

Kimera Naidoo

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I hereby declare that I have read and understood the regulations governing the submission of the Postgraduate Diploma in Tax Law dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms of those regulations.

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Outline:

The purpose of this dissertation is to explore the capital versus revenue distinction, within the scope of tax law. The discussion will begin by establishing the importance of the being able to ascertain what differentiates amounts of a capital nature from amounts of a revenue nature and the reason this subject still remains so controversial. In doing this, the dissertation will examine the South African tax law surrounding ordinary and capital gains tax, the introduction of capital gains in the South African tax system and its conceived effect on taxation in the country, at the time of its implementation.

Next the subject of ascertaining the characteristics of an effective tax system will be addressed, with an emphasis on the most fundamental traits or maxims of taxation. With this in mind an examination of the correctness of the outcomes of two contentious cases, namely *CSARS v Founders Hill (Pty) Ltd* and *CIR v Wyner* will be undertaken to substantiate the controversial nature of the capital versus revenue distinction.

Finally from the analysis of these cases and with reference to existing case law regarding the capital versus revenue distinction, this dissertation will conclude by discussing whether the contentious nature of the capital versus revenue distinction lessens the efficiency of a system of taxation and if anything can be done about this.

Introduction:

The distinction between what constitutes income of a capital nature and what does not has become an important and contentious feature, both in South African Tax law and within many other tax jurisdictions around the world. This issue is unique in comparison to many other parts of tax law in that there has been no legal definition given to amounts of a capital nature. The question which will be asked in this dissertation is, while taxation is a subject matter which is rousing by nature, why does this distinction remain so contentious?

When referring to and when making the distinction between capital and revenue amounts in the Income Tax Act, 1962 (Act No. 58 of 1962) ('The Act'), amounts are merely described as 'of a capital nature' or 'not of a capital nature' and there exists no guidance defining this term. In addition there is no one set of principles which can be used to distinguish taxable amounts of a capital nature from those of a revenue nature and for this reason, this area of tax law has become the subject of considerable litigation in previous years, both before the introduction of capital gains tax in South Africa and after it.

This distinction is one which is important to both taxpayers and The South African Revenue Service ('SARS') alike, in that capital gains are taxed at a lower effective tax rate than income of a revenue nature and prior to the introduction of capital gains tax in South Africa, capital gains attracted no tax liability at all. The capital versus revenue distinction is also important in the set-off of tax losses because losses of a revenue nature can in most instances, barring certain ring-fencing provisions, be set-off against income which is either capital or revenue in nature, while capital losses may only be set-off against capital gains.

In a document issued by the National Treasury entitled 'Briefing by the National Treasury's Tax Policy Chief Directorate to the Portfolio and Select Committees on Finance', in 2001 on the subject of whether more certainty could be created in relation to the capital versus revenue distinction, it was noted that 'according to the Commissioner, one in five cases litigated by SARS involves the capital versus ordinary [revenue] distinction' and that 'written submissions to SARS rightly indicate that this case law distinction is vague, creating taxpayer uncertainty as well as needless litigation.'¹ For these reasons the capital versus revenue distinction is still an important and relevant one within the realm of tax law however its significance begs the questions, why has the distinction remained so ambiguous, even after having being accompanied by so much litigation for so long?

The cases of *Founders Hill* and *Wyner* will be examined, wherein the duty to make this distinction with regard to the nature of taxable income, was appealed to the Supreme Court of Appeal ('the SCA'). In both cases the outcomes were contentious, for different reasons and so this dissertation will ask the questions; does the open-ended nature of the capital versus revenue distinction leave room to contest the correctness of cases which are tasked with distinguishing between amounts of a capital nature and those of a revenue nature?

Following this, with certain maxims of taxation in mind, can it be said that the absence of a clear, precise distinction between revenue and capital amounts is detrimental to a tax system and if so, what can be done to correct this?

¹National Treasury 'Capital Gains Tax In South Africa' Briefing by the National Treasury's Tax Policy Chief Directorate to the Portfolio and Select Committees on Finance, 24 January 2001 available at <http://www.ftomasek.com/NationalTreasury.pdf> accessed on 10 June 2013

Capital Gains Tax in South Africa

There were a number of reasons for the introduction of capital gains tax into South Africa's tax system; capital gains tax had been a part of the tax regimes of many of the country's with whom South Africa had traded for a number of years and so capital gains tax was instituted in South Africa for International Benchmarking purposes. In addition, capital gains tax was seen as a means of achieving horizontal equity in its taxation of the public, this required that members of the public of a similar socio-economic status should bear a similar tax burden.

The incentive of taxpayers to shift their income from revenue to capital also played a role in the introduction of capital gains tax. Prior to its introduction, taxpayers would pay no tax on capital gains, this practice was both contrary to the principle of horizontal equity which the government was trying to achieve and created a loop-hole which tax payers could use to avoid paying tax. While the effective tax differential between capital gains and ordinary income still makes this attractive, the greater onus on taxpayers with regards to disclosure makes it harder to evade tax.²

The words 'of a capital nature' can be found in several sections of the Income Tax Act 58 of 1962 ('the Act') which governs income tax in South Africa. Most importantly this phrase can be found in s1 of the Act which defines, among other things the term 'gross income', which expressly excludes 'receipts or accruals of a capital nature' but includes certain

²South African Revenue Service, 'South African Revenue Service Comprehensive Guide to Capital Gains Tax', 2 November 2010 available at <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-CGT-G01%20%20Comprehensive%20Guide%20to%20Capital%20Gains%20Tax%20-%20External%20Guide.pdf> accessed on 19 June 2013

amounts ‘whether of a capital nature or not’. In addition the distinction between capital and revenue amounts is highlighted in the following parts of the Act;³

‘s9C-which deems the amount received or accrued from the disposal of qualifying equity shares held for at least three years to be of a capital nature. s11(a)-which permits a deduction for expenditure and losses actually incurred in the production of income in carrying on a trade ‘provided such expenditure and losses are not of a capital nature’, 11(c) (deduction for certain legal expenses) – which limits the deduction to so much thereof as ‘is not of a capital nature, s24J(3) includes in gross income the amount of any interest determined under that section “whether or not that amount constitutes a receipt or accrual of a capital nature”’.

The case law surrounding the capital versus revenue distinction is always changing and progressing, as is common in many aspects of tax law nonetheless there still exists a set of pioneering cases which are often cited in support or defense of a particular view.

