Mr. Vaturban

IN THE HIGH COURT OF FIJI

COURT OF REVIEW NO. 4 OF 1988

Between:

THE TRUSTEES OF THE ESTATE OF EVELYN MAY BARKER — Appellant

- and -

THE COMMISSIONER OF INLAND REVENUE — Respondent

Mr. N.S. Arjun for the Appellant
Mr. S. Banuve for the Respondent

JUDGMENT

Evelyn May Barker, the wife of Sir Thomas William Alport Barker, died in suva on 27th November, 1951. Probate of her last will and testament was duly granted to her husband and her daughter Muriel Agnes Ryan the executors and trustees named therein. They were to receive the income from her estate provided that if her husband remarried (as in due time he did) his share of the income from his wife's estate was to pass to his daughter, so that at all times material to this appeal Muriel Agnes Ryan (who subsequently married a man named Gell, and after his death a man named Burrows) was entitled to the whole of the income from her mother's estate. Particulars of that income appear in the accounts annexed to the income tax returns for 1976 and 1977 exhibited among the agreed documents. At the time of her death Lady Barker was registered as proprietor of extensive lands in Suva, among them the land in Rodwell Road presently containing one rood 2.5 perches upon which the Phoenix Theatre complex and its mini-theatre are now erected. On 18th November, 1957 the trustees of Lady Barker's estate

leased that land and buildings (the mini-theatre had not yet been built) to James Gibson Barron Crawford and Thomas Patrick Mulelly for a term of twenty years from 1st November, 1957 at an annual rent of £2,800. That lease was transferred, with the consent of the lessors, to Sharan Brothers Limited on 22nd October, 1964. Sharan Brothers Limited desired to build an air-conditioned mini-theatre underneath the Phoenix Theatre, and on 1st March, 1976 entered into an agreement with Lady Barker's trustees whereby the company agreed to build the mini-theatre, which was, upon completion to become the property of the Estate, and the trustees agreed to grant the company a new lease of the land, together with the two theatres, for 23 years from 1st January, 1976. It will be noted that the former lease had not yet expired. The rent of the whole was to be $800 a month or $9,600 a year, and a draft copy of the proposed lease was annexed to that agreement of 1st March, 1976. That draft agreement subsequently became the agreement to lease dated 5th October 1977, which provided that the lease envisaged by the agreement of 1st March, 1976 was to enure for 20 years from 1st November, 1977. Presumably in pursuance of the draft lease, articles of agreement were signed on 6th October 1976, between Sharan Brothers Limited and Raghwan Construction Co. Ltd. for the construction of the mini-theatre for a price or sum of $104,000. The Commissioner claims to assess upon the Trustees, first under Section 11(t) of the Income Tax Act (Cap 201) and also under Section 14(b), the amount of the cost of the building of the mini-theatre, but the claim under Section 11(t) was first raised in a letter to the trustees' accountants on 3rd March 1982. By that time the Commissioner had obtained from the lessees (Sharan Bros. Ltd.) figures which enabled him to value the improvements at $156,212 and he issued an amended assessment for 1977, but against the estate of Mrs. M.A. Burrows, the daughter of Lady Barker, who was at once the life tenant and a trustee of her mother's estate, not against the estate of Lady Barker. Mrs. Burrows' accountants objected, upon the

ground, inter alia, that the construction of the Phoenix mini-theatre was a right which accrued to the estate of Lady Barker under the terms of the agreement of 1st March, 1976 and as such the right did not accrue to Mrs. Burrows who was the life tenant or to any of the beneficiaries. That objection was allowed, and an assessment was later issued against the estate of Lady Barker for that same amount of $156,212. That was on 16th May 1983, and the estate's solicitors duly filed an objection. The objection then raised was wholly disallowed. By that time the Commissioner had stated that he was also claiming tax under Section 14(b) of the Act. The year of claim was 1977. An appeal was lodged against the assessment. On 18th April, 1986 the Commissioner advised the solicitors for the estate that the assessment for 1977 was being withdrawn, and that a fresh assessment for 1976 would be issued, and the appeal was accordingly allowed, the appellants being awarded costs. A new assessment was then issued for $156,212 against the estate of Lady Barker. Objection was lodged, and disallowed, and this appeal set in train. The appellants sent to the Commissioner, by letter dated 26th September 1986 what was, in effect a set of interrogatories and the Commissioner's answers thereto are set forth as exhibits among the agreed documents.

