G.P.-S.59968—1970-71—2 500

200/75

J 219

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

( APPELLATE. ~~Provincial~~ Division)
( ~~Provinsiale~~ Afdeling)

## Appeal in Civil Case
## Appèl in Siviele Saak

NATAL ESTATES LTD. *Appellant,*

*versus*

SECRETARY FOR INLAND REVENUE *Respondent*

*Appellant's Attorney* GOODRICKE F *Respondent's Attorney* DEP STATE ATT BAM.
*Prokureur vir Appellant* *Prokureur vir Respondent*

*Appellant's Advocate* D. J. Shaw S.C. *Respondent's Advocate* P. W. A. Hunt S.C.
*Advokaat vir Appellant* R. S. Welsh S.C. *Advokaat vir Respondent* P. W. Thirion
D. B. Friedman S.C.

*Set down for hearing on* 26-5-1975 ~~4~~ 27-3-1975
*Op die rol geplaas vir verhoor op*

467811

(I.T.S.C.)

Coram: Hathorn, Trollip, Muller, Corbett JJ.A.
et Galgut AJA.

Monday 26-5-75. 9.45 am ——— 11.00 am
11.15 am ——— 12.45 pm.
2.15 pm ——— 4.00 pm

Tuesday 27.5.75 9.45 am ——— 11.00 am
11.15 am ——— 12.45 pm
2.15 pm ——— 4.00 pm
4.15 pm ——— [illegible] pm

9.45 : 11.00

Security lodged. SEE OVERL AF

| Writ issued<br>Lasbrief uitgereik | Bills taxed—Kosterekenings getakseer | | |
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| | Date<br>Datum | Amount<br>Bedrag | Initials<br>Paraaf |
| Date and initials<br>Datum en paraaf | | | |

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between -

NATAL ESTATES LTD.....Appellant

and

SECRETARY FOR INLAND REVENUE.....Respondent

Coram: Holmes, Trollip, Muller, Corbett, JJ.A., et Galgut, A.J.A.

Heard: 26 & 27 May 1975

Delivered: 11 July 1975

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J U D G M E N T

HOLMES, J.A.:

The parties are litigating about profits aggregating more than R8 000 000 made by the appellant company from the sales of portions of its lands during the years 1965 to 1970.

The appellant is a public company carrying on business as a grower and miller of sugar cane, and a manufacturer of sugar.

The.....2/

The sales in question were in respect of -

(a) certain of the appellant's lands in the coastal area of Umhlanga Rocks and La Lucia during the years 1965 to 1970; and

(b) certain lands in other areas, more inland than coastal, during the years 1969 - 1970.

The respondent determined the profits from these sales of lands to be part of the appellant's income. The tenor of the appellant's unsuccessful objections was that the profits were accruals of a capital nature and ought therefore to have been excluded from its income.

There was an additional ground of objection in respect of the year ending 30 April 1965. Certain profits on disposals of land during that year were not treated as income in the original assessment issued; but they were included in an additional assessment of R548 010 issued by the respondent during April 1972. The appellant unsuccessfully objected to this additional assessment on the ground that the respondent was

precluded.....3/

precluded by the terms of section 79 of the Income Tax Act, No. 58 of 1962, from re-opening in 1972 the assessment previously issued for the 1965 tax year.

On appeal, the Special Court for hearing income tax appeals in Natal, Miller, J., presiding, held in favour of the appellant on the latter point. With regard to the other years, 1966 - 1970, some of the Special Court's findings favoured the appellant and some the respondent.

The effect of the Court's order was -

1. to set aside the additional assessment of R548 010 in respect of the 1965 tax year;

2. to hold that the profits from all of the sales of land in the coastal areas, Umhlanga Rocks and La Lucia, in the tax years 1966 - 1970 were accruals of income (save for one special three-acre site in Umhlanga Rocks which was disposed of in 1970 after a notice of expropriation, the profit from which was found to be an accrual of a capital nature);

3. to.....4/

3. to hold, in respect of sales in Ottawa Township (in 1969 and in 1970), that it was unpersuaded that the respondent was wrong in regarding the profits as accruals of income;

4. to hold that the profits from the sales of land in certain other areas in 1969 and 1970 were accruals of a capital nature and non-taxable;

5. to send back (by agreement) the assessments for 1966 - 1967 to enable the respondent to make certain adjustments; and those for 1969 - 1970 to enable him to issue fresh assessments.

This partial success on each side satisfied neither party. The appellant accordingly appeals and the respondent cross-appeals.

The appeal (as distinct from the cross-appeal) challenges the findings under 2 and 3, supra (save in regard to the one special sale in Umhlanga Rocks). The total of these profits, the taxability of which is in issue, (after allowing for certain agreed adjustments in regard to the years 1966 - 67), was R5 794 838.

The.....5/

The cross-appeal challenges the findings under 1 and 4, supra, and the finding under 2 as to the one special sale in Umhlanga Rocks. The total of these profits, the taxability of which is in issue, was R2 314 001.

Both sides have consented in writing to direct access to this Court. It will be convenient to refer to the parties throughout as the appellant and the respondent.

As to the facts, the judgment of Miller, J., contains a painstaking culling from the record of several volumes, consisting of the evidence of two witnesses and an amplitude of documents over the past half century. I draw freely from the judgment, and sometimes from the Statement of Case, in the following outline of the factual background. Paragraphs in quotations are from the judgment -

(i) The appellant company was formed in 1920. The first of its objects in the Memorandum was to enter into and give effect to an agreement for the purchase, as a going concern, of the whole of the assets, movable and immovable, of a company registered in England. The cost to the appellant in those halcyon days was about £400 000. Counsel informed us that the cost to the appellant of the land (as distinct from the mill and other improvements) was R128 364, or about R6 per acre. The English company was carrying on

business in Natal as a grower and miller of sugar. It had been doing this for some twenty-five years. The lands consisted of 21 025 acres, all to the north of the town of Durban, and bounded on the east by the sea. About 13 000 acres were then under cane, in estates or sections. On one of them a sugar mill had been erected. This was at Mount Edgecombe, some ten miles from the northern boundary of Durban. The going concern, which the appellant took over in 1921, included all of the foregoing, and also, inter alia, about 25 miles of permanent tramway tracks and 30 miles of portable tracks.

(ii) Since 1921 the appellant has at all material times continued and expanded the business of its predecessor, and is a grower and miller of sugar cane and a manufacturer of sugar. And at all material times all of the land suitable for cultivation was under cane.

(iii) At the very outset of its existence there was dangled before the appellant the glittering possibility of a price of £2 000 000 if it would sell out to a certain Mauritian group. That would have represented a quick profit of about 400%. Not surprisingly, the appellant entered into serious negotiations relating, inter alia, to the disposal of the total share capital of the company. The negotiations were protracted, but finally fell through in 1923. Thereupon it was recorded

in.....7/

in the minutes of a directors' meeting held on 27 September 1923 that, "the directors should not entertain any further approach re acquisition of the company but should concern themselves with the main business of the company that is the manufacture of sugar".

(iv) "The records of the appellant company reveal that its Board was aware, at a comparatively early stage of its existence, of its vulnerability to the expropriation of portions of its land by duly constituted authorities; and of the possibility of encroachment upon its south-lying cane fields by the demands of the expanding town (now city) of Durban. In the very first year of its existence, 26 acres of its land were expropriated by the South African Railways for the construction of the Phoenix station. In later years, particularly from 1950 onwards, there were many instances of expropriations or of sales effected by the appellant under notice or threat of expropriation. Thus, in 1951, six acres at Umhlanga Rocks were lost to the Defence Department; in 1953, about seven acres to the Durban Corporation for road purposes; during 1957, about 169 acres to the Natal Provincial Administration's Roads Department for purposes of the construction of the North Coast Road. In 1957, a very substantial portion of Melkhoute Kraal and other land adjoining it was sold to the Durban Corporation for the establishment of a Bantu Township which was soon thereafter laid out by

the.....8/

the Corporation, and is now known as Kwa Mashu Township. The area thus sold was 2262 acres, and it appears that the appellant was a reluctant seller but felt obliged to dispose of the land which was regarded by the Corporation as a pressing need. It is not unlikely that expropriation would have resulted had the appellant not agreed to sell this land. During the period 1960 to 1963, the South African Railways expropriated 24 acres for the establishment of the Ottawa railway line and a further 15 acres for the North Coast line. The farm Richmond, 172 acres in extent, was sold to the Bantu Affairs Department, allegedly unwillingly, to avoid expropriation. There were also, during that time, several disposals of land to the Durban Corporation, the largest of them being the disposal of 793 acres for the purposes of the Corporation's extension of Kwa Mashu township." Thus 3474 acres, in the aggregate, were lost to the appellant. One of the numerous objects in the Memorandum of the appellant was the disposal of any of the property of the company.

(v) "From the outset the appellant recognized the need, in view of the likelihood of loss of cane-producing lands, of building up capital reserves from the proceeds of sales of land to enable it to expand its sugar business northwards, to areas more

remote.....9/

(*)

remote from the inevitable encroachment of an expanding city.....The appellant spent time and money investigating the possibilities of acquiring cane fields and establishing a mill or mills in Zululand or elsewhere to ensure its continued existence as a sugar-cane farmer and miller." One of the appellant's numerous objects, contained in its Memorandum, was the acquisition of land.

(vi) "A substantial tract of land (3635 acres) was also acquired in Zululand (Nkwaleni) during 1943 - 1945 but was sold off during the period 1948 to 1950. (It was 150 miles from Mount Edgecombe, and this caused administrative difficulties). It appears that the bulk of the land acquired after 1921 was primarily cane-land, the following being examples. In 1923 the property known as Effingham Estate, 971 acres in extent, was purchased. This land lies south of Umhlanga Rocks. At the time of its acquisition a very large percentage of the farm was under sugar cane and the appellant planted a further 169 acres very soon after acquiring it. Four years later, the property known as Ottawa Estate, (2821 acres) north-west of Umhlanga Rocks, was purchased as 'a going cane farm'. Approximately 90% of its area was under cane. During 1929 the appellant acquired the property known as Frasers Estate (1643 acres). This land, too, was to a large extent under cane but a possibly more immediate reason for its acquisition was

that.....10/

that the appellant held a bond over the property as security for a loan. During 1934 small portions of Melkhoute Kraal land were purchased (the appellant already owned the large tract which they adjoined) and in 1937 an established cane farm known as Avoca Estate (946 acres) and smaller tracts of land in the Zeekoe Vallei area, near Durban, were acquired. The Bellamonte Estate (1124 acres), acquired in 1945, was also land calculated to serve as a source of cane for the Mill." By 1966 the appellant had acquired, in the aggregate, nearly 7 000 extra acres of land, i.e., in addition to its primary purchase in 1921. The Special Court found as a fact that these extra lands were purchased, not for the purpose of sale, but as an investment of capital for the proper carrying on of the business of the appellant. It was necessary to maintain a high throughput of cane, approximately 80% of the mill's capacity, to break even with the cost-structure. A throughput of less than 80% carried the risk of loss instead of profit.

