IN THE SUPREME COURT OF NAMIBIA CASE NO. SA 15 / 90

In the matter between

ORYX MINING AND EXPLORATION (PTY) LIMITED APPELLANT

versus

THE SECRETARY FOR FINANCE RESPONDENT

CORAM: BERKER, C.J.; MAHOMED, A.J.A.; DUMBUTSHENA,A.J.A.

Delivered on: 1991/07/ 03

APPEAL JUDGMENT

MAHOMED, A.J.A.: The Appellant in this matter is Oryx Mining and Exploration (Pty) Limited. In an assessment of the Appellant for tax for the period of assessment ending on the 30th June 1985, the Respondent, who is the Secretary of Finance, included in the Appellant's taxable income an amount R2 166 302,00 being the profit on the sale of certain mining plant and machinery and the Appellant was *assessed* accordingly.

The Appellant appealed against this assessment to the special Income-Tax Court in terms of section 73 of the Income-Tax Act of 1981 ("the Act") on the grounds thai, this profit constituted a receipt "of a capital nature" within the meaning of that expression in the definition of "gross income" in the Act. That appeal was dismissed by the special Income-Tax Court.

The Appellant thereafter appealed to the Full Bench of the then Supreme Court of South West Africa in terms of section 76 of the Act but that appeal was also dismissed by the Full Bench.

The Appellant subsequently made an application for leave to appeal to the Appellate Division of the Supreme Court of South Africa. That application was opposed by the Respondent on two grounds:

(a) The first ground advanced _iri limine, was that the Appellant had no further right of appeal at all, and that the Full Bench therefore had no right or jurisdiction to grant to the Appellant any further leave to appeal to a higher court.

(b) The second ground of objection was that the appeal in any event had no prospects of success, on the merits.

Both these objections were dismissed and leave was granted to the Appellant to appeal to the Appellate Division of the Supreme Court of South Africa. The Respondent was however also granted leave to appeal to the Appellate Division, against the order of the Full Bench dismissing its point in limine.

Subsequent to these events, however, Namibia attained its independence and the Constitution of Namibia created a new

Supreme Court as the final Court of Appeal. In terms of section 138(2)(b) of the Constitution any appeal noted to the Appellate Division of the Supreme Court of South Africa against any judgment or order of the former Supreme Court of South West Africa was deemed to have been noted to the Supreme Court of Namibia. This Court accordingly came to be seized with the matter.

The point in limine.

Mr E.M. du Toit, *S.C.* (assisted by Mr G.B. Coleman) who appeared on behalf of the Respondent rightly contended before us that if the Respondent's objection ijn limine was sound in law, this Court lacked any jurisdiction to consider the appeal on the merits. It accordingly becomes necessary to examine the point *ir* limine in greater detail.

Mr Du Toit, advanced two basic grounds in support of the point iji limine objecting to this Court's jurisdiction to hear the appeal at all.

His first and principle ground was that the Income-Tax Act created no mechanism for a further appeal after the then Supreme Court of South West Africa had exhausted its appellate jurisdiction, following an appeal from a decision of the special Incom-Tax Court in terms of the Act. He drew our attention to the provisions of section 73(18) (which provide that any decision of the Income-Tax Court under section 73 shall, subject to the provisions of section 76, be final) and inter alia to section 76(1) and

section 76(2). Section 76(1) provides that the appellant in a special Income Tax Court or the Secretary may, in the manner provided in section 76, appeal against any decision of such court. Section 76(2) provides that such appeal lies to the South West Africa Division of the Supreme Court of South Africa (subsequently the Supreme Court of South West Africa and presently the High Court of Namibia).

It is perfectly true that nothing contained in these or any other sections of the Act expressly create any right of further appeal from any judgment or order of the Court □ quo acting in terms of section 76, but Mr Swersky, S.C. (assisted by Mr Trichard) who appeared for the Appellant contended that the Income-Tax Act had to be read together with the relevant provisions of Proclamation 222 of 1981 of the Republic of South Africa (which created a Supreme Court of South West Africa in substitution of the previous South West Africa Division of the Supreme Court of South Africa) and more particularly the relevant terms of section 14 of that Proclamation (as amended by Act No.29 of 1985).

