

197/1958

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In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE ~~PROVINCIAL~~ Division.)
(Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

COMMISSIONER FOR INLAND REVENUE Appellant,

versus
STRATHMORE CONS. INVESTMENTS LTD. Respondent.

Appellant's Attorney *Nicks & Nicks* Respondent's Attorney *Godrick & F.*
Prokureur vir Appellant *Nicks & Nicks* Prokureur vir Respondent

Appellant's Advocate *A. Sengman, Q.C.* Respondent's Advocate *BA Ellinger, Q.C.*
Advokaat vir Appellant *J.M. Nathan* Advokaat vir Respondent *H. Nicholson*

Set down for hearing on *Tuesday, 25th Nov, 1958*
Op die rol geplaas vir verhoor op

(Sp. Inc. Tax Cr.)

1,315.8.11 (A)

9.45 - 2.50
2.15 - 4.30 } CAR

JUDGMENT: WEDNESDAY, 10th DECEMBER, 1958.

Appeal allowed with costs. The decision of the Special Court, in so far as it relates to the item of \$11,246, is set aside and is altered to read: "assessment confirmed."

Coram: Schreiner, A.C.J., Steyn, Breyer, Ogilvie Thompson et Smit (Actg.), J.J.A.

A. Ellinger

REGISTRAR.

10/12 '58

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

Record

In the matter between:

THE COMMISSIONER OF INLAND REVENUE.....Appellant.

and

STRATHMORE CONSOLIDATED INVESTMENTS LTD.....

.....Respondent.

Coram: Schreiner, A.C.J., Steyn, Beyers, Ogilvie Thompson,
J.J.A., et Smit, A.J.A..

Heard: November 25th, 1958. Delivered: *December 10th, 1958.*

J U D G M E N T.

OGILVIE THOMPSON, J.A.:-

During the tax year ended 30th June 1953 Respondent Company sold (a) certain 72 morgen of land at a profit of £38,053, and (b) the rights to take up 69, 210 shares in the Stilfontein Gold Mining Company Ltd. for the sum of £11,246, being 3/3 per right. In assessing Respondent for normal tax in respect of the tax year in question the Commissioner included both these amounts of £38,053 and £11,246 in its gross income. Respondent, its objection to this having been overruled by the Commissioner, appealed to the Special Court which upheld the assessment in regard to the £38,053 but
allowed...../2

allowed Respondent's appeal in relation to the £11,246 which it held to be a receipt of a capital nature. Being dissatisfied with this last mentioned decision of the Special Court, the Commissioner required it to state a case under section 81 of Act 31 of 1941 for the decision of this Court: the consents necessary in terms of section 81(1)(b) of the Act have been duly filed. The finding of the Special Court in relation to the £38,053 profit on the land transaction is not challenged by Respondent. The sole question for decision in the present appeal, accordingly, is whether or not the £11,246, obtained by Respondent on the sale of the rights to take up the Stilfontein shares, attracts tax. For a proper appreciation and determination of that question it is necessary first to make some reference to the circumstances preceding the acquisition by Respondent of the relative Stilfontein shares and which ultimately led up to the sale of the rights in issue.

The Stilfontein Gold Mining Company Ltd. - which I will call the Stilfontein Company - was registered on 23rd April 1949 with a nominal capital of £100 divided into 100 shares of £1 each. This company was promoted by the New

Pioneer Central Rand Gold Mining Company^{Ltd.} (hereafter referred to as the New Pioneer Company) of which Strathmore Investments Ltd. (which I will call the Investments Company) had control. At all times material to this appeal Messrs. Jack Scott, J.C. McIntyre and C.W. Roper were associated together as shareholders in, and directors of, the various companies I have mentioned, and also of various other companies collectively known as the Strathmore group. As between themselves, these three gentlemen held their shares in the proportions of 84%, 12%, and 4% respectively. At all times material to this appeal Scott, through his shareholding, had effective control of the Investments Company, of the New Pioneer Company, and of the Stilfontein Company and was also chairman of these companies.

