

THE COURT OF REVIEW

Civil Jurisdiction

Review No. 3 of 1973

Between:

BERENDON GARDENS (FIJI) LIMITED

Appellant

and

THE COMMISSIONER OF INLAND REVENUE

Respondent

Mr. I. Bond for the Appellant
Mr. Scott for the Respondent

Date of hearing: March 11, 1974

JUDGMENT OF ROTHWELL, J.

The appellant company was formed in October 1968 for the purpose of acquiring certain land at Korolevu and erecting buildings thereon. The primary objects clause in the Memorandum of Association reads as follows:

- "(a) To adopt and carry into effect with or without modification an agreement entered into on behalf of the Company by Maurice Arthur Bennison with Ann Isabella Alice Bernard for the purchase of the land at Paradise Point, Korolevu in the Colony of Fiji comprised and described in Certificate of Title No. 7584 and to erect all types of buildings thereon and to generally develop the said land in any manner thought fit by the Directors of the Company from time to time."

The detailed objective was to purchase the land, erect thereon 84 residential hotel units and dispose of these units in a somewhat unusual way. The whole proposition I hold to be a global indivisible undertaking and that finding will have an important effect which will emerge later in this judgment.

The units were not to be disposed of by sale or lease in any orthodox way but by the granting to the person acquiring each unit a licence to occupy for a term of 30 years without payment of rent in the ordinary way but in consideration of a prepaid lump sum which was fixed for each unit at \$8,500.

It is clear without going into detail that the effect of the primary object of the Company taken in conjunction with its implementation proves that the appellant company was in the business of dealing in land and entered into the scheme described for the purpose of making a profit and that the licences disposed of affect the land in question.

Early transactions were satisfactory and 34 units were disposed of at the set price of \$8,500 each before the scheme appeared to reach saturation point. When that happened the appellant company was forced into the position of having to accept a lower price, and disposed of the remaining 50 units for a block payment of \$105,000. The total amount received for the 84 units was \$408,252.30. The total cost stated by the Company to have been incurred in the erection of the buildings (but excluding the cost of the land) was also \$408,252.30. There was therefore, in my view, a balance between the cost of the erection of the buildings and the amount recouped by granting licences in respect of them showing neither profit nor loss.

After a good deal of preliminary correspondence the Commissioner expressed the view in a letter to the New Zealand solicitors for the appellant company,

"that the monies received from the various licence holders take the form of premiums derived by the owner of land from the granting of licences affecting the land",

and stated his intention of assessing the company accordingly under the provisions of section 15(b)(i) of the Income Tax Ordinance. The solicitors for the appellant immediately objected by letter to the imposition of what would be an alarming tax beyond the ability of the company to pay and the Commissioner then invoked the provisions of section 15(b)(ii) to apportion over six years the income which he considered had been derived, and issued assessments for the years 1970 and 1971 in accordance with that apportionment. He allowed some depreciation but no other deduction.

The solicitors tendered a formal objection which was disallowed and this appeal was then filed on the following grounds:-

- a) If the Commissioner was correct in assessing the receipts of the appellant as "premium"

under Section 15(b)(i) Income Tax Ordinance, Cap. 176, which is denied, then the Commissioner was wrong at law and in fact in not allowing the Appellant the reasonable cost of improvements to the land to be deducted from the Appellant's total income.

- b) Alternatively, the Commissioner was wrong in any event at law in assessing the receipts of the Appellant as being within the definition of "total income" as defined by the said section 15(b)(i) and in particular as being "premium" and such receipts were of a capital nature and not of a revenue nature and in the further alternative such receipts were not derived by the Appellant from "the grant of any ... licence ... affecting the land".
- c) In the further alternative, the Appellant was and is not a dealer in licences and therefore any receipts from such a dealing are not part of the revenue of the Appellant but are receipts of a capital nature and in any event, in the further and final alternative such receipts were only equal to and not in excess of any expenditure of the Appellant and therefore there is no balance in the hands of the Appellant upon which the Commissioner can levy tax of any kind.
- a) If the Commissioner is correct in assessing the receipts of the Appellant as being liable to be taxed, which is denied, the Commissioner is unable to support in fact the random figures selected by him as 'chargeable income' and new and correct figures should be inserted by this honourable Court under its powers contained in Section 76(i) of the said Cap. 176.

In the preliminary correspondence the appellant's solicitors in a letter of December 10, 1971 said as follows:

"The position in this respect is that 34 units were sold fairly readily at the original fixed price of \$8,500 each. The company planned to sell all 84 units at such price of \$8,500 each which of course would have shown a substantial profit for the company".

