

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0013/94S
(High Court Civil Appeal No. 8 of 1987)

BETWEEN:

RAMESH SAMJI f/n Samji Jadavji APPELLANT

-and-

COMMISSIONER OF INLAND REVENUE RESPONDENT

Mr. F.G. Keil for the Appellant
Mr. Iain W. Blakely and A. Naco for the Respondent

Date and Place of Hearing : 6 November 1995, Suva
Date of Delivery of Judgment : 10 November 1995

JUDGMENT OF THE COURT

This appeal against the judgment of Fatiaki J. delivered in the High Court Suva on 30 April 1993 concerns the application of section 11(e) of the Income Tax Act Cap 201. The judgment affirmed the decision of the Court of Review upholding the Commissioner's assessment of over \$135,000.00 in the Appellant taxpayer's income for the year 1984 as profit or gain from the sale of land.

Background

The Appellant was born in Fiji in 1944, his father being a storekeeper in Nadi. The family moved to India in 1948 where his father established a clothing store in Rajkot, Bombay. He retained his Nadi property comprising two lots in the Vadawa subdivision held under native lease and the Appellant's uncle

Manji lived there and ran his own business. In 1965 the Appellant came to Fiji after agreeing to buy the property from his father for \$20,172.00. The native lease was transferred to him by his uncle as his father's attorney and the Appellant returned to Bombay in March 1966. At the time there were two buildings on the property, one of wood and iron and the other of concrete which was occupied by his uncle, to whom the Appellant has given a power of attorney. He appears to have managed the property and accounted for the rentals. In 1972 the Appellant replaced the wood and iron structure with a concrete building containing four shops and offices.

In August 1978 he came to Fiji accompanied by his wife and daughter and said in evidence that he intended to start his own business in the building occupied by his uncle Manji, but that the latter refused to vacate. He discovered his uncle had used his power of attorney to grant himself and his trading firm a ten-year tenancy from 1976 with a right of renewal for a further ten years. What happened next is summarised in the decision of the Court of Review in these terms:-

"The taxpayer said that he took counsel with his other relatives in Nadi and as a result in April 1979 advertised the whole property for sale, intending however, to sell only the building occupied by Manji. This would necessitate a further subdivision of the land. He accepted an offer from Karsanji, who also gave evidence, who agreed to give \$200,000 for that part of the property occupied by Manji. The agreement between the taxpayer and Karsanji was at this stage oral only, and nothing was put on paper

until 1981 when Karsanji came to India and was given an option in writing to buy the property. The taxpayer had returned to India in August 1979, and has not been to Fiji since until he came to give evidence in this appeal.

Among the terms upon which Karsanji bought the property were that taxpayer was to subdivide the lease, and also to get Manji and his family out and give him vacant possession of the building. The taxpayer was not able to do this until he had engaged in costly litigation, and it was not until March 1985 that the transfer to Karsanji's company was executed. A deposit of \$20,000 had been paid in 1981 when the option agreement was signed, and the balance of \$180,000 in 1985. The Commissioner of Inland Revenue took the view that at that time the taxpayer was normally residing out of Fiji and he wished to tax him under section 11(e) of the Income Tax Act."

The Legislation

Section 11 of the Act defines "total income" as the aggregate of all sources of income and goes on itemise what could be regarded as the more conventional sources. Then follows a proviso bringing into the definition a variety of other sources of profit or gain in 28 lettered subparagraphs ranging from (a) through to (bb). Section 11(a) includes any profit or gain derived from the carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit, but excluding profit or gain if the sale transaction does not form part of a series of transactions and which is not in itself in the nature of trade or business. Section 11 (a) therefore governs the position of Fiji residents in relation to the sale of property. This Court held in CIR v. Weller [1982] 28 FLR 46 (App

No. 75 of 1981) that the exclusion did not apply to non-residents whose position is covered by section 11(e) reading:-

"Non-resident

(e) *in the case of a person, residing or having his head office or principal place of business outside Fiji, but carrying on business in Fiji, either directly or through or in the name of any other person, [total income shall include] 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 or 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."

