IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 65 of 1976

Between:

COMMISSIONER OF INLAND REVENUE

Appellant

- and -

SHANKAR LAL (s/o Ram Tahal) Respondent

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

Date of Hearing: 10th March, 1977
Date of Judgment: 25th March, 1977

JUDGMENT OF HENRY J.A.

This appeal relates to the acquisition and sale of property at Nakavu which will be referred to as "Nakavu". The appellant, later referred to as "the Commissioner", determined that a sum of $18,743 was assessable income resulting from this transaction being a calculation of the profit or gain which resulted. The only issue is whether such sum was assessable income. The assessment was made under Section 15(a) of the Income Tax Ordinance (Cap. 176). The relevant portion reads :-

"Provided that, without in any way affecting the generality of this sub-section, total income, for the purpose of this Ordinance, shall include -

(a) all profits or gains derived from the sale or other disposition of any real or personal property or any interest therein, if the business of the taxpayer comprises dealing in such property, or if the property was acquired for the purpose of selling or otherwise disposing of the ownership of it, and all profits or gains derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit; but nevertheless, the profit or gain derived from a transaction of purchase and sale which does not form part of a series of transactions and which is not in itself in the nature of trade or business shall be excluded;"

The facts relating to property transactions of respondent were agreed on as follows :-

(a) C.T. 9717 situate at Kaunitoni Street, Vatuwaqa. Purchase price of the land was $700 in November 1957. A building was erected thereon at cost of $4,275 in 1972. Rental income of the premises is $1,080 per annum.

(b) C.T. 9899 situate at Namaka. Purchase of the land at $1,850 was by transfer dated 4th October 1961. Building erected thereon at cost of $5,649 in 1963. Additions to building in 1964 and 1966 at cost of $1,464. Appellant's rental income from the two shops of the property was $672 per annum and from the two flats $600 per annum. A total of

$1,772. The property was mortgaged to the A.N.Z. Banking Group Limited until 31st May 1968. The property was sold for $18,000 by transfer dated 9th April, 1968.

(c) Native Lease 10248 situate at Legalega. Purchase price of the land was $700 in transfer dated 12th September 1966. Building was erected thereon at cost of $3,904 in 1967-1968. The property was mortgaged to the A.N.Z. Banking Group Limited from 19th July 1967 to 16th April 1968. Property was sold for $7,000 by transfer dated 21st July 1969.

(d) C.T. 12170 situate at Martintar, Nadi. Purchase of the land was for $2,400 by transfer dated 26th April, 1968. Building of two flats was erected thereon at cost of $7,776 in 1968. One of the two flats is let at $720 per annum. The other flat is occupied by the Appellant.

(e) C.T. 11861 situate at Nakavu. Purchase of land was for $2,600 by transfer dated 8th September 1969. Building was erected thereon at cost of $10,464 in 1969-1970 Rental income from the property was $1,440 per annum. The property was sold for $32,000 by transfer dated 30th October 1972.

(f) C.T. 14415 situate at Martintar, Nadi. Purchase price of the land was $11,749 in March 1973. Building was erected thereon at cost of $13,570 in 1973. Property is let at $3,360 per annum.

There was one earlier transaction which does not appear to have been treated as relevant.

The Court of Review held that the Nakavu transaction did not come within Section 15(a). On an appeal to the Supreme Court, which was an appeal on law and fact, that decision was upheld. The grounds of appeal in this Court, which entertains only questions of law, were more extended than those before the Supreme Court. It is necessary to set them out in full. They are:-

1. The learned judge erred in law in that he failed to weigh and evaluate, as against the statements of the Respondent as to his purpose at material times, the following objective factors which appeared from undisputed evidence made available to the Court of Review:-

(i) The Respondent's previous profitable transactions in land, and the systematic and repetitive use by the Respondent, prior to purchase and sale of the relevant property, of the proceeds of such transactions to finance other similar transactions.

(ii) The Respondent's knowledge of property values in the building industry.

(iii) The brevity of time for which the Respondent held the relevant property. (Hereinafter called "The Property".).

(iv) The total disproportion between the sum required to be obtained to effect the payments the necessity for making which was stated by the Respondent to be the cause of the sale of the property and the sum actually realised from the said sale.

(v) The long delay between the sale of the property and the obtaining of medical treatment by the Respondent, stated by him to be pressing cause for the said sale.

(vi) The insignificant size of the Respondent's bank over draft at the time of the sale above referred to, the same being stated by him to be a material cause of the said sale.

