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G.P.-S.59968—1970-71—2 500 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

Barnato Holdings Ltd *Appellant,*

versus

Sec. for Inland Revenue *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Webbers N
Respondent's Attorney / *Prokureur vir Respondent* Dep. S.A / B(fn)

Appellant's Advocate / *Advokaat vir Appellant* A.J. Swersky SC, E. Jobler
Respondent's Advocate / *Advokaat vir Respondent* B. O'donovan SC, E.M. du Toit

Set down for hearing on / *Op die rol geplaas vir verhoor op* 21-11-1977

Coram: Trollip, Muller, Kotzé, Miller et Diemont

Swersky - 9.45 - 12.05 2.17 - 3.07

(I.T.S.C) O'donovan - 12.05 - 12.45, 2.15 - 2.17

C.A.V.

The Court dismisses the said appeal with costs, including those costs relating to the employment of two counsel.

(Judgment per Trollip JA)

Registrar

7/8/78

Bills taxed—Kosterekenings getakseer

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Date / Datum	Amount / Bedrag	Initials / Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BARNATO HOLDINGS LIMITED .... APPELLANT

AND

SECRETARY FOR INLAND REVENUE .... RESPONDENT.

Coram: TROLLIP, MULLER, KOTZé, MILLER *et* DIEMONT, JJ.A.

Heard: 21 November 1977.

Delivered: 24 February 1978.

JUDGMENT

TROLLIP, J.A. :

~~This is an income tax appeal. During the~~ years of assessment that ended on 30 June 1968 and 1969 appellant

made .... /2

made surpluses of R1 600 658 and R1 775 619 respectively through disposing of some of its shareholdings in other companies. The Transvaal Special Income Tax Court (MARGO, J., presiding) held that those surpluses were income subject to tax under the Income Tax Act, No. 58 of 1962 ("the Act"), since appellant had not proved, as it alleged, that they were accruals of a capital nature. Appellant has appealed against that decision direct to this Court with the consent of the respondent ("the Secretary").

The main facts leading to the dispute can be summarized as follows:-

(1). Appellant became a wholly-owned subsidiary of Johannesburg Consolidated Investments Limited ("JCI") in 1961. The latter is an old, well-established mining house and entrepreneur. Its income has been largely derived from dividends on share investments in mining, property, and industrial companies, and from dealing in shares. For tax purposes it has been regarded as an "all-in" company, i.e., the profits and losses on the disposal of its shareholdings in other companies are taken into account in the determination of its taxable income. It also provides services of various kinds for subsidiary and other companies in which it has interests. On 1 January 1963 the management and control of JCI was transferred from Britain to the Republic. Its board of directors thereafter decided to expand its interests in the industrial field and that appellant should be used as a vehicle for acquiring and holding most of its industrial investments. In particular, it was resolved that appellant's future activities would be those of a holding company for permanent investments of fixed capital in industrial (in the sense of non-mining) undertakings.

(2). In anticipation of this change in policy appellant's name had been changed on 8 May 1961 to Barnato Holdings Limited. In 1963, in order to implement the new policy, appellant's memorandum of association was altered by the insertion of new provisions paragraphs (a) to (e), the relevant parts of which read -

"The objects for which the company is established are:

(a) To carry on the business of an investment holding company and for the sole purpose of investment (that is to say only for the purpose of producing revenue) and so that the investments shall form part of the fixed capital of the company:-

(i) To invest the capital and other moneys of the company solely for the purpose of investment in the acquisition .... of .... shares, stocks .... and securities of any kind issued .... by any company, corporation, or undertaking ......

(ii) ....

(iii) To vary any investments of the company from time to time and solely for such purpose to turn to account or sell all or any part of the investments of the

company .... /5

company provided that the proceeds resulting from the sale or realisation of any of the company's investments shall be applied by the company in the purchase or acquisition of other assets again for the sole purpose of investments .... and that any profit arising from any such sale or realisation shall not be distributed by way of dividend but shall be placed or added to the capital reserves of the company."