(vii) "The appellant was aware throughout those years not only of the possibility of expropriation by Government and local authorities for essential development in relation to railways, roads, sewerage works, etc., but also of the growing pressures and demands for land suitable for residential development near Durban, which was expanding northwards. The Minutes of Board meetings and the Chairman's reports reveal that by 1940, many approaches had been made to the appellant by individuals or bodies desirous of purchasing land for residential purposes close to the sea. That part of the appellant's land, which extended southwards from Umhlanga Rocks area towards

Durban.....11/

Durban, along the coast, had obvious appeal for such purposes, as the subsequent phenomenal development of that coastal strip of land has clearly shown. It is also clear that the appellant realized that its seaward property was extremely valuable because of its suitability and desirability as land for residential purposes.....On 17 November, 1943, the Board considered a request made to it to sell land close to the sea. It was resolved to inform the inquirers that 'at this juncture' the appellant was not contemplating the sale of its coastal property. The Chairman observed, however, that the preparation of a development scheme covering the whole or a portion of the coastal area might become necessary. Not long thereafter a sub-committee was formed to examine the situation and it duly submitted a report to the Board, which discussed it on 11 January, 1944. The Chairman is reported in the Minutes of that meeting to have explained that'it was felt that at a later date this land will prove of greater value for residential purposes than for cane-growing and the Board desired to know more about its possibilities'. It was recorded that when the time was appropriate, the company would indicate which land it could spare for residential development. On 24 April, 1946, the future policy of the appellant in regard to its lands was discussed and in such discussion full heed was taken of the possibility that the expansion of Durban might force the company 'to dispose of portions of its present cane lands for residential and other purposes'. On 5 February, 1947,

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the appellant was requested by agents acting on behalf of the Durban Corporation to give an option to purchase 3700 acres of land. The option was not granted but once again it was recorded that 'the company was fully aware that in years to come it would lose land as Durban expanded'. At the same time the Board expressed concern regarding the serious effects upon the company of losing large areas of cane lands and emphasized the importance of acquiring other lands for the purpose of maintaining the company's sugar interests."

(viii) "These references, which are not exhaustive, to the deliberations of the appellant's Board, show clearly that as early as 1947 it was alive to (1) the increasing probability that it would sooner or later be unable to resist the pressure being exerted upon it to part with some of its cane lands, especially the seaward lands, for development for residential purposes, (2) the need to find suitable cane lands, to replace what it might lose in the future, in the interests of the proper maintenance and development of its business of producing and milling cane and (3) the considerable value and potential of its seaward land for purposes of sale. These three considerations were not dormant for any long period in the years that followed; from time to time fresh offers or approaches for the acquisition of portions of the company's land were made but were turned down by the

Board.....13/

Board which regarded the time as not yet ripe for disposing of its seaward land. During 1946 it considered the possible advantages of disposing of small portions of its uncultivated land for residential purposes 'in order to establish land values' - a further indication of its awareness of the importance of land suitable for residential purposes and of its potential value as such. In fact, during or about 1950, a limited number of residential lots at Umhlanga Rocks were sold and a resolution was taken by the Board to treat the proceeds of the sales as receipts of a capital nature."

(ix) "In June 1957, a meeting of the Board of the appellant took place and the question of applying for a certificate of need or desirability, in terms of section 12(5) of the Town Planning Ordinance, No. 27 of 1949(N), was discussed with reference to its coastal land now known as La Lucia. It is common cause that during that year such a certificate, which was a pre-requisite to establishment of a township, was duly granted by the Commission established in terms of the Ordinance, upon the application of the appellant. It appears from the Minutes that after the application for a certificate had been granted, the Board announced that its policy was not to dispose voluntarily of land suited to cane growing until such time as the establishment of the proposed township was necessitated

by.....14/

by the growing demand for residential property as a result of the northward expansion of Durban. In 1959, however, draft conditions for the establishment of a township at La Lucia were submitted and a report from the company's surveyors, together with a model of the township, were laid before the Board which decided that it would be in the interests of the company not to proceed with the scheme until the demand for land for residential purposes north of Durban was more favourable. When that happened the board would decide whether to develop the township itself or to dispose of the land to a township development company. References to the proposed establishment of the township were made from time to time thereafter and during 1962 there was reference to the development of La Lucia 'as a protection against expropriation' and to the fact that ' for reasons of taxation it was not the intention to develop the township fully until the company was forced to do so'.*

(x) *In October 1962 sensational events took place affecting the control and administration of the appellant company.....(namely) the successful bid by Sir J.L. Hulett and Sons Ltd., to take over the appellant company and the equally successful bid, almost immediately thereafter, by a consortium of companies in the sugar industry to take over Sir J.L. Hulett and Sons Ltd. The result was that the appellant company came under the control of

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the consortium and is still a wholly-owned subsidiary of the parent company which is now styled Huletts Corporation Limited, and to which I shall henceforth refer as 'Huletts'."

(xi) On 23 October 1962 the firm of real estate agents and valuers, advising the appellant, reckoned on a sales life of 20 years for the more than 2 000 saleable lots of the La Lucia Township.

(xii) "At one of the first meetings of the newly constituted Board, which was held on 30 November, 1962, the future development of the township established at La Lucia was discussed and it was resolved to instruct the town planners, who had been engaged by the appellant, to proceed with the preparation of plans for the development of zones 1, 2 and 3 of La Lucia. During January, 1963, Consulting Engineers and Architects were appointed for purposes of the development and a special sub-committee was appointed to consider matters of finance and taxation relating to the township (Exhibit 9). Consideration of appointment of selling agents for the township was deferred. During March, progress was reported by Mr. Lloyd, who was Chairman of a special 'Land Committee', regarding organization of 'over-all plans for development of land owned by the company' and during August the committee submitted recommendations regarding 'the practical aspect of development of the initial zones in the La Lucia township' which were accepted in toto by the

Board.....16/

Board for submission to the parent company, Huletts. During June of that year, the appellant's Board had already discussed such details as the naming of streets and the establishment of a nursery for the supply of trees in the township. In Huletts Annual Report for the year ended 30 April 1964 (Exhibit 13) special reference was made to the 'orderly development of the land assets of The Natal Estates Limited' and some portion of the printed Report was devoted to a description, with photographic illustrations, of the development of La Lucia, concerning which it was said that the preliminary planning of that area had commenced in 1958 and that the development programme had been 'intensified during the past year'. The selected references I have made to the Minutes sufficiently bear out the claim by Huletts that development was intensified during the year following the take-over. At the time of publication of the Report, 188 lots of the first zones of the township had been sold by public auction. The whole township was to comprise 2350 lots, each approximately one-third of an acre in extent."

(xiii) "On 3 December, 1964, it was resolved by the appellant to form a company, La Lucia Homes (Pty) Ltd., to which would be entrusted the future construction of homes in La Lucia. That company was duly incorporated early in 1965. It will be convenient at this stage to

sketch.....17/

sketch the re-organization of the Huletts group which took place at various stages after the take-over. At the head of what I may call Huletts ' Diversification and Investment' section was Huletts Investments Ltd., a wholly-owned subsidiary of the parent company. La Lucia (Pty) Ltd., was a wholly-owned subsidiary of Huletts Investments Ltd. Later, La Lucia Homes (Pty) Ltd., became Huletts Construction (Pty) Ltd., a wholly-owned subsidiary of Huletts Property Holdings, Ltd., which was in turn a wholly-owned subsidiary of Huletts Investments Ltd., as was Effingham Hills (Pty) Ltd., a company formed for purposes of property development at Effingham. During 1968, the Anglo-American Corporation entered into an agreement with the parent company for the formation of a new company, La Lucia Property Investments Ltd., which acquired, en bloc, the La Lucia beachfront and Umhlanga Lagoon areas from the appellant company for R1,4 million. Anglo-American Corporation held 55% of the equity interest in the new company and Huletts Investments Ltd., the remaining 45%. The new company was also granted options to acquire further coastal land owned by the appellant. (See Exhibit 13, Report for 1968, P. 8). While this re-organization was taking place the sale of lots in the Umhlanga Rocks and La Lucia areas was proceeding. Initially, the majority of the sales of lots were effected directly by the appellant to members of the public but some lots were sold to what was

then.....18/

then known as La Lucia Homes (Pty) Ltd. During the year ended 30 April, 1968, however, although there were still sales of individual lots to members of the public and to La Lucia Homes, bulk sales of large areas of land in Extensions 5, 6 and 7 of La Lucia commenced. In that year 230 acres were sold by the appellant to La Lucia Property Investments Ltd., for over R1,3 million. During 1969 and 1970, large tracts of land within the township of La Lucia, also in the Umhlanga Rocks Lagoon area and in Extensions 7 and 8 of Umhlanga Rocks, were sold to La Lucia Property Investments and to Huletts Property Holdings. Whereas the appellant had previously developed and laid out the township of La Lucia and been concerned with the construction of dwellings, the purpose in the later years when bulk sales of land were made to associated companies, was that the purchasing companies would themselves take over the development and construction work and re-sell to members of the public for their own profit. The appellant, however, made considerable profits on the sale of the land in bulk to the other companies in the Huletts group."