(vii) The construction by the Respondent of a new building five months after the sale above referred to.

(viii) The recurrent use of speculative language by the Respondent and his representatives in relation to matters pertaining to the appeal herein to the Court of Review.

(ix) The fact that at the time of the "forced" sale of the property the Respondent held certain other valuable properties from which he derived income.

(x) The manifest and extreme contradictions between the various parts of the Respondent's evidence material to the case.

2. The learned Judge erred in law in assuming that the determination of matters in issue between the Appellant and the Respondent turned solely upon the assessment by the Court of Review of the credibility of statements of purpose made by the Respondent.

3. The learned Judge erred in law in holding that the Judge of the Court of Review was correct in proceeding to assess the Respondent's intention at material times and not his purpose as required by the relevant provisions of the

Income Tax Ordinance, the test of intention being wholly subjective and that of purpose objective, and the said terms being fundamentally dissimilar in substance and in law.

4. The learned Judge erred in law in considering that it was open to him to ratify the conclusion of the Court of Review that the said Court was able to accept the totality of statements by the Respondent as to his transactions in relation to land, many of his statements being in factual contradiction of one another.

5. The learned Judge erred in law in assuming that the appeal before him related solely to findings of fact, findings referred to by him in his judgment being of necessity arrived at by the drawing of inferences from proved or admitted facts, the correctness of the drawing of which inferences was freely open to challenge in proceedings before him, and the application of the relevant statutory provisions to the facts established before him, and the question whether the Respondent fell within such provisions, being questions of law.

6. The learned Judge erred in law in that, the Court of Review not having found the facts upon matters vital to the Appellant's case, such as the purpose of the Respondent at the time of purchase of the property and as to whether the Respondent was a dealer in land, he neither remitted such matters to the Court of Review for appropriate findings to be made, nor did he himself proceed to make findings de novo upon evidence appearing upon the record of the Court of Review, but implied the finding of facts by the Court of Review adverse to the Appellant's case, thereby denying the Appellant the benefit of a reasoned adjudication upon his submissions and contentions, an adjudication which had also been denied to the Appellant by the Court of Review.

7. The learned Judge erred in law in giving no reason for arriving at any conclusion reached by him with regard to the determination of the appeal before him, and purporting to deal with the submissions and contentions of the Appellant not expressly and explicitly but by implications and sub-silentio, so that justice was not done to the Appellant's case.

8. That in consequence of matters above referred to, the learned judge erred:

(A) In holding that the Respondent was not at the time of sale of the property, a dealer in property of that nature, within the meaning of section 15(a) of the Income Tax Ordinance.

(B) In holding that the property was not acquired for the purpose of selling or otherwise disposing of the ownership of it within the meaning of section 15(a) of the Income Tax Ordinance.

(C) In holding that the profits or gains derived by the Respondent from sale of the property were not profits or gains derived from the carrying on or carrying out of an undertaking or scheme entered into or devised for the purpose of making a profit, within the meaning of section 15(a) of the Income Tax Ordinance.

(D) In holding that the profit resulting from the sale of the property was not derived from a transaction which was in the nature of a trade of business within the meaning of section 15(a) of the Income Tax Ordinance.

From the foregoing statement of the grounds of appeal it will be noticed that the complaint of the Commissioner is that neither the Court of Review nor the Supreme Court addressed itself to a proper determination of the facts and the application of such determined facts to the principles of law applicable. Counsel for the Commissioner referred this Court to the case of Levin & Company Limited v. C.I.R. (1963) N.Z.L.R. 801 and suggested that this Court might consider following the course there taken. After hearing the arguments, and considering that case, I am of opinion that it would be convenient to follow the same course which is sufficiently set out in that part of the headnote which reads:-

5. If when considering an appeal on a question of law under s.40 of the Land and Income Tax Act 1954 the Court of Appeal finds that a relevant question of fact has not been determined in the Court below, it is competent for the Court of Appeal to place itself in the position of the Supreme Court and itself determine such question of fact.

English Insulated and Helsby Cables v. Atherton (1926) A.C. 205 and Ruhamah Property Co.Ltd. v. Federal Commissioner of Taxation (1928) 41 C.L.R. 148 referred to.

