IN THE FIJI COURT OF APPEAL
CIVIL APPEAL NO. 27 OF 1987

Between:

THE COMMISSIONER OF INLAND REVENUE

Appellant

- and -

EDWARD CHARLES WOODWARD

Respondent

Mr. Leung with Mr. Seeto for the Appellant
Mr. Keil for the Respondent

Date of Hearing: 29th November, 1988

Delivery of Judgment: 3rd March, 1989

JUDGMENT OF THE COURT

This is an appeal from the decision of Mr. Justice Rooney, allowing an appeal by the Respondent in this appeal (the appellant and taxpayer in the appeal before him) from the judgment of the Court of Review, which on the 7th November, 1985 dismissed an appeal by the Respondent against assessments by the appellant (the Commissioner of Inland Revenue).

The appellant appeals on the following three grounds:-

(1) The learned trial judge erred in law in holding that no profit or taxable profit arose from transactions the subject of the Appeal before him.

(2) The learned trial judge erred in law in holding that since there were no expenses to be deducted from the sum realized by the taxpayer from transactions, the subject of the Appeal

before him, it therefore followed that the said sum was not taxable.

(3) The learned trial judge erred in law in failing to appreciate that in the instant case the profit achieved by the taxpayer was indeed the net profit, the net profit in the instant case being commensurate with the gross profit.

The appellate Judge in his judgment repeated the undisputed facts set out by the Court of Review in its judgment. We repeat those facts which are as follows:-

" Edward Charles Woodward (whom I will call the taxpayer) in 1972 inherited from his grandfather a copra plantation at Savusavu, Vanua Levu, containing 240 acres 1 rood 30 perches and known as Naveria comprised in Certificate of Title 5679 His grandfather had died in 1944 leaving a life estate in the land to his son Henry Leonard Barrack. The latter effected no fewer than four subdivisions of the land, intending to raise money by leasing it in part. Those four subdivisions appear to total 11 acres 1 rood 10.7 perches although the Government Valuer estimated the area at 12.67 acres. The property had originally, as I have said, been a copra plantation, and the taxpayer, when he took over, intended to continue it as such, but he found the market depressed, and the expenses attendant upon the production of copra resulted in a very small income from that source. The life tenant had allowed nineteen tenants to build houses on the land he had subdivided, and a further twenty seven to build houses on land which he had not formally subdivided, but these tenants were backward in paying their rent, and apparently unwilling to acknowledge an absentee landlord, although the taxpayer visited the property at least once a year. Faced with that situation he decided to sell their various lots in the subdivided land to the tenants. This, however caused him further problems, in that those who had built houses on the unsubdivided land, pressed him to subdivide in order to give them title. Unwilling to face the trouble and expense of such a subdivision he advertised the property for sale as one block, asking a price of $300,000. That advertisement was in October, 1977 and referred to 12 commercial blocks, 40 to 60 residential blocks, and 60 twenty acre agricultural blocks, and the taxpyer stated in evidence that it was based upon engineering plans which he had caused to be drawn up. He also said that he

had advertised earlier in 1976 and later in 1978 and 1979, and had, besides advertising in Fiji, advertised also in Australia and Hawaii, but advertisements brought him no satisfactory offers, and he therefore decided to subdivide for sale. He had discussions with prospective purchasers in Savusavu and formed the view that a subdivision into five acre blocks would meet a demand. However, he found difficulties with the Town and Country Planning Department, and eventually found himself forced to subdivide into larger blocks. That was in 1980. Upto that time he had made 27 sales, and I set out the amounts received each year:-

1973	one	16000
1974	three	25500
1975	twelve	35100
1976	three	9500
1977	two	8000
1978	five	41500
1979	one	45000 "

The grounds of appeal were poorly framed and do not cover the issues involved in this appeal. They are in our view defective. Objections could have been raised by Mr. Keil and had they been raised we would have felt seriously constrained to dismiss the appeal.

The Court did, however, ask Mr. Seeto, who was arguing the second ground of appeal, where in his judgment had Mr. Justice Rooney held that:-

> "Since there were no expenses to be deducted from the sum realised by the taxpayer from transactions, the subject of the appeal before him, it therefore followed that the said sum was not taxable".

Mr. Seeto had to admit there was no such finding. He attempted to argue that the second ground conveyed the meaning to be gathered from the words in the judgment.

