THE ‘REALISATION COMPANY’ CONCEPT IN SOUTH AFRICAN INCOME TAX LAW

BY

DANIEL JACQUES GROBLER

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PORT ELIZABETH

SUPERVISOR: Professor AJN Brettenny

CO-SUPERVISOR: Mr D Joubert

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DECLARATION

This project is an original piece of work which is made available for photocopying, and for inter-library loan.

Signed at Port Elizabeth on 23 January 2012.

D.J. Grobler
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# TABLE OF CONTENTS

**DECLARATION** .......................................................................................................................... ii

**ACKNOWLEDGEMENTS** .............................................................................................................. iii

**TABLE OF CONTENTS** ................................................................................................................ iv - vi

**TABLE OF CASES** ...................................................................................................................... vii - viii

**SUMMARY** ..................................................................................................................................... ix - x

## CHAPTER 1

**INTRODUCTION AND BACKGROUND**

1.1. Background to the research.......................................................................................................... 1

1.2. Rationale for the study.................................................................................................................. 3

1.3. Research aims and objectives..................................................................................................... 5

1.4. Research procedure...................................................................................................................... 6

1.5. Treatise outline............................................................................................................................ 6

## CHAPTER 2

**INCOME AND CAPITAL**

2.1. Introduction.................................................................................................................................. 9

2.2. The meaning of the term ‘of a capital nature’........................................................................... 10

2.3. Intention – the most important factor......................................................................................... 12

2.4. Intention – mixed and secondary or alternative intentions....................................................... 14

2.5. Intention - change of intention.................................................................................................... 16
CHAPTER 3
THE OBJECTIVE APPROACH

3.1. Introduction.......................................................................................................................... 30
3.2. The objective approach......................................................................................................... 31
3.3. Advantages of the objective approach.................................................................................. 34
3.4. Conclusion............................................................................................................................ 39

CHAPTER 4
REALISATION COMPANIES

4.1. Introduction.......................................................................................................................... 42
4.2. The ‘realisation company’ concept....................................................................................... 43
4.3. Berea West Estates (Pty) Ltd v SIR.................................................................................... 47
4.4. J M Malone Trust v SIR....................................................................................................... 52
4.5. The golden thread.................................................................................................................. 54
4.6. CSARS v Founders Hill......................................................................................................... 57
4.7. Conclusion............................................................................................................................ 60
CHAPTER 5

SUMMARY AND CONCLUSIONS

5.1. Introduction

5.2. The relegation of intention as the litmus test

5.3. The tax status of realisation companies

5.4. Implications of the decision

REFERENCE LIST
### TABLE OF CASES

*African Life Investment Corporation (Pty) Ltd v SIR* 1969 (4) SA 259 (AD), 31 SATC 163

*Balstone Farms Limited v Minister of National Revenue* (1968) SCR 205

*Barnato Holdings Ltd v SIR* 1978 (2) SA 440 (AD), 40 SATC 75

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

*Booysen’s Estates, COT v* 1918 AD 576, 32 SATC 10

*Californian Copper Syndicate v IR* 1904, 41 Sc LR 691, VI SC 894

*Durban North Traders Ltd v CIR* 1956 (4) SA 594 (A), 21 SATC 85

*Elandsheuwel Farming (Edms) Bpk v SBI* 1978 (1) SA 101 (A), 39 SATC 163

*Founders Hill (Pty) Ltd, CSARS v* (509/10) [2011] ZASCA 66, 73 SATC 183

*George Forest Timber Co Ltd, CIR v* 1924 AD 516, 1 SATC 20

*Goodrick, CIR v* 1942 OPD 1, 12 SATC 279

*J M Malone Trust v SIR* 1977 (2) SA 819 (A), 39 SATC 83

*John Bell & Co (Pty) Ltd v SIR* 1976 (4) SA 415 (A), 38 SATC 87

*Levy, COT v* 1952 (2) SA 413 (A), 18 SATC 127

*Lunnnon, CIR v* 1924 AD 94, 1 SATC 7

*Malan v Kommissaris van Binnelandse Inkomste* 1981 (2) SA 91 (C)

*Middelman, CIR v* 1991 (1) SA 200 (C), 52 SATC 323

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

*Nussbaum, CIR v* 1996 (4) SA 1156 (A), 58 SATC 283
Ochberg v CIR 1931 AD 215, 5 SATC 93
Overseas Trust Corporation Ltd v CIR 1926 AD 444, 2 SATC 71
Pick ’n Pay Employee Share Purchase Trust 1992 AD, 54 SATC 271
Rand v Alberni Land Co Ltd (1920) 7 TC 629 (KB)
Realisation Co v COT 1951 (1) SA 177 (SR) (1950 SR 182), 17 SATC 139
Richmond Estates Pty (Ltd), CIR v 1956 (1) SA 602 (A), 20 SATC 355
Stott, CIR v 1928 AD 252, 3 SATC 253
Taylor v Good (Inspector of Taxes) [1974] 1 All ER 1137
The Melbourne Trust Ltd, Commissioner of Taxes v (1914) AC 1001
The Trust Bank of Africa Ltd, SIR v 1975 (3) SA 652 (A), 37 SATC 87
Tod, CIR v 1983 (2) SA 364 (N), 45 SATC 1
Visser, CIR v 1937 TPD 77, 8 SATC 271
Westleigh Estates Co Ltd, IRC v (1924) KB 390
Yates Investments (Pty) Ltd v CIR 1956 (1) SA 612 (AD), 20 SATC 368

TABLE OF SPECIAL COURT CASES

ITC 758 (1952), 19 SATC 94
ITC 1185 (1972), 35 SATC 122 (N)
ITC 1244 (1975), 38 SATC 7
ITC 1283 (1978), 41 SATC 36
ITC 1719 (2001), 64 SATC 73 (SEC)
SUMMARY

The Supreme Court of Appeal has revisited the issue that has attracted the most litigation in South African tax law: whether gains from the disposal of an asset are of a capital or of a revenue nature.

In *CSARS V Founders Hill* (509/10) [2011] ZASCA 66, 73 SATC 183 the court held that ‘intention’ is not conclusive in the enquiry and cannot be the litmus test in determining the nature of proceeds from the sale of an asset. This judgement relegates intention to only one of the factors to be considered as it was held that it should be considered objectively whether the taxpayer is actually trading or not. The court also indicated that a ‘realisation company’ would only act on capital account if it is formed for the purpose of facilitating the realisation of property which could not otherwise be dealt with satisfactorily.

This treatise was primarily aimed at an analysis of the court cases which dealt with the ‘realisation company’ concept in South African income tax law.

In analysing the ‘realisation company’ concept through case law culminating in *Founders Hill*, it was found that in every instance where ‘realisation company’
had won the argument, there had been compelling reasons why the owners of the assets had found it necessary to realise the asset through an interposed company established for that purpose. These reasons include:

- to facilitate the sale of property previously held by different people and
- to consolidate and conveniently administer the interests of beneficiaries under different wills.

Furthermore, this treatise criticised ‘intention’ as the primary test in determining the nature of proceeds from the sale of a capital asset and examined the objective approach to the inquiry as advocated in *CSARS v Founders Hill*. A discussion on the advantages of this approach indicated that it will certainly obviate a number of difficulties that arise from invoking ‘intention’ as the litmus test.

**KEY WORDS**

Capital, income, intention, ‘crossing the Rubicon’, ‘realisation company’.
CHAPTER 1

INTRODUCTION AND BACKGROUND

1.1. Background to the research................................................................. 1
1.2. Rationale for the study.......................................................................... 3
1.3. Research aims and objectives.............................................................. 5
1.4. Research procedure............................................................................. 6
1.5. Treatise outline.................................................................................... 6
1.1 Background to the research

The definition of ‘gross income’ in section one of the Income Tax Act\(^1\) (the Act) excludes an amount that is of a capital nature. The Act does not contain a definition of the term ‘of a capital nature’ and thus uncertainty has blurred the line between the capital and revenue nature of amounts for income tax purposes. This has resulted in a great deal of litigation between taxpayers and the Commissioner.\(^2\)

The nature of proceeds from the sale of an asset, in particular, is a highly contentious issue since the proceeds, should it be of a capital nature, would not be included in gross income but may, subsequent to 1 October 2001, be subject to capital gains tax (CGT); the latter being significantly more favourable from the taxpayer’s point of view and for this very reason the Commissioner would seek to tax the amount as a revenue receipt.

Consequently for many a decade the courts were faced with a plethora of cases necessitating a distinction between capital and revenue receipts. In dealing with this issue the courts had to consider and interpret the particular set of facts and circumstances of each case in order to determine the nature of the

\(^1\) Act 58 of 1962.
\(^2\) The Commissioner for the South African Revenue Service (SARS).
proceeds from sale of an asset. This brought about a wealth of judicial precedent developing the fundamental concepts and guidelines that should be applied in order to arrive at an answer to the ever vexed question – is the amount capital or revenue in nature.

It is common cause that a taxpayer is allowed to realise an asset to best advantage. However if it is found that the taxpayer did more than merely sell an asset or change an investment he is said to have ‘crossed the Rubicon’, thereby embarking on a scheme of profit-making and thus carrying on the business of trading. In determining whether the taxpayer did in fact cross the Rubicon the courts have adopted a number of tests and factors that must be taken into consideration in making this decision, but established the ‘intention’ of the taxpayer as the primary subjective test to be applied.

A principle that emerges from the long line of cases dealing with this issue is that the taxpayer may interpose a company in realising an asset to best advantage. Such an entity is referred to as a ‘realisation company’, and in the present context:

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3Includes both natural- and juristic persons but will hereafter be referred to as ‘he’.
4Natal Estates Ltd v Secretary for Inland Revenue 1975 (4) SA 177 (A), 37 SATC 193.
5Company or trust but hereafter referred to as ‘company’ or ‘entity’ interchangeably.
6CSARS v Founders Hill (509/10) [2011] ZASCA 66, 73 SATC 183 at 187.
'...is one formed for the purpose of facilitating the realisation of property and the company does no more than act as the means by which the interests of its shareholders in the property may be properly realised.'