The remaining provisions of the objects clause, paragraphs (f) to (r) remained unaltered. According to paragraph (i) appellant was authorized -

"to .... take or otherwise acquire and hold shares or stock in, or securities of .... any company, and to sell, hold .... or otherwise deal with such shares, stock or securities."

And the final paragraph (r) contained an "independent objects" provision according to which each of the above objects or powers were to be regarded as separate and distinct from and independent of each other. Hence, notwithstanding the provisions of paragraph (a), appellant, if it so wished, could still "acquire and sell or otherwise deal with" its shareholdings or some of them by dealing in them for profit under paragraph (i).

(3). On 2 April 1963 appellant wrote to the Secretary informing him of its new policy, emphasizing that it would not deal in shares but "subject to periodic revision and appropriate reinvestment" would retain its shareholdings as permanent investments. The chairman of JCI also referred to this new policy in his speech to its annual general meeting on 19 November 1963. Incidentally, in this speech he also mentioned the recent rapid rise in the Stock Exchange prices of the shares of many industrial companies.

(4). Pursuant to those declarations of policy and intention appellant proceeded to build up a portfolio of shares. JCI provided the capital required therefor by way of interest-free loans.

It .... /7

It also provided appellant with the necessary administrative and secretarial services. In the acquisition of shares an important distinction was drawn between appellant on the one hand and JCI and other share-dealing companies in its group on the other hand. Generally those acquired for appellant were industrial (non-mining) shares purchased as long-term investments because of their dividend yields, and those acquired for JCI and the share-dealing companies were purchased for short-term resale at a profit. But despite that distinction, as will presently emerge, appellant did from time to time dispose of its shareholdings, especially when the market (Stock Exchange) prices began to rise towards the end of the 1960s.

(5). The selection of suitable investments for appellant was based on information and recommendations provided by JCI's investment department, which was staffed by experts on investment research and analysis. In 1963 this department was augmented by additional skills in the form of economists, mathmaticians, accountants, investment analysts, and operations research experts. The modus operandi of this department is set out at length in the judgment a quo and stated case. It need not be repeated here in such detail. It suffices to say merely that in determining whether or not appellant should acquire shares in any particular company, this department looked mainly at the company's probable profitability and future dividend yield (apparently over the period of the next 5 years), and especially at the prospect of any growth in its dividend yield; the anticipated yield over the projected period was then calculated and discounted at an appropriate interest rate to give a present value to the shares; this value would then be compared with their market price and a decision made about whether or not to recommend their acquisition and the price to pay for them. The recommendations of this department then came before the investment committee comprising the chairman, deputy chairman, and managing director of JCI, whose decisions were invariably acted upon by appellant. Once acquired the shares would be reviewed from time to time by the investment department or committee. How often that would occur is not clear. But it seems that that would probably happen quite often during a tax year, especially during an active market. Thus appellant in its letter to the Secretary on 27 September 1968 said (my underlining):

> "The holdings of the company are constantly reviewed in the light of changes in the economic climate and current conditions in the markets in which the companies concerned were

operating, with the object of replacing investments in companies whose prospects are thought to have deteriorated or whose shares are considered to be overpriced in relation to other shares."

(6). It was said in the judgment of the Court a quo and the stated case that the circumstances in which appellant would normally dispose of its shareholdings from time to time were as follows -

(i) where the performance of the particular company concerned failed to reach or maintain the minimum expectations required of a satisfactory investment;

(ii) where the capital value of the shares had become such in relation to the return on such shares that it was more economical to replace the investment with another from which such capital would produce a substantially better return (as, for example, where the market value of the shares had risen appreciably without a corresponding increase in their dividend yield); or

(iii) where, in the same field of investment, the performance of another company indicated the desirability of a switch to that company to achieve a substantially better return on the capital outlay.

