Case No. 249/89

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ESTATE LATE A G BOURKE Appellant

and

THE COMMISSIONER FOR INLAND REVENUE *Respondent*

CORAM: HOEXTER, BOTHA, NESTADT, GOLDSTONE, JJA et PREISS, AJA

HEARD: 1 November 1990

DELIVERED: 30 November 1990

HOEXTER, JA .....

HOEXTER, JA,

This is an appeal, in terms of sec 86A(5) of the Income Tax Act No 58 of 1962 ("the Act") against a decision of the Cape Income Tax Special Court. The late Mrs A G Bourke ("the taxpayer") was a widow resident in Cape Town. She derived income from investments, rentals and certain farming interests. The appellants in this appeal are the executors in the taxpayer's estate. The respondent is the Commissioner for Inland Revenue ("the commissioner").

During the year of assessment ended on 28 February 1982, and in connection with her farming interests, the taxpayer received by way of compensation an amount of R109 924,00 ("the accrual"). The events leading up to the accrual will be mentioned later in this judgment. In a revised assessment dated 1 November 1984 the commissioner included the accrual as part of the taxpayer's taxable income. On behalf of the taxpayer an objection

was lodged with the commissioner against the inclusion of the accrual as part of the taxpayer's taxable income. The commissioner disallowed the objection. In February 1985 the taxpayer appealed to the court below against the commissioner's disallowance of her objection. The taxpayer died in March 1985, whereafter the appeal to the court below was pursued by the appellants.

For purposes of the appeal to the special court there was prepared an "Agreed Statement of Facts and Issues" to which reference will hereafter be made as "the statement of facts". At the end of argument in the court below only one issue fell to be decided. That issue was decided against the taxpayer. Hence the present appeal.

The essential facts fall within a small compass. Mr Bernard John Bourke ("Bourke") was at one time the owner of seven Lowveld farms ("the property") in the district of Nelspruit, Transvaal. Bourke leased three of the farms

forming part of the property to the members of the Mayo Timber Syndicate ("the syndicate"). It would appear that at some time after January 1971 the ownership of the property was transferred from Bourke to the Bernard Bourke Trust ("the trust"). For some years before 1979 the trust and the syndicate had carried on the business of timber plantation growers on the property. The plantations consisted of pine trees and gum trees. They also farmed with fruit trees on the property. The aforesaid business was carried on by the syndicate on the three farms of which it was the lessee, and by the trust on the balance of the property.

The taxpayer was the beneficiary of one-half of the trust. In turn the trust held a one-seventh share in the syndicate. In her own right, furthermore, the taxpayer held a one-seventh share in the syndicate.

Adjoining the property was a farm ("the

neighbouring farm") owned by the company H L Hall and Sons Ltd ("Hall"). On 26 June 1979 a fire started on the neighbouring farm. It spread to the property where it destroyed many trees. As compensation for the destruction of the trees Hall paid the trust and the syndicate two amounts totalling almost R336 000,00. By virtue of her interests in the trust and the syndicate the taxpayer received a share of the compensation so paid. It is common cause that if the compensation received by the trust and by the syndicate from Hall represented income in their hands, then the accrual represented income in the hands of the taxpayer.

In para 9 of the statement of facts it was agreed that -

> "...the total amount of compensation received by the appellant" (the taxpayer) "can be apportioned as follows:

(a)	For the loss of pine trees	R102 553,00
(b)	For the loss of gum trees	R 4 160,00
(c)	For the loss of avocado pear and pecan nut trees	R 3 211,00
		R109 924,00"

In the initial objection to the commissioner's revised assessment and in the appeal before the court below it was contended on behalf of the taxpayer that no portion of the accrual was subject to tax since it was a receipt of a capital nature. In sec 1 of the Act the definition of "gross income" reads as follows:-

> "'gross income', in relation to any year or period of assessment, means, in the case of any person, the total amount, in cash or otherwise, received by or accrued to or in favour of such person during such year or period of assessment from a source within or deemed to be within the Republic, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder, namely:-
> ....."
>
> (Paras (a) to (n) of the definition then follow).

It was not contended on behalf of the commissioner that the present case is covered by any of the provisions set forth in paras (a) to (n) of the definition.

In para 10 of the statement of facts it was agreed -

> "...that the amount of R3 211,00 in respect of the loss of the avocado pear trees and the pecan nut trees was a receipt of a capital nature."