(xiv) "Shortly after the take-over, the appellant decided to apply for certificates of need or desirability in respect of portion of Bellamonte Estate and Peace Cottage ' with a view to protecting the company's coastal lands against future expropriations and Group Area determinations'. And on 19 April, 1963, the appellant's Board decided to apply for a similar certificate in respect of

portions.....19/

portions of Effingham Estate, with a view to its development as an Indian residential township. At that time the Durban Corporation proposed to establish an Indian township in the Mt. Edgecombe and Phoenix areas. A certificate in respect of portion of Effingham Estate was duly granted. The land in question was sold by the appellant to a company, Effingham Heights Development Co. (Pty) Ltd., during the year ended 30 April, 1969, at a profit of R389 086. The Minutes show that a group of Durban Indians had for long been interested in acquiring portion of the appellant's lands at Effingham and that the Durban Corporation had also shown and continued to show interest in the appellant's lands in the vicinity of that area for purposes of establishment of a residential area for Indian members of the community..... Long before the sale of the land at Effingham, there had been negotiations with a Mr. Pillay who was very anxious to purchase the land. The appellant had refused to sell to him but Mr. Pillay was persistent in his attempts to acquire the property..... Because the appellant realized the inevitability of the establishment by some person or another of an Indian township in the general vicinity of Mt. Edgecombe, or thereabouts, it was determined to ensure, if possible, that such township be sited at a place convenient to its own interests and not in close proximity to its mill. It was for that reason..... that the appellant resolved itself to apply for the establishment of such a township,

for.....20/

for it preferred to have the township on its Effingham land rather than on other portions of its ground in that area. It is clear that the appellant had for some time been concerned to examine the possibilities in regard to its land in the Mt. Edgecombe and Effingham areas. Pointed reference to these areas was made by Huletts Chairman in his report dated 21 July, 1967 (Exhibit 13); 1967 Report, at p. 12) in which he said, with reference to Huletts 'policy of diversification', that

> 'special impetus has been given to the development of our housing and industrial land at La Lucia, Effingham and Mt. Edgecombe. A special division of land operations has been created as indicated above, to meet the requirements of this most important avenue of diversification, and also to accelerate the generation of funds for diversification.' "

(xv) "In the report for each of the succeeding years, reference was made by the Chairman to the group's progress in regard to the general policy of diversification and, specifically, to the success of the operations concerning the land owned by the appellant, which was described as 'probably the most sought after in Natal'. (1968 Report, at p.9). The Report also made reference to a comprehensive plan, produced early in 1968 by a special committee of the appellant, for the ' ultimate usage' of the land owned by the appellant. That plan, which is Exhibit 15 in these proceedings, envisages the establishment of a new city on approximately 22 000 acres of the appellant's land stretching from the southern

boundary.....21/

boundary of La Lucia, northwards to the Umdloti River and inland for some distance beyond Mt. Edgecombe, which would be the centre of the city - a scheme which the Chairman considered might be brought to fruition only after fifty or more years."

(xvi) "The committee responsible for production of the long-term plan for ultimate usage of the lands, explained in the first chapter of its report that the need for such planning stemmed from the realization that it had long been obvious to the appellant that -

> 'there was nothing it might do to prevent the eventual take over of all the sugar lands owned by it for industrial and residential township purposes and to ward off the threat of the ultimate closure of the company's sugar mill at Mt. Edgecombe.' "

(xvii) "This statement is a crystallization of what had frequently been discussed at meetings of the Board in the years before 1962 and seems to emphasize that the appellant had been concerned in the past, was then concerned and would continue to be concerned in the future, regarding the probable loss of its existing cane lands to the cause of urban development and the need to establish new cane lands and mills further afield. It is necessary to point out, too, that in the Minutes of Board meetings after 1962..... and in others, ..... discussions relating to the development and sale of the company's lands were very frequently coupled with discussion of plans to expand the sugar business of the company northwards."

(xviii) During.....22/

(xviii) During the years 1965 - 1970 relevant to this case the appellant disposed of a total of approximately 4 845 acres of land. As at the date of the appeal in the Special Court the appellant still owned approximately 24 000 acres of land, most of it under cane. It still carries on business as a grower and miller of sugar cane and a manufacturer of sugar - as it has done since 1921. For the years 30 April 1963 to 30 April 1970 the appellant's profits from such business exceeded, in the aggregate, R7 000 000.

One turns now to the assessments which are the subject of this appeal, in so far as they relate to profits made on disposal of land. The following synopsis, substantially as prepared by Miller, J., reflects, in respect of each year reading from the left, a number to designate the transaction (for ease of reference later in the judgment) followed by a brief description of the property sold, the acreage of the property (in brackets), and, finally, the profit realized on the sale. Only items assessed to tax and in issue in this case are listed:

Synopsis.....23/

S Y N O P S I S

1965

| | | |
|---|---|---|
| (1) | La Lucia, Exts. 1 and 2, (227) | R436 474 |
| (2) | Umhlanga Rocks, Ext. 7, (28) | 111 498 |
| (3) | " " Foreshore | 38 |
| | | R548 010 |

The Special Court held that the Secretary was not entitled in 1972 to issue this additional assessment of R548 010.

1966

| | | |
|---|---|---|
| (1) | La Lucia, Extns. 1 and 2, (33) | R268 525 |
| (2) | Umhlanga Rocks, Ext. 7, (0,4) | 4 852 |

Again, only items (1) and (2) were assessed to tax; i.e., R273 377; but certain amounts in respect of those two items were adjusted, resulting in a nett sum of R266 253 being included in the appellant's income.

The Special Court held that these were accruals of income.

1967

| | | |
|---|---|---|
| (1) | La Lucia, Exts. 1 and 2, (21) | R195 227 |
| (2) | Umhlanga Rocks, camp, (0,6) | 1 950 |
| (3) | " " foreshore | 200 |

After.....24/

(C) " " (CCC)

(C) (CCC)

(C) " "

(C) (CCC)

(C) (CCC)

After some adjustments had been made in respect of costs, a nett sum of R196 792 is in issue.

The Special Court held that this total represented accruals of income.

1968

| | | |
|---|---|---|
| (1) | La Lucia, Extns. 1 and 2, (22) | R317 703 |
| (2) | " " Ext. 3, (34) | 249 789 |
| (3) | " " Extns. 2,5,6 and 7, (203) | 1 216 909 |
| (4) | Umhlanga Rocks, Ext. 7. (1) | 4 235 |

The Special Court held that these were accruals of income.

1969

| | | |
|---|---|---|
| (1) | La Lucia, Extns. 1 and 2, (2,6) | R40 277 |
| (2) | " " Ext. 3, (5) | 12 842 |
| (3) | Ottawa Township, (0,6) | 9 097 |
| (4) | Umhlanga Rocks, Road camp., (12,5) | 89 668 |
| (5) | La Lucia, Ext. 4, (109) | 759 891 |
| (6) | Umhlanga Lagoon, (74) | 98 843 |
| (7) | Effingham Estate, (282) | 389 086 |
| (8) | Land for Kwa Mashu Extension (793) | 275 638 |
| | | R1 675 342 |

The latter two items, 7 and 8, were held by the Special Court to be accruals of a capital nature and non-taxable; and the remainder were regarded as accruals of income.

All of.....25/

All of these items were included in the taxable income. It is necessary to add that item (8) relates to land acquired by the Durban Corporation after notice of expropriation had been given. The Corporation and the appellant negotiated for about six years after notice of expropriation had been given; hence the inclusion of the proceeds in the 1969 tax year, finality not having been reached until that year.

| | 1970 | |
|---|---|---|
| (1) | La Lucia, Extns. 1,2, (0,3) | 4 811 |
| (2) | " " Ext. 3, (3) | 42 142 |
| (3) | Ottawa Township, (2,6) | 26 374 |
| (4) | La Lucia, Ext. 8, (100) | 625 634 |
| (5) | Umhlanga Rocks, Ext. 8, (29) | 162 089 |
| (6) | " " Ext. 9, (130) | 1 671 489 |
| (7) | Newlands, (19) | 16 892 |
| (8) | Umhlanga Rocks, (3) | 24 304 |
| (9) | Phoenix - Mt. Edgecombe, (885) | 1 059 183 |
| (10) | Mt. Edgecombe, (0,3) | 888 |
| | | R3 633 806 |

Items 7,8, 9 and 10 were held by the Special Court to be non-taxable as being accruals of a capital nature; the remainder were ~~regarded~~ regarded as accruals of income.

All ten.....26/

All ten of these items were included in the appellant's taxable income. Item (8) relates to land acquired by the Natal Anti-Shark Measures Board, after notice of expropriation; item (9), to land acquired by the Department of Community Development after it had given notice of intention to acquire it in terms of the Housing Act, 1966, and item (10) to land acquired by S.A. Railways after notice of expropriation, given in June, 1968.

The aggregate of all of the foregoing profits assessed to tax (after allowing for the few agreed adjustments in respect of the years 1966 and 1967) is R8 108 839; and it is their taxability which is in issue.

The stage is now set for a consideration of the legal contentions and arguments in this Court in the appeal. (The cross-appeal will be dealt with later).

UMHLANGA ROCKS AND LA LUCIA.....27/

UMHLANGA ROCKS AND LA LUCIA

In the Court a quo the issue was, broadly, whether the profit on the sales of the appellant's land were of a capital nature, or whether they represented income. More closely, the crucial issue was (a) whether the land, which was the subject of the sales, was being held as an investment of capital which was converted into cash; or (b) whether, in respect of such land, the appellant had changed its original intention and had gone over to the business of developing and selling such land for profit, using it as stock-in-trade.

The Court a quo held that (b) was the case in regard to Umhlanga Rocks and La Lucia (save in regard to one special sale). It held, by the clearest implication (and the

implication.....27A/

implication was common cause) that the appellant had changed its intention to hold this land as a capital investment, and had decided to sell it. It held further, in terms, that the appellant had gone over to the business just mentioned; and that therefore the profits represented income. In regard to other sales, more inland than coastal, the Court held that (a) was the case, and therefore that the profits were accruals of a capital nature. See the paragraph commencing "The effect of the Court's order" near the commencement of this judgment.

In this.....28/

In this Court the first and main contention on behalf of the appellant, in regard to sales of land in Umhlanga Rocks and La Lucia, was that there never was a change of the original intention that all of the land represented a capital investment; and that the appellant's admitted business activities, in regard to the land which it sold, represented no more than the business of realising part of its capital assets to the best advantage; and therefore that the profits were not accruals of income. This was a different presentation from that in the Court a quo. It lays its axe at the root of traditional legal concepts in regard to a change of intention and the effect thereof. It takes its stand forthrightly on the thesis that an original intention to regard land as a capital investment is decisive, for it can never change (save in special circumstances not here relevant); and that subsequent development and sales of such land, however businesslike, fall under the umbrella of realising a capital asset to the best advantage.

The foundation.....29/

The foundation of this argument was the Special Court's finding that the appellant "clearly purchased 'as a going concern' its predecessor's assets, including the mill and the cane-lands, with the object and intention of employing them as capital assets for the purpose of an income-producing business, and it has in fact carried on that business for the past half-century and still carries it on".

