COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICE v VAN BLERK
62 SATC 131

Division: Cape of Good Hope Division
Judges: SELIKOWITZ J, BLIGNAULT J and DAVIS J
Date: 7 February and 9 March 2000
Also cited as: [(2000) 1 All SA 616 (C)]

Income tax - Capital and Revenue - Sand - Proceeds on sale of - Whether of a capital or revenue nature - Taxpayer's farm containing significant quantity of sand suitable as building sand and which was of a nature that once removed it could not be replenished - Taxpayer selling such sand at fixed price per cubic metre increasing on annual basis - Court a quo had found that proceeds of such sales were of a capital nature and not taxable - Commissioner for SARS on appeal contending that if taxpayer selling sand at a profit the proceeds would be taxable - Held that dictum in Bourke's Estate v Commissioner for Inland Revenue 53 SATC 86 should be applied and the proceeds of sales were not to be determined by whether fruits or corpus had been sold but rather by means of an examination of the nature of the transactions and the intention with which they were undertaken by the taxpayer - Held that the record of the sales of sand had all the characteristics of trading in this commodity and taxpayer had employed his sand as his stock in trade pursuant to a scheme of profit making - Held accordingly that the repeated sales of sand in the manner undertaken by the taxpayer had all the characteristics of ordinary trading in the commodity and the proceeds were therefore of a revenue nature and taxable.

Respondent was a farmer who had initially farmed together with his father and since 1964 he had farmed for his own account and for this purpose he had leased the farm from his father before purchasing it from him in 1983.

The farm contained a significant quantity of sand which was suitable as building sand and was of a nature that once removed it could not be replenished.

Various persons had over the years approached respondent with a view to purchasing sand from the farm and, after a series of negotiations, it was agreed that one B could remove sand from the farm at the price of 50 cents per cubic metre and the area from which B could remove sand was increased from 10 to 40 hectares. Later M's Transport had taken over and the price per cubic metre had increased to R1,00.

Respondent had received R174 735 for sales of sand in 1990, R122 109 in 1991, R224 672 in 1992 and R148 953 in 1993.

The Commissioner for SARS had assessed these amounts to tax as constituting receipts of a revenue nature.

Respondent had appealed to the Cape Special Court for Hearing Income Tax Appeals (see *ITC 1652* (1998) 61 SATC 114) which held that the proceeds constituted a sale of part of the *corpus* of the farm and accordingly such amounts could not be assessed to tax as constituting receipts of a revenue nature.

Traverso P had predicated her judgment on certain agreed facts, being that there was a considerable quantity of sand on the farm which was suitable for construction purposes, the sand was of such a nature that if it was removed it could not be replaced nor replenished and a removal of the sand from the farm resulted in a decrease in the value of the property.

Traverso P had relied on a judgment of Friedman P in *ITC 1471* (1989) 52 SATC 96.

The Commissioner for SARS then appealed against the judgment of Traverso P in the Special Court to a full bench of the Cape Provincial Division.

The Commissioner contended that if a taxpayer purchased land with a view to selling the sand found thereon at a profit, the proceeds would be taxable and that the sand until removed formed part of land which in its totality was a capital asset would be irrelevant to the enquiry as would the diminution of the value of land caused by the removal of such sand. Moreover, while the sale of *fructus* would invariably be of a revenue nature, the proceeds from the sale of *corpus* would not inevitably stand to be classified as receipts of a capital nature.

Respondent had contended that he had sold his rights to the sand and that he had no involvement in the removal of the sand or in any of the activities for which the sand was utilised. Moreover, he had possessed no sand removing equipment which would have been indicative of a person engaged in a business of trading in sand and the only trade in which respondent had been engaged was that of farming.

Held

(i) That from the *dictum* in *Bourke's Estate v Commissioner for Inland Revenue* 53 SATC 86 it was possible to

formulate the test to be applied here in this way: the proceeds of the sale are not to be determined by whether fruits or *corpus* had been sold but rather by means of an examination of the nature of the transactions and the intention with which they were undertaken by the taxpayer.