On 13th June 1949 the original 100 £1 shares in the Stilfontein Company were subdivided into 400 shares of 5/- each and the nominal capital of the Company was increased to £3,500,000 by the creation of a further 13,999,600 shares of 5/- each. On 28th June 1949 one million of these shares were issued to various companies, including the New Pioneer Company and the Investments Company, ^{which} ~~who~~ respectively

acquired...../4

acquired 400,000 and 200,000 shares. During June and July 1949 the Stilfontein Company purchased from the Strathmore Development Company (Pty.) Ltd. and Eastern ^{Rand} Extensions Ltd. certain mineral rights and prospecting contracts (with options to purchase mineral rights) over various portions of the farms Stilfontein No.39, Hartebesfontein No.41 and Buffelsfontein. Included among the rights so purchased from the Strathmore Development Company (Pty.) Ltd. were certain option and prospecting rights over the farm Stilfontein which Scott had, in his personal capacity, acquired during 1946 and which, subject to the retention of a 10% participation right, he had in March 1957 ceded to Strathmore Development Company (Pty.) Ltd.. This 10% participation right was ceded by Scott, free of charge, to the Investments Company on 19th September 1947. When, in September 1949, the Stilfontein Company decided to issue a further 10,000,000 of its remaining 13,000,000 shares, the Investments Company acquired, in satisfaction of Scott's aforementioned 10% participation right, a further parcel of 792,100 Stilfontein shares. Of these 792,100 shares, 100,000 were, by virtue of a prior agreement not material to this appeal, handed over to the Estate...../5

the Estate G.F.Jooste, thus reducing the parcel to 692,100 shares.

The Investments Company was incorporated in 1936 and, until December 1947, its authorised and issued capital was £2,500 divided into 1,250 ordinary shares of £1 each and 1,250 preference shares of £1 each. All these shares were held by Scott, McIntyre and Roper in the proportions of 84%, 12% and 4% respectively. The Investments Company was a financial company much of whose income was derived from profits on sharedealing: during the years 1945-1948 its profits on the sale of listed shares amounted to £228,980. Prior to September 1947 the Investments Company obtained de facto control of the New Pioneer Company. The latter's sole asset was a gold mine which had reached the limit of its payability, but it had a Stock Exchange quotation for its shares. In November 1947 the capital of the New Pioneer Company was increased, the Investments Company taking up 200,000 shares at 5/- each and acquiring an option to take up a further 400,000 shares at 10/- each. During 1947 the Investments Company suffered from a shortage of capital and an inability to increase its existing overdraft of £100,000.

Negotiations between Scott and certain Financial Houses in England ultimately resulted in a re-arrangement of assets between the Investments Company and Strathmore Holdings (Proprietary) Limited (another company controlled by Scott) and in the Investments Company being granted a loan of £200,000. In December 1947 the ordinary share capital of the Investments Company was increased from £1,250 to £301,250 by the creation of 300,000 ordinary shares of £1 each. Scott and his associates took up 200,000 of the new shares thus retaining control of the Investments Company, whereof Scott remained chairman.

Respondent company was originally incorporated in the South African Republic on 25th March 1899 under the name of G.F. Company Ltd.. On 20th August 1902 its name was changed to Kleinfontein Estates and Township Limited. Throughout its history, up to the tax year in issue in this appeal, the company derived income, inter alia, from supplying water to various mines and from dealing in land and was taxed upon the income so derived. At all material times the company's shares had a stock-exchange quotation. In May 1949 Scott and his abovenamed associates acquired sufficient shares...../7

shares in the company to obtain control of it, and on 10th October 1949 the Company's name was changed to Strathmore Consolidated Investments Ltd. (i.e. present Respondent).

Before the name of the company was changed, the capital of Kleinfontein Estates and Township Ltd. had, on 27th June 1949, been increased from £21,250 to £321,250 by the creation of 1,200,000 new shares of 5/- each. In terms of a prior agreement, these 1,200,000 shares were allotted as fully paid up to the holders of the ordinary shares in the Investments Company in consideration of the latter's shareholders transferring to Kleinfontein Estates and Township Ltd. their 300,000 shares in the Investments Company. As a result of this transaction, the Investments Company now became, according to the stated case, the wholly-owned subsidiary of the Consolidated Company (present Respondent; then still called Kleinfontein Estates and Township Ltd.).

Of the 1,200,000 new shares in the Consolidated Company, 993,000 were awarded to Scott, McIntyre and Roper, in the aforementioned proportions, Scott thus retaining control of Respondent and, through it, of the Investments Company. In order, inter alia, to satisfy

Stock Exchange requirements, a further 257,000 shares were retained and, after the change of name to Strathmore Consolidated Investments Ltd., these 257,000 shares were in November/1949 offered to the public at 37/6 per share, the proceeds being paid to the shareholders of the Investments Company: Scott's share of these proceeds was in excess of £300,000. Scott became, and at all material times remained, the chairman of Respondent Company.