The advantage of the disposal of assets through a realisation company is that the proceeds of disposals may for tax purposes be treated as capital in nature. However, it is accepted that such a company could also cross the Rubicon by doing more than realising a capital asset advantageously, thereby carrying on a business.

1.2 Rationale for study

A present day ruling of the Supreme Court of Appeal (SCA) revisited the concepts and principles that are applied in determining the nature of proceeds from sale of assets, as well as the tax status of realisation companies. The controversial judgment *CSARS v Founders Hill* delivered by Lewis JA on 10 May 2011 created something of an uproar as it allegedly shook the foundations of well established principles relating to the nature of proceeds from the sale of property.

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7 *CSARS v Founders Hill* (509/10) [2011] ZASCA 66, 73 SATC 183.
Even though it is appreciated that the surrounding facts of each case should support the intention of the taxpayer, and that one cannot rely solely on the taxpayer’s *ipse dixit*\(^8\), the intention of the taxpayer has always been indicated to be the primary test. However, in this judgment the court held that intention is not conclusive in the enquiry and cannot be the litmus test in determining whether the taxpayer had crossed the Rubicon. It was held that one should consider objectively whether the taxpayer is actually trading or carrying on a business.

The Revenue authorities have always viewed realisation companies with suspicion, being understandably chary of taxpayers who seek to use the label ‘realisation company’ to characterise their assets as capital when in truth they are trading assets. The judgement in the *Founders Hill* case is significant not only in the sense that it reduces the importance of the intention of a taxpayer, but also the long established principle that a realisation company can be used to realise a capital asset at best advantage without being taxed on the proceeds as a revenue receipt.\(^9\)

In analysing the role of realisation entities, the courts indicated that a realisation entity would only act on capital account if it is formed for the purpose of

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\(^8\) A Latin phrase meaning ‘he himself said it’ and refers to the taxpayer’s testimony.

\(^9\) E. Brincker: Lexology – May 13, 2011: The guillotine has fallen for realisation companies
facilitating the realisation of property which could not otherwise be dealt with satisfactorily. To the extent that the purpose of a realisation company now is to realise the assets so acquired, the consequence is that it will always act on revenue account unless there are specific circumstances that justify the taxpayer transferring the asset to a company or trust rather than selling it directly.¹⁰

This landmark tax ruling necessitates an analysis of the ‘realisation company’ concept in South African Income Tax as established through the long line of legal precedent culminating in *CSARS v Founders Hill*.

1.3 **Research aims and objectives**

The aim of this study was to analyse ‘realisation company’ concept of realising an asset to best advantage through legal precedent culminating in *CSARS v Founders Hill*.

In addition, this study also briefly considered the development of the tests and principles applied by the courts in a number of cases tasked with determining the nature of a receipt or accrual for income tax purposes.

¹⁰ *CSARS v Founders Hill* (509/10) [2011] ZASCA 66, 73 SATC 183.
The goal of this study was to identify the golden thread emerging from the cases where realisation entities were found to be merely disposing of their assets to best advantage.

1.4 Research procedure
An in depth analysis of case law dealing with the capital versus revenue issue was performed. The cases relating to realisation entities, in particular, were examined in order to achieve the research goals and objectives. Textbooks, periodicals, tax articles and various opinions given by the accounting houses and tax experts were scrutinised for relevant information.

1.5 Treatise outline
Chapter 1 has set out the history and background to one of the most frequently asked questions in taxation: whether a receipt or accrual is capital or revenue in nature. It also briefly discusses the differences in the tax treatment of capital and revenue receipts and accruals respectively. The chapter also introduced the tax mantra of ‘crossing the Rubicon’ as well as the ‘realisation company’ concept. The research aims, goals, procedures, methodology and the scope of the treatise are clearly stated in this chapter.

Chapter 2 analysed case law in order to determine the meaning of the term ‘of a capital nature’ as contemplated in the definition of ‘gross income’. The
development of the tests and principles established by the courts through the wealth of precedent dealing with this issue was discussed. A brief overview of objective and subjective tests precluded an in depth analysis of ‘intention’ as the primary test in determining the nature of a receipt or accrual for tax purposes.

Chapter 3 relegated intention to only one of the factors to be considered in determining the nature of the proceeds from sale of assets. The suggested approach advocated in the controversial SCA judgement, *CSARS v Founders Hill*, was analysed and a discussion on the advantages of this approach concluded this chapter.

Chapter 4 visited the tax status of realisation companies and set out the commonly held misperceptions of these entities. An in depth discussion of case law established the golden thread emerging from all the cases where these entities were found to be merely realising an asset to best advantage. These cases was analysed in order to identify the crucial requirements and circumstances which may ensure that the proceeds from sale of property by a realisation company will be ‘of a capital nature’. The discovery of these circumstances concluded the chapter.
Chapter 5 concluded this treatise with a presentation and interpretation of findings along with a brief discussion on the implications of the *Founders Hill* judgement.
CHAPTER 2
INCOME AND CAPITAL

2.1. Introduction........................................................ ......................... 9

2.2. The meaning of the term ‘of a capital nature’................................. 10

2.3. Intention – the most important factor.......................................... 12

2.4. Intention – mixed and secondary or alternative intentions............... 14

2.5. Intention - change of intention..................................................... 16

2.6. Intention – the criticism of intention............................................ 20

2.7. Conclusion.................................................................................... 29
2.1 Introduction

“In 49 BC when Julius Caesar crossed the Rubicon – a small river dividing Cisalpine Gaul (a province of Rome) from Italy – and in doing so committed an act of treason for no Roman general was allowed to enter Italy with his army without the consent of the Roman Senate, he intended to defy the Senate and in effect to declare civil war in Rome. Little did he foresee that his act would come to be a symbol of passing a point of no return in the general sense, and that it has, in South Africa, become a tax mantra in cases that attempt to discern the distinction between capital gains and taxable income upon a disposal of property.”

The Act distinguishes between two different types of transactions, namely those of revenue nature and those of capital nature and a receipt or accrual can accordingly be categorised as falling within one of these categories. Given the differences in the tax treatment of capital and revenue receipts and accruals, viewed against the background of significantly more favourable provisions of CGT, it is vital to determine whether the gain or loss is of a capital or revenue nature.

11 CSARS v Founders Hill (509/10) [2011] ZASCA 66, 73 SATC 183 at 187.
12 Section 1 “gross income” and schedule 8 to the Income Tax Act.
The onus of proving that an amount is of a capital or income nature rests on the taxpayer under s82 of the Act as an amount may be capital in the hands of one taxpayer but revenue in the hands of another.\(^ {13} \) In *CIR v Middelman*\(^ {14} \) the court stated that in order to discharge the onus a taxpayer must

‘establish his case on a balance or a preponderance of probabilities’.

Whether an amount is of an income or capital nature is a question of law, which has to be decided upon the facts and circumstances of each case as these may vary from one case to another.

### 2.2 The meaning of the term ‘of a capital nature’

The question whether an amount is a receipt or accrual of a ‘capital nature’ has exercised the minds of the courts for decades as the Act does not provide objective rules in this regard. A judgement in the Supreme Court of Appeal creates precedent or principle which is adhered to thereafter, unless it is rejected in subsequent judgements or overturned by legislation. Case law has become part and parcel of the South African tax law and a thorough understanding of the principles as enunciated by the courts is a pre-requisite for understanding the term ‘of a capital nature’. The courts formulated a number of

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\(^ {13} \) *CIR v Visser* 1937 TPD 77, 8 SATC 271 at 276.  
\(^ {14} \) 1991 (1) SA 200 (C), 52 SATC 323 at 324.
tests or guidelines over the years in order to determine whether an amount is a receipt or accrual ‘of a capital nature’, however there is\textsuperscript{15} ‘no single infallible test of invariable application’.

In \textit{Elandsheuwel Farming (Edms) Bpk v SBI}\textsuperscript{16} the court states that there are three main tests commonly applied in the determination of the distinction between capital and revenue namely:

\begin{itemize}
  \item the intention at acquisition and sale of the asset;
  \item the nature of the agreement i.e. is it in pursuance of a scheme of profit-making or is it the mere realisation of an asset; and
  \item whether the asset constituted fixed or floating capital.
\end{itemize}

The nature of a receipt or accrual can be determined by objective as well as subjective considerations. The subjective tests attempt to establish the intention, mind or policy of the taxpayer whereas objective tests take into account objective factors in determining whether or not the receipt or accrual is ‘of a capital nature’. The most important test for determining the capital or revenue nature of a particular receipt or accrual is the taxpayer’s intention in acquiring the asset.\textsuperscript{17}

\textsuperscript{15} \textit{CIR v Pick ’n Pay Employee Share Purchase Trust} 1992 (4) SA 39 (A), 54 SATC 271 at 279.
\textsuperscript{16} 1978 (1) SA 101 (A), 39 SATC 163.
\textsuperscript{17} \textit{CIR v Stott} 1928 AD 252, 3 SATC 253.
2.3 **Intention – the most important factor**

‘The primary intention with which property is acquired is conclusive as to the nature of the receipt arising from the realisation of that property unless other factors intervene which show that it was sold in pursuance of a scheme of profit-making’.\(^{18}\)

In determining the taxpayer’s intention, it can be established whether he is carrying on a scheme of profit-making which ultimately determines the nature of receipt or accrual. If the taxpayer’s purpose is to sell the asset which he acquired at a profit, the asset is acquired as trading stock and the proceeds upon disposal will be regarded as revenue in nature and is therefore taxable. However, should the asset be acquired to produce income rather than for resale at a profit or capital appreciation, the proceeds upon disposal will be ‘of a capital nature’.

The determination of a taxpayer’s intention requires more than a superficial assessment, as was emphasised by Erasmus J in *ITC 1719*\(^{19}\) when he said that the intention of a taxpayer must

‘be determined not on the bare bones of the relevant transactions, but on the conspectus of all the relevant facts and attendant circumstances’.

\(^{18}\) *CIR v Stott* 1928 AD 252, 3 SATC 253 at 254.