(ii) That while the principle as set out in *Glenboig Union Fire Clay Company Ltd v The Commissioner for Inland Revenue* 12 TC 427 has been accepted by our courts it was inapplicable to the facts of the present case in that the inquiry relates not to the legal classification of the thing sold that is whether it is part of the *corpus*, or constitutes a sale of *fructus* but exclusively to the nature of any business carried on by respondent in relation to such sand.

(iii) That in this case the record of the sales of sand, *albeit* to a single purchaser, had all the characteristics of trading in this commodity and respondent had employed his sand as his stock in trade: moreover, sand was sold on a regular basis over a number of years and in itself this was indicative of a taxpayer who had been engaged in a trade and had employed the sand in the nature of trading stock pursuant to a scheme of profit making.

(iv) That the fact that respondent did not advertise the sale of sand and that he did not sell sand to the general public but rather to one specific purchaser, was not sufficient to justify a conclusion that he had not embarked on a profit making scheme employing the sand as trading stock.

(v) That, from the principle as laid down in *Bourke's Estate v Commissioner for Inland Revenue* 53 SATC 86, the key question for determination of a dispute such as in the present case was whether an owner of land who sells for profit a

substance found on his land has engaged in a trade even though the substance may be a wasting asset so that its removal inevitably devalued the land.

(vi) That it was apparent that when respondent bought the farm in 1983 he had employed it for two separate and distinct purposes, *ie* to employ the land in farming operations and to sell the sand thereon and the presence of the first of these two purposes would in no way detract from the significance of the second in relation to sand sales: the character of the sand, for purposes of determining whether the proceeds thereof were revenue or capital, must be determined by the respondent's intention in relation to the sand.

(vii) That the transactions in issue represented the proceeds of sales in which respondent had sought to employ a commodity which admittedly formed part of the *corpus* of his land for profit and in this he was successful and the repeated sales of sand in the manner undertaken by respondent had all the characteristics of ordinary trading in the commodity.

Appeal upheld with costs and assessments for the tax years 1990-3 to be reinstated.

DAVIS J: Respondent is a farmer. He commenced farming on the farm Vlak-fontein No 911 ('the farm') in the district of Malmesbury in 1954. Initially he farmed together with his father who had bought the farm in 1942. Since 1964 he has farmed for his own account and for this purpose he leased the farm from his father. On 17 February 1983 respondent purchased the farm from his father for R356 400.

The farm contained a significant quantity of sand which was suitable as building sand. This sand was of a nature that once removed it could not be replenished. During 1977-8 Mr HJ Van Biljon approached respondent acting on behalf of his father with a view to purchasing sand from the farm. After a series of negotiations, it was agreed that Van Biljon could remove sand from the farm at the price of fifty cents per cubic metre. Initially the area from which Van Biljon could remove sand was confined to ten hectares. In September 1982 this was increased to forty hectares. In 1985 Van Biljon was sequestrated and the removal of sand was taken over by Malan's Transport. At this stage the price per cubic metre had increased to R1,00. Respondent agreed to maintain the price at R1,00 per cubic metre for a further year whereafter the price increased at 15% pa. By 1990 the price per cubic metre had risen to R1,74, to R2,00 in 1991, R2,30 in 1992 and R2,65 in 1993. Respondent received R174 735 for sales of sand in 1990, R122 109 in 1991, R224 672 in 1992 and R148 953 in 1993.

Appellant assessed these amounts to tax. Respondent appealed to the Special Income Court.* Traverso P held that the proceeds constituted a sale of part of the *corpus* of the farm and accordingly such amounts could not be assessed to tax as constituting receipts of a revenue nature. Appellant has appealed against this judgment.

Traverso P's judgment was predicated on certain agreed facts, namely that:

1. There was a considerable quantity of sand on the farm which was suitable for construction purposes.
2. The sand was of such a nature that if it was removed it could not be replaced nor replenished.

3. A removal of the sand from the farm resulted in a decrease in the value of the property. The decrease in the value would be commensurate to the market value of the sand which had been removed.