I now set out the appellants' objections as stated in the agreed facts at paragraph 31 thereof :

1. The amount of $156,212 is not either in whole or in part income according to ordinary concepts and is not in whole or in part made total income by any provision of the Income Tax Act.

2. In particular the said amount is not in whole or in part made total income by section 11(t) of the Act.

3. Alternatively if (which is denied) some amount is by section 11(t) of the Act made total income of the appellants then that amount (if any) is not the said amount but some other and lesser amount.

4. Further in the alternative if (which is denied) the said amount or some other amount is in whole or in part income or made total income of some person then -

(a) the same was not wholly derived in year ended 31st December 1976; or

(b) alternatively the sum was not derived by the appellants and in particular was not derived by them in their capacity as the trustees of Evelyn May Barker deceased.

5. Section 14(b) of the Act did not entitle the Commissioner to assess the appellants whether as Trustees of the estate of Evelyn May Barker deceased or otherwise on all or any part of the said amount or any other amount.

6. Further, and in the alternative, the Act did not empower the Commissioner to issue an amended and/or a fresh assessment subsequent to the appeal by the Trustees of the estate of Evelyn May Barker deceased as appellants in Appeal No. 13 of 1984 being allowed with costs by the Court of Review.

7. Further, and in the alternative, the Act did not empower the Commissioner to issue an assessment after the expiry of six years from 31st December 1976, the year of assessment.

I cannot refrain from observing, at this stage that, while in a statement of defence the points made by the appellants no doubt, have their relevance, they do not bear the same weight when the onus of proof lies upon the appellants, vide section 71(2) of the Act.

It is now probably desirable to set out Sections 11(t) and 14(b) of the Act. They are :

11. For the purposes of this Act "total income" means .....(and then follows a very full definition followed by a proviso). Provided that without in any way affecting the generality of this section total income, for the purposes of this Act, shall include.....

(t) in the case of any person to whom, in accordance with the terms of any agreement relating to the grant, licence, concession or permission in favour of any other person of the right to use or occupy,

or over any land or buildings, or by virtue of the cession to him of any such rights, there has accrued in any year or period the right to have improvements effected on the land or to the buildings -

(i) the amount stipulated in the agreement as to the value of the improvements or the amount to be expended on the improvements: or

(ii) if neither amount is stipulated, the amount representing in the opinion of the Commissioner the fair and reasonable value of the improvements:

14. Subject to the provisions of this Act the following classes of income shall be deemed to have been derived from Fiji -

(a) is not relevant to this appeal.
Income of beneficiaries and estates of deceased persons.

(b) any income received by, or accrued or in favour of, any person in his capacity as the personal representative of the estate of a deceased person, and any amount so received or accrued which would have been income in the hands of the deceased person had it been received by or accrued to him or in his favour during his life time. Such income or amount shall, to the extent that the Commissioner is satisfied that it has been derived for the immediate or future benefit of any beneficiary under the estate of such deceased person, be deemed to be income received by or accrued to or in favour of such beneficiary, and to the extent that the Commissioner is not so satisfied, shall be deemed to be income of such estate.

The subsection goes on to deal with expenditure but since it has not been suggested that any expenditure is relevant to this appeal, I propose to disregard the remainder of the subsection.