On 21st October 1949 the Investments Company (which had, on 10th October 1949 changed its name to Strathmore Exploration and Management Limited; but which I shall continue to call the Investments Company) took up a short term loan of £400,000, pledging as security, inter alia, the aforementioned parcel of 692,100 Stilfontein shares. In November 1949 the amount of this loan was increased to £480,000, the 692,100 Stilfontein shares remaining portion of the security for the loan.

I turn now to the circumstances whereunder Respondent acquired the abovementioned 692,100 Stilfontein shares and to the events which culminated in the sale of the rights pertaining to those shares. On 6th March 1950 Respondent's

Board of Directors...../S

Board of Directors ^{passed} ~~formed~~ the following resolution.

"Permanent Investment Portfolio. In connection with
 " the permanent investment portfolio to be held by
 " the company, it was agreed that consideration be
 " given to taking transfer from Strathmore Exploration
 " and Management Ltd. (i.e. the Investments Company)
 " of shares of a book value of £500,000."

Between the date of this resolution and the end of the tax
 year on 30th June 1960, the Investments Company transferred
 to Respondent the ^{Stilfontein} aforementioned 692,100 shares for the sum
 of £173,025, i.e. at 5/- per share, and also the following
 shares:

Quoted Shares:

| | | |
|---------------------------|-------------------|----------|
| New Pioneer Company | 20,000 shares for | £23,254 |
| Alpha Free State Holdings | 100,000 " " | £54,514. |

Shares in Companies which thereupon became wholly+

owned Subsidiaries:

| | | |
|----------------------------|--------------------|-----------|
| Strathmore Industries Ltd. | 576,000 shares for | £144,000. |
| Strathmore Estates Ltd. | 115,000 " " | £94,088. |

Shares in Other Companies:

| | | |
|--|------------------|----------|
| Babrosco Mines (Pty) Ltd. | 5,000 shares for | £5,000 |
| Western Klerksdorp Investments Ltd. | 600 " " | £7,644 |
| Keir & Cawdor (S.A.) Ltd. | 30,000 " " | £15,000. |

The prices whereat the above shares were taken over was the
 value of the shares as reflected in the books of the Invest-
 ments Company; this, so far as concerned the shares with a
 Stock Exchange quotation, was the cost of the shares to the
 Investments Company. Although the Stilfontein shares were

transferred...../10

transferred at par, their market value at this date was in excess of £1 per share. The stated case records that it was the desire of Scott and his associates that there should be no tax liability if any of the shares transferred to the Consolidated Company ^(i.e. Respondent) were realised at a profit. Had there been no problem about taxation, the shares could have remained in any other company. Contemporaneously with the above transfers of shares to Respondent, the latter took over from the Investments Company the abovementioned loan, which then amounted to £500,000. The 692,100 Stilfontein shares continued to be pledged as part of the security for this loan.

In their report, dated 29th November 1950, for the year ended 30th June 1950, the Directors of Respondent included the following statement, viz.:

" Business of the Company.

" Your company will in future carry out the functions
 " and objects of an Investment Company in that its
 " investments will be held for capital appreciation
 " and for production of revenue and that the proceeds
 " of any realisation of such investments will be
 " regarded as realisation of capital for re-investment
 " and will not be available for distribution to
 " shareholders by way of dividend. This change of
 " policy insofar as it concerns your Company's
 " holdings of land is reflected in the accounts for

the year...../11

" the year and is dealt with in detail in a later
 " paragraph of this Report.
 " The effect will be that profit on the sale of
 " land will not, as in the past, be regarded as
 " distributable. In terms of the new conception
 " the total proceeds of the sale will be retained
 " by the company and re-invested. The company will
 " no longer function as a dealer in land or as a
 " township owner, such functions will be performed
 " when necessary through a subsidiary.
 " The Company's investments in shares of subsidiary
 " and associated mining development and finance
 " companies will be treated in like manner. Such
 " shares will be held for capital ^{appreciation} ~~investment~~ and
 " dividends, and the proceeds of any realisation
 " will be retained for re-investment.
 " To define this new policy, it is proposed that
 " the Memorandum of Association be suitably modern-
 " ised and amended."