Any amounts which are not found to be subject to income tax are assessed according to capital gains tax rules, which are set out in the Act. In his 2012 budget speech, the Minister of Finance Pravin Gordhan announced an increase in the inclusion rate of capital gains, in taxable income. From 1 April 2012 individuals were to include 33, 3% of taxable capital gains in their taxable income, an increase from 25% in the previous year, while other taxpayers are now to include 66.6% of their taxable capital gains in their taxable income, an increase from 50%.⁴

³ Ibid

⁴L Olivier ‘Capital Versus Revenue: Some Guidance’ (2012) De Jure 45 Volume 1 2012 available at <http://www.dejure.up.ac.za/index.php/en/volumes/45-vol-1-2012/notes/olivier-l.html> accessed on 10 June 2012

The Characteristics of a Good Tax System

The notion of what makes up a good tax system is one which is ever evolving, as economies expand in their scale and complexity so too do the requirements nations place on tax collectors and visa-versa. Despite this particular characteristics or ‘canons of taxation’, which were first introduced in Adam Smith’s renowned ‘The Wealth of Nations’ have long been considered fundamental to all tax systems regardless of their size or inimitability. Smith outlined four maxims of taxation which should apply to taxes in general, namely, equity, certainty, convenience and economy.⁵

Equity in taxation refers to the ideal that citizens of a nation or state should contribute to that state in proportion to their economic ability to do so, that of certainty proposes that all taxpayers should be sure of the tax that they are liable to pay in respect of the time when they will be liable to pay, the manner of payment and the quantity to be paid. Finally Smith proposed convenience and economy as fundamental characteristics of an efficient tax system because he considered taxes should be levied in the same period that income is earned, in the interest of expedience and ease. He conceived of a tax system in which ‘Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state.’⁶

⁵Kalyan City Life ‘What are Canons of Taxation?’, available at <http://kalyan-city.blogspot.com/2010/12/what-is-tax-definition-adam-smith.html> accessed on 15 June 2013

⁶A Smith, ‘An Inquiry into the Nature and Causes of the Wealth of Nations’, 1904, available at <http://www.econlib.org/library/Smith/smWN21.html> accessed on 10 June 2013

It is evident, that while all of these traits are important they are inextricably connected, if taxes are uncertain to the public, they cannot be said to be economic or convenient, in that if there is a dispute with regard to a tax which has been levied the taxpayer may end up paying it long after they have earned the income which attracted the tax liability in the first place. As part of this research these canons of taxation will be examined with reference to the ambiguity which exists in discerning capital amounts for inclusion in taxable income, from revenue amounts to be included.

Adam Smith said of the importance of certainty in a system of taxation:

‘The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person. Where it is otherwise, every person subject to the tax is put more or less in the power of the tax-gatherer, who can either aggravate the tax upon any obnoxious contributor, or extort, by the terror of such aggravation, some present or perquisite to himself.’⁷

Certainty in a system of taxation is advantageous to both the taxpayer and the tax collector. While taxpayers are able to determine how much of their income will need to be allotted to paying tax, tax collectors are able to resolve how much tax they can expect to collect at any given time. This in turn allows for greater ease in facilitating the tax collection and payment process and generally a more efficient system of tax collection.

Another important feature of a proficient tax system is that of simplicity, this is something which many tax regimes often pursue but very seldom achieve. Simplicity in the understanding of any system allows for a greater compliance rate, it provides less room for

⁷ A Smith, ‘An Inquiry into the Nature and Causes of the Wealth of Nations’, 1904, available at <http://www.econlib.org/library/Smith/smWN21.html> accessed on 10 June 2013

obfuscation of facts to achieve a certain tax advantage and makes the task of monitoring tax compliance easier for tax collectors.⁸

Other than the effect that not having these traits might have on the taxpayers and the tax collectors within a particular tax jurisdiction, another important consequence to consider, particularly within the realm of distinguishing capital amounts from their revenue counterparts, is that on foreign investment. Being one of the largest economies in Africa, South Africa has become a preferred investee among multinationals who want to expand their businesses in countries which have a lot of growth potential. Over the past few years while the rest of the world has remained in decline or stagnation South Africa and indeed Africa have continued to grow. Having uncertainties in the country's taxation system is a signal to investors that despite our growth potential they may not realise their assets to their full potential if they are invested in South Africa.

⁸Institute on Taxation and Economic Policy (ITEP) 'Tax Principles :Building Blocks of A Sound Tax System', August 2011, available at http://www.ieanea.org/media/2012/02/Tax_principles.pdf accessed on 4 June 2013

Founders Hill:

AECI Ltd (AECI) was formed in 1924, borne out of a merger between British South Africa Explosives Company and Cape Explosive Works. The company had acquired large amounts of land in this process, to the extent of 4100 hectares (10131.32 acres). This land would serve predominantly as a buffer between the factory which was constructed on it and other occupied land. As technological advances came into play, the legal hurdles which AECI as an explosives company faced began to change. There came a time when AECI, no longer required the amount of land which it had acquired to surround its factory and AECI together with the Johannesburg City Council began a planning process in order to develop the land which AECI no longer had a need for. Founders Hill was formed by AECI to serve as a realisation company, for the purposes of realising the excess land which AECI sought to dispose of. AECI subsequently sold the land to Founders Hill, who went on to develop and sell the land itself.⁹

Initially Founders Hill was not taxed on the sale of this land; however the Commissioner for the South African Revenue Service ('the Commissioner') issued revised assessments for both the 2000 and 2001 income tax years, claiming that the profits made on the sale of the land, did attract income tax liability as income of a revenue nature. In addition the Commissioner assessed the realisation company for interest on the amounts which were outstanding as a result of the revised assessments. For the purposes of this dissertation, the interest which was charged by the Commissioner and considered before the court will not be discussed.

⁹CSARS V Founders Hill (Pty) Ltd 2011 (5) SA 112 (SCA), 73 SATC 183.

After a judgment of the Tax Court held that the profit earned on the sale of the above mentioned land was of a capital nature, the Commissioner appealed the finding to the SCA. It is the finding of this court and the reasons used to support this final decision that will be examined.

Judgment:

The judgment laid down by the Supreme Court of Appeal overturned the Tax Court judgment and held that the land which was sold by the taxpayer, Founders Hill was not of a capital nature. This judgment was underpinned by two principle suppositions made by the Judge, the first of which was that the sale of land from AECI to its realisation company, Founders Hill in order that Founders Hill would realise that land on behalf of AECI, amounted to a change in the nature of the land, from that of a capital asset in the hands of AECI to 'stock-in-trade' in the hands of Founders Hill. Secondly the assertion put forward by Counsel for the respondent, that the intention of Founders Hill to merely realise the land for its parent company AECI, was not accepted as being sufficient motive to warrant the interposition of a realisation company to facilitate the sale of the land. As a result of this, the facts *in casu* were distinguished from those found in the leading cases involving realisation companies, such as *Berea West*¹⁰ and as a result the principles laid down in Founders Hill diverge from those laid down in the aforementioned case too. This analysis shall identify each of the reasons behind the deductions which were made in the judgment and using existing case law, distinguish some discrepancies in the conclusions which were drawn in the judgment and this case law.