Mr. Arjun for the appellants argued that the agreement of 1st March 1976 marks the initiation of the relation between lessor and lessee, that is to say, between the estate and Sharan Bros. Ltd. but that that agreement gave Sharan Bros., who were at that time the lessees of the Phoenix Theatre, no right to use or occupy the land or buildings. I do not think that he is correct, for the whole basis of the agreement of 1st March, 1976 is the two collateral agreements - on the one hand to build

the mini-theatre, on the other to grant a new lease. It is true that clause 11 of the agreement of 1st March provides that on the completion of the buildings and the execution of the new lease, the lessee is to be entitled to possession of the land and buildings. Nevertheless, the lessee, in consideration of building was given the promise of a new lease, and that, in equity, is sufficient to found a contract. Assuming, however, that Mr. Arjun is right, I take the view that the agreement of 1st March 1976 must be read together with the leasing agreement of 5th October 1977. Mr. Banuve suggests that the original leasing agreement of November 1957 is to be read together with the agreement of 1st March 1976 to provide the initiation of the relationship between lessor and lessee, but those two are separated in time and intention whereas the agreements of March 1976 and October 1977 are, in effect, part of the same transaction. Mr. Arjun then submits that the present facts fall rather within section 11(b) dealing with premiums in respect of leases, rather than within section 11(t). He refers to the South African case of Commissioner of Inland Revenue v. Butcher (1944 S.A.T.C. 21, where the facts are not entirely dissimilar from the present and which clearly is decided under the South African Section corresponding with Section 11(b). I confess that I cannot see that that case helps Mr. Arjun a great deal when the tax charge is made under Section 11(t). I keep in mind another case cited to me by Mr. Arjun, Russell v. Scott (1948) 2 All E.R. 1, particularly the dictum of Lord Simonds at page 6, where he says that a subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him. The appellant's interrogatories were answered by the Commissioner specifying that the persons first mentioned in the section are the trustees, that is the appellants, and the term 'person' second mentioned referred to Sharan Bros. Ltd. and the agreement is that of 1st March 1976. I would have thought that with these explanations Section 11(t) becomes tolerably clear. Mr. Banuve has referred to another South African case, No. 767 in the Transvaal Income Tax Special Court in 1953. It is difficult to assess the value of this case because the Section of the

Act upon which it was decided is not set out and without that, there are too many imponderables. Mr. Arjun also submitted that the real purpose of Section 11(t) was to tax lessors who impose upon their lessees the cost of improvements rather than a proper rent. But here the lessor is getting not only a proper rent - $9,600 in place of £2,800, which would be $5,600 under the original leasing agreement - but also making the lessee pay the cost of improvements. Then Mr. Arjun submits that the improvements have to be valued in the absence of their cost being stipulated in the agreement, and that the word 'period' as an alternative to 'year' in the section means the period of the lease. With respect to Mr. Arjun I find myself unable to accept either of those submissions. The section does not require the improvements to be valued. It merely requires the Commmissioner to set upon them, as a matter of opinion, a fair and reasonable value. Here the Commissioner obtained the cost of the building works as paid by the lessees. It is true that this figure was not given in evidence but tendered from the Bar. However as I understand the matter, Mr. Arjun, while disputing the way by which the Commissioner arrived at his opinion, did not demur to the manner of its production to the Court. He did, however, complain that the Commissioner had given the appellants no opportunity to be heard, and submitted that here there was denial of natural justice. In my view that could have been cured by the appellants calling evidence. Again, Mr. Arjun submitted that the criterion was not the value of the building, but the value of the right to build, but he produced no authority on the subject, nor did he call evidence. I cannot accept that submission in view of the words 'the amount stipulated in the agreement as the value of the improvements or the amount expended on the improvements.' Those words seem to me to indicate clearly the criterion to be applied.

This subject of the exercise of a discretion or the opinion of the Commissioner has been discussed both in England and Australia. In England, in the House of Lords, Lord Thankerton in Inland Revenue Commissioner v. Ross and

Coulter (1948) 1 All E.R. 616, 629 said -

> "It is often a delicate question as to how far the courts are entitled to interfere with the exercise of a discretionary power, but I apprehend, generally speaking, the courts are not entitled to interfere unless (a) the exercise of the discretion has not complied with the conditions provided by the statute for the exercise of the discretionary power or (b) the power has not been exercised judicially."