The Issues

The first matter for consideration by the Court of Review and the High Court was whether on the undisputed facts as recorded in the summary above the Appellant was a person "normally residing outside Fiji". In both courts the answer was in the affirmative and this was challenged on appeal by Mr Keil who referred us to number of cases, mainly from England, in which

the expression "ordinarily resident" has been discussed. We agree that "normally residing" in the Fijian Act has the same meaning. The language is plain and can readily be given the meaning attributed to it by ordinary persons, although ambiguous factual situations may require a closer analysis. We can see nothing to give rise to any question about the taxpayer's normal residence on the facts of this case: since 1948 (when he was four) he lived in Rajkot, coming to Fiji for about seven months in 1965, and he came again in August 1978 intending to remain here and commence business. Because of his uncle's intransigence he changed his mind and set about selling the property in the manner described above, remaining in Fiji for 12 months during which time he initiated the sale process. Adopting Lord Denning's language quoted by Lord Scarman in Shah v. Barnet London B.C. (1983) 2 A.C. 309, the Court of Review held that he was "habitually and normally" residing in Rajkot.

Mr Keil attempted to persuade us that as his purpose in coming to Fiji with his family in 1978 was to settle here permanently, he acquired the status of a person normally resident in this country. However, that purpose lasted only a few weeks until he became aware of his uncle's refusal to vacate. Thereupon his purpose changed to one of returning to and residing permanently in India. In any event a taxpayer's purpose in living in a chosen country does not necessarily answer the question whether he normally resides somewhere else, which is the issue to be determined under section 11(e). We agree with the

High Court that the Court of Review correctly directed itself on this question, and on the evidence was entitled to form the view that the Appellant was normally resident outside Fiji.

The next consideration is whether the taxpayer engaged in a sale of any estate or interest in land in Fiji. Again this question was answered in the affirmative by both the Court of Review and the High Court, both judgments referring to C.I.R. v. Weller in which this court regarded the word "engaged" as connoting occupation in some activity for a period of time - "not whole time occupation, but certainly more than a brief moment of decision-making in one's affairs", adding "to engage in the selling of land means more than to decide to sell and thereafter complete the transaction in a straight forward way. It could mean devoting substantial time to achieving and perfecting a sale." The court concluded by stating "We do not wish however to be taken as saying that the phrase necessarily involves a purality of dealings. One transaction may be quite complicated. It may require the vendor to devote himself and his energies to the transaction for such period of time as to lead one to say that he was so much occupied as to be engaged".

The steps taken by the Appellant to effect the sale of that part of the property occupied by his uncle are set out in the following extract from the judgment of the Court of Review:-

"Now the transaction in which the taxpayer took part involved first an application for subdivision of lease 7190 into two lots, then advertising for sale in two daily newspapers, then consideration of several replies and determination to accept Karsanji's offer. Taxpayer advertised both lots comprised in Native Lease No. 7190 and since Karsanji was interested only in the main shop, a subdivision was necessary. A subdivision had already been applied for in February, although the advertisements did not appear until April. By February 1981 the subdivision had proceeded sufficiently to warrant Karsanji having his solicitors, who were also the taxpayer's solicitors, prepare an option to sell and taking it with him to India where he and the taxpayer executed it. It was provided that it could be exercised by 30th October 1982 and was subject to the vendor giving vacant-possession. Karsanji duly exercised his option as provided on 28th October 1982, but took care to reserve the necessity for payment until he was given vacant possession. In the event that necessity did not arise until the taxpayer had taken unsuccessful actions in the Supreme Court and Court of Appeal, and had later been able to get an order for possession. That was the end of 1984 and the property was eventually transferred to Karsanji in March 1985. All this must be considered to be engaging in sale, and it seems to me that the requirements of the section are complied with. Hence the taxpayer is deemed to be carrying on business in Fiji."

We agree with Fatiaki J. that the Court of Review was fully entitled on these facts to conclude that the Appellant engaged in the sale of land, and in terms of the first part of the proviso to S.11(e) he must be deemed to have carried on business in Fiji. (In its context we are satisfied the "business" could only have been the sale of the subject land.) Having

reached that conclusion the Court of Review dismissed the appeal without going on to consider the second part of the proviso applying to any profit or gain derived from the carrying out of any undertaking or scheme connected with the disposition of any estate or interest in land in Fiji "entered into or devised for the purpose of making a profit". That profit or gain is deemed to be total income.

Fatiaki J. was somewhat critical of the court for overlooking this second limb of the proviso, but it would seem that the case presented by the taxpayer's counsel had focussed on the earlier part, and the Court of Review's decision was given before this court's judgment in CIR v. Woodward [1988] 34 FLR 19 (App. No. 27 of 1987), in which the second part of the proviso was analysed and held to qualify the apparently broad sweep of the first part. The introduction of the concept of an undertaking or scheme for the purpose of making a profit ruled out any suggestion that a profit arising from the sale of land in Fiji by a non-resident was automatically taxable. The overall effect of the proviso was summarised in these terms:-

"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 course 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."