¹⁰ *Berea West Estates (Pty) Ltd v SIR 1976 (2) SA 614 (A), 38 SATC 43.*

At the outset, it was common cause between the parties that Founders Hill had acted as AECI's realisation company in selling the land which had been acquired from AECI and as such Founders Hill was subject to the same legal benefaction that had been assigned to other realisation companies in the leading reported cases. However despite there being no contention between the parties on this matter and there being 'no dispute about the circumstances under which the sales, alleged to attract liability for income tax'¹¹ occurred, this point was disputed when the matter was heard on appeal by the Commissioner to the SCA. The Commissioner had contended in its appeal to the SCA, that Founders Hill had 'crossed the rubicon', in its development and subsequent sale of the land it had acquired from AECI and as such, Founders Hill was liable for tax on the profits earned on the sale of this land in accordance with this. It was conceded in the judgement that, '[t]he parties (and the tax court) thus both approached the matter on the supposition that the property was a capital asset in the hands of Founders Hill upon its acquisition, and that the question for determination was whether Founders Hill subsequently 'crossed the Rubicon' by starting to trade in the property'.¹² The issue of what differentiates having realised an asset to its best advantage and having 'crossed the Rubicon' is discussed at length in the judgment but these principles are not applied to the facts of the case in particular detail. Instead what is seen as the proverbial nail in Founders Hills' coffin is that the company was incorporated with the express intention of realising the land and as such this land is considered the stock-in-trade of Founders Hill by the Court.

¹¹CSARS v Founders Hill supra (n9) at 5[7].

¹²CSARS v Founders Hill supra (n9) at 5[6].

Following this, the question of what constitutes a realisation company and in fact whether Founders Hill met that definition is debated in the judgment. The facts in Founders Hill are distinguished from those of *Malone* and *Berea West* as the incorporation of Founders Hill as a realisation company does not create the ease of disposal which Lewis JA infers as a necessary ingredient in the interposition of a realisation company. This supposition begs the question, can Founders Hill be reasonably distinguished from both *Malone* and *Berea West* on this basis and if not, did Founders Hill acquire capital assets or stock-in-trade, in acquiring AECI's land?

The view taken by the Court was expressed as follows;

‘As will be seen, Founders Hill purchased the property from AECI for the very purpose of developing and reselling it. And so the initial question in my view, is whether the property was acquired by it as stock-in-trade’¹³

‘It [Founders Hill] was formed solely for the purpose of acquiring the property and then developing and selling it at a profit and I see no reason then why the property was not stock-in-trade’.¹⁴

The Courts conclusion that the land which Founders Hill had acquired was stock-in-trade was rooted in its deduction that having acquired an asset for resale implied that what the taxpayer had acquired was floating capital. This view failed to take into consideration what is referred to by Eddie Broomberg SC, in his paper entitled ‘*NWK and Founders Hill*’ as the ‘rider to the golden rule, which is to the effect that there cannot be a trade without an intention to trade’¹⁵ This principle is set out in a number of cases which have established that where actions have been taken to dispose of an asset in pursuance of an objective which exists independent of a profit-making objective, those actions are not legally seen as being in furtherance of a trade. This principle has been illustrated in the case of both *Stott*

¹³CSARS v Founders Hill supra (n9) at 3[4].

¹⁴CSARS v Founders Hill supra (n9) at 22[53].

¹⁵E Broomberg SC ‘*NWK and Founders Hill*’ (October 2011) (Page 187) *The Taxpayer* page 188

and *Paul*, where the taxpayers in each instance had disposed of land which was surplus to their needs, just as Founders Hill had done. In both instances the Court found that in disposing of this land, the taxpayers' principle objective had been to release themselves from the burden of holding land which was, for different reasons in each case, surplus to their requirements and not to begin trading in land. For this reason, the Courts in each instance took the view that the profit earned on the aforementioned disposal was capital in nature.

While Founders Hill did acquire the land to sell, for the highest price possible, it at no time had an intention to trade. Upon examination of the commercial significance of the sale of land from AECI to Founders Hill, it is clear that any profit which was earned on the sale of the land would be allotted to the shareholders of Founders Hill. Since Founders Hill was a wholly owned subsidiary of AECI, these profits would accrue to the shareholders of AECI. The judgment laid down in Founders Hill relies heavily on the premise that the incorporation of the realisation company and the sale of land from AECI to Founders Hill amounted to an act which rendered the nature of the profits earned on sale of this land, different, than they would have been had the land been initially held and subsequently sold by AECI. The question was asked, 'If the sole purpose of the transfer to the realisation company is so that it can realize the property, on what basis can it be said that it ever held it as capital?'¹⁶ The failure on the part of the Court to view the intention of the realisation company as being akin to its parent company is what opens the door for Lewis JA's subsequent distinction between Founders Hills' intention sell and AECI's. To this Eddie Broomberg very succinctly points out,

¹⁶ CSARS v Founders Hill supra (n9) at 18[42].

‘Of course, when it comes to a holding company and a wholly owned subsidiary, it will be the same individuals who form the intention and purpose of both the holding company and the subsidiary. It is all the more important, therefore, to keep in mind that when those individual are acting as the board of directors of the subsidiary, they are forming the intention and purpose of the subsidiary. In the case of a realisation company, then the intention and purpose of the subsidiary in acquiring the asset in question will be to realize it on behalf of the parent company, and to account to the parent for the net proceeds. It [Founders Hill] had no profit motive on its own account.’¹⁷

Following this, another distinction is made between the facts of Founders Hill and the reported cases on realisation companies, in that *in casu* the Judge asserted that there was no necessity motivating the interposition of a realisation company. Given that it was common cause between the parties that Founders Hill was a realisation company as had been envisaged in the reported cases, it was not required by Counsel for the respondent to lead any evidence on the matter. So when probed as to the motivation behind the interposition of the realisation company to facilitate the disposal of the land, by the Court, Counsel’s response that it had been legally advised to do so was interpreted as being an insufficient justification for its formation. This was expressed by the Judge as follows;

‘[W]here the original holder of the assets could, without the interposition of a subsidiary company (the sole purpose of which is to realise what was in the former owner’s hands a capital asset), realise the assets itself, there could never be an intention on the part of the interposed entity to realise the property it has acquired as a capital asset. If the sole purpose of the transfer to the realization company is so that it can realise the property, on what basis can it be said that it ever held it as capital?’¹⁸

‘In my view an interposed realization company (or other entity) will stand in the shoes of the entity that has transferred assets to it, and hold them in turn as capital assets, only in special circumstances, exemplified in Holmes JA’s judgment in *Berea West* (where A, B and C hold shares in property and require a vehicle to sell them as advantageously as possible, as was the case in *Berea West*), or where there is a need to protect the assets from the original holder.’¹⁹

As Lewis JA points out, ‘Special cases do not create general rules’.²⁰ As such, how can an intention or motive to trade and realise the land in a scheme of profit-making, be inferred in the creation of a realisation company, as a result of there not having been any other reason

¹⁷ Broomberg op cit (n14) [6]

¹⁸ CSARS v Founders Hill supra (n9) at 18[42].