Section 14(1) of Proclamation 222 of 1981 provides that an appeal from a judgment or order of the Supreme Court in any civil proceedings or against any judgment or order of the Supreme Court given on appeal shall, subject to the provisions of subsection (3), be heard by the Appellant Division (which is defined as the Appellate Division of the Supreme Court of South Africa. Sections 14(2) and 14(3) go on to provide inter alia for an appeal under section 14 to be heard by a Full Bench of the Supreme Court itself in

certain circumstances and section 14(4) creates detailed machinery for the purposes of obtaining leave to appeal in terms of section 14. Finally section 14(7) of Proclamation 222 provides that notwithstanding anything to the contrary in any law contained, no appeal shall lie from a judgment or order of the Supreme Court in proceedings in connection with an application pertaining to certain matrimonial matters.

Our attention was further drawn to the provisions of section 20(1) of the Supreme Court Act No.59 of 1959 of South Africa which are in substantially the same terms as section 14(1) of Proclamation 222 of 1981 as well as section 2K1A) which expressly provides that the Appellate Division of the Supreme Court of South Africa shall have the same jurisdiction to hear and determine an appeal from any decision of the Supreme Court of South West Africa(or of a supreme Court or a High Court of a State to which independence has been granted by law,) as it has in respect of any decision of the Court of a Provincial or local division of the Supreme Court of South Africa.

It is accordingly contended by Mr Swersky that the Appellant's right to appeal to the Appellate Division (and to this Court following upon the independence of Namibia) arises not from any express provisions of the Income-Tax Act but from the provisions of that Act read together with section 14 of Proclamation 222 of 1981 and sections 20(1) and 2K1A) of the Supreme Court Act of 1959.

In countering this argument Mr Du Toit relied on the provisions of section 14(6)(b) of Proclamation 222 of 1981 which provides that the power to grant leave to appeal as contemplated by section 14 "shall be subject to the provisions of any other law which specifically limits it or specifically grants, limits or excludes any right of appeal." It was contended that no right of appeal to the Appellate Division in terms of section 14 therefore existed unless there is provision in some other law which specifically grants such a right of appeal. I am unable to agree with this construction of section 14(6). Sections 14(4) and 14(5) deal with the circumstances under which leave to appeal is required and the procedures pertaining thereto and what section 14(6)(b) seeks to make clear is that these rules pertaining to the power to grant leave to appeal are subject to the provisions of any other law' which might specifically limit or specifically grant such powers or which might limit or exclude any right of appeal. If any other law therefore specifically provides that there is a right of further appeal without any need to obtain leave to appeal the provisions of such a specific law would therefore prevail and no leave to appeal would be required even if section 14(4) or section 14(5) otherwise provide. Section 14(6)(b) does not mean that unless there is a specific right of appeal provided for in some other law (other than Proclamation 222 itself) an aggrieved party would not have the right to pursue an appeal pursuant to the provisions of that Proclamation. (Exactly the same considerations would apply to section 20(6) . of the Supreme Court Act of 1959

which is substantially in the same terms as section 14(6) of Proclamation 222 of 1981.)

It was further contended on behalf of the Respondent that section 14(1) of Proclamation 222 of 1981 did not itself create a right of appeal. It was argued that the subsection merely provided that if the right did exist, the appeal had to be heard by the Appellate Division. In my view however section 14(1) (read with the other subsections of section 14) provides for two matters. In the first place it confers jurisdiction on the Appellate Division (in terms of section 14(1)) to hear appeals from judgments or orders of the Supreme Court of South West Africa in any civil proceedings or against any judgments or orders of the Supreme Court given on appeal. Secondly, it seeks to define the circumstances under which leave to appeal has to be obtained and the procedures which have to be followed pertaining thereto. There is therefore no need to look for some other law for the purposes of determining whether the Appellant had any right to appeal to the Appellate Division. Proclamation 222 of 1981 itself creates that right, subject to the provisions of section 14 thereof.

Mr Du Toit further contended that section 73(18) of the Income-Tax Act justified the inference that only one appeal from a decision of the special Income-Tax Court was permitted and that no further appeal from the decision of a Superior Court in terms of section 76 was contemplated. This submission is based on the fact that section 73(18) provides that a decision of the special Income-Tax Court under

section 73 "shall, subject to the provisions of section 76, be final". His argument was that the finality of the decision of the special Income-Tax Court in terms of section 73 was qualified only to the extent to which that decision was set aside or corrected by a Superior Court acting in terms of section 76 and since section 76 itself made no reference to the Appellate Division, it followed that once the Superior Court referred to in section 76 (the Court – quoi ntne case) made its decision, "the matter became final". Counsel drew our attention in this regard to the decision of the Appellate Division of South Africa in the case of Munisipaliteit van Windhoek v Ministersraad van Suidwes-Afrika en 'n Ander, 1985(2) SA 893 (A) which followed the earlier decision of the same court in the case of The Minister of Labour v Building Workers' Industrial Union, 1939 A.D. 328.