At the outset of the appeal in the court below a further concession was made on behalf of the commissioner, namely, that the compensation for the loss of the gum trees was likewise a receipt of a capital nature. The propriety or otherwise of the last-mentioned concession is not an issue in the appeal before this court.

Accordingly the only issue which remained for decision in the court below was whether the amounts received by the trust and the syndicate for the loss of the pine trees were receipts of a capital nature within the

meaning of "gross income" in sec 1 of the Act. In terms of sec 82 of the Act the burden of proof that such compensation was a receipt of a capital nature rested upon the taxpayer. The court below came to the conclusion that the compensation for the loss of the pine trees could not be regarded as receipts of a capital nature. The outcome was - to quote from the judgment of the learned President (BERMAN, J) in the court below:-

> "...that save insofar as the gum trees are concerned (where the appeal was conceded by the Commissioner at the commencement of the hearing) the appeal, which was confined to the question of the pine trees, is dismissed."

At the date when the fire destroyed trees on the property there existed and there was being duly performed a written agreement ("the contract") between the trust and the syndicate as sellers and a company known as Densa Sawmill (Pty) Ltd ("Densa") as buyer. The contract, which had been concluded in January 1971, related to the sale of

the yield of pine sawlogs on the property. The full terms of the contract need not here be stated. Suffice it to say that in terms thereof:-

(1) the trust and the syndicate agreed to sell to Densa the total yield of pine sawlogs (as specified in the contract) "which shall be produced on a sustained basis" from the forestry activities of the trust and the syndicate on the property;

(2) the pine sawlogs aforesaid were divided into certain classes according to age, diameter and length, and the prices of the various log classes were defined;

(3) the sellers would deliver the pine sawlogs to the buyer at the plantation road and payment therefor would be made by Densa within 30 days of the date appearing on the monthly statements submitted by

the sellers to the buyer.

Both in the court below and in this court the appeal was argued on behalf of the appellants by Mr **Blignault.** In both courts he advanced substantially the same argument in support of his submission that in respect of the pine trees lost in the fire the compensation received by the trust and the syndicate was a receipt of a capital nature and therefore not subject to tax. Starting with the well-established principle that money received by a taxpayer as compensation for the loss of what is "an income-producing structure" is a receipt of a capital nature, the kernel of the argument of counsel for the appellants came to the following: In terms of the contract the trust and the syndicate would have received income from the pine trees destroyed in the fire only after they had been felled; before actual felling the pine trees standing on the property were an integral part of the

income-producing structure of the trust and the syndicate.

In the court below the commissioner's representative countered the above argument by contending that the pine trees simply represented a crop produced by, but separate from, the income-producing structure of the timber growers; such structure consisted of the ground on which the pine trees grew.

The special court rejected the appellants' contention. In the course of his judgment the learned President remarked as follows:-

> "A pine tree does not fall within the category of **sylva caedua** in that, as pointed out earlier, it does not, upon being felled, grow again. The loss of the pine trees as a result of the fire is to be equated with the loss of the actual peaches or apples of the fruit-farmer, and not with the loss of the peach trees or apple trees themselves. The pine tree is the **fructus** of the land, as the fruit is that of the fruit tree, cf ITC No. 596, SATC 261. There can be no difference between the case where fruit is destroyed whilst unpicked and that where it has already been picked and packed, and the fact that in the instant case the pine trees were still

> standing and had not yet been felled and delivered to Densa ..... cannot alter their 'status'. The pine trees destroyed by the fire, standing and unfelled, did not form part of the income-producing machines of the Trust and the Syndicate, as did the other varieties of trees destroyed in the same fire, for these other varieties of trees were, for want of a better word, self-replenishing; had they not been destroyed they would have continued to yield crops and they thus constituted 'income-producing machines'. On the other hand by no stretch of the imagination can pine trees be so described for they did not constitute, when standing, 'income-producing machines' manufacturing or producing goods (or fruit); they constitute themselves the fruit of the land, whether standing thereon or in the form of logs."

The phrase "receipts or accruals of a capital nature" which occurs in the definition of "gross income" already quoted is not defined elsewhere in the Act; and, understandably perhaps, the courts have not attempted any exhaustive definition of it. The question whether an accrual is to be categorised as capital or income falls to be decided on the facts of each particular case.