¹⁹ CSARS v Founders Hill supra (n9) at 19[44].

²⁰ CSARS v Founders Hill supra (n9) at 23[53].

for the incorporation of that company, other than to realise the assets of its parent company?

The wording of Founders Hill's Memorandum of Incorporation was in line with that which has come to be expected from a realisation company, namely,

' "To acquire from AECI Limited certain properties situate at Modderfontein, Johannesburg which are held by AECI Limited as a capital asset and which have become surplus to its needs, *for the sole purpose of realising same to best advantage* and within a period of one year of completion of such realisation to be voluntarily wound up' (my emphasis). The main object of the company was in identical terms.²¹

This follows almost exactly from what was set out in *Berea West* as what constitutes the intention and purpose for the use of a realisation company in realising an asset,

'Suppose for example A, B and C own a tract of land, not having acquired it with a view to sale, and they wish to realise this capital asset: and they promote a company and become the exclusive shareholders: and they transfer the land to the company for the purpose of realizing the asset: and, when it has been sold, the company is to be wound up and its assets distributed among the shareholders. The company would be regarded as a realisation company, and not a company trading for profits, and the surplus would be regarded as a capital receipt; unless, of course, the company conducted itself as a business trading for profits'²²

Founders Hill's activities followed with what was set out in its Memorandum of Incorporation in that it had acquired this land and realised it to its best advantage and subsequently sold it to third parties. It is difficult to justify how AECI's sale of this land to another company, which it wholly owned, in order that it may be realised, could not be considered a sale to a realisation company merely because there were no hurdles to overcome in the disposal of the land. Holmes JA states in his judgment in the case of *Berea West* that a realisation company is not a company which trades for profit, it acts solely to realise an asset for the benefit of its shareholders. Thus the question for determination in a case such as Founders Hill is whether the realisation company's intention is wholly in line

²¹ CSARS v Founders Hill supra (n9) at 6[11].

²² Berea West Estates (Pty) Ltd v SIR supra (n10) at [628]

with this or not and as such the reasons which prompt the use of a realisation company in the first instance are entirely independent of this determination.²³

The distinction between a company's intention and its actions is an important and decisive one, as is correctly pointed out in the judgment, 'Calling an entity a 'realization company' (and limiting its objects and restricting its selling activities in respect of the assets transferred to it), is not itself a magical act that inevitably makes the profits derived from the sale of the assets of a capital nature.'²⁴ AECI no longer had need for the vast amount of land which it had accumulated and so in order to facilitate its disposal formed Founders Hill. In Founders Hill undertaking to dispose of the land, it developed and marketed it, in order to cater to the growing need for urbanisation in the area in which it was situated and any profits earned on disposal of this land were distributed to AECI. This follows on exactly with both Founders Hill's Memorandum of Incorporation and the definition set out in *Berea West* of a realisation company.

It is difficult to see why any difference exists between the two cases or why a legal line could be drawn between the two purely on the grounds that there was no purpose for the incorporation of the realisation company, other than to dispose of the land for the benefit of its parent company.

Did Founders Hill Cross the Rubicon?

²³ Broomberg op cit (n14) [39]

²⁴ CSARS v Founders Hill supra (n9) at 18[42].

The judgment and indeed the finding in this case relied heavily on the premise that the transfer of land by sale from AECI to Founders Hill, in itself constituted a change in intention. For this reason, the assertion that Founders Hill, ‘crossed the Rubicon’ and had embarked on a scheme of profit-making was not considered, as Lewis JA stated:

‘It is only if the property was acquired at the outset as a capital asset that a second question arises—the question that was considered by the court below—which is whether it thereafter “crossed the Rubicon” by commencing to engage in the business of trading in the property.’²⁵

While the sale of land from one company to a realisation company does not usually infer a change in intention, the realisation company may also ‘cross the Rubicon’ in its treatment of a capital asset. Acquisition of the land by Founders Hill, to develop was considered indicative of a change in AECI’s initial capital intention and was interpreted as an objective to use the land as its stock-in-trade. Various pieces of case law set out the guidelines for what is considered to be a change in intention from realising an asset to using it as stock for trading purposes.

Circumstances which would deem the land acquired by Founders Hill stock-in-trade can be determined by assessing the extent to which the taxpayer had undertaken to develop the land for sale. Although a change in intention from the time between an entities initial acquisition of an asset and the time of its sale and the case law surrounding this, is discussed extensively in the judgment, it is not dealt with explicitly in relation to Founders Hill’s sale of land in the years of assessment in question.

²⁵ CSARS v Founders Hill supra (n9) at 3[4].

Wyner:

Facts:

The taxpayer had purchased a property, which she had previously leased for R802 000. On assessment of her taxable income the Commissioner had included the profit on the sale of this property as profit of a revenue nature. The respondent had acquired the right of use of the property on 10 September 1973 through a written lease agreement with the Cape Town Municipality. The lease included the following terms:

- “(1) The lease commenced on 1 October 1973 and was for an initial period of one year where after it was subject to termination at any time by either party giving the other party one month’s notice in writing;
 (2) Upon the rental being in arrears for seven days or longer, the Council was entitled summarily to cancel the lease and eject the respondent;
 (3) On termination of the lease for any reason whatsoever, any improvements (whether necessary or otherwise) of the land would become the property of the Council without the payment of compensation by the latter, but the Council could require the respondent to remove such improvements.”²⁶

During December 1986, the respondent was informed that the property would be offered to her at a price of R228000. However recognising that many of the lessees had invested a lot of money by way of improvements to the properties, the Council amended the initial offer to the lessees. Despite objection to the initial resolution by the Municipality, a second resolution was passed on 24 May 1994, offering the lessees three choices.

- ‘(a) to acquire the property (including the bungalow) at the price of R802 000; or
 (b) to enter into a new lease whereby she could carry on leasing the property for a period of 20 years. (This lease agreement would provide for a market-related monthly rental, determined every three years, together with an option whereby the lessee would be able to acquire the property at any time during the 20 year lease period at a determined market value and it would provide that the building structures and erections already existing on the land were the property of the Council and that any additional buildings, structures and erections which were in future erected on the land whether necessary or otherwise, would immediately upon their construction become the property of the Council without any payment of compensation); or

²⁶CIR v Wyner 2004 (4) SA 311 (SCA), 66 SATC 1.

(c) To vacate the property in order to afford the Council an opportunity to sell it (together with the bungalow) at the then current market value to third parties.²⁷

The taxpayer's financial situation was such that she could not afford to buy the property which had been offered to her by the Municipality nor was she able to meet the expense of the market-related lease payments. At the time this offer was made by the Council a number of financial institutions approached the respondent offering her financial assistance, in order for her to acquire the property. Among these was Investec Bank Ltd ('Investec') which offered to supply the respondent with bridging finance. 'Bridging finance is a short term micro loan that is secured against a future income and is widely used in property transactions to overcome the obstacles presented by time delays.'²⁸ Usually bridging finance is procured by individuals who are selling a property; while the receipt of the proceeds on the sale of any property may be subject to certain conditions, like the completion of legal transfer of ownership; most individuals still have the task of meeting other immediate financial obligations. In such cases cash is needed straightaway to finance expenses such as estate agent fees, the deposit payable on a new property acquired, lawyers' fees and transfer charges.²⁹ Bridging finance allows those, to whom it is extended, the opportunity to meet their short-term obligations while they await a future source of income, such as the proceeds on the sale of property.