Those were regarded by appellant as "normal sales". In addition there were what appellant termed "abnormal sales". This distinction will be dealt with presently - see paragraph (11) infra. According to the stated case appellant was generally not concerned with the market price once an investment was made except in the circumstances mentioned in (ii) above or where fluctuations in the market price of a share indicated the need for its being re-investigated; whether a profit would be achieved or a loss sustained was not a relevant factor in deciding whether or not to dispose of any shares; the only relevant factors were the gross proceeds derivable therefrom and what return would be obtainable thereon if they were re-invested in other shares.

(7). Appellant acknowledged that the switching out of share investments for one or other of the reasons mentioned in (i), (ii), and (iii) of paragraph (6) above - the normal sales - was always contemplated as being part of its business, and indeed was unavoidable, since no investment analysis could always be correct and no investment adviser or board of directors could foretell all future developments affecting the dividend yield of particular shares.

(8). According to a schedule of appellant's transactions

in .... /13

in shares annexed to the stated case the cost of purchasing shares during the first few tax years was R325 683 (1962), R273 608 (1963), R1 536 901 (1964), R2 548 001 (1965), and R2 136 201 (1966). During that period there were comparatively few disposals. In all 23 counters were disposed of, 8 of which were exchanges of shares probably due to mergers. By 1966 appellant had acquired shares in 92 counters, comprising quoted and unquoted shares, at a cost (less amounts written off) of about R6 500 000. It was common cause (and the schedule reveals) that the share market was then active and share prices thereafter rose appreciably. The appellant's activities in acquiring and disposing of shares in the tax years 1967, 1968, and 1969 are set out below. This information is culled from the schedule and the judgment of the Court *a quo*.

		1967	1968	1969
1. Investments at beginning of tax year -				
(a) quoted shares - net cost	R5	741 140	10 046 332	10 617 011
(b) market value	R5	681 177	13 541 949	22 044 135
(c) unquoted shares - net cost	R	782 581	3 223 258	3 712 545
2. Cost of shares purchased during tax year	R9	134 198	2 770 604	10 823 376
3. No. of counters held at beginning of tax year		92	107	108
4. No. of counters acquired during tax year		54	53	54
5.(a) No. of counters disposed of during tax year		18	26	38
(b) Approx.% of total counters held at end of tax year		17%	24%	36%
6.(a) Cost of shares disposed of	R1	021 467	1 499 210	3 218 379
(b) Approx.% of cost of total shares during tax year		10%	10%	14,3%
(c) Proceeds of disposals	R1	088 314	3 099 68	4 994 000
7.(a) No. of counters disposed of at profit		9	13	22
(b) No. of counters disposed of at loss		9	13	10
8. Total profits of item 7(a)	R	80 049	1 690 879	1 811 685
9. Total losses of item 7(b)	R	13 244	90 222	36 066
10. Net profit of items 8 & 9	R	66 805	1 600 658	1 775 619
11. Dividends received	R	785 717	759 895	1 081 533
12. Dividends declared		Nil	Nil	Nil

Note: acquisition of shares in a counter already held or part disposal of shares in a counter held would not increase or decrease, as the case may be, the number of counters held.

(9). Prior to the tax year of 1969 the Secretary had treated the appellant's net profits on its share transactions as accruals of a capital nature. On 17 October 1969 he informed the appellant by letter that, after examining its sales of shares for the 1969 tax year, he could no longer regard appellant as a purely investment holding company, but, on the contrary, taking into account the frequence and nature of its transactions, he concluded that the appellant should be regarded as a share-dealer and would be assessed accordingly for that tax year. Indeed, he subsequently, on that basis, also issued additional assessments levying tax for the net profits for 1967 and 1968 shown in item 10 in

paragraph .... /16

paragraph (8). Appellant countered the additional assessment for 1967 by relying on the expiration of the period of 3 years mentioned in paragraph (a) of the proviso to section 79(1) of the Act. The Court a quo upheld this special defence. The Secretary did not cross-appeal against that decision. Hence the taxability of the 1967 amount is not in issue in the present appeal.