When the receipt in question represents

compensation to the taxpayer, a test which is sometimes applied is to ask the question whether the compensation was designed to fill a hole in the taxpayer's profits, or whether it was intended to fill a hole in his assets. Cf **Burmah Steam Ship Co Ltd v CIR,** 16 TC 67. However, as pointed out by Broomberg, **Tax Strategy,** 2nd ed (1983) at 199 - 200, the fact that what is plugged is a hole in assets, does not by itself, conclude the inquiry -

> "Of course, it is not sufficient to establish that the compensation is being paid in order to fill a hole in the taxpayer's assets. It is necessary, in addition, to ascertain the true nature of that asset in the recipient's hands. More particularly, was the asset, prior to its destruction or damage, an asset of a capital nature or was it floating capital? If it was floating capital, such as trading stock, standing crops, or consumable stores (like petrol, oil and so forth) the compensation will, obviously, be of a revenue nature, and will be subject to tax. In short, it is only where the payment received is to fill a hole in the capital assets of the taxpayer that the payment will escape the tax net."

In the context of the present case it is useful to remember

that in sec 1 of the Act "trading stock" is widely defined as including -

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

The distinction between "fixed" and "floating" (or "circulating") capital which is so frequent a topic of discussion in tax cases, is not a distinction drawn in the Act, or its predecessor, and the same position applies in the Companies Acts of the United Kingdom. See: **Ammonia Soda Company Ltd v Chamberlain** [1918] 1 Ch 266 (CA) at 286. It is a distinction derived from writers on political economy. The distinction has, however, become entrenched in tax law, and its essence is described thus by RABIE, JA in **Sekretaris van Binnelandse Inkomste v Aveling** 1978(1) SA 862 (A) at 880 E-F:

> "Soos blyk uit die aanhaling hierbo", (**CIR v**

> **George Forest Timber Co Ltd** 1924 AD 516 at 524) "het 'n mens in die geval van vaste kapitaal 'n element van permanentheid, in die sin dat daar 'n bedoeling is om die betrokke bate min of meer permanent te hou met die doel dat dit inkomste moet voortbring. Kenmerkend van bedryfskapitaal daarenteen is 'n bedoeling om die betrokke bate voortdurend in kontant of ander goed om te sit."

Having regard to the crisp issue which arises in the present appeal, certain aspects of the distinction between the two categories of capital thus recognised in tax law should, I think, be stressed at the outset. The first is this. The labelling of capital in either category at a given time and in a particular situation does not impart any ingrained character, incapable of fluctuation, to the capital involved. The mutability of the nature of capital is neatly put by SWINFEN EADY, J in the **Ammonia** case **(supra)** at 287 in the following words:-

> "It must not, however, be assumed that the division into which capital thus falls is permanent. The language is merely used to describe the purpose to which it is for the time being appropriated."

Second, what must be steadily borne in mind is that the assignment of capital to the one or other category -

> "....depends in no way upon what may be the nature of the asset in fact or in law. Land may in certain circumstances be circulating capital. A chattel or a chose in action may be fixed capital. The determining factor must be the nature of the trade in which the asset is employed. The land upon which a manufacturer carries on his business is part of his fixed capital. The land with which a dealer in real estate carries on his business is part of his circulating capital."

(per ROMER, LJ in **Golden Horse Shoe (New), Limited v. Thurgood (H M Inspector of Taxes)** [1934] 1 KB 548 (CA) at 563.)

Cases not infrequently occur in which the facts are such that the line of demarcation between fixed and floating capital is somewhat blurred and difficult to draw with precision. I do not think that the facts of the present case present any real difficulty. The argument for the appellants focuses in the main on the legal nature of the

asset for which compensation was paid (the pine trees standing on the property and, prior to felling, adhering thereto). Now it is trite that the planting of land and the taking root thereon of trees provides an example of industrial accession. The trees are incorporated into the soil which nurtures them. But here the inquiry relates not to the legal status, in the law of things, of the crop on the property but exclusively to the nature of the business carried on by the trust and the syndicate in relation to such pine trees. The trust and the syndicate farmed with the pine trees in order to derive income therefrom.

In determining whether the compensation paid for the loss of the pine trees is income or capital, the feature of the case that prior to severance from the soil the pine trees adhered to the property and that the pine trees were converted into income only after they had been

felled is an entirely irrelevant circumstance. It is clear, in my opinion, that the pine trees on the property represented a trading asset of the trust and the syndicate no less before they were felled than after they were felled and delivered to Densa as sawlogs. Mr **Seligson**, who, with Mr **Kuschke**, argued the appeal for the commissioner in this court, submitted that the conclusion just stated was reinforced by the consideration that in terms of the contract the entire yield of logs from the pine trees was "pre-sold" to Densa. It seems to me, with respect, that the pre-sale does not really advance the case for the commissioner. It is unnecessary, I think, to look beyond the fact that having regard to the essential nature of the business of the trust and the syndicate the pine trees on the property constituted trading stock as defined in sec 1 of the Act. On the grounds undermentioned I am unable to agree with some of the reasoning which impelled the special

court to conclude that the pine trees standing on the property formed no part of the "income-producing structure" of the trust and the syndicate; but in my respectful view the result at which the special court arrived was correct. In my opinion the pine trees, even before felling, clearly constituted floating capital in the business.