A perusal of the judgment indicates that the learned Judge did refer to expenses in two portions of his judgment. He stated:-

> " Between 1973 and 1979 the total figure received by the taxpayer amounted to $180,600. In the absence of evidence as to (a) the agreed value of the inheritance and (b) the expenses incurred by the taxpayer I am unable to say if any profit or gain has yet been achieved."

and later he stated:-

> " The method employed by the respondent, as described by the Court of Review, of treating the proceeds of sales effected in each tax year as gross income from which 60% was deducted as expenses, is not warranted by the Income Tax Act and has the effect of treating as income the value of the inheritance as soon as any porition of it is converted into money."

Those statements do not support the second ground of appeal.

The third ground is also defective and demonstratively incorrect. In the instant case the Commissioner's assessment of the profit on which he levied his assessment was his view of the net profits which were certainly not "commensurate with the gross profits".

The Commissioner first determined the alleged "gross profits". He took the gross receipts from sales and deducted therefrom 60% of the receipts being his method of valuing the land involved in the devise to the taxpayer at the time he acquired it. The remaining 40% was considered by him to be gross profit from which the Commissioner allowed a further deduction for certain expenses incurred arriving at a "net-profit" which he assessed for tax.

The Commissioner's method of ascertaining tax is clearly demonstrated in his adjustment advice in respect of 1975 income part of which is set out below:-

"Sale of lots	35100
Less 60% expenses	21060
	14040
Less other expenses	1686
	12354

The "60% expenses" were not all expenses and this misled the learned Judge. The 60% figure was mainly the assumed pre-sale value of the land sold.

The respondent did not challenge the valuation.

The learned judge apparently did not appreciate that fact or he would not have stated that there was no evidence of the agreed value of the inheritance. There was no evidence produced to the learned Judge of the value of the whole of the inheritance which the Commissioner had fixed at $226,000 but there was evidence of the Commissioner's estimate of the value of the inherited portions of the land which were sold from time to time.

The Commissioner had had a valuation carried out in 1974 and this valuation was not challenged by the Respondent.

There is no merit in either the second or third grounds of appeal.

We could likewise have held that the first ground is defective. The learned Judge did not hold "that no profit or taxable profit arose from transactions the subject of the appeal".

The real issue in the instant case is whether there was under section 11(e) of the Income Tax Act a taxable profit or gain from the sales by the taxpayer of the land which had been bequeathed to him.

The issue was argued before the Court of Review which held there was a taxable profit or gain. It was also argued before the learned Judge who noted the argument but did not consider it, being content to allow the appeal

on different grounds.

The learned Judge, however, did indicate that the Commissioner could now or later make fresh assessments. He stated:-

> " This appeal must be allowed and the assessments set aside. This does not preclude the respondent from making fresh assessments either now or in the future whenever it is shown that the appellant has in fact made a profit or gain as a result of land sales or other dispositions."

It is this statement which has prompted us to go further than merely dismissing the appeal on the grounds that all three grounds raised by the appellant are defective. On our consideration of the issues which should have been decided by the learned Judge the statement just quoted is not correct.

It is first necessary to set out section 11(e) of the Income Tax Act and we can do no better than repeat portion of the Court of Review's statement which is as follows:-

> " The Revenue contend that the taxpayer is liable to tax under section 11(e) of the Income Tax Act Cap 200 which I set out. It can only be understood by being read with the commencement of the Section, which starts off:-
>
> "11. For the purposes of this Act total income means the aggregate of all sources of income including.... "(and it lists a number of sources).
>
> After these there is a proviso.
>
> "Provided that, without in any way affecting the generality of this seciton, total income for the purpose of this Act shall include" -
>
> and there are over twenty matters which are included, of which (e) reads:-
>
> "(e) In the case of a person, residing or having his head office or principal place or business outside Fiji, but carrying on business in Fiji, either directly or through or in the name of any other person, the net profit or gain arising from the business of such person in Fiji:

> Provided that any person normally residing outside Fiji who engages in the sale of other disposition either directly or by the sale of options to purchase or by any other means whatsoever of any land in Fiji or any estate or interest in any such land shall be deemed to be carrying on business in Fiji, and any profit or gain derived from the carrying on or carrying out of any undertaking or scheme connected with the disposition either directly or indirectly of any land in Fiji or any estate or interest in any such land, including schemes involving the interposition of a company, entered into or devised for the purpose of making a profit shall be deemed to be total income for the purpose of this Act."