\(^{19}\) (2001) 64 SATC 73 (SEC) at 76.
The intention of the taxpayer is subjective and as a result it is difficult to determine what the true intention may be. In establishing the intention of the taxpayer the courts rely on the taxpayer’s testimony as primary source of evidence, however\textsuperscript{20}

‘the \textit{ipse dixit} of the taxpayer as to his intent and purpose should not lightly be regarded as decisive. It is the function of the court to determine on an objective review of all the relevant facts and circumstances what the motive, purpose and intention of the taxpayer were. Not the least important of the facts will be the course of conduct of the taxpayer in relation to the transaction in issue, the nature of his business or occupation and the frequency or otherwise of his past involvement or participation in similar transactions’.

The intention of a juristic person such as a company or trust is determined separately from its shareholders, with certain exceptions. The company’s intention is usually represented by the actions of the directors or the controlling mind of the entity. In \textit{CIR v Richmond Estates (Pty) Ltd}\textsuperscript{21} Centivres CJ stated the following:

“A company is an artificial person “with no body to kick and no soul to damn” and the only way of ascertaining its intention is to find out what its directors acting as such intended. Their formal acts in the form of resolutions constitute

\textsuperscript{20} \textit{ITC 1185} (1972) 35 SATC 122 (N) at 123/4.
\textsuperscript{21} 1956 (1) SA 602 (A), 20 SATC 355 at 361.
evidence as to the intentions of the company of which they are directors but where a company has only one director, who is also the managing director and the sole beneficial owner of all its shares, I can see no reason in principle why it should be incompetent for him to give evidence as to what was the intention of the company at any given time. In such a case it is, perhaps, not going too far to say his mind is also the mind of the company.'

2.4 Intention – mixed and secondary or alternative intentions

It is not uncommon for taxpayers to acquire an asset with mixed intentions. This does however result in difficulties but the court will seek and give effect to the main or dominant factor. In SIR v The Trust Bank of Africa Ltd\textsuperscript{22} Botha JA stated that in order for a profit to be regarded as being of a capital nature

‘a taxpayer is not obliged to exclude the slightest contemplation of a profitable resale’.

In the case of COT v Levy\textsuperscript{23}, Judge Beadle J was interested in finding what Levy’s main or dominant purpose was. The taxpayer, Levy, acquired 2 500 shares in a company for £2 750. A few years later Levy sold all the shares in the company and received a sum of £5 531 for his shares. The Commissioner

\textsuperscript{22} 1975 (2) SA 652 (A), 37 SATC 87 at 102.
\textsuperscript{23} 1952 (2) SA 413 (A), 18 SATC 127.
included the sum of £2 781 in his taxable income, being the difference between what he had paid for the shares and what he had sold them for.

The court held that Levy’s dominant purpose when acquiring the shares was to obtain an income-bearing investment and because of this the profit from the shares on its disposal was of a capital nature.

On appeal, the Commissioner argued that in a case of a purchase and sale of an asset, the profit is only capital if the only purpose when acquiring the asset was its retention as an income-producing investment.

The court held that the main and dominant purpose with which the asset was sold is the determining factor when determining the question of capital or income. The fact that the purchaser had alternative methods in mind when dealing with the property should not affect the issue, if the dominant purpose of the acquisition is clearly established.

However, should the taxpayer have a secondary or alternative purpose at the time of acquisition, namely making a profit, the profit on disposal will be of a revenue nature.24 This was laid down in Durban North Traders Ltd v CIR25

24 CIR v Nussbaum 1996 (4) SA 1156 (A), 58 SATC 283.
when it was held that the profit on sale will be of a revenue nature if a taxpayer has two alternative methods of turning an asset to account, that is, selling it or using it to produce income.

An example of this can be found in *CIR v Tod*\(^2\) in which the taxpayer who purchased shares *cum div*, received the dividends and then sold the shares *ex div*. The court held that the resulting profits were of a revenue nature.

It is also well established that the taxpayer’s intention can change over time and therefore one should be cognisant of the intention at the time the asset was acquired, during the period the asset was held as well as at the time of disposal of the asset.\(^2\)

2.5 **Intention - change of intention**

A taxpayer may have originally had the intention to hold an asset as an investment but over time his intentions may have changed in that he may now intend using the asset in the carrying out of a scheme of profit-making, and *vice versa*. Such a change may be eminent from the manner in which the asset was dealt with during the period it was held, or it could be that the taxpayer had held

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\(^{25}\) 1956 (4) SA 594 (A), 21 SATC 85.
\(^{26}\) 1983 (2) SA 364 (N), 45 SATC 1.
\(^{27}\) *Natal Estates Ltd v SIR* 1975 (4) SA 177 (A), 37 SATC 193.
the asset for some time as a capital asset, but then ‘crossed the Rubicon’ by embarking on a scheme of profit-making through commencing to engage in the business of trading in the asset.

The distinction between realising an investment on the one hand, and carrying on the business of trading on the other, is one long recognised. It is well established that where an investment was realised at a profit, the enhanced value may be of a capital nature, but the profit made is regarded as taxable income\(^ {28}\) ‘where what was done is not merely a realisation or change of investment, but an act done in what is truly carrying on or carrying out of a business’.

The mere decision to sell a capital asset does not mean that it will change the nature of the asset; neither does it \textit{per se} constitute a change of intention. In \textit{John Bell & Co (Pty) Ltd v SIR}\(^ {29}\) Wessels JA stated that

\begin{quote}
‘the mere change of intention to dispose of an asset hitherto held as capital does not \textit{per se} subject the resultant profit to tax. Something more is required to metamorphose the character of the asset and so render its proceeds gross income.’
\end{quote}

\(^{28}\) \textit{Californian Copper Syndicate v Internal Revenue} (1904) Sc (Court of Session) LR 691 at 694. 
\(^{29}\) 1976 (4) SA 415 (A), 38 SATC 87 at 103.
In *COT v Booyens Estates Ltd*\(^{30}\) it was said that

‘Every person who invests his surplus funds in land . . . is entitled to realise such asset to the best advantage and to accommodate the asset to the exigencies of the market in which he is selling. The fact that he does so cannot alter what is an investment of capital into a trade or business for earning profits.’

In determining whether the taxpayer has indeed changed his original intention, the courts consider the history and activities of the taxpayer in order to establish whether the taxpayer was realising a capital asset to best advantage or whether he used the asset as stock-in-trade in carrying on a business. These objective factors depend upon the facts of each case and it is a test of degree.

This was clarified by Judge Holmes JA in the case of *Natal Estates Ltd v SIR*\(^{31}\)

‘In deciding whether a case is one of realising a capital asset or of carrying on a business or embarking upon a scheme of selling land for profit, one must think one’s way through all of the particular facts of each case. 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 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

\(^{30}\) *Commissioner of Taxes v Booyens Estates Ltd* 1918 AD 576, 32 SATC 10 at 595.

\(^{31}\) 1975 (4) SA 177 (A), 37 SATC 193 at 220.
subdivides the land, the planning, extent, duration, nature, degree, organization 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. From the totality of the facts one enquires whether it can be said that the owner had crossed the Rubicon and gone over to the business, or embarked upon a scheme, of selling such land for profit, using the land as his stock-in-trade.

It is therefore clear that intention, the subjective test in determining the nature of a particular receipt or accrual, has been regarded as the primary or litmus test for almost a century. It is religiously applied by the courts in the majority of the cases challenged with discerning whether a receipt or accrual is ‘of a capital nature’. It is also appreciated that a taxpayer may change his intention in relation to an asset and consequently the courts have had regard not only to the intention of the taxpayer at the time of acquiring the asset, but also to the intention during the period which the asset was held as well as the intention at the time of disposal.

Furthermore, a number of objective factors have been developed and taken into account by the courts in order to establish whether a taxpayer has ‘crossed the Rubicon’ by carrying on the business of trading in that asset. These factors merely support the intention, but the paramount test has always been the
intention of the taxpayer.\textsuperscript{32} The development of intention as the litmus test through the years nurtured the commonly accepted sentiment that\textsuperscript{33}

‘In the determination of the question into which of these two classes a particular transaction falls, the intention of the taxpayer, both at the time of acquiring the asset and at the time of its sale, is of great, and sometimes decisive, importance.’

Despite the development of this concept through many years and the fact that intention stood the test of time, a number of complications arise when relying on the intention of the taxpayer to determine whether the proceeds of the sale of an asset is capital or income in nature.

2.6 Intention – the criticism of intention

The introduction by the courts of what Silke\textsuperscript{34} calls ‘the golden rule’ of the test of intention into the arena has caused more confusion in this area of law than anything else. Successive Income Tax Acts since the 1917 Act have failed to mention this touchstone of ‘intention’, and the courts, acting in terms of Broomberg’s ‘Booysens – Californian Syndrome’\textsuperscript{35} have developed what the Franzsen Commission called ‘rather vague’ tests in this regard.

\textsuperscript{32} CIR v Pick ‘n Pay Employee Share Purchase Trust 54 SATC 271.
\textsuperscript{33} Elandsheuwel Farming (Edms) Bpk v SBI 1978 (1) SA 101 (A), 39 SATC 163 at 181.
\textsuperscript{34} Silke, Divaris & Stein, \textit{Silke on South African Income Tax}, 9 ed (Juta 1978) at 38.
\textsuperscript{35} E B Broomberg ‘The Taxation of Property Transactions’ (1972) 89 SALJ 445.
The origin of this test lies in the English approach, on which the courts relied in a number of early cases such as *COT v Boysens Estates Ltd*[^36], *CIR v Stott*[^37], *CIR v George Forest Timber Company Ltd*[^38]. The Boysens-Californian Syndrome is a direct consequence of this reliance on English cases, as the structure of the English Income Tax Act was very different to that of South Africa. This was the first of a number of steps in the wrong direction.

The nature of this elusive intention is not the kind of intention we are accustomed to in other branches of the law. As Botha JA put it in *SIR v Trust Bank of Africa Ltd*[^39],

> 'In an enquiry as to the intention with which a transaction was entered into for the purpose of the law relating to income tax, a court of law is not concerned with that kind of subjective state of mind required for the purposes of the criminal law, but rather with the purpose for which the transaction was entered into'.

However, the reasons why intention should occupy such a pivotal position is far from clear as

[^36]: 1918 AD 576, 32 SATC 10.
[^37]: 1928 AD 252, 3 SATC 253.
[^38]: 1924 AD 516, 1 SATC 20.
[^39]: 1975 (3) SA 652 (AD), 37 SATC 87 at 106.
‘There is no legislative provision that makes the intention of the taxpayer
decisive of whether the receipt or accrual was of a capital nature or not.’