Pursuant to this report, the necessary resolutions
 amending the Articles (as pointed out earlier, Respondent's
 company was registered before Union) of Association were
 passed on 21st December 1950, and these were duly confirmed
 by the Supreme Court on 16th January 1951. The relevant
 portions of the additions so made to what may for convenience
 be called Respondent's Memorandum read:

" OBJECTS OF THE COMPANY
 " ~~5. The~~
 " 5. The business and objects for which the Company
 " is established are:-
 " (a).....
 " (f)(1) To purchase or otherwise acquire and to
 " hold for the purposes of investment with the purpose

of receiving...../12

" of receiving and deriving income therefrom land
 " or immovable property under whatsoever title held
 " and whether in the Union of South Africa or there-
 " out (including the landed property now owned by
 " the Company), securities and investments of every
 " kind including within the meaning thereof shares
 " and debentures (whether or not fully paid) in any
 " company or corporation wheresoever incorporated
 " or carrying on business, stocks and loans therein,
 " options on shares and debentures, bonds (mortgages
 " or otherwise) and for any of the purposes aforesaid
 " to acquire any such securities or investments by
 " purchase, exchange, subscription (conditionally or
 " unconditionally), application, participation or
 " otherwise and where necessary to make payments
 " therefor in cash or as called up or in advance of
 " calls or otherwise or by shares of the Company
 " fully or partly paid or other manner as may be
 " deemed expedient.

" (f)(2) From time to time to sell or realise any
 " investments at any time held by the Company. The
 " proceeds resulting from every such sale or realisa-
 " tion shall be applied by the Company in the purchase
 " or acquisition of the like or similar securities
 " or investments as aforesaid or in landed or im-
 " movable property which thereupon shall be held by
 " the Company for the like purposes as in paragraph
 " (1) hereof set out. All profit arising or result-
 " ing from the sale or realisation of any investments
 " at any time owned or held by the Company shall not
 " be distributed by way of dividend but shall be
 " placed or added to the capital reserve of the
 " Company or employed in the writing down of the book
 " value of any landed or immovable property or of any
 " securities or investments or for any other similar
 " purpose which shall not permit of such profits
 " being distributed in dividends.

" (f)(3) To employ any landed or immovable property,
 " in the production of income therefrom by farming or
 " agricultural pursuits, construction of dams or
 " reservoirs and the supply and sale of water, there-
 " from and/or by leasing or letting the same. And

" for better or readier production of income to
 " erect, construct, alter or improve buildings and
 " erections on any such landed property or otherwise
 " develop the same for such purposes.
 " (f)(4) To hire or take on lease buildings or
 " premises for the purposes of the Company.
 " (f)(5) To purchase or acquire such movable
 " property as may be required or necessary to give
 " effect to the purposes or objects of the Company.
 " (f)(6) To act as Secretaries, Trustees or
 " Administrators of the affairs of any persons or
 " company and to undertake secretarial and admini-
 " strative duties and functions and to accept or
 " administer trusts and to undertake the management,
 " investment and disposition of the monies or funds
 " of any person and the supervision, control and
 " administration of any business transaction or
 " operation of any person or Company."

During the tax year ended 30th June 1951 Respondent made no sale of land or shares. It however increased its holding in a company known as Strathmore Management Limited which thereupon became one of Respondent's wholly owned subsidiaries.

During the tax year ended 30th June 1952, Respondent concluded the following transactions. It disposed of two stands and without objection paid tax on the profit which was carried to reserve. It transferred, at book value, to Strathmore Management Limited the 576,000 shares in Strathmore Industries Limited and the 115,000 shares in Strathmore Estates Limited; and it purchased, at cost, from the Investments Company the following shares:

86,000 in...../14

| | |
|--|---------|
| 80,000 in New Pioneer Company..... | £93,136 |
| 16,600 in Pioneer Holdings and Finance Corporation Limited for... | £12,134 |
| 20,000 in Southern Rhodesian Chrysolite Limited for..... | £ 4,412 |
| 189,000 in Ellaton Gold Mining Company Limited for..... | £ 1 |

In addition, Respondent purchased from the Investments Company 50,000 shares in Eastern Rand Extensions Limited for £40,104, being the market price and resulting in a loss of some £8,642 to the Investments Company. During the year ended 30th June 1952, Respondent also repaid the loan of £500,000 and, through Paris, raised a new loan of £850,000. As security for this loan, Respondent pledged the 692,100 Stilfontein shares together with the following shares:

100,000 shares in the New Pioneer Company
100,000 shares in the Alpha Free State Holdings Limited.
50,000 shares in the Eastern Rand Extensions Limited.

On 27th October 1952 shareholders in the Stilfontein Company were given rights to take up further shares in the company on the following terms, viz.:

- (i) the right, exercisable up to the 15th December 1952, to subscribe for 1 further 5/- share at 18/- for every 10 shares held as at 11th November 1952; and

(ii)...../15

(ii) the right, exercisable up to the 30th November 1953, to subscribe for 1 further 5/- share at 22/6 for every 2 shares taken up at 18/-.

