S(1)(c)

IN THE SUPREME COURT OF FIJI
IN SUVA
Appellate Jurisdiction
Civil Appeal No. 13 of 1974

BETWEEN:

COMMISSIONER OF INLAND REVENUE — Appellant

- and -

DEO NARAYAN SAHAY & SUGRA SAHAY — Respondents

Date of Hearing: 25th April, 1975.

Mr. M.J. Scott, Counsel for the Appellant.
Mr. D.N. Sahay, Counsel for the Respondents.

JUDGMENT

This is an appeal by the Commissioner of Inland Revenue against a decision of the Court of Review setting aside assessments raised against Deo Narayan Sahay and his wife Sugra Sahay whom I will hereafter refer to as the taxpayers. There are two appeals one by the husband and the other by the wife, for they were assessed separately, but the points raised on each are precisely the same, and the appeal of Deo Narayan Sahay was heard by the Court of Review, and it was agreed that the decision there would apply also to his wife's appeal. A like arrangement was made in respect of the appeals to this Court. Deo Narayan Sahay and his wife desired to make provision for their infant children and to that intent entered into an arrangement on the 19th day of February 1971 with a company called Tower Investments Limited in which the taxpayers together held 200 of the 401 shares issued, and were also directors of the Company, whereby that company became trustees for their children then aged 11, 7 and 2 respectively. The arrangement comprised a very simple deed and provided that the company would take a lease of the leasehold property at Lami owned by the taxpayers for two years at a rent of $50 a year, and would sublease the property and hold any moneys received in trust for the infant children of the taxpayers. On the same day an agreement to lease was executed from the taxpayers to the company in pursuance of the abovementioned deed, and on 27th April 1971 the company subleased the property for 2 years at $250 a month. Giving evidence before the Court of Review Deo Narayan Sahay admitted that that rent was the rent he expected that the property would bring.

The Commissioner decided to set aside the agreement to lease the Tower Investments dated 17th February 1971 and assessed the taxpayers, each in half the amount of rent received by Tower Investments Limited from their sublessee. The respondents objected. The Commissioner disallowed their objections and they appealed to the Court of Review which allowed their appeal and set aside the assessments. From that decision the Commissioner appeals.

The Court of Review held that the Commissioner was entitled to act under section 103 of the Income Tax Ordinance (Cap. 176) and to treat all three parts of the transaction between the taxpayer, Tower Investments Limited and that company's sublessee as void but that his action did not result in settling any tax liability upon the taxpayers. It is this latter part that the Commissioner challenges before this Court. Section 103 is as follows:

> "Every contract, agreement or arrangement made or entered into, orally or in writing, on or after the thirteenth day of October, 1961, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly -
>
> (a) altering the incidence of any tax;
>
> (b) relieving any person from liability to pay any tax or make any return;
>
> (c) defeating, evading or avoiding any duty or liability imposed on any person by this Ordinance; or
>
> (d) preventing the operation of this Ordinance in any respect,
>
> "be absolutely void, as against the Commissioner, or in regard to any proceeding under this Ordinance, but without prejudice to such validity as it may have in any other respect or for any other purpose."

The taxpayers' argument before the Court of Review and indeed, before this Court, was that because they did not receive the income, and could not receive it, in the way the trust was framed, tax would not accrue. They did not appeal against the decision of the Court of Review that the Commissioner was entitled to apply section 103, and I should have thought the short answer to their argument is that once the three transactions to which Tower Investments Limited were parties, were set aside, all that is left is that company's sublessees paying $250 a month. So that if that be the true view of the matter, the respondents are now receiving the income as a matter of law, although as a matter of fact it continues to be

paid to Tower Investments Limited and by that company placed to the credit of the infants. This is the situation which, as I see the matter, arose in Mangin v Inland Revenue Commissioner (1971) 1 A.E.R. 179 and is referred to by Lord Donovan at page 185, where he said

> "The taxpayer here did derive the income. He sold the crop and received the proceeds. True he then had to account for them to the trustees. But if this obligation has to be regarded as void under section 108 (the New Zealand counterpart of our section 103) and the trusts non-existent, then one is left with the taxpayer receiving the income and accountable to nobody for it."

Similarly if as the Court of Review held, the three documents relating to Tower Investments Limited are to be regarded as non-existent as against the Commissioner, the position is that the occupants of the respondents' property were paying $250 a month as rent to the owners, the respondents.

