IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction



CIVIL APPEAL NO.14 OF 1983

BETWEEN:

TINIKATOLU LIMITED Appellant

and

THE COMMISSIONER OF INLAND REVENUE Respondent

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

JUDGMENT

This is an appeal from the decision by the Court of Review dated the 14th October, 1983 dismissing the appellant's appeal against the Commissioner's assessment of the appellant's income for the years ended 1977, 1978 and 1979.

Pursuant to section 69 of the Income Tax Act the appellant gave notice to the Commissioner stating it was dissatisfied with the decision of the Court of Review for the following reasons:

(1) That the Court of Review erred in law and in fact in not accepting or giving insufficient weight to the evidence before the Court that the purchase price of the property paid by Tinikatolu Limited was $90,000.00 and not $40,000 as alleged by the Commissioner of Inland Revenue.

(2) That the Court of Review erred in law and in fact in not accepting the trustee relationship between the taxpayer and Marass and Cornwall Limited and the ultimate beneficiaries under further trusts and that any income was to be taxable in the hands of those beneficiaries and not in the hands of the tax payer.

The Commissioner pursuant to the said section 69 referred the appeal to this Court for hearing and determination.

It is convenient to repeat the facts stated in the Court of Review's judgment:

> "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 Cronwell (Fiji) Ltd. and Marass Ltd., and those two companies in turn were trustees for two Victorian families, the tax assessments should be raised in accordance with the trusts."

The Court of Review attached no weight to Mr. Cuthbert's declaration. That document being the only evidence before the Court to support the applicant's claim that the purchase price of the land was $90,000, the Court held that the appellant's appeal on that ground failed.

I will deal first with the appellant's appeal against that decision.

In their submissions both Mr. Keil and Mr.Scott raised the question of the admissibility or weight of evidence adduced by the appellant to establish that the Company paid $90,000 for the said land and not $40,000 as shown in the transfer vesting the land in the appellant.

Mr. Scott in particular, has in his usual thorough fashion done considerable research and is supported by authority on this issue. I do not find it necessary to refer to counsel's arguments which I have read and considered as the issue can be decided by reference to the facts stated by Mr. Cuthbert in his declaration, treating some statements as admissions coupled with facts gleaned from admitted documents.

Mr. Cuthbert's declaration could be entirely ignored and the result would be the same. The Court of Review attached no weight to the declaration and in my view it was correct in adopting that attitude.

The appellant contends that it paid $90,000 to acquire the said land. This sum was alleged to have been paid to a foreign company incorporated in the New Hebrides named Eagle Limited.

Evidence of that transaction was a photocopy of an executed agreement dated the 20th day of August 1973 entered into by the said Eagle Limited with the appellant. The photocopy does not indicate that the original had been stamped.

The photocopy of Certificate of Title No.6188 relating to the same land discloses that Eagle Limited was at no relevant time the registered proprietor of the said land.

The Agreement for sale and purchase prepared by Messrs Cromptoms makes no mention of this fact and would seem to indicate on the face of the document that Eagle Limited as owner of the land was agreeing to sell the land to the appellant for $90,000.

The title discloses also that the land was transferred to Pioneer Investments Limited on 16th January, 1973 by Mr. John Neil Falvey (as he then was) in exercise of his power of sale under mortgage No. 93427. The transfer No. 126768 was for the consideration of $30,000.

The appellant lodged a caveat No. 129413 against the title to the land claiming "an estate or interest as Purchaser of an agreement dated the 10th July, 1973."

That agreement was never produced to the Court of Review. The Court commented on the fact that the lodging of the caveat was not explained. There was no comment by the Court or by Counsel in this appeal that the interest claimed is as purchaser of (emphasis added) the said agreement. That would indicate that the caveator was the assigneee of the purchasers interest in that agreement.

The caveat was lodged on the 3rd August, 1973 17 days before the appellant purported to enter into the Agreement with Eagle Limited in respect of the said land.

On the 27th February, 1974 the transfer of the land by Pioneer Investments Limited to the appellant was registered showing a consideration of $40,000 as having been paid by the transferee (the appellant) to the transferor, Pioneer Investment Limited.

The photocopy of the transfer indicates that full ad valorem duly was paid on the transfer. It was not stamped "Duty Paid" indicating that a sale and purchase agreement had been previously stamped with full ad valorem duty.

