling these at a profit, the taxpayer was carrying on a

business as part of his business as a surveyor, and therefore the profits on these transactions could not be regarded as being of a capital nature.

The Natal Provincial Division upheld the minority judgment of the PRESIDENT of the Special Court that the proceeds of the sale of the land in question were accruals of a capital nature within the meaning of sec 6 of Act 41 of 1917. From this decision the Commissioner for Inland Revenue had appealed.

The first point raised by Mr *Hathorn* on behalf of the appellant was that the Court ought to send the record back to the Special Court to find the facts more specifically. What he really wanted was that the case should go back for a special finding whether as a fact the taxpayer was or was not carrying on the trade or business of a landjobber, i.e., a man who makes a business of buying and selling land. The reason for wanting this as a finding of fact was in order to argue that, inasmuch as this would then be a finding of



fact, the Provincial Division would have to accept it as such and there would then in that respect be no question of law to be decided by the Court. It was unnecessary to enquire whether the Court had or had not the inherent right of sending the case back, because in the particular circumstances of this case the Court saw no necessity for such a procedure. The facts as stated were sufficiently clear to enable it to decide the appeal. The question it had to determine was whether the facts as set out in the special case showed that the proceeds of the sale of the Ifafa and Bluff properties constituted gross income or capital. In order to arrive at that decision it was necessary to know whether the acts of the taxpayer in buying and selling those properties showed that he was carrying on the trade or business of a landjobber. Whether he was or was not carrying on such a business was an inference from facts. That inference was a matter of law. Did or did not such facts as were found lead to the conclusion that the taxpayer was carrying on a business or trade within the meaning of the law? Whatever view other Courts had expressed, it was quite clear that the Court had regarded the inference from the acts of the taxpayer that he carried on a trade or business as a question of law. The case of *Platt v Commissioner of Inland Revenue* (1922, A.D. 42) was conclusive. That case decided that whether certain facts did or did not constitute the carrying on of a trade within the meaning of secs 18 and 22 of Act 41 of 1917 was a question of law. It was also the *ratio decidendi* of *Commissioner of Taxes v Booysens Estates Ltd*. (1918, A.D. 576). In the *Overseas Trust Corporation Ltd. v Commissioner of Inland Revenue* (1926, A.D. 441.)1 The CHIEF JUSTICE said at p. 453: "Where an asset is realised at a profit as a mere change of investment there is no difference in character between the amount of enhancement and the balance of the proceeds. But where the profit is, in the words of an eminent Scottish Judge, 'a gain made by an operation of business in carrying out a scheme for profit - making,' then it is revenue derived from capital productively employed and must be income." *Californian Copper Syndicate v Inland Revenue* (41 Sc. L.R.). In order, therefore, for the Court to determine whether an asset realised at a profit was a mere change of investment or an operation of business in carrying out a scheme for profit - making, it must have before it all the facts and circumstances of the sale and not merely the inference of the Special Court from



these facts. In law the Court could only determine whether the proceeds of an asset sold by the taxpayer was capital or gross income when it had considered under what circumstances the asset was sold. The inference drawn by the Special Court from the facts found by it could not bind the Court. Even, therefore, if the majority of the Special Court had stated specifically that the taxpayer was carrying on the business of a landjobber, the Court was entitled to enquire into the correctness of that conclusion by considering the same facts from which the Special Court drew its inference.

His Lordship would proceed to enquire whether the evidence supported the contention that the taxpayer was carrying on a scheme for profit - making by buying land, cutting it up and selling it in lots. It was quite clear that his real business is that of a surveyor and architect. When, however, he had funds to invest he sometimes bought land with those funds. About 30 years ago he bought land on the north coast of Natal, which he sold at a profit. The Court had no further details of that transaction, and as it was so long ago it might be passed over; the same might be said with regard to the farm he owned in Vryheid district and his town properties. Those had been let, and were clearly investments. Next came his transactions between 1918 and 1923. During those five years he had bought and sold land on four occasions. In 1918 he sold the two acres at Winkelspruit, Natal, which he had bought for the purpose of a seaside residence. He thought the place too crowded and so sold the land in plots. It was not stated whether he made a profit or not. There was, however, no suggestion that that land was bought otherwise than as an investment. That purchase showed no intention on the part of the taxpayer of acting as a landjobber. If, therefore, he began to do business as a landjobber, it must have been between 1920 and 1923. It was possible to dispose at once of the purchase of "Woody Glen" in 1923 because the Special Court did not suggest that that land was bought as a profit - making scheme. It was specifically found that the property was bought as an investment in order to assist certain native tenants who were afraid they would be ejected. The taxpayer was the son of a missionary, and there were, therefore, sentimental reasons for the purchase. The Court was therefore confined to purchases of land during the period August, 1920 to March, 1921 and the subsequent sale of that land in plots. In other words it was asked to infer that the taxpayer was carrying on the business of a landjobber or engaged in a scheme for profit - making