The taxpayers say that 'received' and 'derived' mean the same thing, and because this income was received by Tower Investments Limited, it was not derived by the taxpayers. Here again reference may usefully be made to Mangin's case, for there, although the proceeds of the crop came into the taxpayer's hands, he had to account for them to the trustees. So that the money was not his to do with as he liked, and in that sense the money, although it passed through his hands, was not received by him. Here the money did not even come into the hands of the taxpayers. Nevertheless it was derived from the taxpayers' property, and would have been received by them had they not made an arrangement with Tower Investments Limited which the Court of Review has held to be void against the Commissioner. I cannot see how this money can be otherwise than derived by the taxpayers. Mr. Scott points out that the Income Tax Ordinance deals with moneys derived, and only to a much lesser degree with moneys received. 'Derived' means 'arising out of' or 'originating from' and another meaning is 'obtain'. It will be noticed that in section 15 of the Income Tax Ordinance both words 'derive' and 'receive' are used, the latter no doubt following the decision in St Lucia Usines & Estate Co. v St Lucia (Colonial Treasurer) (1924) A.C. 508. That case shows also that the two words are by no means synonymous. I think that Lord Donovan in Mangin's case (supra) uses the word 'derive' in contradistinction to the word 'receive' for he held that there the taxpayer did derive the income, though he did not receive it, since he paid it immediately to the trustees whom he had created. In this case the Court of Review held that the three transactions in which Tower Investments Limited participated - the deed of trust, the lease agreement from the taxpayers to Tower Investments Limited and the agreement between Tower Investments

Limited and their sublessees - were void as against the Commissioner. What is left is the sublessees paying rent for the taxpayers' land. Income is certainly derived by the taxpayers. But Mr. Sahay would say, as I understand him, that it is not received by the taxpayers. It seems to me that if the agreement between the taxpayers and Tower Investments is void as against the Commissioner, as between him and the taxpayers the moneys received from the letting of the taxpayers' premises are moneys held by Tower Investments Limited on behalf of the taxpayers and thus received by them.

But then Mr. Sahay says that the arrangement escapes because it is a family arrangement. It seems to me that that argument cannot be put forward by the taxpayers because they have not appealed against the decision of the Court of Review. However, since the point is put forward, I will deal with it. It arises from the words of Lord Denning in Newton v Commissioner of Taxation (1958) A.C.450 where at p. 466 he says, referring to section 260 of the Commonwealth Act which is in almost identical terms with section 103 of the Fiji Ordinance.

> " You must be able to predicate - by looking at the overt acts by which it was implemented - that it was implemented in that particular way to avoid tax. If you cannot so predicate, but have to acknowledge that the transaction is capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section."

Then Kitto J in Hancock v Federal Commissioner of Taxation (1961) 108 C.L.R. 258, 283, says referring to Newton's case and to the word 'arrangement' in section 260 abovementioned.

> " If those acts are capable of explanation by reference to ordinary dealing such as business or family dealing, without necessarily being labelled as a means to avoid tax, the arrangement does not come within the section."

Likewise Lord Donovan in Mangin's case (supra) cites at p. 188 the passage from Newton's case which I have set forth, and goes on

> " If a bona fide transaction can be carried through in two ways, one involving less liability to tax than the other, their Lordships do not think that section 108" -

the New Zealand counterpart of the Fiji section 103, but not in quite the same terms -

> "can be properly invoked to declare the transaction wholly or partly void merely because the way involving less tax is chosen."

The clue to Lord Denning's meaning lies in the words "without necessarily being labelled as a means to avoid tax". Here the Court of Review found that the taxpayers fixed a completely inadequate rent

for the lease from themselves to the trustee company (Tower Investments Limited) "and its purpose and effect were to transfer to the trustee company for two years in trust for their children some $2950 of annual income on which the taxpayers would not during that period be required to pay tax". I would with respect agree with the learned Court of Review in considering that such a transaction must necessarily be labelled as a means to avoid tax.

I think that I have dealt with all Mr. Sahay's arguments, and the result is that although I agree with the learned Court of Review in holding the transaction involving the three documents concerning Tower Investments Limited avoided as against the Commissioner, I do not agree as to the result of that avoidance, and I hold that the effect of that avoidance is that the taxpayers become liable to tax. To that extent the order of the Court of Review is set aside, the taxpayers' objection is disallowed and the assessments to tax against them is confirmed. The Commissioner is allowed costs as on one appeal.

SUVA,
August, 1975.

(K. A. Stuart)
JUDGE

The Director of Public Prosecutions for the Appellant;

Messrs. D.N. Sahay & Co., Solicitors, Suva, Solicitors for the Respondent.