(10). An important transaction of some magnitude which appellant carried out during 1966 to 1969 concerned the shares in Stellenbosch Wine Trust Limited ("SWT"). The appellant acquired and disposed of certain of these shares in the following way, briefly stated. In 1966 JCI and S.A. Breweries Limited ("Breweries") decided to acquire in effect all the shares of SWT, which held all the shares of Stellenbosch Farmers' Wine Trust Limited, a liquor concern. The acquisition of a substantial stake in the liquor industry as a permanent investment had long been considered as desirable by JCI. The Liquor Act, No. 30 of 1928, however, contains provisions designed to prevent the creation of monopolies in the liquor trade. It was, therefore, necessary under that Act to obtain the consent of the Minister of Justice for JCI and Breweries to acquire or retain their prospective holdings in SWT. It was known that the Minister would approve provided their holdings were respectively limited to 15% and 34% of the shares in SWT. In the meantime JCI's holdings in SWT were put into appellant's portfolio with the intention that the latter would retain permanently so many of the shares as the Minister finally approved of and that it would dispose of the remainder. The Minister finally approved of the acquisition of the shares in SWT on condition that JCI's and Breweries' holdings did not exceed the abovementioned proportions. Appellant then disposed of some of its excess holdings on the Stock Exchange. The remainder of its excess holdings were successfully offered for sale to the public by prospectus, in conjunction with the Breweries' excess holdings. Substantial profits accrued to appellant through the disposal of these excess shares: R67 243 during the tax year of 1967; R1 630 559 during 1968; and R53 034 plus R295 for the sale of nil paid letters of application during 1969. It will be observed that these profits for 1967 and 1968 more than accounted for the appellant's net profits for those years as are shown in item 10 in paragraph (8) above. The Court *a quo* held that this transaction was a "notable exception" to appellant's general system of acquiring permanent investments for their long-term dividend yields. The judgment proceeds -

"Furthermore, the acquisition of the SWT holdings was by ~~JCI, and it has not been shown to be a case of~~ the unavoidable acquisition of surplus assets in order to secure a particular asset. When the SWT holdings were 'put' into the appellant's portfolio, it was known that the whole or a large part thereof would have to be realized, and that such realization would almost certainly be at a substantial profit. In all these circumstances, our conclusion is that the appellant has failed to discharge the onus of proving on a clear balance of probabilities that it acquired its SWT holdings in conformity with its general system. In other words, the appellant has failed to establish that those portions of the SWT holdings which it resold were acquired by it as a fixed capital investment. The legal consequences of this factual conclusion are that, <u>prima facie</u>, the profits on the resale of the SWT holdings were on revenue account."

On appeal before us that finding and conclusion were rightly not challenged by the appellant. Indeed, tha part of the appeal relating to the tax year ended 30 June 1968 ~~was abandoned, since the profits on the SWT transaction more than~~ accounted for the net profits for that year. Hence it must be

accepted .... /20

accepted in this appeal that the SWT transaction, in respect of those holdings acquired and subsequently sold, was from beginning to end one of share-dealing. However, the appeal relating to the net profits for 1969 was pressed before us, except, of course in relation to R53 329 thereof which was derived from the SWT transaction.

(11). According to item 10 of the table in paragraph (8) above the appellant's net profits on share transactions during the 1969 tax year was R1 775 619. These transactions were categorized and described by appellant as follows:

(a) Shares not sold which had to be surrendered in exchange for other shares as a consequence of mergers - 9 counters. Calculated net profit	R 56 651
(b) Sale of shares that appellant had to accept in terms of a merger but which it did not wish to retain for a long-term investment - 1 counter. Profit	R359 361

(c) Sales of shares that had accrued to appellant as rights which appellant did not wish to retain for a long-term investment - 2 counters.