Before proceeding with the argument on this basis, it is necessary to deal with a contention by counsel for the respondent. He attacked the foregoing finding to this extent: he submitted that the assets were acquired in 1921 with a dual intention, the other one being that of re-sale at a profit by way of subdivisional development of residential land. I rather think that this submission equates the post hoc with the propter hoc, for there is no evidence, contemporaneous with the acquisition in 1921, to support the contention. There was, it is true, a written statement in the

negotiations with the Mauritian group (see paragraph (iii) of the tabulated facts early in this judgment) to the effect that certain coastal bush land (this would be, in the main, La Lucia and Umhlanga Rocks) might have a valuable residential potential. But this statement, made in those early days, rather savours of "business puffing", which sellers have ever been wont to favour; and in any event the statement is preceded by the hypothesis "should the Durban Corporation extend its tramways along this beach". As to that, there is no evidence that the Corporation ever envisaged this venturesome possibility. It was further contended, in support of the notion of initial dual intention, that the appellant knew all along that the coastal strip in question was unsuitable for the cultivation of cane; and that therefore the appellant must have intended, from the outset, to develop it residentially and to re-sell it at a profit. There seem to me to be at least two answers to this. First, the appellant bought its

predecessor's.....31/

predecessor's assets lock, stock and barrel, the good land with the less favoured, in what may be described as a package deal. That does not per se import an initial intention to develop and sell off the unfavourable land at a profit. Second, there is evidence to the effect that, from the point of view of a cane grower, the littoral bush growth on the sand dunes was appreciated as a wind-break, lest the beach sand encroach upon the farming area.

Continuing with his contention in regard to an initial dual intention, counsel for the respondent referred to the fact that the appellant's memorandum authorizes it to carry on the business of dealing in property for gain. As to that, I agree with the reply by counsel for the appellant to the effect that it is not the law that where a company has among its objects both dealing and holding, a profit made on the realization of assets will necessarily be income; that the mere fact that a company has power to sell a particular asset or all

of.....32/

of its assets does not imply that it is part of the business of the company to sell that particular asset or its assets; that most people of sound mind and understanding have power to dispose of their property, but it does not follow from that that they carry on the business of dealing if they sell any property which they possess. In African Life Investment Corporation (Pty) Ltd. v. Secretary for Inland Revenue, 1969 (4) S.A. 259 (A.D.) at p. 270 C it was said that "the mere fact that the appellant is ..... empowered to realize its assets by sale or otherwise - a power ordinarily inherent in ownership - does not imply that dealing in shares is part of its business". Furthermore, in Income Tax Case No. 1200 ([redacted]) 36 S.A.T.C. 34, at p. 35, Colman, J., said that the fact that buying shares and reselling them at a profit was covered by the objects clause in the appellant's memorandum of association "is not one to which we should attach great weight because of the well-known practice in South Africa of framing objects clauses in very wide terms".

Lastly.....33/

Text ..... 20

Die Frage lautet: Wie ist es möglich, daß ein Mensch, der
sich selbst als Ich bezeichnet, sich selbst als Objekt
gegenüberstehen kann? Wie ist es möglich, daß ein Mensch
sich selbst zum Gegenstand seiner Betrachtung machen kann?
Wie ist es möglich, daß ein Mensch sich selbst zum Gegen-
stand seiner Erkenntnis machen kann? Wie ist es möglich,
daß ein Mensch sich selbst zum Gegenstand seiner Wissen-
schaft machen kann? Wie ist es möglich, daß ein Mensch
sich selbst zum Gegenstand seiner Philosophie machen kann?
Wie ist es möglich, daß ein Mensch sich selbst zum Gegen-
stand seiner Religion machen kann? Wie ist es möglich,
daß ein Mensch sich selbst zum Gegenstand seiner Kunst
machen kann? Wie ist es möglich, daß ein Mensch sich
selbst zum Gegenstand seiner Moral machen kann? Wie ist
es möglich, daß ein Mensch sich selbst zum Gegenstand
seiner Politik machen kann? Wie ist es möglich, daß ein
Mensch sich selbst zum Gegenstand seiner Wirtschaft
machen kann? Wie ist es möglich, daß ein Mensch sich
selbst zum Gegenstand seiner Technik machen kann? Wie
ist es möglich, daß ein Mensch sich selbst zum Gegen-
stand seiner Medizin machen kann? Wie ist es möglich,
daß ein Mensch sich selbst zum Gegenstand seiner Psycho-
logie machen kann? Wie ist es möglich, daß ein Mensch
sich selbst zum Gegenstand seiner Soziologie machen kann?
Wie ist es möglich, daß ein Mensch sich selbst zum Gegen-
stand seiner Anthropologie machen kann? Wie ist es
möglich, daß ein Mensch sich selbst zum Gegenstand
seiner Theologie machen kann? Wie ist es möglich, daß
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Wie ist es möglich, daß ein Mensch sich selbst zum Gegen-
stand seiner Soziologie machen kann? Wie ist es
möglich, daß ein Mensch sich selbst zum Gegenstand
seiner Anthropologie machen kann? Wie ist es möglich,
daß ein Mensch sich selbst zum Gegenstand seiner
Theologie machen kann?

Lastly, this contention of an initial dual intention was raised in and dealt with by the Special Court; and it rejected it. I am unpersuaded that there are grounds warranting the avoidance of that finding.

I continue, therefore, with the contention of counsel for the appellant on the footing that its original intention was to hold the land as a capital investment. The contention was that that intention was decisive. It is necessary to test this contention by reference to decisions of this Court over the past half century and more. It is undoubtedly correct that if, on the facts of a given case, the most that can be said is that the taxpayer was merely realizing a capital asset to the best advantage, the proceeds do not become part of his gross income. Several judicial decisions to this effect were cited. In Com. of Taxes v. Booysens Estates Ltd., 1918 A.D. 576, Innes, C.J., while recognising at page 593, commencing in fin., that in England the relevant provisions as to

income.....34/

income tax were not identical to those in our then Income Tax Act, No. 25 of 1914, said at page 595 -

> "The line of enquiry under our Act therefore approaches so close to the English test, that in a case like the one before us there is no practical difference. And that being so, we are free to refer for guidance to the English decisions. The general rule approved by the Privy Council in Commissioner of Taxes v. Melbourne Trust (1914 A.C. at p. 1010) was thus stated in the Californian Copper Syndicate v. Inland Revenue (anno 1904, 41 Sc. L.R. 691).....
>
> 'It is quite a well-settled principle in dealing with questions of Income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price than he originally acquired it at, the enhanced price is not profit.....assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on or carrying out of a business.' * (My italics)

The words italicised appear to be the genesis of the distinction consistently drawn by this Court under our subsequent Income Tax Acts (despite some change in wording in the relevant provisions since the 1914 Act) between -

(a) Realising a capital asset. A simple example would be that of a manufacturer selling a redundant warehouse; or a pensioner selling his family house to live in a flat; or a farmer

selling a portion of his land which has become isolated from the farm by the construction of a railway line. In such cases the gain will not be income and is not taxable.

(b) Selling an asset in the course of carrying on a business or embarking on a scheme for profit. A simple example would be that of a speculative builder buying plots for the purpose of erecting houses thereon and selling them at a profit. The latter would be income, and subject to tax.

As a matter of interest, the Scottish Californian Copper Syndicate case of 1904, supra, has remained good law in England; see, e.g., General Reinsurance Co. Ltd. v. Tomlinson, (1970) 2 All ER. 436 at page 442. And in the same year, in a Privy Council appeal from Australia, Lord Donovan applied the "governing principle" formulated in the Californian Copper Syndicate case; see McClelland v. Commissioner of Taxation of the Commonwealth of Australia, (1971) 1 All ER. 969 at page 975 D.

The foregoing principle has been followed and developed in this Court over the years. Thus, in Stott v. C.I.R. 1928 A.D. 252 (which was a case under the 1925 Act), Wessels, J.A.,

relied.....36/

relied on the Californian Copper Syndicate case, supra, by adopting at p. 259, in fin., the remarks of Innes, C.J., in an earlier case (Overseas Trust Corporation Ltd., v. C.I.R. 1926 A.D. 441 at p. 453), namely , "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.' " See, too, pages 261/2. Stott's case, supra, concerned a surveyor who subdivided and sold certain of his land; and the question was whether he was carrying on a scheme for profit-making. The decision (which was in the taxpayer's favour) is noteworthy in the following respects:

(a) It applied the test in the Californian Copper Syndicate case, supra, namely whether the taxpayer sold the asset in pursuance of a business or profit-making scheme.

(b) It recognised the principle that an owner of land (or any other asset) is entitled to realize such asset to the best advantage; and "the fact that he does so cannot alter what is an investment of capital into a trade or business for earning profits"; page 263, at the end of the main paragraph.

(c) In holding.....37/

(c) In holding the balance between (a) and (b) -

(i) it recognised the importance (but not exclusive decisiveness) of the intention with which the asset in question was acquired; page 264;

(ii) it recognised that "The mere fact that the land was cut up into lots rather than sold as a whole cannot by itself alter the character of the proceeds derived from the land from capital to gross income; " ; page 263;

(iii) it recognised that "there is no definite test which can always be applied in order to determine whether a gain or profit is income or capital, but in order to convert what is on the face of it an ordinary investment of surplus funds into a profit-making business there must be proof of some special acts which in the ordinary experience of men shows that the taxpayer has conceived some scheme for profit-making and has made it his business to carry it out"; page 264.

This latter statement is important for it is the beginning of the test of degree, of which more anon.

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As a matter of interest there have been correlative decisions in the Court of Appeal in England which afford illustrations of the scale of operations upon which an owner may embark in realizing his assets to the best advantage. See, for example, The Hudson Bay Co. Ltd. v. Stevens (Surveyor of Taxes), (1909) 5 Tax cases 424; and Taylor v. Good (Inspector of Taxes), (1974) 1 All ER. 1137. I would add, however, that in the instant case the appellant's business operations in realising the Umhlanga Rocks and La Lucia properties, far transcended those of the taxpayers in those cases.

Cases in this Court, subsequent to Stott's case, supra, recognise the relevance of a change of intention on the part of the owner, that is to say, a change from the original intention when acquiring the asset; see C.I.R. v. Leydenberg Platinum Limited, 1929 A.D. 137 at p. 144 where Stratford, J.A., said at page 148,

> "For, even though it be assumed that these properties were originally acquired for the purpose of carrying on the business of mining, the subsequent events to which I have referred

point.....38/

[illegible]

> point to a clear change of policy in regard to the use to which they were put..... In the present case, a new factor did intervene of a decisive character, namely the deliberate adoption of the policy of selling the company's properties to make profits."