In analysing the nature of the agreement between Van Biljon and respondent, which led to the sale of sand, Traverso P said:

'Kragtens die ooreenkoms het Mnr Van Biljon die hele sandverwyderingsaktiwiteit hanteer. Appellant het nooit enige sandverwyderingsapparaat besit nie en het niks met die fisiese verwydering van die sand te doen gehad nie. Sy enigste betrokkenheid by die aangeleentheid is 'n reg op die ontvangs van die koopprys. Nóg Mnr JHH van Blerk nóg die appellant het ooit enige sandkontrakteurwerk verrig en verrig dit ook nie in hierdie geval nie.'

Traverso P placed emphasis on the fact that respondent did not exercise any control over the quantity of sand which could be removed and that the contractor was solely involved in operations to remove the sand. The contractor was also responsible for the construction of a road so that he could obtain adequate access to the area from where the sand was to be removed.

Relying upon a judgment of Friedman P in *ITC 1471* 52 SATC 96, Traverso P concluded

'dit blyk duidelik dat die kernvraag steeds is of die sand beskou kan word as die *fructus* van die grond en of dit bloot deel is van die *corpus*. Myns insiens is dit duidelik in die omstandighede en op die feite van hierdie saak dat dit deel uitgemaak het van die *corpus* van die grond ongeag hoe betaling geskied het.'

Accordingly the court found that the proceeds from the sale of such sand were of a capital nature and could not be taxed by appellant.

In *ITC 1471* the taxpayer, also a farmer, entered into agreements at different times with three different building contractors under which they were granted the right to remove so much sand as they might from time to time require in return for which they paid the taxpayer sums of money calculated on the basis of an amount per cubic foot of sand removed.

Friedman P found that;

'onder die omstandighede doen die feit dat 'n reëling getref is om vir die sand van tyd tot tyd te betaal wanneer dit verwyder is, nie afbreuk nie aan die werklike karakter van die transaksie nie, *nl* die verkoop van 'n gedeelte van appellant se *corpus* . . . Aangesien die bousand nie hernubaar is nie, bring die verwydering daarvan mee dat appellant se plaas noodwendig 'n waardevermindering ondergaan sodra bousand daarvan verwyder word. Ofskoon die sand van moontlik minderwaardige weiveld verwyder is, het die grond egter 'n waarde gehad as synde grond wat bousand bevat het. Wanneer die bousand verwyder is, het daardie grond geen verder sodanige waarde gehad nie.'

In short, Friedman P found that the resolution of the character of the receipt of the proceeds from the sale of sand depended upon whether it was compensation for the disposal of a right to portion of the *corpus* of a capital asset in which case the proceeds could not be taxed.

Mr *Rogers*, who appeared on behalf of appellant in the present appeal, submitted that, if a taxpayer purchased land with a view to selling the sand found thereon at a profit, the proceeds would be taxable. That the sand until removed forms part of land which in its totality is a capital asset would be irrelevant to the enquiry as would the diminution of the value of land caused by the removal of such sand.

While the sale of *fructus* would invariably be of a revenue nature, the proceeds from the sale of *corpus* would not inevitably stand to be classified as receipts of a capital nature. Mr *Rogers* also submitted that it would make no difference in such a case whether the taxpayer proceeded to sell the right to all the sand for a lump sum or sold it *ad quantitatem* over a period of time. By contrast if a taxpayer acquired land solely as a capital asset with a view to conducting agriculture thereon but at some stage thereafter began to sell sand found on the farm the question would arise as to whether the taxpayer was simply realising part of his capital asset or whether he had formed a fresh intention of embarking on a profit making scheme in respect of the sale of sand. In assessing whether there was such a change of intention the manner in which he sold the sand would be part of the evidential matrix from which inferences as to his intention could be drawn.

Support for this submission can be found in the judgment in *Bourke's Estate v Commissioner for Inland Revenue* 1991 (1) SA 661 (A).1 This case concerned the taxation of an amount which was received from the owner of a neighbouring property as compensation for the loss of certain pine trees which had been destroyed as a result of a fire which had started on the neighbouring property. The Commissioner, in a revised assessment, included the accrual as part of the taxpayer's income.