There are a number of difficulties attendant on invoking the intention of a
taxpayer as the litmus test which determines the nature of proceeds from the
sale of assets.

Firstly, intentions by their nature are changeable and often not fully formulated;
and evidence after the event, however honest, is not always reliable as it is
sometimes reconstructed. This has been corroborated by Holmes JA in 
*Natal Estates v SIR* where he clearly says that one must ‘think one’s way through all
the facts’ and thus not rely only upon what the taxpayer claimed had been his
original and continuing intention.

Secondly, even looking at the totality of facts, and the taxpayer’s intention,
discerning where the Rubicon lies gives rise to difficulty.

‘The uncertainty created by the judgment is manifest in the use of the
picturesque “crossing the Rubicon”, which has become the trade-mark, so to
speak, of this judgment. But to what “Rubicon” are we directed? Is it the
objective conduct of the taxpayer which converts what was a mere realisation

\[\text{\footnotesize\ref{40} CIR v Richmond Estates (Pty) Ltd 1956 (1) SA 602 (A), 20 SATC 355 at 365.}\]
\[\text{\footnotesize\ref{41} Malan v Kommissaris van Binnelandse Inkomste 1981 (2) SA 91 (C), 43 SATC 1.}\]
\[\text{\footnotesize\ref{42} 1975 (4) SA 177 (A), 37 SATC 193 at 220.}\]
into an observable trade? Or is it a purely mental turning point relating to the attitude of the taxpayer to his asset?\textsuperscript{43}

Furthermore, in considering whether the taxpayer had changed his intention and subsequently engaged in the business of selling, therefore being taxable on the profits, cannot depend only on the degree of its activities as suggested in \textit{Natal Estates v SIR}.\textsuperscript{44}

In addition, assuming that a taxpayer acquires an asset with the intention to hold it as capital, a subsequent change in that intention (if such be proved) on the part of the taxpayer who realises it, should not be the only determinant of the nature of the profits made. Should this be the case, a number of difficulties arise. Whose intention is relevant? And at what stage? If the taxpayer is a realisation company wholly owned by the original owner of the asset in question, is it the intention of the subsidiary or its controlling mind that counts?\textsuperscript{45}

\textquote{In my view, although this need not be decided at this point, the question should be whether the taxpayer is actually trading, or carrying on a business, at the time of assessment, and not merely whether or not it has changed its mind. Of

\textsuperscript{43} 1975 \textit{Annual Survey of South African Law} p517.
\textsuperscript{44} \textit{CSARS v Founders Hill} (509/10) [2011] ZASCA 66, 73 SATC 183 at 197.
\textsuperscript{45} \textit{CSARS v Founders Hill} (509/10) [2011] ZASCA 66, 73 SATC 183 at 193.
course the intention of all concerned must be considered, but intention cannot be conclusive in the enquiry.

Finally, it is not certain whether a change in intention by itself changes the nature or character of the asset in question from capital to trading stock. As Schreiner JA said in *Commissioner for Inland Revenue v Richmond Estates (Pty) Ltd*: 46

‘The decisions of this Court have recognised the importance of the intention with which property was acquired and have taken account of the possibility that a change of intention or policy may also affect the result. But they have not laid down that a possibility that a change of policy or intention by itself effects a change in the character of the assets.

Exactly how much damage this so-called 'syndrome' with its emphasis on the test of intention has done to clear legal thinking is all too clear in the field of company transactions where a decision as to the capital or revenue nature of a transaction must be made. Whatever theory is adopted to explain the legal personality of a company, it is first and foremost an artificial or fictitious person with, in the picturesque words of Centlivres CJ, 'no body to kick and no soul to damn'. 47 *A priori* then, it cannot have an intention. But the courts blinded with

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46 1956 (1) SA 602 (A), 20 SATC 355 at 610C-D.
47 *CIR v Richmond Estates (Pty) Ltd* 1956 (1) SA 602 (AD), 20 SATC 355 at 361.
the overriding importance of the test of intention, have tried in all sorts of ways to establish what the 'intention' of a particular company in relation to a particular asset was.

Various factors have been called into play in this strange exercise. The intentions in the mind of the shareholder have been held to be the intentions of a one-man company such as CIR v Richmond Estates\textsuperscript{48} or in cases where there are a limited number of shareholders for example Yates Investments (Pty) Ltd v CIR.\textsuperscript{49} One wonders how the courts would have determined the intention of a company with two equal shareholders with diametrically opposed intentions as to the transactions in question.

While it was recognized in Overseas Trust Corporation Ltd v CIR\textsuperscript{50} that ‘neither Dr Lubbert (the sole shareholder) nor the company can escape the consequences involved by the creation of its distinct persona’, there have been a number of cases where this fundamental distinction has been all but ignored. There has in effect been a wholesale lifting of the corporate veil, in spite of the judgment of De Villiers CJ in Ochberg v CIR.\textsuperscript{51}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{48} CIR v Richmond Estates (Pty) Ltd 1956 (1) SA 602 (AD), 20 SATC 355.
\item\textsuperscript{49} Yates Investments (Pty) Ltd v CIR 1956 (1) SA 612 (AD), 20 SATC 368.
\item\textsuperscript{50} 1926 AD 444, 2 SATC 71.
\item\textsuperscript{51} 1931 AD 215, 5 SATC 93 at 99.
\end{itemize}
\end{footnotesize}
'I entirely agree with the view that the court may look at the substance of a transaction. But that argument must be employed with judgment, more especially in company law. The law endows a company with a fictitious personality... A company, being a juristic person, remains a juristic person separated and distinct from the person who may own all the shares, and must not be confused with the latter. To say that the company sustains a separate persona and yet in the same breath to argue that in substance the person holding all the shares is the company is an attempt to have it both ways, which cannot be allowed.'

From this it is clear that the courts should take the test of intention off its pedestal and adjudicate on the issues before them without doing violence to the basic tenets of company law.

The difficulties which this reliance on intention can cause were thrown into sharp relief in *African Life Investment Corporation (Pty) Ltd v SIR*52 in which 'the Appellate Division sent the tax ship sailing into uncharted waters without any navigational aids'.53 The case turned on the so called 'dominant intention'

52 1969 (4) SA 259 (AD), 31 SATC 163.
factor, which had first been developed in *COT v Levy*,\(^{54}\) in which Schreiner J A held that 

'... where the purposes of an individual taxpayer are mixed the only course, on principle as well as for practical reasons, is to seek and give effect to the dominant factor operating to induce him to effect the purchase. The point is hardly covered by authority... But unless one were to hold, what the legislature could not have intended, that the taxpayer must exclude the slightest contemplation of a profitable resale of the property, it seems to me that the only test to apply is that of the main or dominant purpose'.

This approach was used in a number of cases until the *African Life* case was presented before the Supreme Court of Appeal. The appellant company was incorporated to take over the share investments of its holding company, a long-term insurance company. It was intended by the directors of the holding company that the appellant should invest in shares with a view to receiving the income therefrom, and should only buy and sell such shares when necessary to achieve this objective. The question before the court was whether the profits made on such share-dealings (which it was common cause were not the major business of the company) were liable to tax. While accepting that the company had as its dominant purpose the receiving of income from its investments, the court went on to hold

\(^{54}\) 1952 (2) SA 413 (AD), 18 SATC 127 at 136.
'In my opinion we do not have here a dominant purpose into which the regular dealing in shares is absorbed as a merely incidental activity. It would be more in accordance with fact, I consider, to regard the dealing in shares as a secondary object of the appellant; i.e. as part of the appellant's business.'

The decision is hardly in accord with that of Schreiner JA above, and one may well ask what the point is of establishing a so-called dominant intention which is then apparently overridden by a 'secondary' intention. Either the intention of holding shares for income was dominant or it was not; and if an intention is admittedly secondary, how then can it prevail over a dominant intention?

The sophistry inherent in this approach, endorsed in *Barnato Holdings Ltd v SIR*\(^55\) can with respect only be explained on the basis that the court, having found on an objective assessment of all the facts that dealing in shares was an integral part of the business of the appellant, and recognising that investment for income was the major rationale of the business, was faced with the problem of justifying a finding that the share-dealing profits were liable to tax on the basis of intention.

\(^{55}\) 1978 (2) SA 440 (AD), 40 SATC 75.
2.7 Conclusion

Through decades of cases dealing with the thorny problem of capital versus revenue, the Courts have used various factors to try to divine intention. It is submitted that it is clear that the so-called test of intention should be exorcised from the subject. The test of intention, and all the problems which go with it, are an unnecessary aggravation in this field of the law. This so-called test does not explain much in the case of natural persons, and gives rise to a host of problems when dealing companies. It is suggested that the tarnished golden rule should be entirely jettisoned in favour of a purely objective decision on the facts of the particular case, eliminating in the process much unnecessary confusion.

The more logical approach is that the question whether a receipt or accrual is of an income or capital nature is purely a question of law, to be decided objectively on all the facts of a particular case, without recourse to the intention of the taxpayer. A brief analysis of this suggested approach will follow.
3.1 Introduction

The reliance by the courts, to whatever degree, on the intention of the taxpayer has its origins in the early case of *COT v Boosens Estates Ltd*,56 in which the court adopted the principles expounded in the English case of *Californian Copper Syndicate Ltd v Inland Revenue*57. It is noteworthy, however, that the judgment in this case did not rely upon, or even suggest, a subjective test of intention. The approach taken by the court was the objective one of assessing whether, in the light of all the facts, the receipt or accrual was of a capital nature.

This case was followed in *CIR v Stott*,58 with the difference that the intention of the taxpayer in acquiring an asset was explicitly regarded as an important factor in coming to the decision whether the proceeds on disposal were of a capital or income nature. However, the factor of intention was introduced at a very late stage in the judgment, after the court had effectively decided, on a purely objective examination, that the amount in question was of a capital nature. Since then the courts have tended to place far more reliance on the intention of the taxpayer.