²⁷ CIR v Wyner supra (n26) at [21]

²⁸ Home Loans South Africa 'Bridging Finance and how does it work?' Home Loans South Africa, available at <http://www.homeloans-southafrica.co.za/homeloan-costs/bridging-finance>, accessed on 15 July 2013

²⁹ Home Loans South Africa 'Bridging Finance and how does it work?' Home Loans South Africa, available at <http://www.homeloans-southafrica.co.za/homeloan-costs/bridging-finance>, accessed on 15 July 2013

Using the finance which she had procured from Investec, the respondent purchased the property for R802000 and subsequently sold it in September of 1995 pursuant to an agreement she had made with Investec. The taxpayer objected to the inclusion of the profit on sale of the property in her taxable income as a receipt of a revenue nature and appealed to the Tax Court. On appeal from the Tax Court, the Full Court of the Cape of Good Hope Provincial Division upheld the respondent's appeal against the judgment and order of the Cape Income Tax Special Court that the proceeds received by the taxpayer were of a capital nature. The Commissioner appealed to the Supreme Court of Appeal with the leave of the Full Court, leave having been granted in terms of s 20 (4) (b) of the Supreme Court Act 59 of 1959.

The judgment laid down in the Supreme Court of Appeal rested primarily on the premise that the respondent's actions, together with the agreement which she had made with Investec amounted to having embarked on a profit-making scheme. In addition, the court rejected the proposition that the lessee had any interest in the property as 'The respondent's counsel was unable to define the nature of the interest which the respondent allegedly had other than that disclosed in the documents.'³⁰

In order to reach any conclusion on the matter, there is one fundamental distinction which must be made. Was the profit on sale of the property in question, designedly sought for and/or earned in the course of carrying on a business or conversely, was the respondent salvaging an asset to her best advantage?

³⁰ CIR v Wyner supra (n26) at [34]

A Scheme of Profit-Making:

There have been a number of cases which have dealt with the issue of what constitutes a taxpayer having embarked on a scheme of profit-making, however *Pick 'n Pay Employee Share Purchase Trust* has long been the authority on this issue. This judgment cited a number of cases as authority for the decision in that case, which are useful in assessing the facts of *Wyner*.

In the judgment of *Californian Copper Syndicate v Inland Revenue* the Lord Justice Clerk highlighted the distinction which must be made in determining whether gains on the disposal of assets are capital or revenue in nature.

‘What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts, the question to be determined being, is the sum of gain that has been made a mere enhancement of value by realising a security, or is it, a gain, made by an operation of business in carrying out a scheme for profit-making.’³¹

The judgment went on to further separate the approach into that which must be adopted in ascertaining gains made by a company and those made by an individual, citing the judgment of Stratford JA in the case of *Leydenberg Platinum*, ‘A "business", so far as an individual taxpayer is concerned, is characterized by a series of transactions having an element of continuity, and usually performed in the contemplation of making a profit.’³²

With regard to the characteristics of a ‘business’, which an individual may embark on, namely that of continuity and having involved a series of transactions, reference was made to the case of *Platt and Stott*. The dicta laid down by Wessels JA in the case of *Stott*, in

³¹Californian Copper Syndicate v Inland Revenue (1904) 4Sc.L.R. at 694

³²CIR v Leydenberg Platinum Ltd 1929 AD 137, 4 SATC 8 at 145-6.

determining whether the gains on the sale of various plots of land were to be considered capital or revenue stated,

If you are dealing with a company one of whose objects is to buy and sell land, then the company might well be considered to be doing the business of selling and buying land even though it carries out only a single transaction; but when an individual like a surveyor who is not professedly carrying on the occupation of a landjobber buys and sells one or more plots of land, he cannot be said *prima facie* to be doing the business of a landjobber. Before it can be said that an individual is carrying on a business there must be some proof of continuity.³³

In the case of *Platt* the following principle was put forward, 'In the case of a company formed for certain purposes, the question of the continuity of the acts, which is another factor to be considered in deciding whether a business is carried on, is not of the same importance as in the case of an individual.'³⁴

Thus, it is evident from the above that when it falls to determine the nature of a gain made on the disposal of an asset, a different approach must be adopted in ascertaining the gains made by a company in comparison to those made by an individual. *In casu* the taxpayer did not trade in property and there was no continuity in her actions. Given the choices which had been made available to the taxpayer, after the resolution made by the Cape Town Municipality and in her financial situation, the respondent had no other option but to make use of the financial assistance which had been offered to her and acquire the property or risk losing her home by vacating the property.

Watermayer CJ, said in the judgment laid down in the case of *New State Areas*, albeit in regard to the capital versus revenue distinction with reference to the nature of expenditure,

³³CIR v Stott 1928 AD 252, 3 SATC 253 at [262]

³⁴Platt v CIR 1922 AD 42, 32 SATC 142 at 51

‘The conclusion to be drawn from all of these cases, seems to be that the true nature of each transaction must be enquired into in order to determine whether the expenditure attached to it is capital or revenue expenditure.’³⁵ In the present case, the true nature of the transaction which saw the respondent obtaining finance and using it to acquire the property she had previously lived in, was that she had no other reasonable alternative, given the options available to her. The only way she was able to afford to purchase the property was because of the bridging finance which had been advanced by Investec. Both the options to purchase the property and reside there or to purchase and subsequently let the property were not financially viable, as she would not have been able to pay back the loan which allowed her to purchase the property in the first place. Thus the only option she had was to vacate the property or to use financial aid presented by Investec, to acquire the property and realise it. In his judgment Southwood AJA stated:

‘The argument that the profit was not designedly sought for and worked for and was fortuitous cannot be accepted. A distinction must be drawn between the making of the discounted offer, which clearly was fortuitous, and the acquisition of the property for resale, which was anything but fortuitous. With the assistance of Investec the respondent devised a scheme whereby she could make the very large profit which was inherent in the offer. She clearly seized the opportunity to make this profit.’³⁶

With respect, the distinction which the learned judge fails to make here is that while the resale of the property and the profit earned as a result, was most certainly not fortuitous, the profit on sale had not been designedly sought out. While this may initially seem counter-intuitive, it is important to note that while operations which may bear the hallmarks of trade, the most significant consideration in making the capital versus revenue distinction with regard to income earned, is whether these operations are accompanied and supported

³⁵ *New State Areas Ltd v CIR* 1946 AD 610, 14 SATC 155 at 627

³⁶ *CIR v Wyner* supra (n26) at [36]

by an intention and purpose to trade as was asserted in *Pick 'n Pay Employee Share Purchase Trust*.