In the case of the Minister of Labour v Building Workers' Industrial Union, (supra) the Court was concerned with the proper interpretation of certain sections of the Industrial Conciliation Act No.36 of 1937. Section 77(1) of that Act provided for an appeal to a defined division of the Supreme Court against inter alia a decision of the Minister in terms of which a concilliation board is established and section 77(2) thereof provided as follows:

> "The division of the Supreme Court to which an appeal is made shall confirm the Minister's decision or give such other decision as in its opinion the Minister ought to have given; and its decision shall for the purposes of this Act be deemed to be the decision of the Minister".

The Court held that on a proper construction of the Industrial Conciliation Act, the decision of the Division of the Supreme Court to which an appeal had been made in terms of section 77(2) of the Act was final and that no further appeal lied from a decision of that division to the Appellate Division.

Section 77(2) of the Industrial Conciliation Act of 1937 is, in my view, however, distinguishable from the provisions of section 73(18) of the Income-Tax of 1981. In the first place section 77(2) of the Industrial Conciliation Act provides that the decision of the Division of the Supreme Court to which appeal is made "shall for the purposes of this Act be deemed to be the decision of the Minister". There is no corresponding provision in section 73(18) of the Income Tax Act. Nothing contained either in section 73(18) or any other section of the Income-Tax Act provides that the decision of any court acting as a Court of Appeal in terms of the Act, shall be deemed to be the decision of the secretary. Secondly, the element of finality suggested in section 77(2) of the Industrial Conciliation Act by the deeming provision, attaches to the decision of the division of the Supreme Court to which the appeal is made in terms of section 77 (a provincial division). In the case of the Income-Tax Act there is no corresponding provision which attaches finality to the decision of the division of the Supreme Court to which an appeal is made in terms of section 76. All that section 73(18) states is that any decision of the special Income-Tax Court in terms of section 73 shall

(subject to the provisions of section 76), be final.

The legislature could easily have said, if such was its intention that the decision of the court to which appeal is made in terms of section 76(2), shall be final.

These distinctions are in my view crucial because it is clear from the judgment of Centlivres, J.A. in the case of Minister of Labour v Building Workers' Industrial Union, (supra) that no further appeal from a decision by a Superior Court given under section 77 of the Industrial Concilliation Act was competent, precisely because section 77 deemed the decision of such a court to be the decision of the Minister. At pages 332 - 333 of the report in that case Centlivres, J.A. stated that -

> "Had the legislature intended that there should be a further right of appeal from a decision given by a provincial or a local division under section 77 it would have enacted that the decision of the court hearing the further appeal should be deemed to be the decision of the Minister. This it has not enacted.
>
> The language of section 76 is clear and unambiguous. It precludes all notions of a further appeal to any other tribunal for it says unmistakenly that the decision of the division to which the appeal is made - in this case the Transvaal Provincial Division - shall be deemed to be the decision of the Minister. From this it follows that the decision of any other tribunal can have no legal effect. Were this Court to allow any further appeal any decision it might "give on the merits would be

> a vox et praeterea nihil. These considerations lead us to the conclusion that the legislature intended to clothe with finality the decision of a provincial or local division of the Supreme Court given in terms of section 77 of the Act."

It accordingly follows that the decision in the case of The Minister of Labour v Building Workers' Industrial Union, (supra) does not afford support for the arguments sought to be advanced on behalf of the Respondent. Exactly the same considerations apply to the case of the Minister of Labour and Another v Amalgamated Engineering Union, 1950(3) SA 383(A). In that case also the section which fell to be interpreted was section 77 of the Industrial Concilliation Act of 1937.

Counsel for the Respondent also referred us to the decision of the Appellate Division of the Supreme Court of South Africa in the matter of Munisipaliteit van Windhoek v Ministersraad van Suidwes-Afrika en 'n Ander, 1985(2) SA 907(A). The Court in that case was concerned with the interpretation of section 77 of Ordinance 35 of 1952 (SWA) creating machinery for an appeal to the Supreme Court of South West Africa (as it then was) from a decision of the then Council of Ministers of South West Africa. Section 77(2) of Ordinance 35 of 1952 provided that the decision of such a court was to be deemed to be a decision of a Council of Ministers. The Appellate Division, following the reasoning in Minister of Labour v Building Workers' Industrial Union, (supra), held that any decision of the

then Supreme Court of South West Africa given on appeal in terms of section 77 (including any decision confirming a decision of the Counsel of Ministers) was therefore final and not subject to any further appeal to the Appellate Division. Again the relevant section 77(2) of Ordinance 35 of 1952 was entirely distinguishable from section 73(18) of the Income-Tax Act in the present matter. There is nothing in section 73(18) or any other section of the latter ACT. which deems that a decision of any court acting in terms of section 73 or section 76, is a decision of the Secretary.