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56 1918 AD 576, 32 SATC 10.
57 (1904) 41 Sc Lr, 5 TC 159.
58 1928 AD 252, 3 SATC 253.
3.2 The objective approach

From the history of the test of intention it is submitted that it is clear that the intention of the taxpayer is not really at issue. What is at issue is the objective set of facts before the court, which may be elucidated by evidence given by the taxpayer, but from which the court will make an objective assessment. The fact that logically there can be no free-standing test of intention is shown not only by this objective bias, but also by two irrefutable principles:\footnote{59}{Meyerowitz, D. (2006). \textit{Meyerowitz on Income Tax in South Africa.}}

- the \textit{ipse dixit} of the taxpayer as to his intention cannot simply be accepted, since it is likely to be coloured by self-interest.
- the intention of the taxpayer is legally irrelevant if it is not based upon a correct interpretation or understanding of the law.

It is considered that the more logical approach to determining the capital or revenue nature of a particular receipt or accrual is purely a question of law, to be decided objectively on all the facts of a particular case, without recourse to the intention of the taxpayer. If the facts show that the amount is \textit{prima facie} of an income nature, the intention of the taxpayer may be relevant in the sense that the taxpayer may be able to provide an explanation to rebut an inference that an amount is of an income nature.
What is relevant is an explanation by the taxpayer of the events which took place, which may include the reasons for the transaction in question. This evidence must be tested in the light of all the other circumstances, and can prevail only if strong enough to overturn the existing *prima facie* case. Furthermore, if the court is unable, on the balance of probabilities, to determine the intention of the taxpayer with regard to the asset, the onus is on the taxpayer to prove his intention.

The test would then be objective only and this approach is similar to the approach followed in *CIR v Goodrick*,\(^{60}\) in which Van den Heever J is quoted as follows:

‘The taxpayer’s intention, it seems to me, is being unduly stressed. The object of the Income Tax Act is to raise revenue and to raise it on income without affecting a capital levy, not to tax intentions... In judging therefore whether accruals and receipts were of a capital nature or not the question is what was the function of the asset which the receipt or accrual represents. With as much truth as there is in the dictum invoked by the Special Court one could say that if this function was productive the receipt is prima facie of a capital nature; if not productive then it is income.’

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\(^{60}\) 1942 OPD 1, 12 SATC 279 at 305.
ITC 1283\textsuperscript{61} provides an illustration of how this approach is followed implicitly by the courts. On the bare facts the taxpayer exported coffee beans from Angola to South West Africa, and then exported these at a profit. The resultant receipts or accruals were \textit{prima facie} of an income nature. However, the taxpayer was able to explain that as a resident of Angola, he had for many years carried on a trade as a dealer in coffee beans. As the economic and security position in that country deteriorated he decided he must attempt to expatriate as much of his capital as could be saved. Accordingly he converted what Angolan assets he could to coffee beans, which he exported to South West Africa. The beans were subsequently sold abroad at a profit.

While he had bought the beans with an intention of re-selling them, this did not form part of a profit-making scheme but was part of a plan to transfer his capital outside Angola. The capital was simply converted into beans and then re-converted into Rands. In view of the fact that he had never carried on a trade of dealing in beans in South West Africa, the buying and selling of the beans was carried out with a view to the transmission of capital rather than the generation of profit, and the amount concerned was regarded as being of a capital nature.

\textsuperscript{61}1978, 41 SATC 36.
3.3 Advantages of the objective approach

The relegation of the ‘golden rule’ being the test of intention, to a subsidiary evidential element in enquiry will lighten the darkness surrounding the subject. The objective approach is regarded free-standing objective tests of whether the person is in fact realising a capital asset or carrying on a scheme for profit-making.

This approach will firstly obviate the legal problems which have arisen as a result of the blurring of the distinction between the company as a legal entity and the persons concerned with it as legal entities. This resulted from attempting to establish the intention of a juristic person by invoking the intentions of the directors and/or shareholders in determining the intention of a company. It is to be hoped in this regard that the well-reasoned minority judgment of Corbett JA in *Elandsheuwel Farming (Edms) Bpk v SBIF*\(^2\) will be followed in the future.

The appellant company had held as virtually its only asset a piece of land, within the Krugersdorp Municipal area, although not contiguous to the town itself, as a capital asset on which one of the shareholders had conducted farming operations. Following a change of shareholders, the company had sold

\(^2\) 1978 (1) SA 101 (AD), 39 SATC 163.
the land at a considerable profit in a block to the Municipality for township purposes. It was held by the majority of the court that the change in shareholding of the company had effected a change in the intention with which the company had held the land, so that it was now held as stock in trade and sold in the course of a profit-making scheme. The profit made by the company was thus held to be taxable.

Corbett JA however (Kotze JA concurring), held that a distinction must be drawn between the intentions of the new shareholders when they acquired the shares and the intentions manifested by them as directors, in the conduct of the affairs of the company. The learned judge went on to hold that, 'speculation bent' as the new shareholders might have been, the transaction from their point of view was

‘... hardly a profit-making scheme in any accepted sense. What they purchased, viz the shares and loan account, they at all material times retained; there was no resale of these items or property, either at a profit or at all. What was eventually sold was property belonging to the appellant company and the proceeds of this sale accrued not to the shareholders but to the company. It is true that the company, guided by the directors, lent an amount representing the major portion of the proceeds to its shareholders. Whether this form of investment is consistent with the provisions of clause 2(a) of appellant’s memorandum of association may be open to some question - I express no final opinion thereon - but what is quite clear is that these proceeds could never
lawfully become the property of the shareholders; they had to be carried to capital reserve. But in any event, it is not from their point of view but from the point of view of the appellant company that the existence or otherwise of a profit-making scheme must be adjudged. And from the company's standpoint all that happened was that the change in shareholding which occurred on 11 November 1969, and the resultant reconstitution of the board of directors, led to a decision to market and sell a capital asset, viz the property. This, as I shall show later, can also hardly be construed as a profit-making scheme.\textsuperscript{63}

The learned judge then went on to hold that the way in which the asset had been sold indicated that the transaction constituted a mere realisation of a capital asset, and the gain thereon was thus not subject to tax. The appellant had not 'crossed the Rubicon'; and this decision was made in a purely objective manner. The passage quoted above, shorn of the references to intention, is in essence the objective test which should be followed: the legal distinction between a company and the shareholders and / or directors has been rigidly preserved and the final outcome rested on nothing more than an objective assessment of all the relevant factors.

Lack of reliance on the test of intention will also obviate all the problems which have arisen in regard to the different types of intention which the courts have

\textsuperscript{63} At 186.
found to exist: initial intention, changed intention, and dominant intention. It has been recognised that an initial intention with regard to an asset or assets may change and the taxpayer has at times been faced with the onus of proving both an initial intention and the lack of any change in that intention.

The appellant in *John Bell & Co (Pty) Ltd v SIR*\(^6^4\) sold a redundant capital asset some time after it had outlived its usefulness to the company. The Special Court held that the appellant had discharged the onus of proving the initial intention with which the asset had been held viz that of holding it as a capital asset, but had then gone on to hold that the appellant had failed to discharge the onus of proving that the asset, once redundant, had not been held with a changed intention; that of holding it for sale at a profit.\(^6^5\)

On appeal it was held that the asset had merely been held until such time as it might be disposed of to best advantage (in line with the judgment in *Berea West Estates (Pty) Ltd v SIR*\(^6^6\)). From the judgment of Wessels JA it is apparent that if the test of intention ever was 'golden', it has lost a considerable amount of its lustre. After quoting the remarks of Schreiner JA in CIR v *Richmond Estates*

\(^{64}\) 1976 (4) SA 415 (A), 38 SATC 87.
\(^{65}\) At 99.
\(^{66}\) 1976 (2) SA 614 (A), 38 SATC 43.
(Pty) Ltd\textsuperscript{67} and those of Holmes JA in \textit{Natal Estates Ltd v SIR}\textsuperscript{68} to the effect that intention is but one factor to be considered, the learned judge then went on to decide the case on the objective grounds of whether the way in which the asset was disposed of amounted to a scheme of profit-making; i.e. in the same way that Corbett JA approached the problem discussed above in the \textit{Elandsheuwel Farming}\textsuperscript{69} case.

The approach of the Supreme Court of Appeal in this regard, as exemplified in the \textit{Berea West, Natal Estates, Elandsheuwel Farming} and \textit{John Bell} cases shows a movement towards the downgrading of the test of intention and a leaning towards the objective approach. The courts have begun to assess various factors in a far more objective and common-sense way than was the case for some time.

But finally the judgement in \textit{CSARS v Founders Hill}\textsuperscript{70} relegates the intention of the taxpayer together with his activities to one of the factors to be considered in determining the nature of proceeds. Lewis JA held that one should consider objectively whether the taxpayer is actually trading or carrying on a business. It is submitted that this new intervention has been long overdue, but the earlier

\textsuperscript{67} 1956 (1) SA 602 (AD), 20 SATC 355.
\textsuperscript{68} 1975 (4) SA 177 (A), 37 SATC 193.
\textsuperscript{69} \textit{Elandsheuwel Farming (Edms) Bpk v SBI} 1978 (1) SA 101 (A), 39 SATC 163.
\textsuperscript{70} \textit{CSARS v Founders Hill} (509/10) [2011] ZASCA 66, 73 SATC 183.
cases have sown the seeds for such intervention and now with careful nurturing we will see the light of day penetrate the present gloom – and it need not be stressed how invigorating a sunshine it is.

3.4 Conclusion

The objective approach to establishing the nature of a particular receipt or accrual accords with the classic metaphor of capital as the tree and income as the fruits thereof as used, for example, by Meyerowitz. This is no doubt what Innes CJ meant in *CIR v Lunnnon* when he referred to the economic meanings of capital and income. The learned Chief Justice was in fact more explicit in *COT v Boomsens Estates Ltd*, when he adopted with approval the remark of Wessels J that ‘income considered in relation to capital is revenue derived from capital productively employed’. As he himself went on to remark:

‘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 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.’