Given no other choice but to vacate the property she had resided in for more than 20 years, the respondent had no other option but to try and salvage the interest she had in the property. The respondent sought to sell the property in order that she could use the proceeds to both pay off the loan from Investec and in order to acquire another property to reside in, both of which she did upon the receipt of the proceeds on the sale. Her primary intention does not meet the criteria of continuity which Wessels JA described as having been required to show an individual is carrying on a business and in addition is absent from the respondents actions.

The weight which is ascribed to intention with respect to matters of this nature, is highlighted in the judgment of *SIR v Trust Bank of Africa Ltd*, where it was held that, '[i]n an enquiry as to the intention with which a transaction was entered into for purposes of the law of income tax, a court of law is not concerned with the kind of subjective state of mind required for the purposes of criminal law, but rather with the purpose for which the transaction was entered into.'³⁷ In support of this it is useful to consider the case of *CIR v Paul*, in which the taxpayer was taxed on the profit which he had earned on the sale of land that he had initially acquired but which was surplus to his needs. The taxpayer had expressed to the seller of the land, that he only wished to acquire between 30 and 40 acres of it however the seller would only agree to the sale of 167 acres. Initially the taxpayer had

³⁷ *SIR v Trust Bank of Africa Ltd*, 1975 (2) SA 652 (A), 37 SATC 87.

entered into an agreement with his brother-in-law, to acquire a half-share of the 167 acres the seller was willing to dispose of, so that together they would be able to finance the acquisition of the full 167 acres. After coming into some money, the taxpayer had enough capital to finance the purchase of the full 167 acres on his own and following the purchase of the land, he developed approximately 100 acres of it, which were in excess of his needs and sold them. After having appealed the inclusion of the profit on the sale of such land as having been revenue in nature, the Supreme Court of Appeal found that it is the taxpayer's main or dominant purpose which must be considered, citing the case of *Levy*.³⁸

Just as the respondent *in casu* had done, the taxpayer in the case of *Paul* had acquired an asset which had been in excess of his needs. Mrs Wyner had purchased the property *in casu* to salvage the interest she had vested in it over time, as her primary residence and through the improvements she had effected on it, the value of which would pass to The Cape Town Municipality in the event that she chose to vacate the property. Given her financial circumstances the property was unaffordable and so in order to recover her interest, she had to invoke the assistance of a loan, which could only be paid off and which would have only been advanced to her on condition that the property was sold. Her dominant intention in acquiring the property had not been to attain the highest profit possible on sale and then go on to purchase more property, as is customary for a trader. Instead her intention was to recover the interest in what had been her primary residence for more than 20 years and to

³⁸ Commissioner for Inland Revenue v Paul 1956 (3) SA 335 (A), 21 SATC 1.

use the proceeds to meet the obligation of the loan extended to her and to purchase a smaller residence elsewhere.

This distinction was highlighted ubiquitously in the case of *Pick 'n Pay Employee Share Purchase Trust* by both Smalberger JA in his majority judgment and by Nicholas AJA in his dissenting judgment. The facts regarding the extent of *Pick 'n Pay Employee Share Purchase Trust's* dealings are as follows,

'It was part of the duties of the trustees inter alia to subscribe for or purchase shares in the capital of Stores in accordance with the provisions of the scheme; to seek applications from eligible applicants for the purchase of such shares and to sell them to such applicants; and to administer the scheme in order to achieve and maintain the objects stated in paragraph 1.1. The price payable by participants for scheme shares was in practice the middle market price on the Johannesburg Stock Exchange at the time of acceptance of the application concerned.'³⁹

'The schedule records a continuous series of share-dealing activities by the Trust during the four years of assessment.'⁴⁰

Nicholas AJA in his dissenting judgment asserts,

'...a distinction is drawn between the carrying on of a business and the pursuance of a profit-making scheme. The basis for such distinction is that it is more appropriate to refer to a profit-making scheme where a single transaction is involved. I accept that a series of transactions is characteristic of the carrying on of a business. But irrespective of the number of transactions, whether the receipts that flow from the carrying on of a business are revenue still depends on whether the business was conducted with a profit making purpose, i e as part of a profit-making venture or scheme. To hold otherwise would amount to a departure from the earlier authorities – something clearly never intended in either the *Natal Estates* or *Elandsheuwel Farming* cases.'

The respondent had been approached by a financial institution which would assist in her in salvaging her personal interest in the property and after she had successfully sold the property, she went on to acquire another smaller property to reside in and invested the surplus funds. These actions are contrary to those which would be customary for an individual who traded in properties. Given the large profit she had earned on sale and the

³⁹ CIR v *Pick 'n Pay Employee Share Purchase Trust* 1992 (4) SA 39 (A), 54 SATC 271.

⁴⁰ CIR v *Pick 'n Pay Employee Share Purchase Trust* supra (n39) at page 8

bridging finance she had used to acquire the property, she had every opportunity to enter into the same transaction with Investec to acquire more property but she did not, entirely in line with her objective of acquiring a reliable place to stay. Southwood JA, in his judgment stated;

‘The fact that the respondent acquired a cheaper residence in the same area with the proceeds of the sale does not alter the revenue nature of the purchase and sale of the property. The character of the proceeds from the sale of the property is determined by whether the property was purchased and held for investment or for resale. If the second and cheaper property were in the future to be sold, the character of the proceeds of that sale would be determined by assessing whether the respondent purchased the cheaper property for investment or for resale.’⁴¹

With respect, this approach, failed to take into consideration the significance which had been assigned to the characteristics of continuity and the premise that for an individual to be considered to be trading, they should have been involved in a series of transactions.

⁴¹ CIR v Wyner supra (n26) at [37]

Conclusion:

The cases of *Wyner* and *Founders Hill* are tasked with making the capital versus revenue distinction and in addition both are concerned with determining the nature of income earned on the disposal of an asset, which is acquired for the purpose of resale. While the law surrounding the capital versus revenue distinction is fundamentally ambiguous, this holds true for a reason. There exists no one true definition of what constitutes income of a capital nature, which can be applied to all circumstances because to use one definition would amount to a failure to recognise the complexity of the distinction. The capital versus revenue distinction, as a feature of income in the context of tax law is so complex because it is ever-evolving. As the intricacy of commercial transactions increase, so the law on this matter must develop and thus to apply one single definition or principle in order to make the distinction between capital and revenue amounts, in every situation would amount to a failure to identify these intricacies.

Since the inception of capital gains tax in the South Africa, a multitude of judgments have given rise to case law on the matter. The capital and revenue distinction is a unique one in that, even within the case law which is tasked with deciphering it, there are no decisive tests to determine one from the other. This was first set out in the judgment of Wessels JA in the case of *Stott*, one of the earliest cases involving the capital and revenue distinction, which is still cited widely today.