There is no dispute in the instant case that the taxpayer is normally resident outside Fiji and if he engages in the sale of land in Fiji he is deemed by virtue of the proviso to be carrying on business in Fiji. The Court of Review held that the taxpayer was engaged in selling land, a finding the respondent has not challenged. In Weller v. Commissioner of Inland Revenue C.A. 75 of 1981 this court considered the meaning of "engages in". In that case there was a single sale and this court held that the word "engage in that context connotes occupation in some activity for a period fo time. The facts in this case indicate there were a number of sales over a number of years and there can be little doubt the taxpayer was engaged in selling land in Fiji.

What we are concerned with here is whether the taxpayer made a profit or gain which is taxable.

A number of Australian and new Zealand authorities were cited in argument both before the Court of Review and the Appellate Judge.

The Court of Review rejected the authorities. It stated:-

> "Mr. Keil relied on two Australian cases, McClelland v. Federal Commissioner of Taxation (1970) 120 CLR 487: (1971) 1 WLR 191 which was an inheritance, and Williams v. Federal Commissioner of Taxation (1972) 3 ATR 283 which was a gift. Both of these cases were decided upon a statute the words of which are vastly different from the words of Section 11(e), and I cannot see that Mr. Keil can derive any help from them. I would add that when the Australian Commissioner was successful in the High Court of Australia in McClelland's case, he had made an allowance somewhat similar to the allowance made here."

We will refer later to the McClelland and Williams cases but it is of interest to note that the Court of Review changed its view when it later came to consider the case of Betty Merl Ferguson v. Commissioner of Inland Revenue (not reported) a case almost on all fours with the instant case in which case the court allowed the appeal.

The Court stated:-

> "Mr. Shah also relied upon Woodward's case No. 1 of 1983, which decided against the taxpayer. I am afraid that I have misled Mr. Shah, for although there I did not see the application of either of McClelland's or Williams' case, I have come to the conclusion that I was wrong, and I think on reflection that Woodward's decision can only be defended on the basis that the taxpayer 'adventured his inheritance' in developing the remainder of it. Even that is not clear."

We would state at once that the facts in this case do not disclose that the taxpayer had "adventured his inheritance". That could have been the situation if the taxpayer had decided to extend his "deemed business" and adventured his inheritance in the capital of an active business in Fiji e.g. building thereon and selling houses. That is not what happened. The taxpayer in the instant case in our view took steps to dispose of his inheritance to the best advantage.

The Court of Review considered both McClelland and Williams case and referred to the differences between the Australian and Fiji legislation. It stated further

"the essential part is that both deal of profits or gain".

The facts in McClelland's case were not unlike the facts in the instant case. Mrs McClelland received a half interest in a piece of land under the will of her uncle. She wanted money and not the land. So as to augment her return from sales she purchased her brother's share and after a survey sold most of the land.

The Commissioner in that case used the same method of determining the historic value of the land as did our Commissioner in the instant case to determine the profit or gain obtained by the taxpayer, a method which the court in Australia rejected.

McClelland's case went to the Privy Council. Lord Donovan at p. 491 of 120 C.L.R. stated:-

> "The appellant - so far as she had been obliged to sell - had done no more than realize a capital asset.
>
> On appeal by the respondent to the Full Court Barwick C.J agreed with the foregoing conclusions. He took the view that the "realization of an inheritance even though carried out systematically and in a businesslike way to obtain the greatest sum of money it will produce does not...make the proceeds either profit or income for the purposes of the Act" (1). It would be different if the inheritance had been adventured as the capital of a business, for example, land jobbing or development, but no such thing had been done here."

In our view the taxpayer in the instant case did no more than realize a capital asset.

It was held in that case (inter alia) that none of the profit of the taxpayer was profit according to ordinary concepts.

Lord Donovan said at p. 496:-

> "The whole of the facts have still to be considered; the same criteria have to be applied; the question to be asked and answered is still whether the facts reveal a mere realization of capital, albeit in an enterprising way, or whether they justify a finding that the appellant went beyond this and engaged in a trade of dealing in land albeit on one occasion only. To this question their Lordships think that, as in the case of the question arising under s. 26(a) the answer should be in the negative."

Notwithstanding the wording of section 11(e), to which we will refer later, we believe the question to be asked is that formulated by the Lord Justice Clerk in California Copper Syndicate v. Harris (1904) 5 Tax Cas at p. 166:-

> "Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a shceme for profit".