As appears from that portion of its judgment already quoted, the special court appeared to regard as significant the fact that a pine tree does not fall within the category of **sylva caedua.** In argument before us counsel on both sides were agreed, correctly I think, at least in regard to one matter: that the arboricultural distinction between trees which are **sylva caedua** and those which are not, is unhelpful to a determination of the appeal. It is true that in **ITC 596**, 14 SATC 261, to which the judgment of the court below makes reference in this connection, one ground upon which the appeal succeeded

was that since pine trees are not **sylva caedua** their proceeds could not be regarded as **fructus** of the land. In passing I would mention that in the context of cases such as the present one use of the word "fruits" or "crops" is to be preferred to the word "fructus" because the latter sometimes carries technical overtones, and in its widest acceptation signifies the equivalent of any enjoyment or pecuniary advantage. See Goudsmit, **Pandects** (1873), Gould translation, at 110 note 5. However that may be, the distinction between trees which are **sylva caedua** and those which are not, appears to me to be irrelevant to the matter in issue. As examples of **fructus naturales** brought forth from nature from a fruit-bearing thing, Lee & Honoré, **Family, Things and Succession,** 2nd ed par 228 (at page 234) include also -

> ".....trees grown to provide firewood or timber ..... irrespective of whether they have the quality of **renascentia** i e whether they sprout again when cut down as in the case of gum trees,

or not."

I agree, further, with the submission of Mr **Seligson** that the **ratio** for the finding in **ITC 596 (supra)** was directly related to the question whether the taxpayer in that case had engaged in the business of cutting the timber and selling the product. In the result the President (INGRAM, KC) found that the appellant company had not engaged in such business; and (at 262) that the sale of the timber in question was simply the realisation of part of an asset and its conversion into cash.

Returning to the judgment of the special court in the instant case, I respectfully agree with the view therein expressed that the loss of the pine trees is akin to the loss of the apples from an apple tree rather than to the loss of the apple tree itself. In the case of an apple orchard the income-producing structure has a dual component : the soil on which the apple trees stand and the

apple trees from whose branches the apples hang. The crop is the apples which are picked. In the present case the crop is the pine trees. The income-producing structure was here the soil of the property on which the pine trees stood. What was destroyed was simply the crop. There was no sterilisation of the capital asset, the property, which could forthwith have been replanted to pine trees to produce further "crops" or "fruits".

For the sake of completeness it is necessary to deal briefly with a trilogy of decisions in this court from which Mr **Blignault** extracted various **dicta** which, so it was urged, were destructive of the commissioner's argument that the compensation paid for the loss of the pine trees represented income. The three decisions are respectively **Commissioner for Inland Revenue v George Forest Timber Co Ltd** 1924 AD 516 ("the **George Forest** case"); **Crowe v Commissioner for Inland Revenue** 1930 AD 122 "the **Crowe**

case"); and **Baikie v Commissioner for Inland Revenue** 1931 AD 496 ("the **Baikie** case").

In the **George Forest** case the decision of this court was unanimous, but separate judgments were delivered by INNES, CJ and DE VILLIERS, JA. In the course of his judgment (at 523) the learned Chief Justice sounded a warning which has been echoed in many subsequent tax decisions:-

> "It is dangerous in income tax cases to depart from the actual facts; the true course is to take the facts as they stand and apply the provisions of the statute."

Having regard to the thrust of the appellants' argument in the present appeal another cautionary precept might not be out of place. When guidance is sought from judicial utterances in earlier decided cases their true significance and their value in solving the matter under consideration has to be assessed with a careful regard to the particular issue involved in the earlier case; and the precise scope

of the inquiry upon which in such earlier case the court had embarked. **Dicta** wrested from a completely alien context are unhelpful and may be misleading.