from two transactions, viz., the purchase of the land at Ifafa in August, 1920, and the farm at the Bluff in March, 1921.

As regards the land at Ifafa, it was true that it was difficult to assume that Mr Stott would wish to buy 54 acres for a seaside residence only. The explanation was that he had either to buy the whole lot or leave it alone. He chose to buy. There was nothing in that to suggest any intention to do the business of a landjobber. In April, 1921, he was asked to sell 30 acres out of the 54. He offered to sell the whole block for £3,000 and thus realise a large profit. Nothing came of that. He built a seaside cottage on the land, and some time afterwards divided the block into two portions. He retained the cottage and about half of the property, divided the other half into lots and sold those at a profit. The stated case did not say that Stott surveyed the lots himself, but the judgment of Mr *Mitchell*, a member of the Special Court, seemed to imply it. His Lordship would assume that he did the survey himself. Could the fact that he divided the property into two halves and cut up the one half into lots convert what was *prima facie* an investment into a business? It was not sufficient that the cutting up of the land and its sale in lots should in its result prove to be a profit - making matter so as to stamp the proceeds as gross income. The gain must be acquired by an operation of business in carrying out a scheme for profit - making. His Lordship would quote here the words of the LORD JUSTICE CLERK in the *Californian Copper Syndicate* case referred to with approval by the CHIEF JUSTICE in the *Overseas Corporation* case (*supra*). After stating that if an owner of an ordinary investment chooses to realise it and obtains a greater price that is capital and not profit, he went on to say: "But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable where what is done is not merely a realisation or change of investment but an act done in what is truly the carrying on or carrying out of a business." The fact that an owner cuts up his land in order to get more for it than if he sells as a whole cannot be described as the carrying on of a business. In *Commissioner of Taxes v South Deeps Ltd*. (1918, A.D. at p. 606), INNES, C.J., said: "When the directors of a company genuinely floated for mining purposes are faced with the position that their capital is inadequate and that it is not practicable to increase it; if under those circumstances they decide to dispose of their assets and finally wind up the concern, the fact that they do so by instalments is not in itself sufficient to prove that they



are embarking in a new business and using their capital to produce revenue." As a general rule one or two isolated transactions could not be described as the carrying on of a business. There were no doubt exceptions. A single undertaking might be of such a nature that it could be correctly described as a business. Thus in *Stephan's* case (1919, W.L.D., p. 1), the salvaging of a single ship's cargo was considered a business because "these salvage operations which were managed by the staff of the appellant's business, and which necessitated so many ordinary business acts such as the engaging of services of men, hiring apparatus, purchasing equipment, the transport of the cargo to Cape Town and the like stand on an entirely different footing" - *per* MASON, J. at p. 7. In dealing with a company one of whose objects was to buy and sell land, then the company might well be considered to be doing the business of selling and buying land even though it carried out only a single transaction; but when an individual like a surveyor who was not professedly carrying on the occupation of a landjobber bought and sold one or more plots of land, he could not be said *prima facie* to be doing the business of a landjobber. Before it could be said that an individual was carrying on a business there must be some proof of continuity. Thus in *Smith v Anderson* (45 Ch. D. 247), quoted with approval in *Platt's* case, JESSEL, M.R. (p.258), pointed out that acts which were done by a company would be regarded as business, whilst these same acts if done by an individual would not be so regarded, and then he added: "The same observation may be made as regards a single individual buying or selling land, with this addition that he may make it a business and then it is a question of continuity. A man occasionally buys and sells land, as many landowners do, and nobody would say he was a landjobber or dealer in land, but if a man made it his particular business to buy and sell land to obtain profit he would be designated as a landjobber or dealer in land." From the extracts given by the PRESIDENT of the Special Court the *Hudson's Bay Co., Ltd. v Stevens* (5 T.C. 424) (of which his Lordship had no report), was decided on lines similar to the above quotation from JESSEL, M.R.