The second main ground upon which Mr E)u Toit relied was that in so far as section 14 of Proclamation 222 of 1981 purported to confer a right of appeal to the Appellate Division of the Supreme Court of South Africa, it was ineffective because Proclamation 222 of 1981 was made by the South African State President pursuant to the provisions of section 38(1) of Act 39 of 1968 of the Republic of South Africa which could only apply within the then territory of the then South West Africa and not within any part of the Republic of South Africa excluding South West Africa.

For the purposes of this argument I shall assume that a Proclamation made by the South African State President in terms of section 38(1) of Act 39 of 1968 cannot lawfully provide for appeals from any Superior Court in the then South West Africa to the Appellate Division of the Supreme Court of South Africa and that any provision in Proclamation 222 of L981 purporting to confer any such

jurisdiction on the Appellate Division does not in law operate extra-territorially (outside the territory of the then South West Africa) to clothe the Appellant Division with such jurisdiction. Even on that assumption however the Respondent's argument cannot succeed because section 2K1A) of the Supreme Court Act of 1959 which is a South African Act itself expressly confers jurisdiction on the Appellate Division to hear and determine an appeal from any decision of the then Supreme Court of South West Africa, in the same way that the Appellate Division has jurisdiction in respect of any decision of the court of the provincial or local division of the Supreme Court of South Africa. Section 21(1A) (read with section 20 of the Supreme Court Act of 1959,) clearly therefore conferred jurisdiction upon the Appellate Division of the Supreme Court of South Africa to hear and determine appeals from the then Supreme Court of South West Africa and pursuant to the provisions of the Namibian Constitution that jurisdiction now vests in this Court.

In the result therefore I have come to the conclusion that the point _i_n limine raised on behalf of the Respondent is unsound in law and must be dismissed.

The MERITS.

The sole issue on the merits which requires to be determined in the present appeal is whether the profit of R2 166 302,00 which the Appellant made on the sale of certain mining plant . and machinery during the tax-year

ending on the 30th of June 1985 constituted a receipt "of a capital nature". if it did it had to be excluded from the "gross income "of the Appellant in respect of that year and was therefore not taxable.

The material facts relevant to the determination of this issue are not really in dispute. The Appellant was incorpora-ced during the 60's under the name of Falconbridge of South West Africa (Pty) Limited to conduct exploration and mining activities in what was then known as South West Africa. Upon its incorporation and until October 1982 the Appellant was a wholly owned subsidiary of Falconbridge Limited (which was formerly known as Falconbridge Nickle Mines Limited) of Canada ("Falconbridge"). In the early 70's Appellant commenced the development of the Elbe Mine in the Okahandja district and expanded some R2 million pursuant thereto and this amount was allowed by the Secretary for Inland Revenue as capital expenditure incurred pursuant to the company's mining activities. In 1974 after the collapse of base-metal prices the development of the Elbe Mine was terminated and the property was put on "a care and maintenance basis".

Oamites Mining Company (Pty) Limited ("Oamites") was itself incorporated in the late 60's and until October of 1982 its members were Falconbridge as to 74.9% and the Industrial Corporation of South Africa ("IDC") as to 25.1%. Oamites developed and mined the Oamites ore body of Copper and Silver from 1970 tot 1984.

In the early 70's the Appellant acquired a prospecting grant in the district of Rehoboth ("The Swartmodder claims"). Some prospecting was carried out on the Swartmodder claims during the period 1974 to 1976 by the Appellant at a cost of some R500, 000.00. Although the Appellant was a wholly owned subsidiary of Falconbridge, by agreement between Falconbridge and Superior Oil Company ("Superior") of the United States of America, both the cost and the benefit of this prospecting activity was shared between Falconbridge and Superior. Certain feasibility studies were carried out by the Appellant on the Swartmodder claims during the years 1976 to 1979 and it was concluded that a separate mining venture would not be economically viable.

In May of 1979 a feasibility study was carried out by Oamites which indicated that a Swartmodder mine could be economically viable provided that it was developed and operated as an integral part of Oamites entailing the transportation of Swartmodder ore for some 50 kilometres to the Oamites Mine, where, by utilising Oamites plant and infra-structure, the Swartmodder ore would be blended and milled with ore derived from the Oamites Mine.