As at 11th November 1952 Respondent still held the 692,100 Stilfontein shares mentioned above, and thus obtained the right, in terms of the first portion of the above offer, to take up a further 69,210 Stilfontein shares at 18/- by 15th December 1952. Respondent, which had already borrowed extensively, lacked the necessary funds to avail itself of this offer: it had not got the money to take up the first lot of shares at 18/-, and there was no reasonable prospect of its having the ^{money} ~~right~~ to take up the second lot of shares at 22/6. It was accordingly decided to sell the rights. This was duly done, the rights being sold privately in a block, at 3/3 per right, for an aggregate sum of £11,246, being the amount in issue in this appeal.

No further transactions relevant to this appeal occurred ~~d~~uring the tax year ended 30th June 1953. During the next tax year Respondent acquired the following shares, viz.: 3,400 Pioneer Holdings and Finance Corporation Limited for £1,275; 50,000 Montrose Exploration Limited for £4,164;

1,289...../16

1,289 Hartebeestfontein Gold Mining Company Limited for £1,036. During the same period Respondent sold 20,000 Southern Rhodesian Chrysolite Corporation Limited shares for £1 and certain other shares, details of which are not recorded in the stated case, but the proceeds of which were utilized by Respondent to take up shares in Buffelsfontein Gold Mining Company Limited. By 30th June 1954 the Stilfontein shares were not yet dividend producing; and there is nothing in the stated case to show that any of the shares held by Respondent had paid any dividends either by that date or at any earlier time. At the end of December 1953 Scott, McIntyre and Roper sold, for £226,035, the 190,696 shares which they collectively held in Respondent Company to Strathmore Holdings (Proprietary) Limited, which latter company, still under the control of Scott, thereby acquired control of Respondent. During December 1954 the Strathmore group of companies merged with General Mining and Finance Corporation Limited, a large financial concern and in the process Respondent company became a wholly-owned subsidiary of General Mining and Finance Corporation Limited, while shares in the latter became the main assets of Strathmore

Holdings (Proprietary) Limited. This merger, so far as concerned the Strathmore group, was, according to the stated case, induced by lack of capital.

As the culmination of a process of reasoning to which I will refer below, the Special Court expressed itself, in its judgment, as follows:

" We have therefore come to the conclusion that the
 " 692,100 shares were always intended, both by Strath-
 " more Investments and by the appellant, to be held
 " as an investment, that these shares were in fact
 " held as an investment by the appellant and that
 " the rights were only sold because of the financial
 " position of the appellant."

Findings of this nature being findings of fact — whether of primary fact or of inferences therefrom (see Edwards v. Bairstow 1955(3) A.E.R. 50 (K.L.); Durban North Traders v. Commissioner for Inland Revenue 1956 (4) S.A. 594 (A.D.))— they are, having regard to the provisions of section 81(1) of the Act, unassailable unless it can be shown that the overall conclusion reached by the Special Court is one which could not reasonably be reached (Yates Investments (Pty) Limited v. Commissioner for Inland Revenue 1956(1) S.A. 612 at 615 (A.D.); Commissioner for Inland Revenue v. Paul 1956(3) S.A. 335 at 340,341 (A.D.); Durban North case

supra); or, as it is sometimes put, unless it can be shown that "the true and only reasonable conclusion contradicts the determination" made by the Special Court (see Commissioner for Inland Revenue v. Strathmore Exploration Limited 1956(1) S.A. 591 at 598 adopting the criterion preferred by LORD RADCLIFFE in Edwards v. Bairstow (supra). And see also the authorities collected in Strathmore Holdings (Pty.) Limited v. Commissioner for Inland Revenue (AD. 10-12-1958; not yet reported).

Now the Special Court's above-cited finding that the 692,100 Stilfontein shares were always intended to be held as an investment by the Investments Company is certainly one which could not reasonably be reached. There was no evidence whatever to support such a finding. As pointed out earlier, the Investments Company derived much of its income from ~~speculation~~ sharedealing. It acquired, in the circumstances outlined earlier in this judgment, the 692,100 Stilfontein shares in September 1949. During the tax year ended 30th June 1950 the Investments Company sold 1,260,032 Stilfontein shares at a profit of £217,501. Gunn (Commonwealth Income Tax, 5th Edition section 539) states that