In this Court counsel on both sides closely analysed the facts in the foregoing case, each to illustrate his own submission. However, the principle just stated was recognised by this Court in C.I.R. v. Richmond Estates (Pty) Ltd., 1956 (1) S.A. 602 (A.D.) at page 607, in which Centlivres, C.J., said -

> "That the character of assets held by a company can be altered by a change of intention in regard to those assets is clear from the case of Commissioner for Inland Revenue v. Leydenberg Estates Limited, 1929 A.D. 137 at 144, where the Court decided on p. 147 that there was a change of policy by the company concerned which resulted in capital assets becoming the stock-in-trade of the company." (The citation of the respondent should be Leydenberg Platinum Ltd.)

Schreiner, J.A., in his dissenting judgment, also recognised the relevance of a change of intention. The learned Judge of Appeal expressed himself thus, at page 610 D -

"The decisions.....39/

> "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 intention 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." (My italics).

That passage was approved by this Court in C.I.R. v. Strathmore Consolidated Investments Ltd., 1959(1) S.A. 469 (A.D.) per Ogilvie Thompson, J.A., at page 478 B.

In Lace Proprietary Mines Ltd. v. C.I.R., 1938 A.D. 267, Stratford, C.J., in deciding whether the profit on the realisation of certain mineral rights was income, said at page 277, "For guidance we must go back to what has been said in Booysen's case and subsequent cases." The learned Chief Justice went on to stress the importance of the intention, but declined to peg it as at the date of acquisition.

The principle was again stated by Centlivres, C.J., in Yates Investments (Pty) Ltd. v. C.I.R., 1956(1) S.A. 612 (A.D.) at 616.....40/

at 616 in fin., namely, that it is clear from C.I.R. v. Leydenburg Platinum, 1929 A.D. 137 at page 148, and from New Mines Ltd. v. C.I.R., 1938 A.D. 455 at 460/1, that a change of intention can take place, i.e., to change from a trader to an investor, and vice versa.

Lastly, in the recent case of S.I.R. v. The Trust Bank of Africa Ltd., 37 S.A. Tax Cases 87 (1975(3) S.A. 652) Botha, J.A., at page 104 approved of certain remarks by Corbett, J. (as he was then) in the Court a quo, in deciding the question of realization of a capital asset versus steps in a scheme of profit-making, in the circumstances of that case. Botha, J.A., said that what the learned Judge conveyed was that "the intention with which the shares were acquired was of the utmost importance, but not necessarily decisive". (My italics).

The tenor of all of the foregoing decisions was criticised by counsel for the appellant. He submitted that they

lost.....41/

lost sight of the principle that an owner was entitled to realise a capital asset to the best advantage without attracting tax. I do not think that the criticism is warranted, for that principle was expressly mentioned by Wessels, J.A., in Stott's case, supra, at page 283, at the end of the main paragraph; and the decision has long been recognised as a leading case. Counsel also contended that the test of degree was too uncertain to be realistic. As to that, courts have often indicated that, while a principle may be stated, its application is fraught with difficulty; see, as an example, the remarks of Innes, C.J., in the Booysens case, supra, at page 595 - "The rule is plain enough; the difficulty lies in the application of it." See, too, the correlative remarks of Wessels, J.A., in Stott's case, supra, at page 264, in fin. Counsel also pointed to the inequity of taxing the appellant on profits based on the excess of today's prices over the value in 1921 (about R6 per acre). Counsel on both sides were at one that, on the Act as it stands, there is no way of taxing the profits on the excess of today's prices over the value as at the date when an owner decides and starts to go into the business of selling land

for profit.....42/

for profit, with his land as his stock-in-trade. Counsel referred to section 22. I express no view on the correctness or otherwise of counsels' approach. It might be conceivable that, if the owner proves the amount by which the land appreciated in value while he held it as a capital asset, the exclusion of that amount from the profits might be upheld under the Act as it stands, as being a capital accrual and not gross income, as defined. No opinion is expressed. However, if there is the inequity contended for, that is a matter which might well engage the attention of the Legislature.

One could continue to cite relevant decisions of this Court with regard to the appellant's main contention, but I

think.....42A/

think that it would be heaping Pelion upon Ossa. In my view the cases cited clearly demonstrate that the main contention on behalf of the appellant cannot be sustained. Indeed, to uphold it would be to flout the principle of stare decisis to the point of iconoclasm.

The second and alternative contention by counsel for the appellant was that any change of original intention on the part of the appellant, involving a decision to sell a portion of its land (i.e. in Umhlanga Rocks and La Lucia), did not transmute the character of that land from capital to stock-in-trade. In this connection counsel conceded that the appellant was engaged in business in Umhlanga Rocks and

La Lucia.....43/

La Lucia, but only in the context of realizing capital assets to the best advantage, the proceeds thereof being of a capital nature. The argument was that it is only when a taxpayer carries on the business of buying land for re-sale and then selling it (i.e. as a land-jobber) that the land can be regarded as stock-in-trade and the proceeds as income. That was not the position here, so the argument continued, because the appellant already owned the land before it changed its intention and decided to sell it. Thus it did not, and did not have to, buy in land for re-sale and then sell it. Therefore it was not a land-jobber, carrying on business with land as its stock-in-trade. It was merely realizing a capital asset. Thus the argument.

In my view the fact that a taxpayer is doing land-jobbing, (i.e. buying land for re-sale and then selling it at a profit) may establish (a) that he is not merely realizing a capital asset to the best advantage; and (b) that, on the

contrary.....44/

contrary, he is engaged in the business of selling land for profit, with land as his stock-in-trade. As was said by Russell, L.J., in Taylor v. Good (1974) 1 All ER., 1137 (C.A.) at page 1144, second paragraph -

> "If of course you find a trade in the purchase and sale of land, it may not be difficult to find that properties originally owned (for example) by inheritance, or bought for investment only, have been brought into the stock-in-trade of that trade."

It does not necessarily follow, however, that proof of land-jobbing (buying land for re-sale and selling it) is the only way of establishing that a taxpayer is engaged in the business of selling land for profit, using it as his stock-in-trade. Nor is the argument in my view well attended by logic, for it was conceded (correctly) that the character of land can change from stock-in-trade to capital in consequence of a changed intention to hold it as an investment.

It was.....45/

It was also conceded (correctly) that the character of land can change from that of capital to that of stock-in-trade by a change of policy whereby the land is merged with the stock-in-trade of an existing trading concern. I agree with counsel for the respondent in his submission that it is not a definitive characteristic of carrying out a scheme for profit-making in land that there should be a buying in for the purpose of a re-sale at a profit; that that feature may often be present but, on the other hand, the taxpayer may find it unnecessary to buy in for purposes of re-sale; that he may have at hand such a stock-in-trade of hitherto capital assets that he does not need to buy in further stock; and that to say that there must always be buying in for purposes of re-sale at a profit is in effect to say that capital assets immutably remain capital assets in the hands of the acquirer.

As was said by Farwell, L.J. in The Hudson Bay Co. Ltd., v. Stevens (Surveyor of Taxes), (1909) 5 Tax Cases, 424 at page 437 (first paragraph) -

"It is clear.....46/

> "It is clear, therefore, that a man who sells his land, or pictures, or jewels, is not chargeable with income tax on the purchase-money or on the difference between the amount that he gave and the amount that he received for them. But if instead of dealing with his property as owner he embarks on a trade in which he uses that property for the purposes of his trade, then he becomes liable to pay, not on the excess of sale prices over purchase prices, but on the annual profits or gains arising from such trade, in ascertaining which those prices will no doubt come into consideration."

I draw attention to the words "embarks on a trade in which he uses that property for the purposes of his trade..."

To sum up with regard to counsel's alternative argument, it cannot be upheld.

The third contention by counsel for the appellant was that its business operations in regard to the sales of land in Umhlanga Rocks and La Lucia related only to the realization of a capital asset to the best advantage; and that it was not using its land as stock-in-trade in a profit-making business.

In deciding.....47/

In deciding whether a case is one of realising a capital asset or of carrying on a business or embarking upon a scheme of selling land for profit, one must think one's way through all of the particular facts of each case. Important considerations include, inter alia, the intention of the owner, both at the time of buying the land and when selling it (for his intention may have changed in the interim); the objects of the owner, if a company; the activities of the owner in relation to his land up to the time of deciding to sell it in whole or in part; the light which such activities throw on the owner's ipse dixit as to intention; where the owner subdivides the land, the planning, extent, duration, nature, degree, organisation and marketing operations of the enterprise; and the relationship of all this to the ordinary commercial concept of carrying on a business or embarking on a scheme for profit. Those considerations are not individually decisive and the list is not exhaustive. From the totality of the facts one enquires whether it can be said that the

owner.....48/

owner had crossed the Rubicon and gone over to the business, or embarked upon a scheme, of selling such land for profit, using the land as his stock-in-trade.

Finally, one does not lose sight of the incidence of the onus of proving non-liability, imposed by section 82 of the Act, on the person claiming such non-liability, in this case the appellant.

The Special Court substantially followed the foregoing approach. I have already indicated that it was common cause that the Special Court, by the clearest implication, held that the appellant had changed its intention to hold its land as a capital investment and had decided to sell some of it. The judgment of Miller, J., proceeds to make the following findings. For convenience I have paragraphed and lettered the passages -

(a) "It is.....49/

(٤) .....

(a) "It is very clear that the appellant's operations were on a vast scale. Preparatory to selling, intensive planning and organization took place. It was conceded by the appellant's witnesses and was publicised at the time that the intention was to create at La Lucia a luxury township and the appellant's expenditure to achieve that purpose was lavish. (See Exhibits 25 and 28-33). Every care was taken to ensure excellence of design and the provision of attractive amenities of high quality. The appellant itself at first constructed houses 'to set the tone' for future builders..... All building plans were required by the conditions of title to be submitted to the appellant for approval, because the appellant desired to maintain the high standards of design and construction which it had set. It appears to me that it must have been very obvious to any objective observer at that time that the appellant had entered the field of township development and the marketing of township land on a grand scale. The appellant had, to put it plainly, gone into business. I do not know of any more appropriate words to describe what it was doing. It is true that that was not its only business. Nor was it its main business, which we accept was and remained that of producing and milling sugar cane. The township development and property marketing business might have been as profitable as its main business, but it was in truth ancillary to it as one of the diversifications of the group's interests. We accept that the appellant was concerned to maintain and expand its sugar business and that the area of the ground which it

sold.....50/

sold in La Lucia and Umhlanga Rocks was almost negligible in relation to the totality of its land holdings, but the business which it was carrying on in dealing with such land was no less a profit-making scheme merely because it was subsidiary or secondary to the main business. (c.f. African Life Investment Corporation Ltd., vs. S.I.R., 1969(4) S.A. 259 (A.D.) at p. 269). We cannot accept, therefore, that the appellant was doing no more than realizing its capital assets to best advantage....."