Following upon the feasibility study of May 1979 Oamites, Falconbridge, Superior, Oamites, the I.D.C., and the Appellant entered into various negotiations and discussions with the object of exploiting effectively the Swartmodder claims.

These negotiations led to two important agreements concluded on the 10th December 1979.

(c) In terms of the first agreement Appellant granted to Oamites the right to develop and work the Swartmodder claims. In consideration therefor Oamites undertook to pay Oryx tribute monies at the rate of R4 per ton of Swartmodder ore produced by Oamites.

(d) In terms of the second agreement (entered into on the same date) Oamites sold to another wholly owned subsidiary of Falcanbridge, Falconbridge Exploration (Botswana (Pty) Limited ("Febots"), or its nominees, all the "non-renewable tangible assets" which might be owned by Oamites at the date upon which the Board of Directors of Oamites passed a resolution in the future approving a shutdown programme for the Oamites mine. (The "non-renewable tangible assets" were to include the relevant mining plant and machinery. )The purchase price was to be an amount equal to the royalties which Oamites would have paid it to the Appelant in terms of the first agreement referred to in (a) above.

Pursuant to these 1979 agreements Oamites in fact mined the Swartmodder claims during the period 1979 to April 1981. In April 1981 mining at the Swartmodder Mine was terminated "because of various factors including the unexpected complexity of the geology with the consequent dilution of all reserves, increases in the cost of transport of the ore from Swartmodder to Oamites and a plunge in the price of copper on world markets". In May 1981 the Swartmodder Mine was placed "on a care and maintenance basis".

During August of 1982 Falconbridge issued a directive tc the managing director of its South African operations to dispose of its 74.9% interest in Oamites. Following upon certain negotiations Falconbridge thereafter disposed of its interests in both the Appellant and Oamites during 1982 for a consideration of Rl 050 000 to a sindicate led by Metorex (Pty) Limited ("Metorex"). There were two important conditions attached to the sale.

(e) Oamites was to be constituted as a subsidiary of the Appellant with the result that the Appellant became the owner of 74.9% of the shares in Oamites previously owned by Falcon-bridge .

(f) Falconbridge was to procure the assignment by Febots to the Appellant of all rights and obligations which Febots had acquired (in terms of the agreement of December 1979) to the purchase of the non-renewable tangible

> assets owned by Oamites on the date upon which the Board of Directors of Oamites passed a resolution approving the shutdown programme for the Oamites Mine.

In the result the relevant sindicates led by Metorex came to own 100% of the Appellant which in turn owned 74.9% of Oamites. The Appellant became entitled to the rights which Febots previously enjoyed to acquire all the "non-renewable tangible assets" which might be owned by Oamites at the date when Oamites resolved to approve the shutdown programme for the Oamites Mine to which I have referred. (The "non-renewable tangible assets" included the mining machinery and equipment which the Appellant later sold for the profit of R2 166 302.00).

In December 1982 the 25.1% share-holding in Oamites held by the I.D.C. was also sold to a sindicate which included Metorex.

At the beginning of 1984 the Oamites Board of Directors in fact resolved to approve a shutdown programme for the Oamites Mine. That event entitled the Appellant as the cessionary of rights previously vesting in Febots, to acquire the relevant "non-renewable tangible assets" (including mining plant and machinery) owned by Oamites on the date of this resolution. The Appellant duly acquired these assets and without taking any physical delivery thereof and almost immediately, authorised Oamites to sell them. That sale resulted in the profit of

R2 166 302.00 which the Respondent has sought to include within the taxable income of the Appellant and which the Appellant contends constitutes a receipt of "a capital nature".

The proper legal approach.

Relevant to the determination of the issue between the parties in this matter are a number of legal principles which were debated in argument before us.

(a) The onus.

> Section 72 of the Income-Tax Act provides that "the burden of proof that any amount is exempt from or not liable to any tax-charge liable under this Act or is subject to any deduction, rebate or set off in terms of this Act, shall be upon the person claiming such exemption, non-liability, deduction, rebate or set off, and upon the hearing of any appeal from any decision of the Secretary, the decision shall not be reversed or altered unless it is shown by the Appellant that the decision is wrong." It is I think clear from this provision that the onus was upon the Appellant to prove on a balance of probabilities that the profit of R2 166 302.00 which was made by the Appellant upon the sale of the relevant mining plant and machinery, was a receipt of a

"capital nature".