In reply to the Commissioner's letter stating his intention of assessing the total sum as premiums, the appellant's solicitors replied in a letter of January 25, 1972 in which the following passages occur:

"The total building cost which was \$408,252.30 is exactly equated by the total sale prices received from all the unit owners. The transaction resulted in no cash gain at all for the company".

And further -

"It seems to me that the explanation lies in the fact that you have overlooked the application of section 30(a) of your Income Tax Ordinance providing that in determining total income a reasonable allowance must be made for depreciation or improvements or both".

The Commissioner contended that the solicitors had taken the word "improvements" out of context and that the position was controlled by general instructions issued by the Governor-in-Council as to allowances for improvements in October 1959.

It is now necessary to consider the nature of the receipt of \$408,252.30 and I turn to the definition section of the Income Tax Ordinance which, stripped down to its bare essentials for the purposes of this appeal, reads as follows:

"15. For the purposes of this Ordinance "total income" means the annual net profit or gain or

Provided that, without in any way affecting the generality of this section, total income, for the purpose of this Ordinance, shall include -

- (i) subject to the provisions of the two next succeeding sub-paragraphs all rents, fines, premiums or other revenues (including payments for or in respect of the goodwill of any business or the benefit of any statutory licence or privilege) derived by the owner of land from the grant of any lease, licence or easement affecting the land, or from the grant of any right of taking the profits thereof; "

It is clear to me that the opening words of the section referring to "profit or gain" govern the whole of the rest of the section including the paragraph upon which the Commissioner relied in making his assessment. "Annual" means merely "in the year of assessment" and not necessarily recurring.

Some argument was directed by counsel to the meaning of "profit or gain" but in my opinion the words are so plain and intelligible that no authority by way of case law is necessary.

A profit and loss account has two sides - one dealing with moneys coming in and the other dealing with moneys going out (generally in relation to some activity which results in the money on the other side of the account coming in). If the income exceeds the expenditure there is a profit or gain. In an isolated transaction of sale and purchase the profit is ascertained by allowing the cost of the asset against the amount for which it is sold. If it is sold for an amount which exceeds the cost there is a profit or gain to the extent of that excess.

In my view the Commissioner has clearly erred in not giving effect to the predominance of the words "profit or gain" over the provisions of section 15(b)(i) making the premium assessable. That paragraph is governed by the words of the proviso, "without in any way affecting the generality of this section".

As to the character of the moneys received by the appellant company as a premium, I hold that there is no doubt that it is, notwithstanding that it operates as a consideration for a lengthy term of 30 years licence to occupy without payment of rent in the ordinary way. A premium is more commonly in the form of a payment in addition to rent or consideration for use and occupation, but in my view not necessarily so.

From what I have already said it follows that the amount of the premium liable to be taxed must be ascertained by reference to the portion of it which constitutes profit or gain. Buildings erected on land are undeniably an improvement and in the course of the hearing I so held.

This brings us to a consideration of Section 30 the relevant parts of which read as follows:

"30. In determining total income the following exemptions and deductions shall be allowed:-

- (a) such reasonable amount as the Commissioner, subject to general instructions of the Minister, may allow for depreciation or improvements or both:"

the general instructions referred to in the section and on which the Commissioner relied in declining to making an allowance for improvements read as follows:

" B. Allowance for Improvements

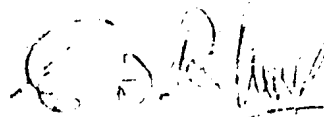
1. The Commissioner may, for the purpose of arriving at the total income of the taxpayer for any year, allow to any taxpayer engaged in an agricultural or pastoral pursuit a deduction in respect of any sum spent in that year by the taxpayer on capital improvements to land where the sum is spent on -

And then follow eight instances of improvements of an agricultural nature relating exclusively to the soil and the natural or induced growth thereon. This clearly has no limiting effect on the Commissioner's discretion with regard to allowance for erection of buildings as improvements on the land.

Without going into further detail, I now hold that the entire undertaking for purchase of land, erection of buildings and disposal of them was one global unseverable transaction and must be assessed as such without in any way attempting to pick out individual parts in ascertaining the profit or gain. I hold further that the Commissioner was in error in law in assessing the whole amount received as a premium having the characteristic of a profit or gain in that he did not direct his attention to his obligation under the provisions of Section 30 to allow for improvements.

In these circumstances I vacate the assessments and refer them back to the Commissioner with a direction from this Court that he reopen the matter and give attention to the assessment of profit or gain by allowing a deduction for improvements under his discretion and powers as set out in Section 30.

It is clear that whatever assessment results from this re-consideration will be a new one and as such open to objection and appeal either to this Court or to the Discretions Review Board. The assessments are set aside and to the extent set out above the appeal is allowed. Appellant is allowed costs of appeal \$50.00.



(E.F. ROWELL)
JUDGE

Suva,

18 March, 1974.