(b) "The fact that the appellant may have been motivated in the first instance to trade in its south-lying lands because it feared that sooner or later it would have to surrender them to the pressing urban needs of Durban, does not affect the issue. If it in fact sold the land in the course of carrying on a business or a profit-making scheme, it does not matter what the circumstances were which prompted or inspired it to enter into that business."

(c) "In this case, not only do the activities of the appellant lead to the conclusion that it was carrying on the business of selling land but the deliberations of its Board and the published pronouncements of the parent company which received reports from the appellant and the sub-committees which it appointed for purposes of the scheme, fortify and underline that conclusion. In short, in so far as the La Lucia and Umhlanga Rocks township land is concerned, it is clear both from statements of purpose and intent and from what was actually done by the appellant, that its intention

was.....51/

was to employ that land for purposes of what it had long anticipated would be a highly profitable business."

These factual findings, particularly in the last sentence in paragraph (a) and the last sentence in (c), are unequivocal. They are unappealable unless vitiated by misdirection, irregularity or the absence of any evidence reasonably warranting them. As to that -

(i) The findings do not seem to me to be impaired by the fact that a latent residential potential already inhered in the coastal areas. I say this because such potential needed a scheme in order to attract buyers. To that end, the appellant's scheme was a profit-making business enterprise on a grand scale.

(ii) The findings are not vitiated by the definition of trading stock in section 1 of Act 58 of 1962. It is to be noted that it is not an exhaustive definition, for it commences with the word "includes". In so far as here relevant it reads -

"Trading stock.....52/

> "Trading stock includes anything..... purchased.....by a taxpayer for purposes of.....sale or exchange by him or on his behalf....."

Up to that point, it may be that the asset has to be purchased with the intention of selling it. But the definition continues -

> "or (anything) the proceeds from the disposal of which forms or will form part of his gross income."

I have repeated the word "anything" for clarity. See the concluding words of the Afrikaans definition of "handelsvoorraad" namely -

> ".....of enigiets waarvan die opbrings uit die van die hand sit daarvan deel van sy bruto inkomste uitmaak of sal uitmaak."

This portion of the definition is not inconsistent with the situation in the present case.

(iii) The findings are not vitiated by the absence of any evidence reasonably warranting them. As to that, I accept the following submission by counsel for the respondent -

> "To a degree not paralleled in any reported case, the evidence in the present case established a scheme of profit-making. If it were to be held that the appellant was merely realising a capital asset to best advantage, then it would be difficult to envisage that there could ever be a case in which it could be held that a taxpayer had changed its intention and gone into the business of profit-making in land. One would have arrived de facto at a situation in which land acquired as a capital asset immutably retained that character in the hands of the acquirer."

To sum up.....53/

To sum up with regard to the profits from sales of land at Umhlanga Rocks and La Lucia (I shall deal in a moment with the question of certain bulk sales in these areas), on all the facts the Special Court was entitled to find that the appellant, with its elaborate and sustained scheme and expertise, was doing much more than merely realizing a capital asset to the best advantage in a businesslike manner; and that by any canons of commerce it had gone beyond that field: it had crossed the Rubicon and committed itself on a grand scale to the course and business of selling land for profit, using the land as its stock-in-trade. On those factual findings the Special Court's conclusion, that the profits were receipts or accruals of income and taxable, is correct in law.

The fourth contention on appeal was that certain sales of land in bulk in the foregoing coastal areas should have been regarded as realisations of capital assets, and that the proceeds were not income. As to that, the judgment of Miller, J., said this -

*It is true.....54/

> "It is true.....that the appellant itself later discontinued the actual planning and development of the township and extensions, and the direct sale of lots therein and sold, instead, land in bulk within the townships to the group companies .....But the sale of its land to such companies was to enable them, instead of itself, to develop the township and construct houses and was clearly done in pursuance of the business or scheme it had evolved for profitable dealing in land; only the details and machinery for the fulfilment of the object were varied."

And see the latter portion of paragraph (xiii) of the tabulation of the facts, supra.

It was contended on behalf of the appellant that, whatever the position might be in regard to the many retail sales of land in Umhlanga Rocks and La Lucia, the sales of land in bulk in those areas represented capital realization. These sales were to associated companies, namely, La Lucia Homes (Pty) Ltd., which is a subsidiary of appellant; and to three other companies in which the appellant's parent company held a 45% interest. These three companies were La Lucia Property Investments (Pty) Ltd., Umhlanga Rocks (Pty) Ltd., and La Lucia Shopping Centre (Pty) Ltd.

The contention.....55/

The contention was that the bulk sales of these areas were unaffected by the Special Court's reasons for holding that the retail sales were in the course of a business carried on for selling land at a profit. Those reasons, it will be recalled, included the preparatory intensive planning and organisation, the intention to create a luxury township, the lavish expenditure in achieving that purpose, the construction of certain houses "to set the tone" and, in general, the fact that the appellant had entered the profit-making business of township development and marketing of township land on a grand scale.

The argument in this Court was that it would be logical to exclude the bulk sales from the business referred to, since none of the foregoing considerations applied to them.

I am unable to accept this contention. It is true that, in regard to the bulk sales, there was not the same degree of close urban settlement; and only one or two houses had been erected thereon "to set the tone". Nevertheless, some quite appreciable sums of money had been spent to develop them,

covering.....56/

covering such matters as survey, general planning, bush clearance, roads and sewerage. And the bulk areas all benefited and were intended to benefit from the intensive business activities referred to above. Indeed, on the facts, they were all part of the same concept. As there was a change of original intention in regard to land in Umhlanga Rocks and La Lucia, that change also embraced the areas therein subsequently sold in bulk. It would be wrong to dissociate them from the profit-making business on the grounds of larger area or a lesser degree of development. Furthermore, a good deal of development was common to both retail and bulk sales, such as access roads, to mention only one indispensable amenity.

To sum up.....56A/

To sum up on this issue, once it is recognised that, on the facts, the land in Umhlanga Rocks and La Lucia became stock-in-trade, it does not matter whether the sales therein were in retail or in bulk. In either event the proceeds are referable to gross income. The Special Court found as a fact that the bulk sales were clearly in pursuance of the business or scheme which the appellant had evolved for profitable dealing in land. Standing that factual finding, the Special Court's conclusion, that the proceeds of the bulk sales were referable to gross income, is correct in law. In the result, the appeal on this issue cannot succeed.

OTTAWA TOWNSHIP

The fifth contention in the appeal. We have now dealt with the appeal in relation to sales of land in Umhlanga Rocks and La Lucia (save in respect of one special sale in the former area which was held to be a capital realization and which will be dealt with under the cross-appeal). The fifth and final contention in the appeal relates to the sale of fourteen lots in the Ottawa Township, also referred to in the record as Ottawa Estates. These are not in Umhlanga Rocks or La Lucia. Three of these lots were sold in 1969 and eleven in 1970. See the SYNOPSIS (supra), Item (3) (1969) and Item (3) (1970). The appellant was assessed to income tax in respect of the proceeds of these sales. The Special Court held that there was not sufficient material before it to enable it to draw a firm conclusion; and that therefore the appellant had not discharged the onus of showing that the Secretary was wrong in treating the receipt as revenue.

In this Court.....58/

In this Court, counsel on both sides diligently winkled from the thousand-page record the paucity of facts that could be pieced together on this issue. It appears that the Ottawa Estate was purchased in 1927 for a purpose ancillary to the appellant's sugar business. The small area in question in the appeal was not under cane and was not suitable for such cultivation. The area sold represented pieces of land which the appellant had caused to be re-subdivided into lots for sale to members of the Indian community, a number of the purchasers being employees of the appellant. In 1967 the appellant applied for a certificate of need and desirability for the establishment of a small township. At the time of sale the area was a proclaimed township and was zoned for Indian ownership and occupation. It was a very small area of land. Township development costs, totalling several thousand rand, had been incurred in respect of matters such as roads, bush clearance and drainage. A substantial profit was made on the sales.

On this.....59/

On this meagre patchwork of information the case appears to be a borderline one, as between realizing a capital asset and embarking on a profit-making scheme. In the unusual circumstances I am unpersuaded that the Special Court erred in considering that the case fell to be decided on the footing that the appellant had not discharged the onus, imposed by section 82 of the Act, of establishing that the Secretary was wrong in regarding the profits as accruals of income. The appeal on this issue cannot, therefore, be sustained.

To sum up with regard to the entire appeal, it is dismissed with costs. Two counsel appeared on behalf of the respondent, and the order for costs will include those occasioned by their employment.

I turn now to -

THE CROSS-APPEAL.....60/

THE CROSS-APPEAL

ADDITIONAL ASSESSMENT OF R548 010 FOR THE YEAR 1965

As mentioned early in the judgment, for the year ended 30 April 1965 certain profits on disposals of land were not treated as income in the original assessment issued in February 1967; but they were included in an additional assessment of R548 010 issued by the respondent during April 1972. On 20 April 1972 the appellant lodged a formal objection, in terms of section 81 of the Act (No. 58 of 1962), on the ground that the nett proceeds of the relevant sales constituted receipts and accruals of a capital nature; and further, that the respondent was precluded by the terms of section 79(1)(a) of the Act from re-opening the original assessment after the expiration of three years. A further ground of objection is not here relevant. On 24 April 1972 the respondent disallowed the objection, by a notice to the appellant in terms of section 81(4). On 18 May 1972 the appellant lodged a

notice.....61/

notice of appeal under section 83. The grounds of appeal were the same as those in the disallowed objection. The Court a quo upheld the appellant's ground that the respondent was precluded by the terms of section 79(1)(a) from re-opening the original assessment. The respondent has cross-appealed against this decision.

Section 79(1) of the Act reads as follows -

> "If at any time the Secretary is satisfied that any amounts which should have been subject to tax have not been assessed to tax either under this Act or any previous Income Tax Act, he shall raise assessments in respect of such amounts, notwithstanding that assessments may have been made upon the person concerned in respect of the year or years of assessment in respect of which the amounts in question are assessable, and notwithstanding the provisions of sub-section (5) of section eighty-one and sub-section (18) of section eighty-three or the corresponding provisions of such previous Income Tax Act : Provided that the Secretary shall not raise an assessment under this sub-section -
>
> (a) after.....62/

(a) after the expiration of three years from the date of assessment in terms of which any amount which should have been assessed to tax under such assessment was not so assessed, unless the Secretary is satisfied that the amount was not so assessed because of fraud or misrepresentation or non-disclosure of material facts;" (My italics).