) The Act contemplates that all receipts or accruals must be categorised as being either of a capital or of an income nature. The concept of an amount which was both "non-capital" and "non-income" was described by Davis, A.J.A, in the case of Pyott Limited v CIR,1945 A.D. 128 as a "half-way house of which I have no knowledge". It accordingly follows that the Appellant's appeal must fail if the Appellant has not established on a balance of probabilities that the profit of R2 166 302.00 made by the Appellant on the sale of the relevant mining plant and machinery constituted a receipt of a capital nature.

) A receipt or accrual of a "capital nature" is not defined in the Act. It is ultimately a question of law which has to be decided upon the facts of each case by having regard to the totality of all the relevant circumstances SIR v The Trust Bank of Africa Limited, 1975 (3) SA 652 (A); Natal Estates v SIR, 1975 (4) SA 177 (A).

) The object of the enquiry is to determine in which of two possible classes a particular profit falls.

"Income considered in relation to capital is revenue derived from capital productively employed. In a transaction of this nature, therefore, where profit has undoubtedly resulted from the disposal of the company's assets, we have to enquire whether the profit has resulted from the productive use of capital employed to earn it, or whether it has resulted from the realisation of capital at an enhanced value. In the former case it falls within the definition of income and was rightly assessed; in the latter it remains capital, and is not liable to duty" - per Innes, C.J. in COT v Boysen's Estate Limited, 1918 A.D. 576.

(e) Intention.

A very important guide which the courts have generally used in deciding whether the proceeds arising upon the disposal of an asset are in the nature of income of capital is the "intention" of the tax-payer in acquiring and in holding the asset concerned.

"The proceeds will be in the nature of capital and tax-free if the asset was acquired and held not for the purpose of re-sale at a profit, but, for example in order to produce an income in the form of rent, interest or dividends" (Silke on South African Income-Tax 11th Memorial Edition Vol.1 paragraph 3.2.).

What the Court is required to do is to consider all the circumstances which surround the acquisition of the asset, and the manner in which it has treated the asset. The tax-payer's intention is important but it does not itself necessarily determine whether the proceeds arising upon its disposal will be treated as capital or income (CIR v Stott, 1928 A.D. 252 to 264; CIR v Richmond Estates (Pty) Limited, 1956(1) SA 602 (A)).

Where the intentions of a tax-payer are "mixed" the correct approach is to give effect to the dominant motive in determining the nature of the subsequent profit but "if a tax-payer has two alternative business methods of turning to account an asset that he has acquired, that is, he is willing to secure a profit either by re-selling the asset or by using it to produce income, the asset is of an income nature and the proceeds arising upon it sale will be included in his income" (Silke (supra) paragraph 3.5).

In the case of a company "with no body to kick and no soul to damn" the intention of the tax-payer is determined by reference to the intention of its directors or those in effective control of the company (CIR v Richmond Estates (Pty) Limited, (supra)).

(f) The determination of intention:

The intention with which a tax-payer acquires and holds an asset is a question of fact. The tax-payer's ow-n evidence about his intention

(or the evidence of the directors of a company or those in control thereof where the tax-payer is a company) must be given proper weight but in order to determine properly and objectively what the real intention of the tax-payer was in a particular case, the Court has to review all the relevant facts and circumstances and to test the assertion of the tax-payer against the objective facts including where this is relevant -

i. The inherent nature of the asset disposed.

ii. The circumstances under which it was acquired.

iii. The duration of the period for which it was held by the tax-payer.

iv. The use to which it was put by the taxpayer while it was so held.

v. The relationship between the tax-payer and the party from whom it was acquired and to whom it was disposed.

vi. The tax-structure, the tax-imperatives and the tax-needs of the tax-payer during the relevant period.

vii. The quality and character of the taxpayer's conduct in relation to the relevant asset and more particularly the issue as to whether such conduct could be said to constitute usual and normal conduct in the commercial community, or unsual.

(g) Isolated transactions.

> A profit made in consequence of the sale of an asset, might be taxable, notwithstanding the fact that the tax-payer is not ordinarily engaged in the business of selling that kind of asset. The relevant test is not whether the transaction yielding the profit was an isolated transaction. The relevant test is to determine the intention or motive behind the transaction. If the intention involved a "scheme of profit-making" the resultant profit would attract tax even if there were no previous or subsequent similar transactions. (ITC 382, (1937) 9 SATC.)

The application of the law to the facts.

Having carefully applied these legal principles to the facts in the present matter I have come to the conclusion that the Appellant has not discharged the onus of establishing that the profit of R2 166 302.00 which the Appellant made in consequence of the disposition of the relevant mining plant and machinery, constituted a receipt of a capital nature, within the meaning of that expression in the definition of "gross income" in the Act.