In dismissing the taxpayer's appeal Hoexter JA said:

'it is trite that the planting of land and the taking root thereon of trees provides an example of industrial accession. The trees are incorporated into the soil which nurtures them. But here the inquiry relates not to the legal status, in the law of things, of the crop on the property, but exclusively to the nature of the business carried on by the trust and the syndicate in relation to such pine trees. The trust and the syndicate farmed with the pine trees in order to derive income therefrom . . . It is unnecessary, I think, to look beyond the fact that, having regard to the essential nature of the business of the trust and the syndicate, the pine trees on the property constituted trading stock as defined in s 1 of the Act' (at 673H).2

That the present case concerns sand and *Bourke*'s case dealt with trees should not render inapplicable the *dictum* in *Bourke* to the facts of the present case. In *Commissioner for Inland Revenue v George Forest Timber Co Ltd* 1924 AD 516 at 5263 Innes CJ drew no distinction between trees, 'stone or clay in land purchased for the purpose of a quarry on a brickfield'.

From the *dictum* in *Bourke* it is possible to formulate the test thus: The proceeds of the sale are not to be determined by whether fruits or *corpus* has been sold but rather by means of an examination of the nature of the transactions and the intention with which they were undertaken by the taxpayer.

In the present case the sale of sand began during the financial year which ended on 30 June 1978. In the first full year in which sand was sold, which ended on 30 June 1979, the proceeds amounted to R35 140,23. Van Biljon was the only purchaser. In 1985 he was sequestrated and another purchaser, Malan's Transport was found. As a result of price increases and an expansion of the area of the farm from which sand could be removed the proceeds increased significantly. Payment took place by means of monthly cheques and were

received initially from Van Biljon and subsequently from Malan's Transport. There was no suggestion in the evidence that there was any break in the continuity of monthly sales of sand after 1977-8.

Mr *Derksen*, who appeared on behalf of respondent, submitted that respondent sold his rights to the sand, that before the sand was removed the purchaser had acquired a personal right against respondent to enter upon the latter's property and remove sand therefrom. Respondent had no involvement in the removal of the sand or in any of the activities for which the sand was utilised. The state permit which has been issued, initially to Mr Van Biljon on 11 February 1981 with respect to the removal of the sand stated *inter alia*

> 'Die regte vervat in hierdie permit mag slegs deur Mnr H J Van Biljon, hierin verwys na die ontwikkelaar, uitgeoefen word mag en aan niemand oorgedra word sonder die voorafgaande goedkeuring van die Kantoor van die Eerste Minister nie.'

Mr *Derksen* submitted that respondent was possessed of no sand removing equipment which would have been indicative of a person engaged in a business of trading in sand. The process by which sand was removed was handled entirely by Van Biljon initially and subsequently by Malan's Transport. The only trade in which respondent was engaged was that of farming and indeed after sand had been removed from his farm, respondent continued to farm on that very land.

In support of these submissions Mr *Derksen* referred to the decision of the House of Lords in *Glenboig Union Fire Clay Company Ltd v The Commissioner for Inland Revenue* 12 TC 427. The taxpayer which carried on business as a manufacturer of fire clay goods and as merchants of raw fire clay had leased numerous fire clay fields in or near Glenboig, Scotland. A railway company, acting in terms of legislation, successfully prevented the removal of clay from a portion of the land, as a result of which compensation was paid to the taxpayer.

In deciding upon the question as to whether compensation should be taxed, Lord Buckmaster said

> 'The argument in support of its inclusion can only be well founded if the sum be regarded as profits, or a sum in the nature of profits, earned in the course of their trade or business. I am quite unable to see that the sum represents anything of the kind. It is said, and it is not disputed, that the amount in fact was assessed by considering that the fire clay to which it related could only be worked for some two and a half years before it would be exhausted and it is consequently urged that the amount therefore represents nothing but the actual profit for some two-and-a-half years received in one lump sum. I regard that argument as fallacious. In truth the sum of money is the sum paid to prevent the Fire Clay Company obtaining the full benefit of the capital value of that part of the mines which they are prevented from working by the Railway Company. It appears to me to make no difference whether it be regarded as a sale of the asset out and out, or whether it be treated merely as a means of preventing the acquisition of profit that would otherwise be gained. In either case the capital asset of the Company to that extent has been sterilised and destroyed and it is in respect of that action that the sum of £15,360 was paid' (at 463).