It would appear from the extracts quoted and from what was said in *Thew's* case (131 L.T.R. 248, 254), that the Hudson Bay Company was a fur trading company whose objects did not embrace the sale of lands and who were found not to have purchased or acquired land for the purpose of resale, consequently the Court held that they were not carrying on a trade in selling land, and therefore the



proceeds they derived from a sale of some of their land was regarded as capital and not as gross income. The Court had taken the same view with regard to the sale of certain assets in the case of *Commissioner of Taxes v Booysen's Estates, Ltd.* (*supra*).

The mere fact that the land was cut up into lots rather than sold as a whole could not by itself alter the character of the proceeds derived from the land from capital to gross income. Nor could the fact that Stott as a surveyor knew somewhat more than the ordinary public about the value of land make any difference. Certainly the fact that Stott cut up the land himself into lots rather than employ another surveyor could not convert an ordinary investment of capital into a trade or business. Every person who invested his surplus funds in land or stock or any other asset was entitled to realise such asset to the best advantage and to accommodate the asset to the exigencies of the market in which he was selling. The fact that he did so could not alter what was an investment of capital into a trade or business for earning profits.

It might, however, be urged that the Ifafa property did not stand alone. In the case of the Bluff farm, acquired in the year following that in which the Ifafa property was bought, the land was also cut up into lots and sold. There would be some force in the argument that they were acquired as a profit - earning concern if the two transactions were similar, for then there would be some evidence of continuity; but the argument broke down because the transactions were in fact dissimilar. There was no idea of cutting up the Bluff property and selling it in lots when it was acquired, for there was then a seven year lease upon the property. It was only fortuitously that the lease came to an end by non - payment of rent. But even when the first lease expired the property was again let, though subject to the right to cut it up in lots and to sell those if Stott so desired. That idea only arose in August, 1922, or almost eighteen months after the property had been bought. There was therefore no proof that the taxpayer conceived a scheme of making profits by buying land for the purpose of cutting it up and selling it in lots. The intention of the purchaser had been regarded as one of the tests whether he is making a trade of buying and selling land as a profit. In *Thew's* case (*supra*), ROWLATT, J., said: "For the purpose of ascertaining whether profits made upon the sale of an article are taxable profits I think it is sufficiently accurate to say that it depends upon whether the article was acquired for the purposes of trade or not" (p. 254). It was unnecessary to go so far as to say



that the intention with which an article or land was bought was conclusive as to whether the proceeds derived from a sale were taxable or not. It was sufficient to say that the intention was an important factor and unless some other factor intervened to show that when the article was sold it was sold in pursuance of a scheme of profit - making, it was conclusive in determining whether it was capital or gross income. Now the evidence was clear that neither the Ifafa nor the Bluff property had been bought for that purpose. *Prima facie* each property was bought as an ordinary investment of surplus funds, and there was nothing in the stated case to show that at any time thereafter there was an idea of dealing with them as a part of a business of buying and selling land. As had been pointed out in the *Booysen's Estates* case, there was no definite test which could always be applied in order to determine whether a gain or profit was income or capital, but in order to convert what was on the face of it an ordinary investment of surplus funds into a profitmaking business there must be proof of some special acts which in the ordinary experience of men showed that the taxpayer had conceived some scheme for profit - making and had made it his business to carry it out. Of that the Court had no proof in the case submitted to the court below, and therefore it was unnecessary to deal with Mr *Hathorn's* argument that the *onus* of proof lay on the taxpayer. The facts as found by the Special Court negatived the contention that the respondent dealt with his land as a landjobber and that therefore the enhanced value at which he sold was taxable.

The judgment of the court below was therefore upheld, and the appeal failed and must be dismissed with costs.

SOLOMON, C.J., DE VILLIERS, CURLEWIS and STRATFORD, JJ.A., concurred.

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**Footnotes**

1 2 SATC 71.