Respondent was aged about 54 years. He was married and lived with his wife and dependent members of his family on the property at Martintar more particularly described in (d) of the agreed facts. One of his daughters is dumb and her future is not within importance in the case. He worked for wages until 1959 when he commenced a construction business of his own account. His business was small - about 3 houses a year. Owing to ill-health he retired from business in June 1971. It will be noted that Nakavu was not sold until October 1972. Since retirement respondent has relied solely on rents from his properties for the maintenance of himself and his family.

It is convenient now to analyse the six property transactions and relate them to respondent's circumstances.

(1) The first property was bought in 1957. It is still retained as an income producing asset, that is, from rentals.

(2) The second property was purchased in 1961 and was retained for 7 years, namely until April 1968 when it was sold.

(3) When the property in (2) above was sold in April 1968 respondent bought the property described in (d) above. On this he built 2 flats - one of which he still occupies and one of which produces income.

(4) Between the two transactions referred to in (2) and (3) above respondent purchased the leasehold described in (c) above. This was in 1966. It was sold in 1969.

(5) On the sale of the said leasehold in 1969 respondent purchased Nakavu which he turned into a rent producing asset.

(6) Nakavu was sold in March 1973 and the property described in (f) above was purchased.

The position of respondent at the date of his retirement was as follows:-

(1) He had retained property (a), acquired in 1957, as an income producing property,

(2) He had sold the leasehold property (c) in 1969 and acquired Nakavu which he converted into an income producing property, and

(3) He had acquired a home and a flat for renting after disposing of property (b) in agreed facts.

He thus had a home (bringing in income from an additional flat) and two income producing properties. After retirement he sold Nakavu, which he had held for 3 years, and, six months later he purchased property (f) which was converted into an income producing property. He thus still had his home and two properties producing income. It was in this setting that the Commissioner claimed that the gain made on the sale of Nakavu attracted income tax. Any consideration of the activities of respondent in respect of Nakavu and criticisms of his evidence must be viewed in the totality of this background. It was not, and ought not to be considered, as an isolated transaction.

The first ground of appeal relates to certain "objective factors" which it is claimed were not weighed and evaluated. I shall deal with each sub-heading in turn.

(i) This referred to previous profitable transactions in land. They need no further comment after being analysed and put into proper perspective as I have done earlier;

(ii) This referred to respondent's knowledge of property values in the building industry. Some of the cases show that this is an important factor but it must be subordinated to the overall picture of respondent's activities. If the other evidence supports the claim that he was planning for income for his retirement then this factor is unimportant. Why should he not use such knowledge for that purpose? In this case it would appear to be a neutral factor.

(iii) The time factor appears clear from the earlier analysis and does not stand in isolation. In my view in the circumstances when the sale of Nakavu took place and the last acquired property (f) was purchased there were reasons which might be accepted as an explanation for the change. These appear in later discussion but have to some extent been referred to earlier in summarising the transactions.

(iv) This is a criticism of the reasons given for the sale of Nakavu. The first concern the overdraft of $500. Even though small it was a factor respondent could consider but it did not stand alone. Respondent

was in ill-health and said he contemplated going overseas. He said "life was valuable". Some point was made of this statement. I do not know why. He was a sick man unable to work at a time of life when most are still active. It is true that he did not go overseas for some considerable time but he got a passport and it is dated in November 1972. The notes of evidence disclose that he gave as his reason for not going then was "nobody advised me how to go". I cannot understand this note - either it is cryptic or has some explanation referable to his health and treatment. He did stay in Fiji and bought the last-named property, and, when well enough, supervised building operations. All this must be looked at in the light of a man unable to work by reason of ill-health and with considerable family responsibility and faced with medical treatment then and in the foreseeable future. He did not go to Melbourne until 1974 when he took $2,000 seemingly from the proceeds of sale of Nakavu. It was contended that these explanations "stretched too far", were unraliable and ought to be rejected. For myself I do not think they are inconsistent with an ill man unable to work wishing to get cash funds and to replace

one of his two income producing assets. It seems the market was good and he says his tenants were bad. He wanted a better type of tenant in a better type of premises. These criticisms can carry little weight in the overall picture.

(v) This deals with the delay in going to Melbourne. It has already been dealt with as is also the case with matters raised in sub-paragraphs (vi) and (vii).

(viii) With respect I am unable to follow this submission. Why should not any person act to his best advantage whatever his purpose motive or intention?

(ix) The language used in this ground is not justified. Surely the choice of the best course was his. The matter is taken out of the context of the general picture. Respondent was not bound to keep Nakavu and use his other properties as suggested. The choice of how he would meet the situation was his and it is not for the Commissioner to claim some other course, whether better or worse, ought to have been taken.