While the principle as set out in *Glenboig* has been accepted by our courts (see *Commissioner for Inland Revenue v Illovo Sugar Estates Ltd* 1951 (1) SA 306 (N) at 311;4 *Taeuber and Corssen (Pty) Ltd v Commissioner for Inland Revenue* 1975 (3) SA 649 (A) at 660)5 it is, in my view, inapplicable to the facts of the present case. The inquiry relates not to the legal classification of the thing

sold that is whether it is part of the *corpus*, or constitutes a sale of *fructus* but exclusively to the nature of any business carried on by respondent in relation to such sand.

In my view the record of the sales of sand, albeit to a single purchaser, had all the characteristics of trading in this commodity. Respondent employed his sand as his stock in trade. Trading stock is defined in s 1 of the Act to

include

> 'anything produced, manufactured, purchased or in any other manner acquired by a taxpayer for purposes of manufacture, sale, exchange by him or on his behalf or the proceeds from the disposal of which forms or will form part of his gross income . . .'

In the present case sand was sold on a regular basis over a number of years. In itself this is indicative of a taxpayer who was engaged in a trade and employed the sand in the nature of trading stock pursuant to a scheme of profit making. The fact that respondent did not advertise the sale of sand and that he did not sell sand to the general public but rather to one specific purchaser, is not sufficient to justify a conclusion that he had not embarked on a profit making scheme employing the sand as trading stock.

From the principle as laid down in the *Bourke* case the key question for determination of a dispute such as in the present case is whether an owner of land who sells for profit a substance found on his land has engaged in a trade even though the substance may be a wasting asset so that its removal inevitably devalues the land. Had respondent constructed a sign on his farm which issued an invitation to the public to purchase sand there could have been no doubt that the proceeds from such sales would have been of a revenue nature pursuant to the conduct of a trade. The fact that no sign was constructed and that only one purchaser entered the land to remove sand should not alter the nature of the enquiry, namely was the taxpayer trading in the commodity sold.

By the time respondent purchased the farm in February 1983, the sale of sand had taken place on a continuous basis for some six years. Respondent had been involved in all the initial negotiations with Van Biljon in 1977-8. He had attended to the receipt and banking of the proceeds of sand sales on behalf of his father. There can be no doubt that respondent was aware that the monthly sales of sand were yielding substantial amounts. He would have been aware, shortly before purchasing the farm in February 1983, that the area from which sand could be removed had recently been increased from ten hectares to forty hectares. Sand sales continued after his acquisition of the farm without any apparent interruption. It is apparent that when respondent bought the farm in 1983 he employed it for two separate and distinct purposes, namely:

(*a*) to employ the land in farming operations; and
(*b*) to sell the sand thereon.

The presence of the first of these two purposes would in no way detract from the significance of the second in relation to sand sales. The character of the sand, for purposes of determining whether the proceeds thereof were revenue or capital, must be determined by the respondent's intention in relation to the sand. It is entirely irrelevant, for the purposes of this case, that he may have intended to use the rest of the farm for agricultural purposes. The transactions fetched R670 469 over the four year period in issue. They represented the proceeds of sales in which respondent had sought to employ a commodity which admittedly formed part of the *corpus* of his land for profit. In this he was successful and the fact that

he was fortunate to negotiate with one purchaser rather than the public at large should not give rise to a different conclusion, that the repeated sales of sand in the manner undertaken by respondent had all the characteristics of ordinary trading in the commodity.

In my view the appeal should be upheld with costs and the assessments for the tax years 1990-3 inclusive should be reinstated.

Selikowitz and Blignault JJ concurred.

_____

Footnotes

* See *ITC 1652* (1998) 61 SATC 114.
1 53 SATC 86.
2 53 SATC (*supra*) at 95.
3 1 SATC 20 at 25.
4 17 SATC 387 at 393.
5 37 SATC 129 at 137.