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PLOBAR ESTATES (PROPRIETARY) LIMITED

AND

COMMISSIONER FOR INLAND REVENUE

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PLOBAR ESTATES (PROPRIETARY)LIMITED Appellant

AND

COMMISSIONER FOR INLAND REVENUE Respondent

CORAM: Corbett,Miller, Hoexter, Grosskopf, JJA et Nicholas, AJA

HEARD: 9 May 1985

DELIVERED: 24 May 1985

J U D G M E N T

NICHOLAS, AJA

The question in this appeal is the familiar one, whether the profits arising out of the disposal of land

by .....

by a taxpayer were accruals of a capital nature and hence not subject to tax.

The taxpayer is PLOBAR ESTATES (PTY) LTD ("PLOBAR") which carried on business in OUDTSHOORN. In 1965 it owned fixed property, namely, a block of flats and an adjoining dwelling. Its income was derived from rentals and interest.

In about August 1965 it purchased three erven fronting on Jan van Riebeeck Road, Oudtshoorn, 2,5824 hectares in total extent, and zoned for use as agricultural land. On 11 December 1967, at a time when the authorities had begun rezoning land in the area from agricultural zoning, PLOBAR made application for the

subdivision .....

subdivision and rezoning of the ground. Approval was given on 16 March 1971. In 1972 the erven were consolidated and then subdivided into five residential and three agricultural erven. To the west the block of residential erven fronted onto Jan van Riebeeck Road, and it was separated from the three agricultural erven and the erven on either side by newly constructed roads.

PLOBAR disposed of some of the erven during the years of assessment ended 30 June 1974, 1975 and 1976, realizing profits as follows:

1974	R2941
1975	R7015
1976	R5844

In its returns of income for each of those years PLOBAR

sought .....

sought to deduct the respective amounts from its income, and also to deduct certain administration fees. The Commissioner for Inland Revenue, however, added back the said amounts and the administration fees to PLOBAR's income, and on that basis issued assessments for normal tax in respect of a taxable income amounting to R3184,00 in 1974, R7263,00 in 1975, and R7158,00 in 1976.

Against those assessments PLOBAR lodged objection and appeal on the grounds (a) that the profits on the sale of land constituted receipts of a capital nature, and (b) that the administration fees constituted expenditure incurred in the production of income.

The appeal was heard by the Eastern Cape Income

Tax .....

Tax Special Court, with SMALBERGER J presiding. The Court upheld the appeal so far as it related to the administration fees, but dismissed it so far as it concerned the profits on the sale of land. It held that PLOBAR had "failed to establish that the land was acquired as a capital asset .... and that the resultant profits from the sale of portions thereof amounted to accruals of a capital nature."

An appeal by PLOBAR to the Eastern Cape Division of the Supreme Court was dismissed with costs (per KANNEMEYER and EKSTEEN JJ, STEWART J dissenting). PLOBAR now appeals to this Court with the leave of the Court a quo.

In deciding whether 'a disposal of land was a

realization .....

realization of a capital asset, the intention with which the land was acquired is always of primary and may often be of decisive importance. The onus in this regard rests on the taxpayer, and in considering whether it has been discharged, the activities of the taxpayer in relation to the land up to the time of the sale, and any other relevant circumstances, are of importance for the light they throw on his assertion as to intention.

The only witness before the Special Court was Mr. ISADORE BARRON. During the relevant period he held all but one of the issued shares in PLOBAR; he controlled the company; and he was its directing mind.

In his evidence before the Special Court, BARRON said .....

said that he lived in Oudtshoorn. He was a business-man with wide interests, which included ostrich farming on a large scale - an activity in which his family had been engaged for three generations.

In about August 1965, acting for PLOBAR, he purchased the land concerned from the insolvent estate of one LOMBARD for about R3 000,00 - "a very small sum". His reasons were two-fold: the land was in front of his home in Jan van Riebeeck Road, Oudtshoorn, and he wanted to ensure that "nobody started anything noxious there", such as pig or horse breeding which might cause a fly nuisance; and he intended to use it for breeding and raising ostriches. That would be "a viable

economic proposition" which would yield about R1 000,00 per annum.

After PLOBAR acquired the land, BARRON said, steps were taken to put into effect the intention of farming it. The ground was levelled to make it suitable for flood irrigation. The whole area was fenced and divided into three camps. The fences were jackal-proofed. Lucerne was planted, presumably to provide fodder for the ostriches. Twenty-one ostrich chicks were brought from a farm of BARRON's outside the district and raised up to six months, at which stage an ostrich is fully grown. Then one night marauding dogs got in under the jackal-proofed fencing and killed eighteen

of the ostriches; another died subsequently and two more were injured. BARRON said, "I was so disgusted that I just deferred everything and did not continue bringing any more chicks there." Later he discovered that many other people in Oudtshoorn had had similar or worse experiences.

Subsequently the land lay fallow. He did not farm it because coloured employees (who might have supervised operations there) were not permitted to live on the land, and because he was a farmer on a large scale and "this was a comparatively fiddly piece of ground" which was not practical for his way of operating. He did not lease the land, and PLOBAR at no time derived any income

from .....

from it.