Profit R 7 375

(d) Sale of unquoted shares in an industrial company that had failed to operate profitably - 1 counter. Loss (R 25 966)

(e) Small holdings of mining shares acquired some years ago (but not prior to 1962) which were regarded as inappropriate to appellant's portfolio - 6 counters, of which 2 at a profit, 4 at a loss. Net loss (R 10 100)

(f) Shares sold with the intention of switching investments into shares in similar fields but with better investment prospects - 6 counters of which 5 at a profit, 1 at a loss. Net profits R970 538

(g) Shares sold because the trend in profits in previous years had been unsatisfactory and future outlook was no better - 7 counters of which 4 at a loss, 3 at a profit. Net profits R 202

(h) Shares sold because the original expectation that appellant would have a larger investment and a more significant participation in the company was not fulfilled and because the future outlook was not up to appellant's requirements - 1 counter.

Profit R353 881

(i) Small holdings of shares acquired during the year (1969) as a result of private placings but sold because appellant decided not to increase the holding as their prospects did not justify it - 3 counters, all at a profit. Profits R 10 348

(j) Sale of SWT shares and rights - see paragraph (10) above - 2 counters at a profit. Profits R 53 329

Total net profits R1 775 619

The appellant averred that the transactions in (a) to (e) were "abnormal" in the sense that they were unusual or unexpected and not part of appellant's ordinary business, while those in (f) to (i) were "normal" as being in the ordinary course of its business.

That concludes the summary of the main facts.

The reasoning of the Court a quo in holding that the net profits for the sales of shares during 1967, 1968, and 1969 constituted taxable income requires some detailed analysis in order to understand its true inwardness. Its main findings

(iv) "However, there is a broader consideration, which makes it unnecessary to examine further the justification for the disposal in each individual case, and that is that it was part of the appellant's business to resell shares where the market value thereof had risen to the point where the increased capital was no longer being economically employed; where it was judged to be expedient to switch out of one investment into another with better prospects; where the prospects of the company concerned were no longer up to expectation; and where the shares had been acquired through private placings, but the prospects did not justify retention. It was also part of the appellant's business to dispose of the preference shares, and of shares obtained through mergers, take-overs and rights issues where the prospects did not justify retention."

(v) "In all these disposals the appellant obviously aimed at a profit, if that were possible. The description in the evidence of some of these disposals as 'normal' and of others as 'abnormal' is merely a subjective classification. The general aim and practice, which constituted a substantial part of appellant's ordinary business decisions and operations, was to dispose of share acquisitions which were considered as being or as having become insufficiently attractive and to replace them with more attractive share acquisitions."

(vi) "The judgment in African Life Investment Corporation (Pty.) Ltd. v. S.I.R. 1969 (4) S.A. 259 (A.D.) was then referred to, found to be apposite, and applied in support of the conclusions in (iv) and (v) above.

(vii) "(Appellant's witness) when asked to explain what the appellant's object was in limiting its activities to fixed capital investments, so that it would not be entitled to deduct for tax any losses on the disposal of shares, answered to the effect that the appellant wished to ensure that it could re-invest its capital gains without having to provide for tax. That answer indicated the intention to achieve 'capital gains' by ensuring as far as possible that the inevitable changes of investment from time to time, which were contemplated as part of the appellant's ordinary business operations, would be effected at a profit. In any event that would be the natural and obvious motive. This consideration leads to the conclusion that it was an integral, albeit secondary, part of the business of the appellant to dispose of shares at a profit."

(Again the African Life case, *supra*, was relied on.)

(viii) "In the result we are not able to find that the appellant has discharged the burden of proving that the profits on the disposals of shares in the tax years under consideration were capital and not income."