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72 1924 AD 94, 1 SATC 7.
73 1918 AD 576, 32 SATC 10.
74 At 25.
However, it should be appreciated that the realisation of property to best advantage applies to the realisation of a capital asset only and

‘the fact that a taxpayer refers to an asset as a capital asset does not make it one.’ \(^75\)

It must be noted that a taxpayer may ‘cross the Rubicon’ by embarking on a scheme of profit-making through trading in the assets initially held as capital. Dealing with the question whether the taxpayer ‘crossed the Rubicon’ suggests a supposition that the asset was capital in the hands of the taxpayer upon its acquisition. Approaching the matter in this way begs the question whether the property was indeed a capital asset in the hands of the taxpayer in the first place bearing in mind that the fact that a taxpayer refers to an asset as a capital asset does not make it one.

It is accepted that a realisation company, too, can ‘cross the Rubicon’ when doing more than realising same to best advantage. The Revenue authorities have always viewed ‘realisation entities’ with some suspicion. This being understandable as the very purpose of a realisation company is to acquire assets with the express intention of selling them – carrying on the business of

\(^75\) CSARS v Founders Hill (509/10) [2011] ZASCA 66, 73 SATC 183 at 194.
trading. Therefore the tax status of realisation companies requires greater scrutiny.
CHAPTER 4
REALISATION COMPANIES

4.1. Introduction........................................................................................................ 42
4.2. The ‘realisation company’ concept...................................................................... 43
4.3. Berea West Estates (Pty) Ltd v SIR................................................................. 47
4.4. J M Malone Trust v SIR.................................................................................. 52
4.5. The golden thread............................................................................................. 54
4.6. CSARS v Founders Hill.................................................................................... 57
4.7. Conclusion........................................................................................................ 60
4.1 Introduction

An important exception to the general rule that if a company acquires an asset with the express object of reselling it the proceeds are income is to be found in the concept of a ‘realisation company’. A trust can also be used as a realisation vehicle and the concept applies equally to a ‘realisation trust’.

This concept has its origin in the Rhodesian case of *Realisation Company v COT* where the company concerned had been formed with the object of liquidating to best advantage assets that it took over from its holding company, which owned all the shares of the company. The court considered that what was envisaged by the concept of a ‘realisation company’ in certain foreign cases was ‘a company the main object of which is the recovery of capital, not the making of profits’, and concluded that

‘where a company is formed for a legitimate purpose unrelated to tax avoidance with the express object of realising assets acquired at its formation from its promoter – assets which the promoter himself could have realised in similar circumstances without attracting tax, and that company does nothing more than realise those assets, then any gains [proceeds] made on a simple realisation of those assets would be regarded as accruals of a capital nature.’

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77 1951 (1) SA 177 (SR) (1950 SR 182), 17 SATC 139 at 160.
The concept of a ‘realisation company’ was acknowledged as having a proper place in South African law in *Berea West Estates (Pty) Ltd v SIR*,78 in which the court referred with approval to various decisions of the courts of the United Kingdom and to the *Realisation Company* case, all of which had upheld the validity of the concept of a realisation company.

Doubts about the correctness of the *Realisation Company* decision were expressed in *ITC 758*79 but were allayed in *ITC 1244*80, in which the concept of a realisation company was not necessarily accepted. The concept was accepted, however, by the Appellate Division of the Supreme Court in *Berea West Estates (Pty) Ltd v SIR*, where the failure of the court in *ITC 758* sufficiently to ‘recognize the legal position of a realisation company in relation to income tax’ was noted by Holmes JA, who delivered the judgment of the court.

4.2 The ‘realisation company’ concept

The Commissioner has always viewed realisation companies with suspicion, being understandably chary of taxpayers who seek to use the label ‘realisation company’ to characterise their assets as capital when in truth they are trading assets. The advantage of the disposal of assets through a realisation company

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78 1976 (2) SA 614 (A), 38 SATC 43.
79 (1952) 19 SATC 94 at 95.
80 (1975) 38 SATC 7 at 11.
is that, subject to the discussion below, the proceeds of disposals by a realisation company may for tax purposes be treated as capital in nature instead of fully taxable proceeds of revenue transactions. As the court pointed out in *CSARS v Founders Hill*\(^8^1\), when a company is given the label ‘realisation company’, the question is twofold: whether it merely disposed of its assets to best advantage on capital account or whether in effecting the disposal it was trading in the assets as a realisation company too can ‘cross the Rubicon’.

The principle that emerges from the long line of cases dealing with this concept is that a ‘realisation company’, in the present context\(^8^2\)

‘...is one formed for the purpose of facilitating the realisation of property and the company does no more than act as the means by which the interests of its shareholders in the property may be properly realised. Surpluses made from sales of the property are supposedly not taxable as trading profits since such surpluses are capital receipts.’

It was widely believed that the case law established a general rule that if a company sets up a so-called realisation company in order to sell off land or property, the proceeds of the sale will be capital in nature, and thus subject to capital gains tax. There are many examples in case law where realisation

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\(^8^1\) *CSARS v Founders Hill* (509/10) [2011] ZASCA 66, 73 SATC 183.

\(^8^2\) *CSARS v Founders Hill* (509/10) [2011] ZASCA 66, 73 SATC 183 at 187.
companies were used to sell land and thereby ensured that the proceeds would be of a capital nature. The most famous of the realisation company cases is *Berea West Estates (Pty) Ltd v SIR*\(^{83}\), in which the Supreme Court of Appeal found that the use of a realisation company in the circumstances did ensure that the proceeds on sale of property were of a capital nature.

Some academic writers have also created the impression that the use of a realisation company should secure the income from the sale of property as capital. Silke\(^{84}\) states that ‘an important exception to the general rule that if a company acquires an asset with the express object of reselling it the proceeds are income is to be found in the concept of a realisation company’. Legal and tax advisors have also followed suit, advising clients to set up realisation companies when companies need to sell land owned by them, which would secure the proceeds as capital in nature.

This commonly held misperception was identified in the landmark judgement of *CSARS v Founders Hill*\(^{85}\) with its profound tax consequences.

> ‘Calling an entity a ‘realisation company’ (and limiting its objects and restricting its selling activities in respect of the assets transferred to it), is not itself a

\(^{83}\) 1976 (2) SA 614 (A), 38 SATC 43.

\(^{84}\) *Silke on South African Income Tax* in para 3.16.

\(^{85}\) *CSARS v Founders Hill* (509/10) [2011] ZASCA 66, 73 SATC 183 at 198.
magical act that inevitably makes the profits derived from the sale of the assets of a capital nature. Silke recognizes this when it states that it is conceivable that a realisation company can change its intention and start trading in the assets. But this assumption begs the question whether, in circumstances where 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 ever 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 realisation company is so that it can realise the property, on what basis can it be said that it ever held it as capital?’

The view taken that the interposition of a realisation company in some way enhance the intention to realise capital assets, rather than to trade, thereby ensuring that the proceeds are of a capital nature required greater scrutiny and the court considered the relevant cases and found that in every instance where a company or trust had won the argument, there had been compelling reasons why the owners of the assets had found it necessary to transfer the assets into a company (or sometimes a trust) established for that purpose.86

86 CSARS v Founders Hill (509/10) [2011] ZASCA 66, 73 SATC 183 at 183.
An analysis of the relevant cases and the compelling reasons necessitating the interposition of a realisation company will now follow.

4.3 Berea West Estates (Pty) Ltd v SIR

The principal progenitor of cases in South Africa dealing with realisation companies is *Berea West Estates (Pty) Ltd v Secretary for Inland Revenue*\(^{87}\).

The facts of *Berea West*, in summary, were these. Hermann Konigkramer (K) married his wife, Elise, in community of property. In 1890 they entered into a postnuptial contract excluding the community. K owned a farm in Berea West, in the Durban area. It was some 620 acres in extent. Elise died in 1912, leaving her rather small estate (since community was excluded) to their 13 children, subject to a usufruct in favour of K.

In terms of the trust deed, executed notarially in 1922, an undivided half share of the farm was donated in trust for his 13 children and was transferred to the trustees after K’s death in 1927. In terms of K’s will, the remaining undivided half share of the property was also left to his 13 children. The administration of the trust and K’s estate proved to be difficult and protracted and it took some ten years before the estate liabilities were fully paid.

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\(^{87}\) 1976 (2) SA 614 (A), 38 SATC 43.
The beneficiaries and other interested parties agreed that a company be formed to acquire the assets of the deceased estate and of the trust, and that shares be issued as consideration for the interests of the heirs and beneficiaries in the company in proportion to their respective entitlements.

The land was transferred to the company. Prior to the company's acquisition of the land, K’s estate had received approval for the conditions of establishment of various townships, and these were proclaimed after the company had acquired the land. The company disposed of the land by first developing and selling lots in one area and then, using the funds so acquired, developing and selling lots in another area.

Holmes JA concluded that the basis of the finding that the company had become an ordinary company, trading for profit, was that after inception it had deviated from its original intention. Furthermore he held that:

‘The corner-stone of the argument on behalf of the respondent [the Secretary] was that, basically, if a company buys land with the object of selling it, and does so at a profit, the latter is regarded as income. Counsel for the appellant did not collide with this proposition: he sought to turn its flank by contending that it did not apply because the appellant acted merely as a realisation company and

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88 Berea West Estates (Pty) Ltd v Secretary for Inland Revenue 1976 (2) SA 614 (A), 38 SATC 43 at 59.
therefore any profit was of a capital nature. It is accordingly necessary to refer to the concept of a realisation company in relation to income tax. As will appear later, in general the authorities sanction a proposition which may be illustrated along the following lines:

Suppose, for example, A and 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 realising 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, using the land as its stock-in-trade.

The position is well put in Simon’s Taxes, 3rd Ed at p B 1.214

“If a company is formed for the purpose of facilitating the realisation of property and the company does no more than act as the means whereby the interests of its shareholders may be properly realised in the property, surpluses made from sales of the property are not taxable as trading profits since such surpluses are capital receipts.”

The editors of Simon’s Taxes relied on the case of Rand v Alberni Land Co Ltd (1920) 7 TC 629(KB). In this case the surveyor of taxes contended that the
receipts from the sales of land should be included as trade receipts, and the expenses as trade expenses, in computing the profits of the company, and that such profits were assessable to income tax. The company contended that the reason for which the company was formed was solely to facilitate the realisation of the estate which could not be dealt with satisfactorily by any other means, owing to the number of persons interested and the diversity of their interests; and that the company had never bought any land or carried on any trade in land.

