IN THE SUPREME COURT OF FIJI

REVIEW JURISDICTION

Review No.10 of 1982.

IN COURT

BETWEEN:

TINIKATOLU LIMITED Appellant

A N D

THE COMMISSIONER OF INLAND REVENUE Respondent

Mr. F.G. Keil, for the Appellant
Mr. M.J. Scott, for the Respondent.

J U D G M E N T

Tinikatolu Limited, which I shall call the appellant, is a company registered in Fiji and it owns a piece of land at Nadi which, according to the records in the Land Transfer office, it acquired in 1973 from Pioneer Investments Ltd. The transfer showed the consideration as $40,000 and the transfer was stamped as at that sum. The appellant duly filed its income tax returns but showed that the property had been bought for $90,000. On the latter figure it would escape payment of tax, but if the consideration was only $40,000, its margin of profit in selling sections of the land which it had caused to be subdivided after purchase, would be somewhat greater and the appellant would be liable to tax.

The Commissioner of Inland Revenue, whom I shall refer to as the Commissioner, assessed the appellant for tax on the basis that it had paid $40,000 for the land and the appellant objected and produced a statutory declaration by a man named Cuthbert who lives in Melbourne, Australia and is

a director of appellant purporting to show that the land had been bought by the appellant from a concern called Eagle Limited for a price of $90,000. The Commissioner rejected this declaration and the appellant appealed. Its appeal took two points - first that the Commissioner should have accepted the price of the land as being $90,000, and secondly that as the appellant was merely a trustee for two other companies, both registered in Fiji, called Cromwell (Fiji) Ltd. and Murass Ltd., and those two companies in turn were trustees for two Victorian families, the tax assessments should be raised in accordance with the trusts.

I will deal first with the objection that the Commissioner should have accepted that the purchase price of the land was $90,000. Mr. Keil for the appellant first asked leave under Order 38 of the Rules of the Supreme Court to adduce written evidence in the form of the declaration by Cuthbert. I accepted the evidence de bene esse. No objection was taken to the fact that the declaration is merely a photocopy of another document, nor that there was no evidence that the document of which it is a photocopy is an original document. I will therefore assume, for the purposes of this case that this is a photocopy of an original document. I regard it however, as defective in that it merely asseverates that the appellants paid $90,000 for the land, and does not explain, or even attempt to explain the point at issue, namely, the connection between the undoubted purchase by appellant of land from Pioneer Investments Ltd. for $40,000, supported as it is by registered documents, and the alleged purchase by the appellant of the same land from Eagle Ltd., apparently a New Hebrides company, for $90,000, supported only by a minute of the appellant - not in a minute book, but on a loose sheet, and a copy of an agreement dated 23rd August, 1973 to that effect purporting to be a true copy. I think that I should say that the appellant's accounts have consistently ~~in its returns~~ shewn the cost of the land at $90,000, but I do not think that should weight the balance against the failure to explain why the document of transfer gave the price as $40,000.

There is the further fact, again unexplained by the appellant, that appellant lodged a caveat against the title after Pioneer Investments Ltd. had acquired the land, seeking to protect an interest claimed by it under an agreement dated 10th July, 1973. That caveat was registered on 3rd August, 1973, twenty days before the alleged purchase from Eagle Ltd. Then there are photocopies of receipts, but they mean nothing as they are, and could doubtless have been properly proved. In these circumstances I am not disposed to attach any weight to the appellant's declaration, and since the onus of proof is on the appellant this ground of appeal must fail.

In April, 1976, the appellant made returns of income for 1973, 1974 and 1975 and returns for 1976 and 1977 were lodged in July, 1978. 1978 and 1979 returns were lodged more or less as they became due. All those returns shew a nominal capital of $100,000 and an issued capital of $3. The question at issue concerns the 1977, 1978 and 1979 returns. I would add for the sake of completeness that Cornwell and Marass have duly made returns, each shewing a nominal capital of $10,000 and an issued capital of $2. After the purchase of the land the appellant appears to have caused it to be subdivided. There were originally two mortgages given by the appellant, but in 1976 they were discharged and a new mortgage given to the Australia and New Zealand Bank. Each of these mortgages must have been executed by the appellant. The first sales of land appear to have taken place in 1977 when five blocks were sold., The returns for 1977, 1978 and 1979 all shew sales made and set against the expenditure on the basis that $90,000 was paid for the land, and the Commissioner adjusted those figures on the basis that only $40,000 was paid for the land. The Commissioner's figures will now stand.

The appellant, however, seeks to substantiate a further ground of appeal which was allowed by the Court with the consent of the Commissioner to be introduced into the notice of appeal, although it does not appear in the appellant's original objection. The appellant

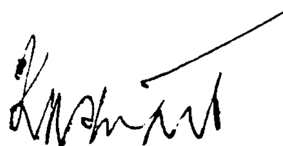
claims that the assessments for 1977, 1978 and 1979 should not have been raised against the appellant, or indeed against Cornwell or Marass whom the appellant represents, but against the ultimate beneficiaries, the Grubb and Cuthbert families and at the hearing of the appeal deeds of trust were produced, shewing the addresses of some of the ultimate beneficiaries, although there was nothing to shew whether any of them or which of them were still alive, or were minors. Mr. Keil did not tell the Court under which section of the Act he considered the beneficiaries might have been taxed, but contented himself with producing authority that a company can act as a trustee. He also produced the memoranda and articles of association of the appellant, Cornwell and Marass. I am willing to assume for the purposes of this appeal, without deciding the point, that the memoranda and articles of these three companies empower them to act as trustees. The fact is, however, that in all the years under consideration, all moneys received by the appellant have been applied in reducing the mortgages and paying the debts of the appellant, and up to the end of 1979 there had been, according to the accounts, constant losses. The result is that no money got beyond the appellant.

Now, the law in the matter is well settled and is set out, so far as the English Income Tax Acts are concerned in Williams v Singer (1921) 1 AC.65: 7 TC.367: 89 LJKB 1156 where Viscount Cave L.C. said -

> "The fact is that if the Income Tax Acts are examined, it will be found that the person charged with the tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to secure for the State a proportion of the profits chargeable and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found. If the beneficiary receives them, he is liable to be taxed upon them. If the trustee receives them and controls them, he is primarily so liable. If they are under the control of a guardian or committee for a person not sui juris or if an agent or receiver for persons resident abroad receives them, they are taxed in his hands. But in cases where a trustee or agent is made chargeable with the tax the statutes recognise that he is a trustee or agent for others, and he is taxed on behalf of, and as representing, his beneficiaries or principals".

The principle there indicated applies equally to Fiji as to England. Section 39 of the Act deals with representatives of persons who have not made returns and imposes liability upon the representative. Section 40 deals with a trustee receiving income on behalf of a non-resident, section 42 provides for payment of tax on income accumulated in the hands of a trustee but provides also that if the income shall have reached the beneficiary, it will be taxed there, but tax is not to be paid twice.

In this case the person in actual receipt of the income is the appellant, and there was never anything to pass beyond the appellant, which is therefore primarily liable for tax. Hence the appeal will be dismissed and the appellant will pay the Commissioner's costs to be taxed in default of agreement.



(K.A. Stuart)
Court of Review

14th October, 1983
~~26th September, 1983~~

Solicitors: Mitchell Keil & Co: The Solicitor to the Inland Revenue Department.