At first blush it would seem that the final, crucial findings of the Court *a quo* in (iv), (v), and (vii) about appellant's dealing in investments conflict with its earlier findings or observations in (i), (ii), and (iii) about appellant's holding of investments. This apparent conflict cannot be explained by any subsequent change of policy by appellant by 1967 from being initially an investment holding company to an investment dealing company, for the Court _a quo_ made no such finding. I think that the true interpretation of the judgment, indeed the only feasible way to reconcile the ostensibly conflicting _dicta_ is this: the Court _a quo_ decided (a) that appellant's general, primary business was and remained the holding of long-term investments (see (i) and (ii) above); but it found (b) that it was also an integral, albeit secondary, part of appellant's business to deal in shares (see (iv) to (vii) above); and it concluded (c) that while each of the relevant share transactions during the 1967, 1968, and 1969 tax years, "considered in isolation", might _per se_ be regarded as merely a change in the holding of an investment (see (iii) above), when the totality of those transactions (i.e., their circumstances, nature, extent and frequency) was regarded, appellant failed to prove that any of them fell within its primary business (a) and they must all therefore be accepted as falling within its secondary business (b) - see (viii) above. The parts of the above _dicta_ underlined and the reference to the _African Life_ case, _supra_ - a similar case - bear out that interpretation of the judgment _a quo_.

On that interpretation of the judgment appellant's counsel submitted that the above findings of the Court _a quo_ that the relevant share transactions constituted share-dealing were findings of law which this Court could overrule if the proved facts warranted it. For that submission the dictum of WESSELS, J.A. in C.I.R. v. Stott 1928 A.D. 252 at p. 259 was relied on. It is to the effect that whether or not the taxpayer there was carrying on the business of a land-jobber in selling the properties in question depended on an inference from the stated facts and was a question of law. This dictum has been criticized - see Morrison v. C.I.R. 1950 (2) S.A. 449 (A.D.) at pp. 456 - 7; Yates Investment (Pty.) Ltd. v. C.I.R. 1956 (1) S.A. 612 (A.D.) at p. 616 A - C. In Stott's case the Special Court had not made any finding about whether or not the taxpayer was a land-jobber and sold the properties as such, so this Court had to decide that issue itself in determining the question of law whether the proceeds of the sale of the properties were gross income or capital. The present case is thus distinguishable in this sense that here the Court a quo has found that the share transactions in question were carried out as part of appellant's secondary business as a share-dealer; and in any event, despite the _dictum_ in _Stott_'s case, the modern and preferable view is that findings of that kind, whether made directly or inferentially by the Special Court, are findings of fact (see _African Life_ case, _supra_, 1969 (4) S.A. 259 (A.D.) at p. 268 E - G; and cf. _S.I.R. v. Trust Bank_ 1975 (2) S.A. 652 (A.D.) at p. 666 B-D; _Natal Estates v. S.I.R._ 1975 (4) S.A. 177 (A.D.) at pp. 203 B - 204 H; and especially _Strathmore Holdings (Pty.) Ltd. v. C.I.R._ 1959 (1) S.A. 460 (A.D.) at p. 467). Hence, the findings of the Court _a quo_ must, I think, be regarded as factual. The question before us is, therefore, not whether we think that those findings were right or wrong, but whether appellant has shown that, on all the accepted or acceptable facts, they could not reasonably have been made (<u>ibid.</u>). For reasons that follow I do not think that that has been shown.

At the outset I should observe that, according to the <u>African Life</u> case, <u>supra</u>, 1969 (4) S.A. 259 (A.D.), an investment share-holding company may also carry on a secondary business of dealing in shares for profit (see pp. 269 E - 270 A, 271 D - F). Whether or not it does so depends entirely upon the facts. In the present case it must be accepted that the shares disposed of by appellant during the tax years of 1967, 1968, and 1969 were originally acquired in and after 1962 with the intention that their retention would be constantly and fairly often reviewed (see paragraph (5) above), and that they would normally be disposed of if any of the circumstances relating to their expected performance, enhanced market value or price and comparative yields, as mentioned in (i), (ii), or (iii) of paragraph (6) above, or any similar circumstances, supervened. That such circumstances were likely to supervene from time to time - shares being given to fluctuations in both fortune and value - must have been foreseen. Indeed, appellant conceded that the switching out of such share investments from time to time for any of those reasons was unavoidable and always contemplated as being part of its business (see paragraph (7) above). That would tend to indicate _prima facie_ that those shares were not acquired for better or for worse, or, relatively speaking, for "keeps" (i.e., only to be disposed of if some unusual, unexpected, or special circumstance, warranting or inducing disposal, supervened), which is the usual badge of a fixed, capital investment (see _S.B.I. v. Aveling_, a judgment of this Court delivered on 29 November 1977 and the authorities there cited). Hence a formidable and difficult onus rested on appellant to convince the Court *a quo* that the shares disposed of during the relevant period were nevertheless originally acquired and held as fixed capital, or putting it another way, that those shares were not disposed of in the course of appellant's conducting an additional, secondary business of dealing in those shares for profit.