"It is possible for a company or any other tax payer to change from a trader to an investor and vice versa but, with reverence, it is as difficult to make the change for taxation purposes as it is for a rope to pass through the eye of a needle." Certainly the mere facts that the parcel of 692,100 Stilfontein shares ^{was} ~~were~~ originally acquired by the Investments Company in satisfaction of Scott's 10% participation right/ and that, soon after its acquisition, the parcel was pledged can not suffice to establish that the Investments Company, although contemporaneously trading extensively in Stilfontein shares, was investing in this particular parcel of 692,100 Stilfontein shares. To say any more on the latter would be unduly to labour the point. It is abundantly apparent that the Investments Company never invested in these, or in any other, shares. The fact that the Special Court thus erred in relation to the Investments Company's holding of the 692,100 Stilfontein shares is, of course, in no way conclusive of the enquiry in relation to Respondent's holding of these shares; but the Special Court's erroneous view concerning the Investments Company's holding appears to have influenced it in

regard to Respondent's initial acquisition of the shares as well. Moreover, in this latter connection the Special Court also ~~unfortunately~~ misdirected itself on the facts in at least two important respects to which I will now refer.

At an early stage in its reasons, the Special Court, after mentioning the transactions of June 1949, outlined above, whereby the Investments Company became the wholly-owned subsidiary of Respondent, went on to say:

" It appears that at the time of this transaction
 " the Strathmore group was extending in a number of
 " directions and Scott was anxious to create an in-
 " vestment company in the group, that is to say a
 " company which would hold a number of interests,
 " mainly in other companies of the Strathmore group,
 " as permanent investments. Instead of creating a
 " new company for that purpose and in order to
 " avoid any difficulty in obtaining a Stock Exchange
 " quotation for the shares in such a scheme, the
 " opportunity of acquiring the control of an exist-
 " ing company was taken when the shares of appellant
 " became available. The appellant company was an
 " ordinary land dealing company and township owner
 " and in order to carry out the object as above
 " described the Memorandum and Articles of Association
 " of the company had to be amended."

The actual facts, as agreed upon in the stated case, are that at the time Scott and his associates had in mind a controlling company for their group and which would have a Stock Exchange quotation. Respondent had such a quotation and,

when the opportunity offered to acquire control of Respondent, this was, in the manner indicated above, duly exploited.

Mr. Ettlinger, for Respondent, valiantly sought to explain away the above cited statement in the Special Court's reasons as being merely an inference or deduction drawn by the Court. In its context, I do not think that this is the true meaning of the statement; but, even if it be so regarded, there is no evidence from which such an inference or deduction can reasonably be drawn. As appears from what is set out earlier in this judgment, it was only very considerably later that any "investment" aspect in relation to Respondent was ventilated. Nor can the matter be dismissed on the ground that the above misdirection was merely incidental reasoning; for the misdirection in question appears to have coloured the whole approach of the Special Court to the nature of Respondent's holding of the Stilfontein shares. For instance, in a later passage, referring back to the passage last-quoted above, the reasons state that "Pursuant to the change of policy hereinbefore described, the appellant (i.e. Present Respondent) decided on 6th March 1950 to consider taking transfer

.....of shares."/22

.....of shares!"

A misdirection of an even more serious nature relates to the view of the Special Court, in regard to Respondent's intention at the date it acquired the 692,100 Stilfontein shares, as expressed in the following passage:

" The acquisition of shares only followed on
 " the change of policy, and were acquired in
 " accordance with the declarations made by the
 " directors of the company. Having regard to
 " this fact and to the terms of the Memorandum,
 " it is the view of the Court that when the
 " shares were acquired the appellant intended
 " to hold them as an investment."

Respondent acquired the 692,100 Stilfontein shares, together with the other shares mentioned earlier, from the Investments Company between 6th March 1950 and 30th June 1950.

In cases of this kind the ascertainment of intention⁴¹ at the date of acquisition is of great importance (see Lace Proprietary Mines Limited v. Commissioner for Inland Revenue 1938 A.D. 267 at 277). The test whether a company was carrying out a scheme of profit making is not entirely identical with that applied to an individual (Yates Investments (Pty) Limited v. Commissioner for Inland Revenue supra at 616; Commissioner for Inland Revenue v. Strathmore supra⁴² at 598):

...../23.

at 590); and, as was remarked by SCHEPERS, J.A., in L.L.C. Corporation of South Africa (Pty) Limited v. Commissioner for Inland Revenue 1950(4) S.A. 640 at 646, finance companies make profits on shares either by selling or holding which are "merely alternative methods of dealing with the shares for the purpose of making profit out of them" (per SOLOMON, J.A., in Overseas Trust Corporation Limited v. Commissioner for Inland Revenue 1926 A.D. 444 at 457). At the time when respondent acquired the 692,100 Stillfontein shares, its objects and activities were those of an ordinary trading and finance company: as at that date, respondent could not possibly be regarded as an investment holding company. It follows that, in the absence of evidence to the contrary (and here I would again refer to Gunn's above-cited remarks), the 692,100 Stillfontein shares must be taken to have been acquired by respondent as part of a scheme of profit making. In my view, there was no evidence to the contrary. As at the date when these shares were acquired by respondent, there had in fact not yet been - as stated by the Special Court in the above-cited passage from its reasons - any "declaration made by the