Lord Donovan also at p. 496 stated:-

> "So far as concerns the claim that the appellants profit is income according to ordinary usages and concepts it is common ground that this can be established only if what the appellant did was an adventure in the nature of trade".

In Williams case Barwick, C.J. said:-

> "Also, having had the benefit of the argument in this case, including consideration of the advice of their Lordships in McClelland v. Federal Commissioner of Taxation (1970), 120 C.L.R. 487; 2 A.T.R. 21, I remain of the opinion that the realization of a gift, however elaborately made can neither yield a profit nor in itself be a profitmaking scheme".

Barwick C.J. later went on to say:-

> "In the first place it is impossible, in my opinion to discover a "profit" made by the respondent by this realisation. There was no cost to her of her asset."

That is likewise the situation in the instant case. The land was devised to the taxpayer. He did not "adventure" his inheritance but merely took steps to realize the best he could by sales of his land.

Too much attention was paid by the courts and counsel for the Commissioner involved in the first two appeals in the instant case to the proviso to section 11(e) in isolation, which is also a proviso to the substantive section, and not enough to both the proviso and the section.

The first point we make is that the substantive section refers to net 'profit or gain'. 'Profit or gain' is repeated in proviso 11(e). The Court of Review held the gain in section 11(e) included capital gains. The appellate Judge was content not to decide that issue.

The proviso to section 11(e) does not appear to us to have altered or added to the meaning of the words "profit or gain" in any way. If capital gain is excluded from profit or gain in the substantive section it should be also excluded where the same words are used in the proviso. The normal concept of profit is a gain from a business venture not a capital accretion.

The second matter is that the substantive section contains these words:-

> "and also the annual profit or gain from any other sources including the income from but not the value of property acquired by gift, devise or descent...".(Emphasis is ours).

We pose this question, if the value of the corpus of a gift or devise is specifically excluded from the definition of income does the mere conversion of that corpus into specie convert the receipts into income? Our answer to the question is in the negative.

Where error appears to have crept in is in the interpretation of the proviso to 11(e) which is in two parts. It has been assumed in our view erroneously, that if by selling land in Fiji a non-resident makes a profit or gain, ipso facto that profit or gain is taxable. The second part of the proviso is intended to cover different situations. It does not refer to carrying on business which would link it to the first part. There must be an undertaking or scheme connected with land entered into or devised for the purpose of making a profit before a profit or gain becomes taxable.

All the first part of the proviso does is to put a non-resident with no actual business in Fiji on a par with a non-resident who actually operates a business in Fiji. The "income or gain" of both types of non residents must be ascertained in the same manner. The final part of the proviso does not state nor can it be interpreted to mean that the profit or gain merely from a sale is taxable. There must be the carrying on or carrying out of an undertaking or scheme for the purpose of making a profit.

Nowhere in the proviso is there a provision that the "profit or gain" involving what would otherwise be a capital gain which for other taxpayers would not attract tax, becomes taxable ipso facto on sale of the land by a non-resident. Where a non resident taxpayer has purchased and sold property, tax on a single sale will depend on whether the taxpayer can be considered to have 'engaged' in selling the property in the cause of conducting his business or whether he was carrying out an undertaking or scheme entered into or devised for the purpose of making a profit.

Each sale will have to be considered on its merits.

There is no justification in our view for the Commissioner considering section 11(e) imposes a tax

on capital accretion. We see no reason why a non-resident should be treated any differently from a resident, if both are carrying on business in Fiji or are deemed to be. Treating a non resident differently would be unjust and on our reading of section 11(e) as a whole, no such unjustness can be read into the section.

While a non-resident selling land on an interest in it must be deemed to be carrying on business in Fiji, the sale by him of land need not necessarily be a business sale.

The sale must be in the nature of a business transaction or one designed to make a profit from which arises a profit or gain, which in the context of the section are synonymous terms, before such profit or gain becomes liable to tax.

Unless a taxpayer uses his property as capital in a business venture or undertaking no profit can in our view arise from the sale of a property acquired by devise or gift where it can be held on the facts that the sales of the land were in fact merely realisation in specie of the taxpayer's interest in the land. We are satisfied on the facts in the instant case that the taxpayer is not liable for income tax and the learned Judge was correct in allowing the appeal albeit for different reasons.

The appeal is dismissed with costs to the respondent.

T.U. Tuivaga

President, Fiji Court of Appeal

Justice of Appeal

Justice of Appeal