‘There is no definite set test which can be applied in order to determine whether a gain or profit is income or capital’⁴²

⁴² CIR v Stott supra (n33) at [264]

This idea was further highlighted in the case of *Natal Estates*, another leading judgment on the matter in which Holmes JA stated;

Important considerations include, *inter alia*, the intention of the owner, both at the time of buying the land and when selling it (for his intention may have changed in the interim); the objects of the owner, if a company; the activities of the owner in relation to his land up to the time of deciding to sell it in whole or in part; the light which such activities throw on the owner's *ipse dixit* as to intention; where the owner sub-divides the land, the planning, extent, duration, nature, degree, organisation and marketing operations of the enterprise; and the relationship of all this to the ordinary commercial concept of carrying on a business or embarking on a scheme for profit. Those considerations are not individually decisive and the list is not exhaustive.⁴³

In *Pick 'n Pay Employee Share Purchase Trust*, one of the principal cases on what is legally considered having embarked on a 'scheme of profit-making,' this premise was again emphasised when Nicholas AJA very succinctly stated;

'The problems to which the expressions receipts "of a capital nature" and expenditure "not of a capital nature" give rise are perennial and have generated a large number of decided cases, but the tests therein enunciated are not to be regarded as either prescriptive or comprehensive: they do no more than provide guidelines for the solution of the problems which arise. Ultimately each case must be decided on its own facts.'⁴⁴

All three judges affirm the premise, that while there are numerous considerations which must be made in distinguishing the nature of gross income, no one factor is decisive. However despite this, a number of tests have been developed over time which give guidance on how best to approach the task of making the distinction. While these tests are most certainly useful and in many cases decisive in making the distinction, uncertainty arises in applying these tests uniformly. This is because before one can ascertain which tests should be applied, the most relevant factors to be considered, given the contention which has arisen, must be determined. Only once the most relevant factors for

⁴³ *Natal Estates Ltd v SIR* 1975 (4) SA 177 (A), 37 SATC 193 at 202G-203A.

⁴⁴ *CIR v Pick 'n Pay Employee Share Purchase Trust* supra (n39) at page 16

consideration have been selected can the appropriate test be applied to the facts. This is where an important judgment must be made and this is one area where uncertainty arises. While early cases on the capital versus revenue distinction such as *Stott, Paul and John Bell and Co*, are still cited often in defense or attack of a certain position, modern day commercial dealings have become so complex that the principles underlying each of these cases, can often get distorted in the facts surrounding the convoluted commercial transactions. In addition, among the many different tests and facts for consideration, what one may consider as important in coming to a conclusion, another may not, also leading to uncertainty in the outcome of litigation on the subject.

Generally the terms objective and intention are used to describe what a person does, whereas the words the word motive is used to explain why a person does something. The importance with which these two factors have been assigned has varied in different cases. In the *Pick 'n Pay Employee Share Purchase Trust* case Nicholas AJA, in his judgment, distinguished between the business' object and its motive stating, 'A distinction is to be drawn between the *raison d' être* of the scheme and the scheme in action - between the overall purpose of the scheme and the transactions performed in executing it.'⁴⁵ Contrary to this in the case of *CIR v Paul*, Centlivres CJ stated;

'There seems no room for reasonable doubt that the appellant's intention in acquiring the property originally was what he has stated in evidence, and, that being so, we are unanimously of the view that he intended to make a capital investment. We are also satisfied that, at all relevant times his object was to sell the surplus over and above his own requirements and to do so at a profit if he could.'⁴⁶

⁴⁵ *CIR v Pick 'n Pay Employee Share Purchase Trust* supra (n39) at page 42

⁴⁶ *Commissioner for Inland Revenue v Paul* supra (n38) at [340]

The above is an example of how in one case, namely *Paul*, the words object and motive are used interchangeably, whereas in the case of *Pick 'n Pay Employee Share Purchase Trust*, a distinction is made between them and so the two cases produce contrary outcomes.⁴⁷ While it may be appropriate to adopt one approach rather than the other in certain circumstances, implementing one approach instead of the other may lead to counter-intuitive outcome, in principle, as is seen in the case of *Wyner*.

This distinction between motive and intention again arises, in a different form in the case of *Founders Hill*, where Lewis JA distinguishes the intention and purpose of Founders Hill in disposing of the land it had acquired, from the intention and purpose of its parent company AECI. In doing this, it is concluded that the nature of the land which was acquired by Founders Hill, from AECI was in-fact stock-in-trade, despite it being common cause between the parties that what was acquired, was a capital asset. In addition, in the judgment laid down by Lewis JA, a distinction was made between the facts surrounding other reported cases on realisation companies, including *Berea West* and for this reason, the principle laid down in *Berea West* was not seen to be appropriate to apply to *Founders Hill*. In the paper entitled '*NWK and Founders Hill*', this distinction is highlighted as follows,

‘In treating the proceeds on the disposal of assets by a realisation company as being of capital nature, the Courts in *Berea West*, *Malone Trust et al* were simply applying the basic principle, the golden rule that holds that if there is no trading for profit there can be no trading stock. This has nothing to do with a supposed exception to a supposed general rule, as the *Founders Hill* Court would have it.’⁴⁸

⁴⁷ L Olivier op cit (n5) 3

⁴⁸ Broomberg op cit (n14) [45]

While the interpretation of intention versus motive may have been significant to the outcome of in each case, the interpretation of the law was also imperative to have come to the conclusion each judge did. The approach adopted in the case of *Founders Hill* was literal, some may even say excessively so. The reasoning supporting the judgment laid down leads to the premise that by distinguishing any case on the basis of a certain premise, even one which may not be correct, an alternative outcome may be found. While this may indeed be appropriate in certain circumstances, if a minor difference in the facts is used to distinguish, what is in principle the same thing, contrary outcomes may prevail, to the detriment of certainty.

This difference in approach is the result of a difference in perspective on whether the law relating to a case, should be interpreted literally or whether consideration should be given an equitable and literal interpretation. In his consideration of the facts of *Wyner*, Counsel for respondent expressed the significance of this distinction in his appeal, noting;

‘The choice faced by this court is whether to adopt a narrow approach which focuses mainly on the purpose of purchasing the property with the intention of selling it some 12 months later and the sale thereof, or to adopt a broader approach which takes into account the fact that the respondent had occupied the property for more than 20 years as well as the fact that the respondent bought and sold the property some 12 months later in the context of her prior occupation as lessee, who had an ‘interest’ in the property that was no less real for being unexpressed.’⁴⁹

To say that by merely by challenging the correctness of a decision made by the SCA, uncertainty and inequity exists in the South African Tax regime would be amiss. However the complex nature of the capital revenue distinction opens up its legal interpretation to obfuscation. Therefore it is the middle ground between having regard to the variable,