It is common cause that almost immediately after Oamites

had passed the necessary resolution approving the shutdown programme for the Oamites Mine, the Appellant acquired and disposed the relevant assets at a very substantial profit without using the mining plant or equipment or even taking delivery thereof from Oamites. These facts by themselves would in the ordinary course make it extremely difficult for a tax-payer in the position of the Appellant to contend that its purpose in acquiring these assets was to employ the mining plant and machinery as a capital asset in order to generate an income from mining or mining exploration. In an able argument on behalf of the Appellant Mr Swersky contended, however, that this would constitute too fragmented and simplistic an approach to the problem and that the formal date on which the Appellant became entitled to the acquisition of these assets was not the crucial date from which the Appellant's intentions were properly to be determined. He contended that the period preceding that date was also relevant and more particularly the period following upon the 1982 agreement in terms of which the Appellant had obtained cession of the rights to the plant and machinery previously vesting in Febots. In support of that approach he referred us to a number of cases including Matla Co. Limited v CIR, 1987(1) SA 108 AD at 128 H to 129 B; Thorn and Thorn vThe Queen, 1979 Canadian Tax-cases 403; Western Gold Mines No Liability v C of T (W A), 1938 (1) A.I.T.R. 248. These cases show that in certain circumstances, it is indeed permissible to have regard to such a preceding period and I shall for the purposes of this argument assume, as the special Income Tax Court did, that the approach contended for by Mr Swersky is correct.

It accordingly becomes relevant and necessary to examine the history and the circumstances which gave rise to the chain which finally led to the acquisition of the relevant assets by the Appellant in 1984.

That chain effectively commences with the agreements of 1979 and more particularly the agreement between Oamites and Febots in terms of which Oamites sold to Febots the relevant assets owned by Oamites on the date when it was to pass a resolution in the future approving a shutdown programme for the Oamites Mine. These were extroardinary and unusual agreements. Why was it necessary for the agreement of sale of assets to Febots to be on the same day as the agreement between Appellant and Oamites giving to Oamites the right to exploit the Swartmodder ore for a royalty? And why was the consideration which Febots was required to pay for the sale determined arbitrarily•not with reference to the value of the assets which were being sold but by the quantity of royalties which Oamites might eventually have to pay to the Appellant pursuant to the first agreement? What was going to be the quality and the quantity of the mining plant and machinery on some future date when Oamites resolved to approve a shutdown programme for the Oamites Mine? What was Febots going to do with this plant and machinery? How could Febots have known precisely what it would eventually have to paying for these assets if the quantification thereof depended on the energy and the speculative potential of other parties? These and other difficulties caused the Appellant's only witness before the special Income Tax Court to concede that

he knew of no "similar agreement in mining history".

The only reason which was suggested by the Appellant in its objection to the Respondent against the assessment sought to be impugned was that -

> "Falconbridge wished at the end of the life of the Oamites Mine to secure the mining assets of the Oamites Mine for use in other mining operations carried on or to be carried on by Falconbridge in Southern Africa through one or other of its subsidiaries. The assets were therefore sold by Oamites to Febots or its nominees".

This is a non sequitur. Oamites had the equipment. It was then controlled by Falconbridge. It would have continued to retain ownership and possession of the mining equipment and machinery after the mine at Oamites was shut down.

The objective circumstantial evidence, suggests that the true reason for the sale in 1979 to Febots lies in quite a different direction. The Oamites Mine was not expected to last more than three to four years and the Falconbridge Group which effectively controlled Oamites must clearly have contemplated the sale of the mining plant and machinery at the end of that period. But such a sale would have had tax-disadvantages for Oamites because the whole cost of acquiring the mining plant and equipment had in terms of the Act been deducted from the income of Oamites with the result that any sale of these assets (worth at least R2 million)

at market related values would have

constituted a recoupment for income-tax purposes negating the advantages which Oamites had enjoyed by allowing the cost of the plant and equipment to be deducted from its income.

The objective result was that when the plant and machinery owned by Oamites was eventually sold by Oamites, the recoupment was limited to an amount of R39 483.00 and the profit of R2 166 302 made by the Appellant did not substantially affect the tax-advantage which had accrued to Oamites by the perfectly legitimate technique of writing off the cost of these assets against its income in previous years. Inherent in this strategy was the contemplation that once the Oamites Mine had been shut down, the mining plant and machinery which would then be acquired by Febots would be sold for its true market-value in excess of R2 million by a subsidiary of Falconbridge.