The earlier provisions of section 11(e) are relatively straight-forward, and the first part of the proviso appears to equate the situation of non-residents and those normally residing outside Fiji in relation to the sale of land. That is how the Court of Review saw it. There seems, however, to be a tension between the first and second limbs of the proviso which Woodward's case resolved in the interests of avoiding the imposition of a capital gains tax on non-commercial transactions, which unqualified application of the first limb of the proviso could have involved. Mr Blakeley asked us to revisit Woodward but we are not disposed to do so. It is important at this level to ensure consistency in the administration of tax law, and any reconsideration of that decision should be left to the Supreme Court.

In Woodward this court held that notwithstanding the wording of section 11(e), the question to be asked is that formulated by the Lord Justice Clerk in California Copper Syndicate v. Harris (1904) 5 Tax Cas 159. It was referred to by Gibbs CJ at page 695 of FCT v. Whitfords Beach Pty Ltd. 12 ATR 692 in these terms:-

"When the owner of an investment chooses to realize it, and obtains a greater price for it than he paid to acquire it, the enhanced price will not be income within ordinary usages and concepts, unless, to use the words of the Lord Justice Clerk that have so frequently been quoted. "what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business". The Lord Justice Clerk went on to say at 166:

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

Each case must be decided on the light of its own circumstances. Mr. Keil referred us to a number of decisions dealing with land subdivisions and sales in various jurisdictions which were held to mere realisation of capital. He submitted that the present case was not one in which the Appellant went beyond that. We do not think there is anything to be gained from a citation of the various cases mention by counsel or consideration of their quite different circumstances. Fatiaki J referred to the appropriate principles established by the authorities in interpreting section 11(e), and concluded that on the facts found by the Court of Review this transaction fell within the second limb of the proviso. He held that the profit being a gain from a business venture, it was taxable income under section 11(e).

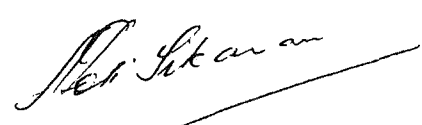
We think he was entitled to reach this conclusion. The Appellant acquired the property as an income-producing asset and used it as such until his arrival in Fiji in 1978 with the intention of taking over the part occupied by his uncle to conduct his own business. In the meantime he had enhanced its profitability by the erection of the concrete block of shops and offices on the other part. It retained its character as a

business investment right up to the time he decided to sell the part occupied by his uncle. The only buyer wanted vacant possession and it can be assumed that with his uncle still in occupation under his long term tenancy, the appellant could not have expected anything like the \$200,000 Karsanji was prepared to pay. In order to achieve the profit which he was able to obtain from vacant possession (thereby enhancing the value of the property) the Appellant had to set about the task of getting rid of his uncle by undertaking the risk and expense of litigation in the High Court and Court of Appeal, losing on both occasions; and then by apparently effecting a compromise to obtain an order for possession. This process took some years. He also had to make a further subdivision to obtain a separate title for the purchaser. Town Planning approval was given subject to conditions for the provision of parking and loading access, including the demolition of a toilet block. Looking at this overall picture of the effort and expense the appellant engaged in to enhance the value of his property by subdividing and securing vacant possession, we are satisfied that what he did amounted to carrying on an undertaking or scheme connected with the disposition of his interest in the land, which was entered into for the purpose of making a profit, and the transaction is caught by section 11 (e).

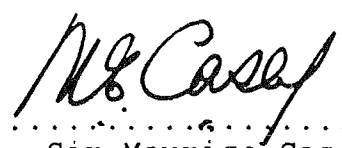
The taxpayer wished to put forward two further grounds of appeal relating to the method of assessment of tax should his

contention on section 11(e) not be upheld. These are new grounds and did not appear on the original notice of objection, or in the notices of appeal to the Court of Review or the High Court. We agree with Mr Blakeley that the Appellant is precluded from raising them now by section 62(6) of the Income Tax Act noting, however, his indication that the Commissioner may be prepared to entertain a submission about the amount properly payable.

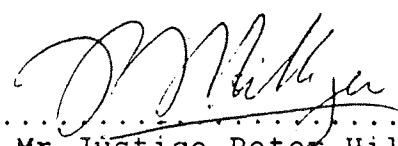
For the foregoing reasons the appeal must be dismissed with costs to the Respondent.



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 Sir Moti Tikaram
President, Fiji Court of Appeal



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 Sir Maurice Casey
Judge of Appeal



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 Mr Justice Peter Hillyer
Judge of Appeal