The alleged agreement of 10th July, 1973 should have been stamped within two months either as an agreement or with full ad valorem duty which is what is the normal practice in legal circles.

The clear documentary evidence indicates that the appellant paid $40,000 for the land. Mr. Cuthbert's declaration, whether it was admissible or not is an issue I do not have to decide, is of no assistance at all to the appellant.

There is a possible explanation, which is purely conjecture, if in fact the appellant did pay $90,000 for the land and that is that Pioneer Investments Limited sold

the land to Eagle Limited for $40,000 under sale and purchase agreement which in turn sold to the appellant for $90,000. If these were the true facts then the transfer should have been one by direction disclosing both considerations and stamp duty would have been paid on the $40,000 transaction as well as the $90,000. No duty was apparently paid on the alleged $90,000 sale, and no explanation was offered for the apparent evasion of stamp duty.

The appellant at the time it purchased the land from Pioneer Investments Ltd also executed a mortgage in its favour which is disclosed by the memorials on the title.

What can also be gathered from the documents is that the Court of Review was not told the whole story and was presented with a declaration alleging facts which sought to contradict documents to which the appellant was a party or allowed to be registered indicating it had paid $40,000 for the land.

The Court of Review rightly placed no weight on Mr. Cuthbert's declaration.

The appellant's first ground of appeal fails.

I turn now to consider the second ground.

This was not originally a ground of objection but leave was given by the Court of Review to raise it as an alternative ground of appeal.

The Court of Review when considering this alternative ground stated:

"The appellant, however, seeks to substantiate a further ground 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 purpose 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 mortgag es 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."

The Court held as follows:

" 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."

Before considering this ground I would refer to some facts which became evident on considering the documentary evidence. There was no reference to these facts by Counsel before this Court or the Court of Review. I do not base my findings on these facts but it is evident that there should have been some explanation offered to the Court. Coupled with the applicant's failure to fully explain what happened regarding the purchase of the land there is a feeling created that such failure to fully make disclosure was deliberate.

By letter dated 11th November, 1975 the Commissioner requested copies of the trust deed or deeds of settlement in respect of the two Companies Marass Limited and Cornwell Fiji Limited. These were furnished on 8th March, 1976, but it is doubtful whether they were of any legal effect at that time or any relevant time.

The three documents were:

(1) A Declaration of trust dated 4th December, 1973 by the appellant company declaring that it had entered into a contract for the purchase of the said land and a statement that it would hold it in trust for Marass Limited and Cornwell Fiji Limited in equal shares.

(2) A Deed of Settlement dated 28th May, 1973, the Trustee being Marass Limited.

47

(3) A Deed of Settlement dated 28th May 1973, the Trustee being Cornwall Limited.

If the declaration was a reference to the Agreement with Eagle Limited on the facts before the Court the Agreement was never performed and was in fact incapable of performance. The question may have been asked what then is the effect and validity of the Declaration of Trust?

The Declaration does not identify the parties to the Contract and this is unusual.

The Declaration although dated 4th December, 1973 was not stamped until 24th March, 1983 over 9 years later. Under section 100 of the Stamp Duties Act the declaration had no validity until stamped. When the Commissioner assessed the appellant there was no valid declaration of Trust or Deeds of Settlement in existence. Both the deeds were dated the 28th May 1973, and like the declaration were not stamped until the 24th March, 1983.

When the appellant purported to create the trust indicating that the two companies were beneficial owners in equal shares of land it had proposed to purchase the Companies had entered into the Deeds of Settlement some months previously. No deeds of trust were produced executed by the two companies indicating they held the land in Trust for the beneficiaries of the trusts evidenced by the Deeds.

There is nothing in the Deeds of Settlement to indicate that the said land declared by the appellant to be held in trust by it for the two companies in equal shares was again held in trust for the beneficiaries named in the two deeds.

The memoranda of the two companies are in standard form and there are no references to the Deeds of Settlement and any trust therein created or that the Companies were set up as trustee companies.

That is the situation also as regards the appellant company. Its memorandum makes no mention of the alleged trust.

In the copies of the accounts for the year ended 31.12.73, attached to the Company's return of income for 1973 there is a note which states:

"NOTE TO ACCOUNTS

"The Company was incorporated on 9.4.1973 and did not trade for the period to 31st December 1973. The Company acts solely as trustee for a family trust and on behalf of the trust has incurred liabilities at 3rd December, 1973, such liabilities being contingent liabilities of the company."