This inference is strengthened by the way in which the controlling shareholders and directors of the Appellant, Oamites and Febots thereafter handled the possesion and alienation of this mining plant and machinery. Thus when the Metorex Group in 1982 sought to acquire the interests of the Falconbridge Group in the Appellant and Oamites, something needed to be done about the 1979 agreement to sell the mining plant and equipment to Febots. The obvious course would have been to effect a re-cession from Febots to Oamites. But that was not the course which was followed. What was done was to cause Febots to cede its rights in this respect to the Appellant. Again the likely reason for

this strategy which suggests itself was to avoid the situation where Oamites was forced, (upon the resale of the mining plant and machinery) to lose its previous tax-advantage because of the recoupment of the very costs which it had previously written off against its income. The strategy is perfectly understandable but it carries with it the inherent intention to sell this mining plant and machinery at a profit.

This would also explain why the Appellant was able to acquire from Febots (without having to pay any consideration to Febots) the right of Febots to possess and to own valuable mining plant and machinery in excess of R2 million.

There are other objective facts which do not support any suggestion that the Appellant had really any interest in acquiring the relevant mining plant and machinery as a capital asset for the purposes of generating an income. When the Appellant accepted cession of the rights of Febots to this mining plant and equipment no mention was made in the resolution doing so that there was any intention by the Appellant to use these assets and it is common cause that in fact the Appellant never made any such use.

Indeed the truth is that the Appellant did not even take physical delivery from Oamites. Possession never left Oamites. Oamites was simply constituted an "agent" of the Appellant to sell the assets concerned. This is perfectly consistent with its preceding history. As early *as* the 2nd

August 1974 the Johannesburg attorneys of the Appellant had informed the revenue authorities that the Appellant had no intention of becoming a mining company and Mr Beatty in his evidence on behalf of the Appellant also conceded that the Appellant had never derived any income whatsoever from mining operations. This concession appears from the following passage:

> "Including the Elbe operation, whatever it was, did that company, Falconbridge South West Africa, or Oryx, derived any income whatsover from mining operations? - No, it did not" .

The actual activities and financial policies pursued on behalf of the Appellant during the period between the date of the 1982 agreements (when it obtained cession of the rights of Febots to the relevant plant and machinery) and the date when these assets were sold by it, also does not suggest any serious intention to use these assets as capital mining assets to generate an income or to retain the liquidity and the infra-structure which might be necessary for such purposes. Its disposable assets were steadily being liquidated and its cash reserves run down by the declaration of substantial dividends and repayments of shareholders' loan accounts. Thus on the 11th March 1983 it resolved to sell some of its fixed property, on the 13th June 1983 it resolved to pay an amount of R66 000.00 to shareholders, on the 15th August 1983 it declared a dividend of R250 000.00 to be paid to its shareholders and on the same date it resolved to dispose its consumable stores and equipment and to make a further payment of

R30 000.00 to shareholders. Again on the 24th April 1984 it resolved to make a further payment of R225 000.00 to shareholders on their loan accounts.

It is against these objective facts that the intentions of the Appellant must be tested. Having carefully examined the evidence of Mr Beatty, his responses to some of these objective facts put to him in the course of cross-examination and having further regard to the records and minutes of the Appellant, I am not satisfied that the Appellant has discharged the onus of proving on a balance of probabilities that the profit which it eventually made on the resale of the relevant mining plant and equipment through the agency of Oamites constituted a receipt of a capital nature. I am also not satisfied that the Appellant has established that its predominant intention in acquiring these assets was to hold and nurture such assets as capital mining assets in order to generate an income.

I am not persuaded that the special Income-Tax Court and the Full Bench of the Supreme Court of South West Africa (as it then was) were wrong in dismissing the appeal of the Appellant on the merits.

In the result I would propose an order -

1. Dismissing the appeal of the Appellant on the merits with costs including the costs of two counsel.

2. Dismissing with costs (including the costs of two counsel) the appeal of the Respondent against the decision of the Court *a* quo, rejecting the Respondent's objection in limine to the jurisdiction of the Appellate Division (and therefore of this Court) to hear an appeal from the Court a_ quo against its decision on the merits of the appeal before it.

DATED AT WINDHOEK THIS
DAY OF JULY 1991

I. MAHOMED ACTING JUDGE OF APPEAL

I concur

H. J. BECKER
CHIEF JUSTICE

I concur

E. DUMBUTSHENA
ACTING JUDGE
OF APPEAL

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