The court found that upon the evidence that the company had not traded in land but was a realisation company.89

“I think that in this case the company has done no more than provide the machinery by which the private land-owners were enabled, under the peculiar circumstances of their divided title, to properly realise the capital of the property which they held in the lands in question, and that it is not income or the proceeds of trade...”

Rand v Alberni Land Co Ltd90 was applied by the Court of Appeal in Taylor v Good (Inspector of Taxes) [1974] 1 All ER 1137 at 1143, where Russell LJ said of it:91

89 Berea West Estates (Pty) Ltd v Secretary for Inland Revenue 1976 (2) SA 614 (A), 38 SATC 43 at 59.
“It was a case in which lands were owned in the ordinary sense (that is to say, not acquired with a view to sale) by a number of people who set up a company purely as machinery to realise their interests in the land — to turn land into money. The company expended money in clearing the land and forming roads and even in procuring a railway company to bring a line to open up the area. This was only a course, it was said, of enhancing the value of the land and not of trading”.

Continuing with the concept of a realisation company in relation to income tax, one finds the Privy Council using the expression in Commissioner of Taxes v The Melbourne Trust Ltd.92

“The argument for the respondents (i.e. the company assessed to income tax on certain profits) can be stated in a single sentence. They say they were not a trading company but a realisation company; that the realisation was truly for the benefit of the original creditors of the three banks; that all the shareholders in the company are either such original creditors or assignees of such original creditors. If that is the true view of the situation their Lordships do not doubt that the argument must prevail”.

90 (1920) 7 TC 629(KB).
91 Berea West Estates (Pty) Ltd v Secretary for Inland Revenue 1976 (2) SA 614 (A), 38 SATC 43 at 60.
92 (1914) AC 1001 at 1009
Holmes JA considered the cases on which the editors of Simon’s Taxes had relied, and concluded that they were authority for the proposition that where a company was formed solely for the purpose of ‘facilitating the realisation of property which could not otherwise be dealt with satisfactorily’, then the profit achieved on sale would be of a capital nature and not taxable. In none of the cases discussed in Simon’s Taxes and evaluated by this court was there but a single owner who interposed a ‘realisation company’ where it could satisfactorily have realised the capital asset itself.

The court concluded that Berea West had not traded in land and was not taxable on the profits that it made on its sales over time. Holmes JA held that the beneficiaries had set up the company ‘for the purpose of facilitating the realisation of the land, and that the company, in which they became the shareholders, was merely the machinery for realising their interest in the land’.

4.4 J M Malone Trust v SIR

The concept of a realisation company was further developed in J M Malone Trust v SIR\(^\text{93}\). In 1917 Mrs J F Malone acquired a farm in Beacon Bay, East London. She lived there with her family for many years but the land was not suitable for farming. Upon the death of Mrs Malone and her husband, their son,

\(^{93}\) 1977 (2) SA 819 (A), 39 SATC 83.
Joseph Malone, acquired the farm. When he was fifty he married a younger woman and they had three children. His wife, in the words of Trollip JA, was ‘financially irresponsible’ and his money was rapidly dissipated.

Joseph Malone decided to establish a township on the land but before this was finalised Mrs Malone had spent all the family money and had taken up with a younger man.

Joseph established a trust, the purpose of which was not only to establish a township but also to ensure that the proceeds from any sales would go to the trust and not to Mrs Malone. Malone died in June 1968 and the executor of the estate had considerable difficulty in dealing with the property and proceeding with the establishment of a township. He thus transferred the land to the trust so that he could see to the establishment of the township in his capacity as a trustee.

For the tax years 1970 and 1971, sales of erven in the township achieved profits which the Secretary taxed as income. An appeal against the assessment to a special income tax court failed.

On a further appeal to the Supreme Court of Appeal, Trollip JA held that Malone, had he established the township himself, would have been doing no
more than realizing his property to best advantage. When his executor transferred the land to the trust it did not engage in land trading. In forming the trust Malone merely ‘set up the necessary machinery to implement that intention [to realise to best advantage] on his behalf more efficiently in order to protect the interests of himself, his wife, and more especially his children.’ Trollip JA, also relying on Simon’s Taxes\textsuperscript{94} and on Berea West said that the principle to be distilled was that:

‘[I]f a trust is formed for the purpose of facilitating the realisation of property and the trust does no more than act as the means whereby the interests of its beneficiaries may be properly realised in the property, surpluses made from sales of the property are not taxable as trading profits since such surpluses are capital receipts. That statement is particularly apposite to the present case. In other words the trust here was purely a realisation trust to which the principles expounded in the Berea West case are applicable.’

4.5 **The golden thread**

The distinction between cases where an asset is transferred to a company from a single source for the sole purpose of realizing it, on the one hand, and Berea West and Malone on the other, is that in each of the latter cases there was a real justification for the formation of the company or trust (in addition to the purpose of realizing the assets). First, more than one person transferred the

\textsuperscript{94} Third edition p B1.214.
assets to the interposed entity (as in Holmes JA’s example of A, B and C); and second, without the interposition of a company or trust, realisation would have been difficult if not impossible.

So too, the cases discussed in Simon’s Taxes, referred to by Holmes JA in Berea West are instances of interposition of another entity in order to achieve a purpose over and above the realisation of property. In Rand v Alberni Land Co Ltd a new entity was required to facilitate the sale of property previously held by different people. In Inland Revenue Commissioners v Westleigh Estates Co Ltd the purpose was to consolidate and conveniently administer the interests of beneficiaries under different wills. In Commissioner of Taxes v The Melbourne Trust Ltd a company was formed to facilitate the sale of assets belonging to three banks for the benefit of their respective creditors.

In a more recent case in the Supreme Court of Canada, Balstone Farms Limited v Minister of National Revenue, an elderly couple had owned farm land, let under crop leases, for many years. They decided to sell the land, at a profit, to a company for the purpose of selling it, though it was anticipated that it would continue to be farmed for a period and this object was set out in the letters

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95 Inland Revenue Commissioners v Westleigh Estates Co Ltd [1924] KB 390.
96 Commissioner of Taxes v The Melbourne Trust Ltd 1914 AC 1001 (PC).
97 (1968) SCR 205.
The company gave several options on the lands to prospective purchasers: when these were not exercised the company retained option payments. In due course the property was sold. The Minister assessed both the receipts of option payments and the proceeds of sale for tax. The company, on appeal to the Supreme Court, relied inter alia on *Rand v Alberni Land Co Ltd*[^98], arguing that it had been formed as a realisation company for the purpose of disposing of capital assets. The court rejected the argument. That case, it said, quoting from the judgment of Rowlatt J, had ‘done no more than provide the machinery by which the private landowners were enabled under the peculiar circumstances of their divided title, to properly realise the capital of the property ... and that is not income or proceeds of trade’.

Judson J in *Bals tone Farms Ltd v Minister of National Revenue*[^99] added: ‘In none of these realisation cases was there an out and out transfer by former owners for a cash consideration. [Bals tone] was not “realising” or selling these properties for the benefit of prior owners or the creditors of prior owners. The

[^98]: (1920) 7 TC 629(KB).
[^99]: (1968) SCR 205 at 212 – 213.
facts speak for themselves and fully justify the finding of fact of the learned trial judge. The company was selling on its own behalf to make a profit...’

4.6 CSARS v Founders Hill

The respondent, Founders Hill (Pty) Ltd (Founders Hill), is described as a ‘realisation company’ since it was formed for the avowed purpose of realizing land formerly owned as a capital asset by its holding company, AECI Ltd (AECI). The land, in extent about 4 100 ha, served as a buffer between the explosives factory and the surrounding residential areas. By the mid-1980s legal and technological conditions had changed to the extent that much of this land was no longer needed as a buffer. Accordingly, Founders Hill was incorporated in 1993 as a wholly owned subsidiary of AECI to take ownership of much of the land “for the sole purpose of realising same to best advantage”, according to the Memorandum of Association.

Activities by Founders Hill in the process of disposing of the land included rezoning, subdividing, engaging professionals to develop the erven, installing services and marketing. A marketing company called Heartland, also a wholly owned subsidiary of AECI, was engaged to market that portion of the land not transferred to Founders Hill. The unsold land was later transferred to it and it
developed, marketed and sold this land “on a grand scale”. The use of this phrase, culled from *Natal Estates*\(^{100}\) which resulted in defeat for the taxpayer, in part because of the scale of its activities, is the first hint of where the judgment was going.

The court found that Founders Hill was not merely AECI’s alter ego, but it was formed solely for the purpose of acquiring the property and then developing and selling it at a profit and therefore the property was stock-in-trade. This is apparent from the terms of the memorandum of association and was confirmed by the minutes of the board of directors and the witnesses as well as the manner in which it dealt with the properties. The mere fact that Founders Hill said that it acquired the properties as capital assets did not make them such. Founders Hill was no different from *Balstone*\(^{101}\). Its business was to develop the erven and sell them. Its intention in acquiring was different from that which AECI had had, at least originally, to hold its surplus land as a capital investment.

Founders Hill’s profits were gains ‘made by an operation of business in carrying out a scheme for profit-making’ and therefore revenue derived from capital productively employed and must be taxable income. Counsel for Founders Hill

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\(^{100}\) *Natal Estates Ltd v Secretary for Inland Revenue* 1975 (4) SA 177 (A), 37 SATC 193.

\(^{101}\) *Balstone Farms Limited v Minister of National Revenue* (1968) SCR 205.
could not explain why it was formed, and AECI assets sold to it, other than on the basis that AECI had taken legal advice to this end. That is not an explanation. And the case does not fall within the exception recognised on the special facts of *Berea West*\(^{102}\) where the realisation of the property was not the main purpose of the interposition of the trust but a subsidiary one, or where, in the example of Holmes JA, three parties form a company to enable them to realise their properties to their best advantage. Special cases do not create general rules.

It was held that Founders Hill acquired the property as stock-in-trade and then conducted business in trading in the property and that the profits made were taxable as income. The court found that there were no compelling reasons present of the kind that had caused the taxpayers to prevail in *Berea West* and *Malone Trust*\(^{103}\). Accordingly, the proceeds were gross income and taxable as such.