BARRON's evidence stood alone, but that was no reason why it should have been accepted. "It does not follow that because evidence is uncontradicted, therefore it is true ..... The story told by the person on whom the onus rests may be so improbable as not to discharge it." (Siffman v Kriel 1909 TS 538 at 543); or the witness's evidence regarded as a whole may not bear the impress of truth (See Nelson v Marich 1952(3) SA 140(A) at 149). See also Secretary for Inland Revenue v Gallagher 1978(2) SA 463(A) at 472.

In the judgment of the Special Court, it was stated that BARRON was "a verbose, frequently evasive and

not .....

not very impressive witness" and that "there were significant differences between the facts set out in the correspondence and those deposed to by Mr. Barron."

The Special Court found, despite BARRON's evidence, that "no efforts were ever made to farm the property." In argument before us, this finding was strongly attacked by counsel for PLOBAR as being contrary to the unchallenged evidence of BARRON.

In my opinion the Special Court's finding was fully justified.

The overall impression given by the letters written to the Receiver of Revenue on PLOBAR's behalf was that no steps to farm the land were taken at any time:

the idea of farming was abandoned very shortly after the acquisition, before anything was done on the land, because neighbours, who had experienced losses due to attacks on their ostriches by roving dogs, advised against it.

The Receiver of Revenue requested information from PLOBAR on two specific points: (a) furnish details of the actual development to the property; and (b) for what purpose was the property actually used over the years?

PLOBAR's answer to the first query was the following:

> "Details of actual development to the properties:
>
> | | |
> |---|---|
> | Levelling | R 173,00 |
> | Roads | R 773,60 |
> | Survey Fees | R 494,70 |
> | | R1441,30 " |

Nowhere in the correspondence did PLOBAR refer to fencing

the land, jackal-proofing or an actual division into camps. The reference in the reply to levelling was, it is clear from BARRON's own evidence, not to levelling for the purpose of flood irrigation, but levelling in connection with the sub-division of the ground, which took place years after the alleged idea of farming had been abandoned. The only reference to a division into camps was in a letter written on PLOBAR's behalf in 1980, where it was stated that the erven could have been broken into 8 camps.

The answer to the second query was this: "Purpose property used over the years: Redundant (vacant)." There was no mention in any of PLOBAR's letters of the

planting .....

planting of lucerne, or of the raising of the twenty-one ostrich chicks, or of the canine carnage. When SMALBERGER J put it to BARRON that the impression given by PLOBAR's letters was that no farming venture was ever commenced on the land, his answer was:

> "I did not bring Plobar's own ostriches there and I did not do it on a large scale ... We did experiment with ostriches there. That is so. But they did not belong to Plobar Estates .... They belonged to me."

This answer was disingenuous. If in fact actual steps, namely, levelling the ground, fencing it, dividing it into camps and planting it with lucerne were taken, and if ostrich chicks were raised (whether by PLOBAR or BARRON is immaterial), and if the slaughter of the ostriches did take place, the

omission .....

omission to mention any of these matters in the correspondence is inexplicable. They could not have been forgotten, and the omission gives rise to at least a strong suspicion that BARRON's evidence in this regard was fabricated.

It was argued on behalf of PLOBAR that, in stigmatizing BARRON as "a verbose, frequently evasive and not very impressive witness" the Special Court failed to make allowance for the fact that BARRON gave his evidence fifteen years after the time of the relevant events, and for the fact that he was subjected to a cross-examination which was often unfair and improper.

In regard to the lapse of time, the Court's finding .....

ding related, not to the accuracy of BARRON's recollection, but to other shortcomings in his evidence.

It is true that the cross-examination of BARRON by the Commissioner's representative was subject to criticism, and upon occasion SMALBERGER J intervened in it. Counsel's submission that BARRON was "irritated or upset" by such cross-examination gets no support from a reading of the record of his evidence.

In my view it has not been shown that there is any reason to disagree with the Special Court's finding that BARRON's evidence was unsatisfactory and insufficient to discharge the onus resting on PLOBAR.

It was also submitted that in its judgment the

Special Court relied on "neutral facts" to support its conclusion, and failed to "give consideration to the actualities of the situation and the probabilities of the case."

The so-called "neutral facts" were that PLOBAR's objects as set out in its memorandum of association permitted property speculation; that PLOBAR had prior to the acquisition of this land speculated in property; and that "the land had been acquired cheaply from an insolvent estate, a situation lending itself to speculation." I agree that these matters, regarded separately, were in themselves not of any great importance, but I do not think that the Special Court gave undue weight to any of them .....

them. They were regarded, not in isolation, but as part of the totality of all the circumstances of the case.

There was no specific mention in the judgment of the Special Court of the other matters relied on by counsel, but I do not think that any of them could have affected the conclusion that BARRON's evidence was not of such a quality as to discharge the onus.

The appeal is dismissed with costs.

H C NICHOLAS, AJA

CORBETT, JA
MILLER, JA
HOEXTER, JA
GROSSKOPF, JA } Concur