Directors of the Company"; the "change of policy," referred to by the Special Court, was not announced until the Directors' report/ dated 29th November 1950. In terms of the resolution passed by the Directors on 6th March 1950, it was at that date merely agreed that "consideration be given" to taking transfer of shares from the Investments Company "in connection with the permanent investment portfolio". It is, I think, manifest that a bare statement of this kind can not change the character of the assets concerned. Nor could what was stated in the Directors' Report of 29th November 1950 suffice to bring about that result. As SCHALKER, J.A., remarked in Commissioner for Inland Revenue v. Richmond Estates (Pty) Limited 1956 (1)

S.A. at page 610:

" The decisions of this Court have recognised
 " the importance of the intention with which
 " property was acquired and have taken account
 " of the possibility that a change of inten-
 " tion or policy may also affect the result.
 " But they have not laid down that a change
 " of policy or intention by itself effects a
 " change in the character of the assets."

It is to be observed that this Directors' Report of 29th November was couched in terms of the future. The Stilfontein

shares...../25

shares had been acquired by Respondent several months earlier, and it was not until January 1951 that Respondent's memorandum was altered. Assuming that the intention of a company is to be ascertained in relation to its formal acts (Commissioner for Inland Revenue v. Richmond Estates supra at page 606), it could, having regard to the primary facts, not reasonably be inferred that - as stated in the passage from the Special Court's reasons last cited above - when the Stilfontein shares were acquired Respondent intended to hold them as an investment.

The altered objects of Respondent were rightly regarded by the Special Court as being a very relevant feature in the case. It is almost an irresistible inference that this alteration was dictated by what was said, after referring to Simon's Income Tax (Vol. 2 sections 176, 209, 210), by this Court in L.H.C. Corporation of S.A. (Pty) Ltd. ^(supra) v. Commissioner for Inland Revenue 1950 (4) 640 wherein judgment was delivered on 3rd October 1950. As was pointed out by SCHIMMELER, J.A., at pages 645, 646 of the L.H.C. Corporation case, the terms of a company's memorandum are an important element in an enquiry such as this. It is,

moreover, true that the above-cited provisions of clause 5(f)(2) of Respondent's objects conform to what Simon in section 209 ^{indicates} ~~states~~ is the distinguishing characteristic of a true investment trust or holding company, as distinct from an investment dealing company. It is, however, also very relevant that the alteration to Respondent's memorandum was made only some considerable time after the shares in question - and also most of its other shares - had been acquired by Respondent. On a true analysis of the position, the case is, in my judgment, really one of alleged change of intention. The critical point which Respondent - having regard to the onus placed on the taxpayer by section 78 of the Act - had to establish before the special Court was that it had in reality changed its intention in regard to these 692,100 Stillfontein shares after it had already acquired them. That such a change of intention may, in a proper case, alter the character of assets held by a company, is recognised by the decisions of this Court (see e.g. the Richmond Estates case ^{and 610} supra at page 507_A and cases there cited); but it is seldom an easy matter to establish. It is, in my judgment, not enough for Respondent merely to

point to its altered memorandum. A prohibition against the distribution by way of dividend of any profits arising from the realisation of investments may, as Simon (loc.cit.) *indicates* ~~states~~, be an indispensable attribute of the memorandum of a true Investment Holding Company: but, in my opinion, the mere fact that a company's memorandum is in this form — however persuasive that may be — can not by itself be conclusive. The Court must have regard to all the circumstances of the case. This was, indeed, in some measure appreciated by the Special Court; for, despite the ~~form~~ form of the altered memorandum, the Special Court held the proceeds of the subsequent land transaction to be subject to tax. In my judgment, the Special Court was quite correct in so holding; but the distinction drawn by the Special Court between the land transaction and the share-rights transaction appears to me to lack validity. The Directors' Report of 29th November 1950 stated that "in terms of the new conception" the total proceeds of the sales of land would be retained and reinvested. In the altered memorandum land was treated on precisely the same basis as shares (vide clause 5(f)(1)); and the restrictive provisions...../28