In the **George Forest** case the taxpayer was a company which carried on business as timber merchants and sawyers. For the purpose of its business it acquired 600 morgen of natural forest. For practical purposes the value of the land without the forest was negligible. The company annually felled a quantity of timber. This was sawn up in its mill and sold as part of its trading stock. In the calculation of its taxable income the company claimed to deduct a sum representing the proportion of the cost of the forest relative to the timber felled in that year. This court held that the total amount received from the sale of stock-in-trade in the course of the business of the company fell within the definition of "gross income"; that *no part of its receipts constituted receipts of a*

capital nature; and that no deduction was permissible from those receipts by way of provisions for redemption of wasting capital. One of the issues which arose was whether the price paid by the taxpayer for the afforested land represented expenditure "of a capital nature" (see 525). In this connection Mr **Blignault** called our attention to the following **dicta** in the **George Forest** case. At 526 INNES, CJ observed:

> "No doubt the trees constituted the chief value of the property, and formed the inducement for its acquisition. But the same might be said of the stone or the clay in land purchased for the purpose of a quarry or a brickfield. They formed part of the realty to which they acceded, and they passed with it.
>
> Now, money spent in creating or acquiring an income-producing concern must be capital expenditure....."

And at 530 DE VILLIERS, JA stated:-

> "The land, with its accessories, forms a portion of the fixed capital of the company to be used in its business for the purpose of producing income. The cost of such land, therefore, must be considered as an outgoing of a capital nature,

> for it went to purchase property which was added to the fixed capital stock of the company."

Having regard to the issues in the **George Forest** case the above-quoted **dicta** appear to me to have no relevance whatever to the question whether in the instant case the pine trees standing on the property represented the taxpayer's floating capital and trading stock.

In **Crowe's** case the taxpayer wished to buy a farm on which a mature wattle plantation already stood, but he had insufficient money to pay the purchase price. Two companies, one of which dealt in wattle-bark and the other in timber, were interested in securing the produce of the plantation but not in the purchase of the property itself. With these two companies the taxpayer concluded agreements to buy the wattle-bark and the timber for the eventuality that he should acquire the farm; and he also secured a contract for the felling and stripping of the wattle trees at a remuneration. Armed with these contracts the

taxpayer bought the farm and proceeded to fell and strip the plantation, delivering the bark and timber to the companies which had bought them. The proceeds so received for the bark and timber were paid immediately by the taxpayer to the seller of the farm on account of the purchase price. By a majority decision this court held that, in the particular circumstances of the case, the plantation had been sold as a portion of the capital asset acquired; and consequently that the amount received by the taxpayer for the bark and timber was simply a realisation of portion of his capital, and not a receipt on income account. It is unnecessary to expatiate further on the **Crowe** case. Suffice it to say that the taxpayer did not buy and sell the plantation to make a profit. What he did was to buy an improved farm and at the same time he sold the improvements to raise enough money to pay the purchase price of the farm. On the view adopted by the majority,

the position was the same as if the taxpayer had sold a portion of the farm in advance in order to enable him to pay for the whole. Nothing said in the judgment of STRATFORD, JA, who delivered the majority judgment in the **Crowe** case, remotely represents authority for the proposition that in the present case the pine trees grown by the trust and the syndicate in order to derive income therefrom represented fixed capital.

There is likewise a vast difference between the issue in the **Baikie** case and the issue in the present appeal. The appellant, a wattle farmer, bought a farm for £13,750, the wattle plantation on the farm being valued for the purposes of transfer duty at £3,470. During the following tax year the appellant sold bark and wood for a sum of £6,687, which sum was included by the commissioner as part of the appellant's income for that year. The appellant having claimed without success to deduct the sum

of £3,470 on the ground that this sum was expenditure actually incurred in the production of income, and *therefore not of a capital nature, this court in dismissing* the appellant's appeal held that the expenditure was in the circumstances of a capital nature and therefore not deductible under the Income Tax Act of 1925. The court held (at 500) that it was impermissible "to divide the single purchase of the farm with all its accessories ..... into two purchases" and that the separation for the special purpose of transfer duty was irrelevant. STRATFORD, JA, who delivered the judgment of the court, concluded by saying (at 500):-

> "..... it is impossible to accept the appellant's argument that there was a separate - a floating capital -expenditure on the plantation, and it is also impossible to distinguish the case before us from that of the **George Forest** case."

The inquiry in the **Baikie** case bears no resemblance to that in the instant case; and the **ratio** of the **Baikie** case has

no application here.

The appeal is dismissed with costs, such costs to include the costs of two counsel.

G G HOEXTER, JA

BOTHA, JA)
NESTADT, JA) Concur
GOLDSTONE, JA)
PREISS, AJA)