Now the table in paragraph (8) affords cogent evidence that, *prima facie* at any rate, appellant did indulge in share-dealing during the tax years of 1967, 1968, and 1969. That appears from the number of counters of shares it disposed of during those years as compared with previous years, the proportion they annually constituted of appellant's total shareholdings, and the fact that they had not been held for very long (some at the longest since 1962, others for shorter periods). There is also appellant's concession, already mentioned, that disposals of shares in appropriate circumstances constituted part of its business. Lastly, the facts concerning the SWT transaction showed that, to the extent mentioned, appellant did trade in the latter shares during that period. There were facts, therefore, to support the finding of the Court a quo that dealing in those shares was, at the relevant time, an integral, albeit secondary, part of appellant's business.

Nor does appellant's memorandum of association assist it in showing that the transactions were mere changes or realizations of capital investments. For while paragraphs (a) to (e) empower appellant to carry on the business of an investment holding company, paragraph (i), as a separate independent object

according .... /34

according to paragraph (r), empowers it to carry on the business of share-dealing (see paragraph (2) of the summary above). As the Court *a quo* correctly observed:

> "the retention of the power to engage in share-dealing undoubtedly qualified the otherwise unequivocal expressions of intention on behalf of appellant (in paragraphs (a) to (e)), in the sense that such power permitted a change of or departure from such intention."

Could it also reasonably have been held that such dealing was for making profits? Counsel for appellant relied heavily on the statement in the stated case that whether a profit would be achieved or a loss sustained was not a factor that appellant took into account in deciding whether or not to dispose of any shares (see paragraph (6) above); he maintained that the finding of the Court *a quo* that the share transactions were for profit was therefore not supportable at all. On this point there does seem to be a conflict between the stated case and the Court a quo's finding. The general rule is that if such a conflict cannot be reconciled, the finding of the Court a quo in its judgment must prevail (see W.F. Johnstone & Co. Ltd. v. C.I.R. 1951 (2) S.A. 283 (A.D.) at p. 290 B - D; Goodrick v. C.I.R. 1959 (3) S.A. 523 (A.D.) at p. 529 F - H). The above apparent conflict can be reconciled, I think, in this way. The statement in the stated case relates to the disposal of shares as a realization of a capital investment in the course of appellant's primary business of holding such investments, while the finding of the Court a quo relates to appellant's disposals of shares in the course of its secondary business as a share-dealer during the tax years of 1967 to 1969. There is evidence that reasonably supports the latter finding. As previously pointed out appellant acquired the shares with the intention inter alia that, should their market prices rise without a corresponding increase in their yield, it was appellant's business policy to sell them (see paragraphs (6) and (7) above). Such sales, it must have been contemplated, would generally be at a profit. As early as November 1963 the chairman of JCI remarked on the then rise in prices of industrial shares (see paragraph (3) above), and, although he doubted whether that trend would continue, it apparently did continue, especially during the relevant tax years. Hence it must have been envisaged from an early stage that future disposals of any shares acquired would generally be profitable. That, too, is implicit in the evidence given on appellant's behalf and mentioned by the Court a quo in the passage of its judgment quoted in (vii) above. That profit motive, too, accounted for the transaction in the SWT shares during the period in question;