In Australia Latham, C.J. in MacCormick v. Federal Commissioner of Taxation (1945) 71 C.L.R. 283, 299, said -

> "This court has, in a series of cases involving the interpretation of taxation statutes, held that certain matters are to be determined by the exercise of a discretion by the Commissioner of Taxation, or in accordance with an opinion formed by him, and upon an appeal the Court cannot substitute the opinion or discretion of the Court for that of the Commissioner. But in those cases the Court has also held that if he shows that the discretion was exercised or the opinion formed upon a wrong construction of the relevant statute or that the discretion exercised or the opinion formed was so irrational as to be not a discretion or opinion of the character contemplated by the statute, an assessment should be set aside and remitted to the Commissioner for reconsidersation in accordance with law."

I cannot see that the opinion formed here by the Commissioner was irrational, and in the absence of countervailing evidence, I think that I must accept it as a proper exercise of the discretion given to the Commissioner. Mr. Banuve submitted that the Commissioner is not bound to furnish the appellants with the figures upon which he reached his conclusions, but I do not accept that. The appellants did get an answer to the question posed by their interrogatories, albeit that it was evasive. They could have pressed the matter further, but they did not or, as I have said, they could have called evidence. As to the word 'period'

whatever else it may mean, I do not think it can possibly mean 'the period of the lease' I would think that the word 'period' must be equated with the word 'year' and is probably a period of taxation.

Mr. Arjun submitted that Section 14(b) is inapplicable because the administration of the estate of Evelyn May Barker was completed, as is agreed by paragraph 13 of the statement of agreed facts. I am not happy about this allegation, because I do not think that paragraph 13 contains an explicit statement that administration has been completed. It is a statement introduced, as it were, by a side-wind. No attempt has been made since the death of Mrs. Burrows, Lady Barker's daughter and the life tenant, to amend the papers before the Commissioner. Mr. Banuve submits that the assessment is presumed to have been made in 1976, and it is true that the 1977 assessment was withdrawn in 1983 and the Court was told then that a fresh assessment would be issued. Yet the fresh assessment was allowed to be issued in the name of the Barker estate. The agreed statement of facts says that Mrs. Burrows' death occurred long after administration had been completed and, the assessment should then have been issued in the names of the beneficiaries. But, here again, Mrs. Burrows was still alive in 1976 and 1977, and her accountants had already had an assessment against her withdrawn, and that same assessment issued against the estate. I am not able to accept Mr. Arjun's submission that administration of Lady Barker's estate had been completed, or that it is so agreed in the agreed facts. In any event, quite irrespective of whether or not administration was completed, it seems to me clear that this sum of $156,212, if Section 11(t) is applicable to it, would have been income in the hands of Lady Barker had it accrued to her during her lifetime.

Then Mr. Arjun says that the income was not wholly derived in 1976 and alternatively that it was not derived by the appellants, but by the beneficiary, who so far as the land upon which the Phoenix Theatre buildings are constructed, is Frank Alport Ryan. But, Frank Alport Ryan was not entitled

to the income until after the death of his mother, who was still alive in 1976 and 1977, and according to the statements annexed to the returns in 1976 and 1977 received the income of Lady Barker's estate. Both these contentions appear to involve putting the Commissioner to the proof, contrary to Section 71(2) of the Act. So far as this Court can see, the only documents available are the agreement of 1st March 1976 and the building agreement dated 6th October 1976. The former contains a provision that the Mini-Theatre was to become the property of the lessors, that is the appellants, on completion, although, of course it might be argued that it was the property of the appellants from the moment the building works were begun, because the work was being done on the appellants' land, and by that very fact, became the property of the appellants. If the appellants assert that the income was not wholly derived in 1976, it behoves them to prove it.

The alternative submission is in much the same position. Here the appellants are saying that the income was not derived by them, but, presumably, by the beneficiary. As I have shown, in 1976 and 1977 Mrs. Burrows was still alive, and in receipt of the income. The ultimate beneficiary's right did not accrue until after her death.