provisions of clause 5(f)(2) of the memorandum apply equally to the proceeds of sales of land and of shares. The Special Court - in my view, quite correctly - specifically found that, notwithstanding the provisions of the altered memorandum, Respondent did not in fact change its intention with regard to land. In this the Special Court was, of course, largely influenced by Respondent's long history as a dealer in land. Had the Special Court not - as I have indicated earlier - misdirected itself in relation to the nature of Respondent's holding of the 692,100 Stillfontein shares prior to the change of memorandum, it would - so it seems to me - in all probability not have differentiated between the shares and the land. However that may be, in an enquiry such as the present it is, in my judgment, necessary, despite the form of the memorandum, to consider all the facts of the case. Respondent's memorandum - which, as indicated earlier, has been shown by the land transactions not to be all it seems - can neither be considered in vacuo nor can it, in my view, be regarded as per se decisive. It is only one - albeit an important - aspect of the overall enquiry (cf. the remarks of SCHLESINGER, J.A.,

in the Richmond Estates case (supra) at page 612).

Addressing oneself to that overall enquiry, one is at once struck by the presence of a variety of features which, in my view, are alien to the concept of a true Investment Holding Company. I refer, more particularly, to the nature of the shares held by Respondent and to Respondent's financial position -- both considered against the general background of Respondent being one of a group of inter-locking companies all controlled, and from time to time re-arranged, by Scott who, it may be mentioned in passing, did not himself give evidence before the Special Court. As regards finance, Respondent commenced its new regime with a debt of £500,000 which it took over from the Investments Company, and there was throughout a shortage of available capital. During the 1952 tax year Respondent increased its loan indebtedness from £500,000 to £850,000. There was never any prospect of this indebtedness being discharged except by the sale of a substantial portion of Respondent's shareholding. As regards its shareholding, Respondent acquired its "investment portfolio" almost entirely from the Investments Company at prices which

enabled the latter to avoid paying any tax on the sales. In the case of the 692,100 Stilfontein shares, the disparity between the figure of 5/- and the then market price was very considerable. All that was, no doubt, good business for Respondent. But the significant feature is that the stated case contains no evidence of any of the shares in Respondent's "investment portfolio" ever having paid a dividend at any relevant time. No doubt an Investment Holding Company can, in theory, hold shares for a long time before any dividend is received; but it is hardly the hallmark of the normal Investment Holding Company that all its shares should pay no dividend. So far as concerns the 692,100 Stilfontein shares, that company was only registered in April 1949. Respondent acquired the shares in 1950, and by 30th June 1954 they had not yet paid any dividend. On the other hand Scott, by virtue of his chairmanship of the Stilfontein and other related companies, was peculiarly well situated to assess the prospects of making a profit on the shares consequent upon a rise in their market price. All the indications are that the block of 692,100 Stilfontein shares was held by Respondent, not as an investment,

but to be sold, when the time was opportune, at a profit.

The cumulative effect of the various considerations I have mentioned is such as, in my judgment, to lead irresistibly to the conclusion that the acquisition and holding of the 692,100 Stilfontein shares by Respondent was a scheme of profit making. In my view, the conclusion reached by the Special Court that these shares were acquired and held by Respondent as an investment is one which could not reasonably be reached. In my judgment, on the primary facts - to use the words employed by LORD RATCLIFFE in Edwards v. Bairstow (supra) - the true and only reasonable conclusion contradicts the determination of the Special Court.

If the 692,100 Stilfontein shares were held by Respondent as a scheme of profit making, it ~~is not possible~~ necessarily follows - as was, indeed, conceded by Mr. Ettlinger - that, on the facts of this particular case, the sale of rights for £11,246 attracted tax. I do not wish to be understood as implying that the proceeds of a sale of rights to subscribe for shares must always necessarily constitute income: on the contrary, I expressly

confine myself to this particular case. It was at all material times apparent to all concerned that the Stillfontein Company would from time to time require further development capital, that existing shareholders would, in the first instance, be given the right to subscribe therefor, and that such rights would, if so desired, be saleable to advantage. Under those circumstances, the sale of the rights in issue in the present appeal can, in my view, only be regarded as an integral part of Respondent's scheme of profit making and, in consequence, the proceeds of the sale of the rights are liable to tax.

For the foregoing reasons, the appeal is allowed with costs. The decision of the Special Court, in so far as it relates to the item of £11,246, is set aside and is altered to read "assessment confirmed".

SCHREINER, A.C.J.,

STEYN, J.A.,

BEYERS, J.A.,

SMIT, A.J.A.,

concur.

