Legal.

IN THE HIGH COURT OF FIJ

Court of Review

Appeal No.3 of 1989

Between :

ELIMA P SKYES Appellant

- and -

THE COMMISSIONER OF INLAND REVENUE Respondent

Mr N S Arjun for the Appellant

Mr G A Keay for the Respondent

J U D G M E N T

The appellant is a daughter of Sir Hugh Ragg who in 1951 caused to be formed a family company called Petrie Ltd. which owned several family properties among them, Natadola near Sigatoka, Wairua in Tamavua and Malaqereqere also near Sigatoka. Sir Hugh had four daughters and to each of them he gave as a gift a one-eighth share in Petrie Ltd. There was an outside company which was interested in acquiring Natadola with a view to developing it and building a hotel. The daughters were however opposed to this although other shareholders in Petrie Ltd were in favour. A compromise was worked out whereby the daughters transferred their interest in Natadola receiving in return the interests of other shareholders in Wairua and Malaqereqere.

Later part of Wairua comprising a house in which the appellant's stepmother, Lady Ragg, had resided was sold to the First National Bank for $130,000. The area of 2½ ac sold to the Bank was cut off by subdivision and 7½ ac principally gully was left. A new title was issued for this area to the four daughters or their representatives. No tax was levied on the $130,000 which was divided among the daughters. There were a number of squatters in the gully and when the Suva City rates went up from $475 to $1461 and the income was minimal the daughters decided to sell. The proposed sale was placed in the hands of an agent and eventually after quite a deal of negotiation and fresh surveys the property was sold in 1986 to Ocean Shores Estates Ltd for $80,000 of which after sale expenses had been allowed the appellant became entitled to $18,751 upon which the Commissioner has assessed duty.

The Malaqereqere land was also subdivided, and divided among the four daughters and the appellant received Lots 2 & 3 and 14 to 18 both inclusive. These are all small farms occupied by tenants protected by the Agricultural (Landlord & Tenant Act) Cap.270. The appellant sold lots 2 & 3 to the occupancy tenants for $18650 and $20000 respectively in 1987. The amounts received both from Wairua and from Malaqereqere have been treated as profit by the Commissioner and he has assessed them for duty under Section 11(e) of the Income Tax Act 201.

The appellant's notice of appeal as filed treated the matter as a case of inheritance but that was a mistake cured by the statement of agreed facts put in and no amendment was necesssary. In any event, the law is precisely the same whether the issue is gift or inheritance. In the case of a gift Williams v Federal Commission of Taxahan (1972) 3 ATR 283 is applicable in the case of inheritance McClelland v Federal Commissioner of Taxation (1970) 120 CLR 487 (1971) WLR 191. These cases have been followed in Fiji in Commissioner of Inland Revenue v Woodward in the Fiji Court of Appeal No.27 of 1987 and Commissioner of Inland Revenue v Ferguson Civil Appeal No.17 of 1986 a decision of Byrne J in the High Court. Both these were cases of inheritance. Mr Arjun for the appellant relied very strongly on Woodward's case the facts in which closely resemble the present appeal, save that this is a case of gift. Mr Keay for the Commissioner sought to find help from an earlier case, Inland Revenue Commissioner v Weller another decision of the Fiji Court of Appeal, No.75 of 1981 submitting that appellant had engaged in business in Fiji and thus brought herself within section 11(e) of the Act.

It is now desirable that I should set out the section in issue. Section 11 reads "11. For the purpose of this Act "total income" means the aggregate of all sources of income including .....

Then it lists a number of sources which however are not relevant to this case, following which is a proviso reading : "Provided that without in any way affecting the generality of this section, total income for the purpose of this Act shall include ..... and thereafter follow no fewer than twenty-eight matters of which (e) reads:

"(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, 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".

Now it is conceded that the appellant was at all material times residing outside Fiji. She engaged in the sale of land, and is therefore deemed to be carrying on business in Fiji. But there has also to be a profit or gain. "Gain" as used in the section is analagous to profit. The Commissioner equates it with 'surplus'. But this is impermissible, as is indicated by the judgement of the English Court of Appeal, delivered by the Vice-Chancellor, Sir Nicolas Browne-Wilkinson in Customs & Excise Commissioners v Bell Concord Educational Trust Ltd (1989) 2 WLR 679: 2 All ER 217 where the Customs & Excise failed in an attempt to tax a surplus. Rooney J in the Supreme Court on the hearing of Woodward's appeal from this Court, cited a long discussion by Fletcher Moulton LJ in In re Spanish Prospecting Co. Ltd (1911) 1 Ch 92 on the meaning of profit, but Byrne J in the High Court in Ferguson's case (Civil Appeal No.17 of 1986) relied on a much simpler definition from the shorter Oxford Dictionary.

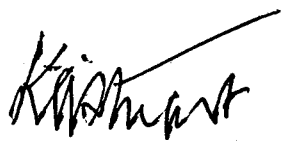
"The pecuniary gain in any transaction the excess of returns over the outlay of capital. Byrne J also cited two passages from the judgement of Barwick CJ in Williams v Federal Commissioner of Taxation (1972) 3 ATR 283 which would seem pertinent to this enquiry. First,

"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 CLR 487 I remain of the opinion that the realisation of a gift, however elaborately made, can neither yield a profit nor in itself, be a profit making scheme", and again "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".

I have no doubt that the Fiji Court of Appeal decision in Woodward's case governs this one, and I must hold myself bound to follow it. In McClelland's case, Lord Donovan delivering the advice of the Privy Council (1971) 1 WLR 191, 199 said "In California Copper Syndicate v Harris (1904) 5 T C 159, the Lord Justice Clerk formulated the question which must be asked in cases like the present. "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". I think that here there was merely a realisation of the asset.

Mr Arjun raised a final point namely that he must succeed by virtue of the words in Section 11 "including the income from, but not the value of property acquired by gift, bequest devise or descent". At first sight the Fiji Court of Appeal in Woodward's case might appear to have agreed with Mr Arjun, but their words are somewhat ambivalent and in Weller's case Appeal No.75 of 1981 at p.6 the same Court, somewhat differently constituted, says "For the reasons advanced by Mr Scott we are of the view that the exception only relates to persons who fall within the ambit of Section 11 (a) and does not apply to a person who is "deemed" to carry on business within the context of Section 11(e)".

Mr Keay as I have said sought to find from Weller's case evidence of the appellant's engaging in business within the meaning of that phrase in section 11(e). Weller was held not to have engaged in business. The question did not arise in Woodward's case, but the Fiji Court of Appeal clearly thought that he had. But it did not disentitle him to succeed. To a similar extent probably did the appellant. She likewise must succeed. The appeal will be allowed. The appellant will have her costs. I understand that she came from Perth, prepared to give evidence. In the event the facts were agreed. No allowance will therefore be made for the appellant's evidence.



Court of Review

25th July 1991.