indeed it accounted for the entire profits of the 1967 and 1968 tax years and R53 329 of the profits for the 1969 tax year; and it possibly also accounted largely for the other numerous disposals that occurred during that last year at a substantial overall profit see items 5, 6, 7(a), and 10 of the table in paragraph (8) and the items in paragraph (11) above. Of the latter items, (i) is of revealing significance. It relates to 3 counters of shares acquired by appellant through private placings with it during the 1969 tax year, which were all re-sold within the same year at profits totalling R10 348. That smacks strongly of share-dealing for profit.

On all the aforegoing facts I think that the Court *a quo* could reasonably find that appellant, in acquiring and disposing of the shares in question, was *prima facie* dealing in them for an overall profit as a secondary but integral part of its business, i.e., that appellant had not discharged the formidable and difficult onus resting on it of proving the contrary. It was contended for appellant that if it were so dealing in shares, it could and would have sold a far greater number of shares when the market was favourable. But the answer to that is that its primary business was investment holding, not share-dealing, and it wished to retain that character. That some shares were sold at a loss was not in the circumstances significant, as the Court a quo rightly observed, since it was the overall profit motive that was important in conducting its secondary business - see the African Life case, supra, at p. 272 E. Nor did the manner of originally acquiring the shares make any difference - whether by purchase, rights issue, private placing, or as a result of a merger - since they must all have been acquired and held with the same intention. See the finding of the Court a quo in (iv) above. The aforegoing reasoning therefore applies to all the items (b) to (j) in paragraph (11) relating to the disposals of shares in the 1969 tax year. The differentiation made by appellant between these items of some being "abnormal" and the others being "normal" disposals was its own subjective classification and was of no legal or factual significance for tax purposes. It was rightly disregarded by the Court a quo, for all these disposals were prima facie equally part and parcel of the secondary business of share-dealing that was being carried on by appellant. Item (a) in paragraph (11), however, requires some special mention. It relates to 9 counters of shares that were not sold but were disposed of by being surrendered in exchange for other shares in consequence of mergers. The Court *a quo* did not refer to these transactions specifically. It obviously treated them as part of appellant's share-dealing. That finding is reasonably supportable on the facts. For mergers seem to have been fairly common after appellant embarked in 1962 on its new regime; there were 8 during 1962 to 1966 (see paragraph (8) above) and these 9 in 1969 that affected the shareholdings of appellant; hence it is reasonably possible that mergers and the consequent disposal of the shares in question by surrendering them in exchange for others constituted, during that period, one of the methods available to a share-dealer for turning a shareholding to profitable account. At any rate, appellant, apart from including these transactions in the broad category of "abnormal" disposals, did not otherwise attempt to differentiate them from the other share-dealing transactions.

For all those reasons I think that the Court *a quo* could reasonably have made the factual findings that it did. In doing so it relied on the *African Life* case, *supra*, 1969 (4) S.A. 259 (A.D.). For appellant it was contended that there it erred, for the case is distinguishable on the facts. But the distinctions relied on were all matters of detail, not of substance or principle. It is true that whether or not an investment holding company also carries on a secondary business of share-dealing is essentially a question of fact depending upon the totality of the circumstances. Hence a decision resolving the problem in one case is unlikely to be of assistance in another case. But the broad, fundamental facts of the *African Life* case so closely resemble those in the present case that I think the Court *a quo* rightly relied on it for general guidance as to the correct approach to adopt.

It follows that the conclusion of the Court *a quo* that appellant failed to prove that any of the net profits it derived from the disposals of shares in the 1969 tax year were capital accruals is unassailable and the appeal must fail.

The appeal is dismissed with costs, including those costs relating to the employment of two counsel.

W.G. TROLLIP, J.A.

MULLER, J.A.)
KOTZé, J.A.) concur
MILLER, J.A.)
DIEMONT, J.A.)