\(^{102}\) *Berea West Estates (Pty) Ltd v Secretary for Inland Revenue* 1976 (2) SA 614 (A), 38 SATC 43.

\(^{103}\) *J M Malone Trust v SIR* 1977 (2) SA 819 (A), 39 SATC 83.
4.7 Conclusion

Referring to companies formed for the purpose of realizing property Clerk LJ stated the general rule in *Californian Copper Syndicate*:\(^{104}\) in such cases ‘it is not doubtful that where they make a gain by a realisation, the gain they make is liable to be assessed for income tax’. The importance of this statement is that when an entity is formed for the sole purpose of realizing property, profits achieved amount to income made from trading. An interposed realisation 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*.

The court in *Founders Hill* considered the relevant cases and found that in every instance where a company or trust had won the argument, there had been compelling reasons why the owners of the assets had found it necessary to transfer the assets into a company (or sometimes a trust) established for that purpose. It is not sufficient merely to argue that, had the owner sold the asset without recourse and without using a realisation vehicle, the proceeds would have been capital in nature.

\(^{104}\) *Californian Copper Syndicate v Internal Revenue* (1904) Sc (Court of Session) LR 691 at 694.
An analysis of the cases dealing with the tax status of realisation entities indicated the following circumstances as real justification for interposing a realisation vehicle as opposed to selling it directly:

- in *Berea West Estates (Pty) Ltd v SIR* the rights to the assets of a deceased estate were jointly owned by the members of a very large family. In order to facilitate the disposal, over a considerable period, the company was formed and the family members given proportionate shares in it.

- in *J M Malone Trust v SIR* the executor of a deceased estate had to establish a trust with himself as trustee and transfer the estate property to the trust, so that as trustee he had powers of disposal that he did not enjoy as executor. In addition he was concerned to protect the minor children of the deceased from their prodigal mother.

Further examples, these from foreign jurisdictions, were:

- *Rand v Alberni Land Co Ltd*, where the company was formed to facilitate the sale of property previously held by different people;
• **IRC v Westleigh Estates Co Ltd**\(^{105}\), where the purpose, rather like *Berea West*, was to consolidate and conveniently administer the interests of beneficiaries under different wills;

• and **COT v The Melbourne Trust Ltd**, where the company was formed to facilitate the sale of assets belonging to three banks for the benefit of their respective creditors.

By contrast, in cases where the taxpayer had failed to convince the court that it was a realisation company or that, if it was, the proceeds were nevertheless found to be taxable, there had been no pressing reason to use a company as a disposal vehicle. The mere fact that the proceeds would have been capital in the hands of the founder of the company does not of itself render the proceeds capital in the hands of the company. In the Canadian case *Balphs Farms Ltd v Minister of National Revenue* the elderly couple who owned the land in question sold it to a company with a view to its ultimate sale. The court held that the company had acquired the land with the intention of selling it, and the proceeds were taxable.

The *Founders Hill* judgement does not, as might first appear, change the law relating to realisation companies. It merely spells out the requirements needed

\(^{105}\) (1924) KB 390.
to enable a realisation company to escape being taxed on the proceeds of the
disposal of its assets effectively correcting the commonly held misperception.
The court has in effect done no more than crystallise the principles applied in
deciding the earlier cases.
CHAPTER 5
SUMMARY AND CONCLUSION

5.1. Introduction................................................................. 64
5.2. The relegation of intention as the litmus test.......................... 65
5.3. The tax status of realisation companies............................... 67
5.4. Implications of the decision............................................ 69
5.1 Introduction

The problems which have arisen from the deceptively straightforward definition of ‘gross income’ are well known, but none have been so perplexing, or so unsatisfactorily answered, as those generated by that magic phrase ‘excluding receipts or accruals of a capital nature’. The question has occupied the minds of the courts for decades but the subject is still as murky as ever.

The problem has arisen because of a lack of definition of what in fact constitutes ‘receipts or accruals of a capital nature’. The result has been that the courts have grappled over the years with the problem without very much guidance from the legislature, and some limited guidance from English cases on the subject. The issue that has attracted the most litigation in South African tax law has been whether gains from the disposal of an asset are of a capital or of a revenue nature.

It has been a truism up until now that if the taxpayer that disposes of the asset is a so-called ‘realisation company’, a company formed for the sole purpose of realising that asset, the proceeds will be treated as capital in nature. A recent ground-breaking decision of the Supreme Court of Appeal, *CSARS v Founders*
Hill\textsuperscript{106}, has upended that view and the magic tax planners could weave by moving assets into these companies, is virtually gone.

5.2 The relegation of intention as the litmus test

In determining whether an amount received upon realisation of an asset is capital or revenue in nature the starting point is usually the intention of the taxpayer. It is a longstanding principle in tax law that where an asset is realised at a profit as a mere change of investment there is no difference in character between the amount of enhancement and the balance of the proceeds.

However, where the profit is ‘a gain made by an operation of business in carrying out a scheme for profit making then it is revenue derived from capital productively employed and must be income’.\textsuperscript{107}

It is a well established principle that a person is entitled to realise his assets to his best advantage and to accommodate these assets to the exigencies of the market in which he was selling without converting what is capital to revenue.\textsuperscript{108}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{106} CSARS v Founders Hill (509/10) [2011] ZASCA 66, 73 SATC 183.
\item \textsuperscript{107} COT v Booyzen’s Estates 1918 AD 576, 32 SATC 10.
\item \textsuperscript{108} CIR v Stott 1928 AD 252, 3 SATC 253.
\end{itemize}
\end{footnotesize}
However, determining whether a person has merely realised an asset to his best advantage or embarked on a scheme of profit making is subjective and depends on the individual facts of each case. The question often posed is whether, based on the extent of the activities of a taxpayer, he has crossed the Rubicon and embarked on a scheme of profit making.\textsuperscript{109}

The \textit{Founders Hill}\textsuperscript{110} case in dealing with the question whether there is a change in intention, indicated that the question is whether a taxpayer is actually trading or carrying on a business and not merely whether or not it has changed its mind. Even though one should consider the intention of all concerned, it was indicated that intention cannot be ‘conclusive’ in the enquiry. It was indicated that the intention of a taxpayer cannot be the litmus test which determines whether the proceeds of an asset are on revenue or capital account.

Lewis JA held that one should consider objectively whether the taxpayer is actually trading or carrying on a business and not merely whether or not it has changed its mind.\textsuperscript{111}

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\textsuperscript{109} \textit{Natal Estates Ltd v SIR} 1975 (4) SA 177 (A), 37 SATC 193.
\textsuperscript{110} \textit{CSARS v Founders Hill} (509/10) [2011] ZASCA 66, 73 SATC 183.
\textsuperscript{111} \textit{CSARS v Founders Hill} (509/10) [2011] ZASCA 66, 73 SATC 183 at 193.
\end{flushright}
5.3 The tax status of realisation companies

It is clear that Berea West and other case law have established the principle that where an entity is formed solely for the purposes of facilitating the realisation of property which could not otherwise be disposed of to best advantage, the profit realised on the sale would be capital in nature.

In Founders Hill the Court analysed the Berea West judgment in detail and concluded that a realisation company will stand in the shoes of the entity that has sold assets to it, and hold them in turn, as capital assets, only in special circumstances. However, special cases do not create general rules.

The intervention of a realisation company to sell the land does not constitute an automatic mechanism by which the receipt of the proceeds will constitute a capital receipt. This is fortified by the fact that once purpose of the realisation company is established as being the realisation of the property, it could not be said that the land was held as capital.

Such special circumstances did not exist in the case of Founders Hill. In contradistinction to Berea West and the other cases (referred to above) although Founders Hill was formed with the avowed purpose of realising land (formerly owned, as a capital asset, by its holding company, AECI Ltd) to best advantage, it was a wholly owned subsidiary of AECI. It was not established to
consolidate the interests of a number of parties in order to facilitate a unified realisation to best advantage. AECI could have realised the asset itself without the intervention of the realisation company. In fact, Counsel for Founders Hill could not explain why the realisation company was necessary other than that AECI had taken legal advice to this end.

In Berea West and the latter cases there was a real justification for the formation of the realisation entity (in addition to the purpose of realising the assets). First, more than one person transferred the asset to the interposed entity; and second, without the interposition of a company or trust, realisation would have been difficult if not impossible.

This judgment does not overturn longstanding principles established in law. In fact it reinforces and clarifies these longstanding principles. It is clear from the Berea West case, a case dating back to 1976, that the mere use of a realisation entity does not guarantee that the profits realised by such an entity are always capital in nature. It is only in certain special circumstances that a realisation entity will stand in the shoes of the person that has sold assets to it, and hold
them in turn, as capital assets. But, as clarified in Founders Hill, special cases
do not create general rules.\textsuperscript{112}

Where these special circumstances do not exist, the general principles must still
be applied in determining whether the activities of the taxpayer are such that a
taxpayer has crossed the Rubicon and started trading, as was the case in
Founders Hill.

5.4 Implications of the decision
The decision of the SCA will no doubt lead to the decline and ultimate
disappearance of realisation entities, except in the most special of cases. The
mere presence of these companies will now invite scrutiny from Revenue
authorities rather than decrease the risk of a greater tax burden. A chill will no
doubt run down the spine of taxpayers who have used these entities in the past
but provided they have made full disclosure in their tax returns, the decision
should not affect transactions that occurred outside of the 3-year prescription
period.\textsuperscript{113}

\textsuperscript{112} Barry Ger ‘Tax Planners Con-“founder”ed by Supreme Court of Appeal Decision on
Realisation Companies’ (2011) KPMG Tax & Legal Newsletter.
\textsuperscript{113} Barry Ger ‘Tax Planners Con-“founder”ed by Supreme Court of Appeal Decision on
Realisation Companies’ (2011) KPMG Tax & Legal Newsletter.
The decision should also remind advisors that long established tax planning tools can prove unwieldy when the cold light of judicial scrutiny shines upon them. Revenue receipts and accruals cannot be transformed so easily into capital merely by having it realised in a different entity. The magic that realisation companies held up until now is gone.
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