That note contradicts the Declaration of Trust dated 4th December 1973 and raises some doubt as to that document.

That doubt is increased when it is appreciated that the appellant declared on that return that:

"The purpose for which the Company was formed was to act as Trustee for a family settlement" (only one family settlement is referred to not two).

That statement on the facts now disclosed was not correct.

The shareholders are shown as:

| | | |
|---|---|---|
| Cornwell Fiji Ltd | 1 | $1 share |
| Marass Ltd | 1 | $1 share |
| Cornwell Ltd & Marass Ltd | 1 | $1 share |

The appellant always disclosed that it was a Trustee Company when rendering returns but the Commissioner does not appear to have been interested in examining that situation whilst the Company was making no profit. When it did start to make a profit he then appears to have started an investigation and assessed the company for tax which arose on his refusal to accept the alleged purchase price of $90,000.

The hearing before the Court of Review was an unusual one. No witnesses were called to give evidence but a large number of documents were admitted.

The Court without deciding the point accepted for the purpose of the appeal, that the three companies were empowered to act as trustees and held that the income must be taxed in the hands of the appellant company. Mr. Keil does not disagree with this but he makes the point,supported by authority, that the trustee or agent must be "taxed on behalf of, and as representing his beneficiaries, or principal." In other words any deductions to which a beneficiary would be entitled must be allowed. The rate would not be the rate for a company, which is the rate which the Commissioner has used.

The quotation just made is from the last two lines of the extract quoted by the Court and attributed to Viscount Cave L.C in WILLIAMS v SINGER (1921) 1 AC 65. 7 TC367 89 LJKB 1156.

Under section 11(p) of the Income Tax Act income accruing to or derived by a beneficiary is within the definition of total income.

Uncharacteristically, Mr Scott has ignored this argument. He states at page 18 of his written submissions:

> "The sole question to be decided on the second point of this appeal is whether appellant has an authority vested in it by its memorandum or otherwise to act as trustee for the purposes of other companies."

Mr Scott raised a similar argument before the Court of Review which the Court did not consider. The Court assumed for the purposes of the Appeal that the three Companies could legally act as trustees, and came to a decision which I consider is correct but not for the reasons given by the Court of Review.

The Court of Review's decision is somewhat ambiguous. Did the Court mean that the appellant was liable at the rate applicable for incorporated companies or was it liable as trustees at the rate applicable for the beneficiaries as the ultimate recipient of the incomes.

Whatever the Court meant the outcome on the facts is the same and that is so whether the appellant was authorised to act as trustee or not.

So far as the appellant was concerned the beneficiaries of its alleged trust were the two companies and the rates of tax would appear to be the same whether the appellant or the two companies were assessed.

When the two companies set up the appellant Company and b ecame the sole shareholders they invested money in the appellant company on a joint venture as indicated

in the companies accounts. The two companies entered into no deed of trust to indicate the Company they set up as a joint venture was a trustee Company. The transaction has all the hall marks of a joint commercial venture. The income they made on that investment is the income on which they should be taxed on behalf of the beneficiaries but the income of the appellant company should be taxed at the rate applicable for either the appellant company or its beneficiaries the other two Companies.

I do not consider that the appellant can legally create a trust for beneficiaries who are the sole share-holders and owners of the Company. The two companies owned the appellant company and controlled it. Income earned by the Company if distributed by way of dividends would go to the two companies in any event.

The appellant company was correctly assessed by the Commissioner.

If I am wrong then the position is, if the appellant can legally create a trust, that it holds the land in trust for the two companies. Until those companies as beneficiaries call on the appellant to transfer the land to them the appellant company must be assessed as trustee for those companies.

The accounts of the three companies disclose that Marass Limited and Cornwell Fiji Limited entered into a joint venture set up the Appellant Company which purchased land for development. The appellant company was not set up as a trustee company but as an ordinary trading company. The two companies made money available to the appellant company and were legally creditors of that Company and also took up shares. The Company paid no dividends but did make a paper profit when the Commissioner

000052

refused to accept the purchase price of $90,000 and assessed on the purchase price of the land being $40,000 which the registered transfer disclosed.

The Court of Review was correct in my view in holding that the appellant company was primarily liable for the tax.

The appeal is dismissed with costs to the Commissioner.

R.G. KERMODE
J U D G E

SUVA,

1st March, 1985