The argument in this Court by counsel for the respondent was that the use of words such as those italicised, supra, ordinarily indicates an administrative discretion, and excludes a right of appeal in the absence of contrary indications. He relied on Irvin & Johnson (S.A.) Ltd. v. C.I.R., 1946 A.D. 483 at pages 492/3; and Holden's Estate v. C.I.R., 1960(3) S.A. 497 (A.D.) at page 502 E - F. Counsel contended that there were no "contrary indications" in sections 79 and 83 or any other section of Act 58 of 1962; and therefore the respondent's "satisfaction" was unappealable.

I shall..... 63/

I shall assume, without deciding, in favour of the respondent, that, once he is satisfied that an amount was not previously assessed because of fraud or misrepresentation or non-disclosure of material facts, his decision is unappealable. However, there must be some evidence before the Special Court that he was so satisfied, otherwise there is no displacement of the immunity conferred on the taxpayer by the proviso to section 79(1) and the opening words of paragraph (a) thereof. A convenient time and place for indicating the Secretarial satisfaction would be in the additional assessment itself, or in a covering letter; or in the notice which the respondent is required by section 81(4) to send to the taxpayer, if the latter's objection to the assessment is disallowed. And it should state the particular conduct of the taxpayer to which it relates, i.e., whether fraud or misrepresentation or non-disclosure of material facts.

It is..... 64/

It is common cause that in the present case (which lasted for four days before the Special Court) there was neither testimony nor any document stating that the Secretary satisfied himself as to the requirements of section 79(1)(a). All that happened in this regard in the Special Court was that, during the argument stage after the cases had been closed, the representative of the respondent (who was not the counsel in this Court) made the submission that the Secretary was satisfied that there had been a material non-disclosure. With all respect, that is not the way to establish it.

Counsel for the respondent in this Court recognised all the foregoing, but he contended that (a) the correspondence between the parties prior to the issue of the additional assessment, and (b) the maxim omnia praesumuntur rite esse acta, gave rise to the inference that the Secretary had indeed applied his mind to the requirements of section 79(1)(a) and had satisfied himself thereanent.

I am..... 65/

I am unpersuaded that the correspondence has the effect contended for. With regard to the maxim relied upon, in Byers v. Chinn & Another, 1928 A.D. 322 at page 332, Stratford, J.A., giving the judgment of the Court, had this to say about it -

> "In Wigmore on Evidence (vol. 4, paragraph 2534), the author says: 'The general experience that a rule of official duty, or a requirement of legal conditions, is fulfilled by those upon whom it is incumbent, has given rise occasionally to a presumption of due performance. This presumption is more often mentioned than enforced; and its scope as a real presumption is indefinite and hardly capable of reduction to rules. It may be said that most of the instances of its application are found attended by several conditions; first, that the matter is more or less in the past, and incapable of easily procured evidence; secondly, that it involves a mere formality, or detail of required procedure, in the routine of a litigation or of a public officer's action; next, that it involves to some extent the security of apparently vested rights, so that the presumption will serve to prevent an unwholesome uncertainty; and, finally, that the circumstances of the particular case add some element of probability.' "

In the present..... 66/

In the present case none of these conditions can be said to apply. Nor, in particular, is this a case of a merely formal decision : on the contrary, the Secretary's "satisfaction" is a substantive and far-reaching determination, which should be communicated to the taxpayer, if not before, then at the very latest at, the hearing in the Special Court. In these circumstances I do not consider that the maxim rescues the Secretary in this case.

Once it is recognised that there should be some evidence of the Secretary's satisfaction, the taxpayer should be informed of it plainly, and of the particular conduct in respect of which he is satisfied, e.g., fraud, or material non-disclosure. The taxpayer should not have to grope inferentially for the Secretarial satisfaction, or the particular form of dereliction of duty to which it relates. In particular he should not be left to infer from the mere receipt of an additional assessment, after the expiration of three years from the

date..... 67/

date of the original assessment, that the Secretary, after applying his mind to the matter, is satisfied that the taxpayer's fraud or misrepresentation or material non-disclosure caused a non-assessment. For one thing (and it was common cause in this appeal that the material non-disclosure could be innocent) the taxpayer is entitled to know whether fraudulent conduct - a grave and ugly imputation - is being held against him.

Lastly, counsel for the respondent sought refuge in the terms of section 82 of the Act, which inter alia casts upon the taxpayer the burden of proving non-liability. As to that, because three years had expired since the original assessment, the taxpayer enjoyed statutory immunity from further assessment. If the Secretary wished to displace that immunity, it was for him to state that he was "satisfied" that the non-assessment in question was caused by the taxpayer's fraud or misrepresentation or non-disclosure of material facts. This is because the proviso to section 79(1)

of.....68/

of the Act, read with paragraph (a) thereof, prohibits the Secretary from raising an additional assessment, after the lapse of three years, unless he is so satisfied. In the present case there is no evidence of such "satisfaction" on his part, and the taxpayer's immunity stands. The appellant has therefore shown that the Secretary's decision to assess him further was wrong. Thus the appellant has fulfilled the condition at the end of section 82, namely, "unless it is shown by the appellant that the decision is wrong".

In the result, the cross-appeal on this issue cannot succeed.

I proceed now to deal with sales in several areas of land, inland from Umhlanga Rocks and La Lucia, which were adjudged to be capital realizations. The Secretary cross-appeals against those decisions. The areas in question are listed in the SYNOPSIS, supra. For the tax year 1969 they are listed therein as item (7), Effingham Estate; and item (8), Kwa Mashu Extension. For the tax year 1970, they are

listed.....69/

listed in the SYNOPSIS as item (7), Newlands; item (8) Umhlanga Rocks (this is the one special sale in that area previously mentioned which was held to be a capital realization); item (9), Phoenix - Mt. Edgecombe; and item (10), Mt. Edgecombe. I shall deal with them in their order.

EFFINGHAM ESTATE

Item (7) in the SYNOPSIS, supra, in relation to the 1969 tax year; and see paragraph (xiv) of the tabulation of the facts, supra.

The contention on behalf of the Secretary in the cross-appeal was -

(a) that the intention with which the appellant held Effingham Estates must be viewed in the light of its overall intention and conduct in regard to its land which had a township potential;

(b) that the appellant all along had in contemplation that it would utilise Effingham Estates for township development in a scheme for profit-making when the time should prove opportune;

(c) that.....70/

(c) that the appellant took active steps in that direction in pursuance of the policy laid down by Huletts of turning the appellant's land to account.

In my view the starting point is the fact that the appellant's original intention in acquiring this land as a cane farm in 1923 (as part of a larger area) was to use it as a capital investment, in its main object and business of engaging in the sugar industry. This was so found by the Special Court. The notion of a dual purpose, which seems to be inherent in the contentions just set out, has already been considered at length and rejected, supra. So the question is whether the original intention was changed to one of using this particular land as stock-in-trade in the business of selling land for profit.

Miller, J., giving the judgment of the Special Court, was careful to point out that the finding that the appellant carried on such a business in selling its coastal land in

Umhlanga Rocks.....71/

Umhlanga Rocks and La Lucia, could not, in the circumstances of this case, automatically be extended to every sale of the appellant's land elsewhere. The reason, said the learned Judge, was that the coastal land was land of distinctive quality for the purposes for which it was sold, and represented a very small percentage of its total holdings of land; and that it was readily conceivable that some of the appellant's other land might be sold as a true realization of capital for purposes of change of investment, and not at all in the course of a business or profit-making scheme. It would be fallacious, continued the learned Judge, to assume that no portion of its considerable landed estate could be excluded from the scope of its property business. In the result, concluded the learned Judge, each and every sale of land beyond the coastal areas of Umhlanga Rocks and La Lucia must be considered on its own merits and should not be regarded as necessarily and

inevitably.....72/

inevitably falling to be dealt with, for tax purposes, as part of the land-dealing business.

I agree with the foregoing approach.

The area in question, 282 acres, was sold to Effingham Heights Development Co. (Pty) Ltd., an Indian-owned company. The land had long been sought after by members of the Indian community for the purposes of establishing an Indian township. The judgment of the Special Court continues -

> "The land was zoned for Indian occupation and we accept that the appellant recognised the probability, if not the inevitability, of a notice to vacate the land in terms of the Group Areas legislation. Although the appellant applied for a certificate of need and desirability in respect of this land, it did not develop it, nor cause it to be developed. It incurred expenditure in the total sum of some R34 000, mostly in respect of survey and administrative expenses. The circumstances which form the background of the sale of this piece of land to an Indian-owned company set it apart from the business which it was carrying on in respect of its coastal land. It is significant that this land was not sold to Effingham Hills (Pty) Ltd., which had already been formed within the Huletts group

in 1967.....73/

> in 1967 for the purpose of property development at Effingham. We have come to the conclusion that the profit of R389 086 on the sale of this particular portion of Effingham Estate, which was acquired by the appellant during 1923 as a cane farm, ought not to have been regarded by the Secretary as revenue but as an accrual of a capital nature."

The clear implication is that the Special Court found as a fact that the appellant had at no time changed its original intention of holding and using this land as a capital investment. That finding is unassailable. Hence the Special Court's conclusion (in the last sentence, supra) that the profit was a capital accrual and not income is correct in law. Indeed, it seems clear that the appellant was here adjusting and attuning its land holdings to changing circumstances; and

in this.....73A/

in this context it was doing no more than realizing a capital asset. To hold otherwise, in the circumstances of the present case, would be to condemn the appellant to static holdings upon pain of taxation. The Act does not require this. In the result, the cross-appeal on this issue cannot succeed.

KWA MASHU EXTENSION

Item (8) of the SYNOPSIS, supra, in relation to the 1969 tax year.

This area of 793 acres was sold to the Durban Corporation after receipt of a notice of expropriation. It adjoins

an area.....74/

an area of 2262 acres of Melkhoute Kraal which the Corporation had acquired from the appellant for Kwa Mashu Bantu Township in 1957. All of this land was part of the appellant's primary purchase in 1921.

The argument in this Court on behalf of the respondent in the cross-appeal was to the following effect -

> Viewed in the context of the appellant's policy in connection with that part of its land which had township potential, and in the context of the general policy of Hulett's regarding the appellant's land, there can be no doubt but that the appellant disposed of this Kwa Mashu Extension in pursuance of a policy of realizing its land for profit-making.