Mr. Arjun dealt with his sixth and seventh grounds of appeal together. They both arise out of the allowance of his clients' first appeal in 1986. The facts in connection with that first appeal are, briefly, that Mrs. Burrows filed an income tax return for 1977 showing the income arising from her mother's estate and accruing to her as life tenant, but not including the cost of the building of the Phoenix Mini-Theatre. Tax was assessed upon that return and duly paid. In March 1982 it appears that the Commissioner became aware of the cost of the Phoenix mini-Theatre, and issued an amended assessment against Mrs. Burrows for 1977, to which her accountants, who were also the estate accountants, objected, upon the ground, inter alia, that if the

construction of the Mini-Theatre was a right, it was a right which accrued to the estate of Lady Barker and not to the estate of Mrs. Burrows. I should add that Mrs. Burrows had died in 1979, but there was no evidence that the Commissioner was aware of her death. The Commissioner allowed the objection filed by the accountants, and issued an amended assessment against Lady Barker's estate for 1977, such amended assessment claiming only the cost of the Phoenix Mini-Theatre. No one on behalf of Lady Barker's estate, it would seem, informed the Commissioner of Mrs. Burrows' death. Objection was made to the new assessment, it was disallowed and an appeal lodged. That appeal actually got as far as this Court, when the Commissioner decided that he should have raised an assessment for 1976 and not 1977. The appeal was accordingly allowed by consent, and costs were awarded to the appellants. That was April 1986 and on 5th May 1986 an assessment was issued against Lady Barker's estate for 1976 for the amount of the cost of the Mini-Theatre. Ocjection was lodged and disallowed, and this appeal has resulted.

Mr. Arjun submits that the Commissioner cannot chop and change like this, ten years after the year of assessment, and relies upon section 59(2) of the Act. He concedes that there is no estoppel against the Crown. Mr. Banuve submitted that the Commissioner did not re-open or review the assessment here. He said that what the Commissioner did was to withdraw one assessment and issue a fresh one for a different year. I think in this connection the comments of Isaacs, J. in the Australian case of the King v. Deputy Federal Commissioner for Taxation ex-parte Hooper (1926) C.L.R. 368, 374 are pertinent. He said "There is one main or basic assessment for each year, which is amendable. If any amendment increases the liability, that is separately open to objection and appeal". The English cases of Aramayo Franke Mines Ltd. v. Eccott: Aveline Aramayo & Co. v. Ogston (1925) 1 K.B. 86:94 L.J.K.B. 145: and on appeal (1925) A.C. 634:94 L.J.K.B. 688 are not dissimilar from the present. There an assessment,

against the firm, was held bad, but the second, against the company while litigation was pending against the first assessment, was held good. It seems to me that the second assessment issued after the first had been withdrawn, even though it had been appealed against successfully, is good, since, although it is for the same amount, it is for a different year.

Although Mr. Arjun relies only upon Section 59(2), in my view the whole section may be relevant, and I set it out:

> 59(1) Any person liable to pay tax shall continue to be liable and where any person so liable has failed to make a return as required by this Act or has made an incorrect or false return, the Commissioner may at any time assess such person for the additional tax which such person may be liable to pay, and the provisions of this Act as to notices of assessment, payment and objection shall apply to such assessment or additional assessment and to the tax charged thereunder.
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> (2) In addition to any powers conferred upon the Commissioner under subsection (1) the Commissioner may reopen any assessment within six years of the end of the year of assessment and may, where the amount of tax assessed under such assessment is less than the amount which ought properly to have been assessed, amend such assessment. Where the Commissioner amends assessment under the provisions of this subsection, he shall fix the date of payment of any tax outstanding thereunder. An objection shall lie from the amended assessment in the same manner as if it were an original assessment but subject to the proviso to subsection (1) of section 62.

That proviso restricts the right of objection on an amended assessment to fresh liability in respect of the amended assessment or the increase of an existing liability.

It appears to me that omitted income, and if the Commissioner is correct in taxing these improvements at all, this must be omitted income, is taxed under an additional assessment under Section 59(1), whereas an assessment may be

reopened under Section 59(2) if the Commissioner finds that some item therein, for example, has been wrongly stated. There is no limitation of time under section 59(1) and I think that is the section applicable. In my view Section 59(2) does not apply at all. The appeal must therefore be dismissed, with the result that the appellants will have to pay the costs of the appeal, to be taxed in default of agreement.

(K.A. Stuart)
COURT OF REVIEW

SUVA,

28th November, 1988.