⁴⁹ CIR v *Wyner* supra (n26) at [29(5)]

indefinite distinction between capital and revenue and the notion that an efficient tax system should be one which bears characteristics such as certainty, simplicity and equity, which should be sought. Smalberger JA said in his judgment of *Pick 'n Pay Employee Share Purchase Trust*;

‘There are a variety of tests for determining whether or not a particular receipt is one of a revenue or capital nature. They are laid down as guidelines only - there being no single infallible test of invariable application. In this respect I agree with the following remarks of Friedman J in ITC 1450 (at 76) "But when all is said and done, whatever guideline one chooses to follow, one should not be led to a result in one's classification of a receipt as income or capital which is, as I have had occasion previously to remark, contrary to sound commercial and good sense."’⁵⁰

Therefore it cannot be said that the South African tax system or any other for that matter, is poorer for not having defined the term ‘amounts of a capital nature’ or not having distinguished it from ‘amounts of a revenue nature’. Indeed it is all the better for it. It has been said that, ‘things should be made as simple as possible, but not any simpler’⁵¹ and the same holds true for the capital versus revenue distinction. To simplify what is in essence a multifaceted subject would be to the detriment of equity, in that a single definition, when applied to a variety of circumstances may yield a legally incorrect result. Thus in terms of what Adam Smith termed the canons of taxation, it is fitting that the capital versus revenue distinction has been left to the mercy of the Courts which preside over it. It will continue to hold true for as long matters of tax are litigated, that the correctness of decisions laid down will be probed and challenged. However with regard to the cases of *Wyner* and *Founders Hill*, both seem to contradict one of the most fundamental traits of both taxation and law,

⁵⁰ CIR v *Pick 'n Pay Employee Share Purchase Trust* supra (n39) at page 52

⁵¹ Brainy Quote ‘Oversimplification’ available at

<http://www.brainyquote.com/quotes/quotes/a/alberteins148825.html> accessed on 10 September 2013

that of equity. In both instances the substance of what had actually occurred was hidden by a clouding of the law and the facts in relation to the law and it is these cases which are bound to muster uncertainty and which allow for what Adam Smith termed to ‘aggravate the tax upon any obnoxious contributor, or extort, by the terror of such aggravation.’

University of Cape Town

Bibliography

Primary Sources

Cases

South African Cases

CSARS v Founders Hill (Pty) Ltd 2011 (5) SA 112 (SCA), 73 SATC 183.

Berea West Estates (Pty) Ltd v SIR 1976 (2) SA 614 (A), 38 SATC 43.

CIR v Wyner 2004 (4) SA 311 (SCA), 66 SATC 1.

CIR v Leydenberg Platinum Ltd 1929 AD 137, 4 SATC 8.

CIR v Stott 1928 AD 252, 3 SATC 253.

Platt v CIR 1922 AD 42, 32 SATC 142.

New State Areas Ltd v CIR 1946 AD 610, 14 SATC 155.

SIR v Trust Bank of Africa Ltd 1975 (2) SA 652 (A) 37 SATC 87.

CIR v Paul 1956 (3) SA 335 (A), 21 SATC 1.

Natal Estates Ltd v SIR 1975 (4) SA 177 (A), 37 SATC 193.

CIR v Pick 'n Pay Employee Share Purchase Trust 1992 (4) SA 39 (A), 54 SATC 271.

Foreign Cases

Californian Copper Syndicate v Inland Revenue (1904) 4Sc.L.R. (UK)

Statutes

Income Tax Act 58 of 1962

Secondary Sources

A Smith, 'An Inquiry into the Nature and Causes of the Wealth of Nations', 1904, available at <http://www.econlib.org/library/Smith/smWN21.html> accessed on 10 June 2013

B Croome 'SARS argues company crossed the tax Rubicon' 14 June 2011 available at <http://www.bericcroome.com/2011/06/sars-argues-company-crossed-tax-rubicon.html?m=0> accessed on 10 June 2013

Brainy Quote 'Oversimplification' available at <http://www.brainyquote.com/quotes/quotes/a/alberteins148825.html> accessed on 10 September 2013

Brink Cohen Le Roux 'Purchasing Property For The Purpose Of Reselling It At A Profit Is a Taxable "Scheme Of Profit Making"' available at http://bclr.com/purchasing_property.htm accessed on 10 June 2013

E Broomberg SC 'NWK and Founders Hill' (October 2011) (Page 187) *The Taxpayer* page 188

Home Loans South Africa 'Bridging Finance and how does it work?' Home Loans South Africa, available at <http://www.homeloans-southafrica.co.za/homeloan-costs/bridging-finance>, accessed on 15 July 2013

Institute for Fiscal Studies 'The Economic Approach to Tax Design' available at <http://www.ifs.org.uk/mirrleesreview/design/ch2.pdf> accessed on 4 June 2013

Institute on Taxation and Economic Policy (ITEP) 'Tax Principles :Building Blocks of A Sound Tax System', August 2011, available at http://www.ieanea.org/media/2012/02/Tax_principles.pdf accessed on 4 June 2013

Kalyan City Life 'What are Canons of Taxation?' available at <http://kalyan-city.blogspot.com/2010/12/what-is-tax-definition-adam-smith.html> accessed on 4 June 2013

L Pretorius ‘A critical analysis of recent Supreme Court of Appeal Judgments that have deviated from the Stare Decisis principle’, June 2012, available at http://c.ymcdn.com/sites/www.thesait.org.za/resource/resmgr/h_dip_dissertations/a_critical_analysis_of_recen.pdf?hhSearchTerms=founders+and+hill Accessed On 17 June 2013

L Olivier ‘Capital Versus Revenue: Some Guidance’ (2012) De Jure 45 Volume 1 2012 available at <http://www.dejure.up.ac.za/index.php/en/volumes/45-vol-1-2012/notes/olivier-1.html> accessed on 10 June 2013

National Treasury ‘Capital Gains Tax In South Africa’ Briefing by the National Treasury’s Tax Policy Chief Directorate to the Portfolio and Select Committees on Finance, 24 January 2001 available at <http://www.ftomasek.com/NationalTreasury.pdf> accessed on 10 June 2013

South African Institute Of Tax Practitioners ‘The meaning of “expenditure” (CSARS v Labat Africa case)’, February 2012 available at <http://www.thesait.org.za/news/82756/Corporate-Tax-The-meaning-of-expenditure-CSARS-v-Labat-Africa-case.htm> accessed on 17 June 2013

South African Revenue Service, ‘South African Revenue Service Comprehensive Guide to Capital Gains Tax’, 2 November 2010 available at <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-CGT-G01%20%20Comprehensive%20Guide%20to%20Capital%20Gains%20Tax%20-%20External%20Guide.pdf> accessed on 19 June 2013

Smith Tabata Buchanan Boyes ‘Summary of the Judgement- “Company's Tax Liability On Sale Of Assets – Is The Return Capital Or Revenue?”’ 10 May 2011 available at http://www.stbb.co.za/uploads/stbb_plu17-2011_s1.pdf accessed on 15 July 2013