The difficulty about this contention is that the Special Court has made certain findings of fact. Miller, J., said -

> "As I understand the argument on behalf of the Secretary in support of the assessment in respect of this transaction, it was that when the Consortium took over the appellant company in 1962, it knew that this land was to be

expropriated.....75/

expropriated and it therefore contemplated selling it to the Corporation. It was not the consortium but the appellant which sold the land to the Corporation. The notice of expropriation was served in January 1962 and although the appellant might have suspected some years before (possibly in 1957 when the 2262 acres were taken) that further land might be taken for KWA MASHU, it certainly had no knowledge or suspicion thereof in 1921. It appears to us that there is no justification for regarding the proceeds of this transaction as anything other than capital accruals. Of course, the appellant endeavoured, as it was entitled to do, to obtain the maximum price for the land, but this is not sufficient to bring it within the sphere of its operations in La Lucia. In concept, purpose and design, and in every other material respect, the sale of this piece of land to the Durban Corporation differs fundamentally from the transactions by which the coastal land was disposed of. The appellant's objection to the inclusion of the profits on this transaction (R275 638) in its taxable income was well-founded."

In my view the contention on behalf of the respondent in the cross-appeal is insufficient to subvert the foregoing reasoning and finding of the Special Court.

I would add.....76/

I would add that counsel for the respondent prepared a careful collation of circumstances and activities over the years which, he contended, revealed an overall pattern of the appellant's gradual use of its land as stock-in-trade. The Special Court was aware of this general contention, and considered and rejected it. In this regard I do not think that I need burden the wearily tenacious reader by quoting at length from the judgment of that Court. The tenor of its finding was that the appellant early realised that some of its cane land would be lost to it through the thrust and demands of turgid urban expansion; and that sooner or later there would have to be a change of capital investment in respect of them; but that (save in the case of Umhlanga Rocks and La Lucia) this was capital realization which fell far short of going over to the profit-making business of using such land as stock-in-trade.

In the result, the cross-appeal against the decision in regard to Kwa Mashu Extension cannot succeed.

NEWLANDS.....77/

NEWLANDS

Item (7) of the SYNOPSIS, supra, in relation to the 1970 tax year. This land, about 19 acres in extent, was sold to one Mahomed for R19 076 on 21 October 1969. Of this sum, R16 892 represented profit. The land had been acquired by the appellant in 1922. The Special Court's finding was as follows -

> "After the establishment of Kwa Mashu township and the construction of the road connecting with Durban, this piece of land became isolated and was of minor benefit to the appellant. It was clearly a case of realization of a capital asset which had become redundant."

In this Court, counsel for the respondent in the cross-appeal conceded, rightly, that the land had become surplus to the appellant's requirements as agricultural land. However, counsel went on to contend that this was not a case of capital realization because -

(i) the price obtained indicates its township potential;

(ii) it is.....78/

(ii) it is situated close to the residential areas of Newlands;

(iii) the appellant had by 1969 adopted a policy of turning to account its land in proximity to residential areas under a profit-making scheme.

Counsel submitted, further, that the Special Court had had regard to the immediate reason for the realization of this property, rather than the general policy in pursuance of which the sale was concluded. For these reasons, counsel for the respondent submitted that there was no factual basis on which the Special Court could have concluded that this was a case of realization of a capital asset which had become redundant.

The enquiry turned basically on the reason for the realization of this property. That is a question of fact. It is not for this Court to decide that matter afresh. Standing the Special Court's factual finding, its conclusion that this was a capital realization is correct in law. The appeal on this issue cannot succeed.

SPECIAL SALE AT UMHLANGA ROCKS.....79

SPECIAL SALE AT UMHLANGA ROCKS

Item (8) of the SYNOPSIS, supra, in relation to the 1970 tax year.

As a general rule, once there is a business of selling land for profit-making in a particular area, one would ordinarily expect the proceeds of every sale in that area to be part of the gross income. This case, however, was exceptional. The Special Court made the following finding in respect of it -

> "(This piece) of land is situated in the Umhlanga Rocks Drive area, close to the large tract of land previously sold to the S.A. Sugar Association as an experimental farm (the profits in respect of which were not regarded by the Secretary as taxable income)..... It was acquired by the Natal Provincial Administration, after notice of expropriation, for purposes of the Natal Anti-Shark Measures Board. No development was undertaken in respect of this small area which is not far removed from the refuse removal sites of the Glenashley and Umhlanga local authorities. The probabilities are that this piece of land, isolated

from.....80/

> from, although in fairly close proximity to, the Umhlanga Rocks extensions, was disposed of as a casual realization of a small piece of redundant land required by the Province and the proceeds are of a capital nature rather than revenue nature."

In this Court it was urged on behalf of the respondent that the price of R24 360 for just under three acres does not suggest redundancy. I think that this submission wrongly tends to equate redundancy and worthlessness. The main argument was that the nature of this accrual must not be viewed in isolation, but in the context of all of the evidence relating to the appellant's dealings with its seaward properties. Wherefore, so the argument concluded, there was no factual basis on which the Special Court could conclude that the proceeds of this sale were of a capital nature. In my view the respondent does not survive the factual hurdle. The Special Court made a positive finding of fact as to the reason for the realization of this small property and, putting it at its lowest, there is some evidence upon which to found it. Standing that finding, the Special Court's conclusion that the proceeds were of a capital nature was correct in law. Consequently the cross-appeal on this issue cannot succeed.

PHOENIX/MT. EDGECOMBE

Item (9) of the SYNOPSIS, supra, in relation to the 1970 tax year.

This item relates to the sale of 885 acres of land, near Mt. Edgecombe, to the Department of Community Development for purposes of Indian housing. This land formed part of Melkhoute Kraal and was part of the appellant's primary acquisition in 1921. Notice of intention to expropriate it was given to the appellant in June 1968; and several expropriation interdicts had been issued in respect of land in that area, commencing in 1957. In February 1967 the appellant had made application for a certificate of need and desirability for the establishment and development of an industrial township of approximately 1600 acres on this land. The price paid by the Department of Community Development in March 1970 was R1 075 275. The appellant was assessed to tax on the nett proceeds of R1 059 183.

The Special Court.....82/

The Special Court distinguished this transaction from the sales in La Lucia. Miller, J., observed -

> "As I have pointed out, the profits made in respect of sales in the La Lucia area are revenue accruals only because the appellant received the proceeds from the actual carrying out of its profit-making scheme; those profits were the fruits of trading in its land."

On the other hand, in the transaction here relevant -

> "It had not yet gone over to trading in the land at Phoenix - Mt.Edgecombe when the Department of Community Development required it, and the proceeds of the sale were not the fruits of trading but the realization of land it had acquired and held as capital."

In this Court, counsel for the Secretary advanced the following contention -

> "It is submitted that by 1962 Appellant was holding the whole of the area of its land along the railway line between the Umgeni and Mt. Edgecombe as potential township land which it intended to sell in a scheme of profit-making. After the take-over by Huletts in 1962 fresh impetus was given to the intention of developing townships on the land. By the time that the Kwa Mashu

extension.....83/

> extension and Phoenix/Mt. Edgecombe areas were taken over, Appellant had begun to take active steps in the implementation of township development. Viewed in the context of Appellant's policy in connection with that part of its land which had township potential and in the context of the general policy of Huletts regarding Appellant's land, there can be no doubt but that Appellant had disposed of the Kwa Mashu Extension and Phoenix/Mt. Edgecombe areas in pursuance of a policy of realizing its land for profit-making."

It will be seen that this contention, which was also before the Special Court, is much the same as that discussed in regard to the sale of the land for the Kwa Mashu Extension, supra. The Trial Court faced this issue squarely. It concluded that the appellant's policy was that, where it appeared to be inevitable that land in the vicinity of the mill would be taken for purposes of establishments in accordance with Group Areas zoning, it preferred, if it were possible, itself to regulate the development with an eye to the protection of its interests in relation to the mill and its environs.

"But".....84/

"But", said Miller, J., in the judgment of the Special Court, "the requirements of the Department anticipated the appellant's schemes for development, and the land was disposed of to the Department, under circumstances very nearly equivalent to compulsion, before the appellant could put into effect its plans for the future."

The foregoing, particularly the last sentence thereof, appears to me to be a fair view of the situation. I am therefore unpersuaded that the Special Court was wrong in holding that, at the stage when this inevitable transaction took place, the appellant had not yet gone over to a trading in land at Phoenix - Mt. Edgecombe; and that this was a case of the realization of a capital asset. The cross-appeal on this issue must therefore fail.

MOUNT EDGECOMBE

Item (10) of the SYNOPSIS, supra, in relation to the 1970 tax year.

This piece.....85/

This piece of agricultural land was less than a third of an acre in extent. It was acquired by the appellant in 1921 at a cost of R2. Nearly half a century later it was sold to the South African Railways for R890 following a notice of intention to acquire it by expropriation, given to the appellant in June 1968. The appellant was assessed to tax on R888. The Special Court pointed out that this land was part of the appellant's primary (1921) estate; and held that there did not appear to be any reason for regarding the transaction otherwise than as a realization of capital.

The only contention in the cross-appeal was that there was no evidence upon which the Special Court could have come to this conclusion, having regard to the onus of proof imposed on the taxpayer by section 82.

In my view.....86/

In my view this contention is met by what has been said in this judgment under the heading of NEWLANDS, in the concluding paragraph thereof. Furthermore, what was said earlier in this judgment (under the heading of EFFINGHAM ESTATE, in fin.,) about the adjustment by the appellant to changing circumstances, applies here as well. What else can you do but sell, when you receive a notice of intention to expropriate; and there was no suggestion at all that the appellant was regarding this piece of land as stock-in-trade, or was here engaged in a business or a scheme of profit-making. In the result, the cross-appeal in regard to this issue cannot succeed.

To sum up.....87/

To sum up with regard to the entire cross-appeal, it is dismissed with costs. Three counsel appeared on behalf of the appellant (i.e., the respondent in the cross-appeal) and an order was sought for costs on this footing. This was opposed by the Secretary. I bear in mind the magnitude of the amount in dispute, the amplitudinous record, the complexity of the issues, and the correlation between the appeal and the cross-appeal. In these circumstances I consider it appropriate to allow costs against the unsuccessful cross-appellant on the footing of the employment of three counsel. I would add that a similar order would have been made if three counsel had appeared on behalf of the respondent in the unsuccessful appeal; but in fact only two counsel so appeared.

In the result.....88/

IN THE RESULT

1. The appeal is dismissed with costs, including those occasioned by the employment of two counsel.

2. The cross-appeal is dismissed with costs, including those occasioned by the employment of three counsel.

Neville Holmes

Judge of Appeal

Trollip, J.A. )
Muller, J.A. )
Corbett, J.A. ) CONCUR
Galgut, A.J.A. )