(x) I have examined with care the alleged "manifold and extreme contradictions". The Court of Review dealt with the position in November 1970 when respondent said he could not own two developed properties at that stage. This was, in my view, acceptable. The use of the word "accidentally" and its criticism is of little importance and must have been, for what it was worth in the mind of the tribunal which need not refer to every such item. The reference to "knowledge of real estate business" was linked to a question about his "real estate friends" (sic). Its importance eludes me. It does not necessarily mean he was evasive about knowledge of prices or in any other way. There is next a contradiction between his accountant's letter and the true position of his sources of income to support himself and his family. This appears to be Exhibit N. I can find no cross-examination on it and no note of it in counsel's address. It was in 1974 when respondent's position was well known. What explanation there is for the accountant's making that statement I know not and the record is silent. There is nothing important in this point. The last matter mentioned was a passage from the address of counsel to the Court of Review. Its content adds nothing to the matters earlier discussed.

A careful consideration of all these criticisms does not materially affect the overall picture as I have set it out above. In essence the analysis of his transaction provides the basis for the determination of the questions which arise. I can find no material in Group 1 which is of importance on the ultimate question which must be decided.

The remaining grounds refer in general to errors which it is contended the learned judge fell into when considering the appeal, and, of course, consequently that he failed to consider and properly adjudicate on the decision of the Court of Review. They include also a finding of the Court of Review which I shall later examine. Since I will follow the course taken in Levin & Company Ltd. v. C.I.R. (supra) my task is to consider whether or not the Court of Review came to a correct decision. Section 15(a) has three separate limbs any one of which will attract income tax. Similar legislation has been enacted in a number of Commonwealth Countries. A number of cases were cited all of which I have read. The principles are not in doubt. Some cases were pressed as having particular force to certain of the factual matters in this case. So be it. What this Court must do is to consider the meaning of the statutory language and then see whether the peculiar facts of this case are within that language. Lord Buckmaster, when speaking of a statutory phrase said in John Stewart & Son (1912) v. Longhurst (1917) A.C. 249, 258:-

> " Some of the reported cases .... appear to me to have made the same mistake and to have attempted to define the fixed boundary dividing cases that are within the statute and those that are without. "

His Lordship was commenting on a claim that decided cases fixed a standard of measurement. They do not. It is a truism that each case depends on its own facts and that it is the principle of law applied which is important.

The first question is whether the decision of the Court of Review has any error on its face. The Court of Review said this in its judgment, namely -

> Having heard the appellant under cross-examination, I think it would be an unwarranted assumption to say that he bought the Nakavu property with a view to ultimate resale at a profit. It is equally credible that his intention changed as his circumstances changed during the period between 1970 when the building on his Nakavu property was completed and 1972, when he sold the property.

This passage is difficult to follow but it seems that the Court of Review was stating alternative propositions - not very aptly. But the Court of Review then went on to deal with the onus of proof and appears to have come to a conclusion that Nakavu was not bought with a view to re-sale at a profit. Although "intention" was referred to yet in dealing with the onus of proof "dominant purpose" of profit making "by sale" was given as the test. The Court of Review then went on to

deal with question whether or not there was a "scheme or undertaking" under another limb of Section 21(a). Again it said intention was the deciding factor. There does not appear to be a definitive finding on the question whether or not Nakavu was acquired for the purpose of sale although this is implicit in the result. However, since this Court is following the course taken in Levin's case (supra) it can come to its own conclusion whether or not that result was correct.

Section 15(a) requires consideration of three separate questions. They are:-

(1) Was Nakavu sold as part of a busine ss of respondent which comprised dealing in land,

(2) Did respondent acquire Nakavu for the purpose of selling it, and,

(3) Was the sale of Nakavu an undertaking or scheme devised for the purpose of making a profit?

I turn first to what was, I think, the real and only issue in this case, namely: Did respondent acquire Nakavu for the purpose of selling it? The question is one of fact bearing in mind of course that it is purpose which is relevant. Intention was referred to in each of the judgments given earlier.

Whilst any statement of intention is relevant to purpose the terms are not synonymous. This was pointed out in Plimmer v. C.I.R. (1958) N.Z.L.R. 147: 7. A.I.T.R. 286. It has now become clear that dominant purpose is the test: Holder v. C.I.R. (1974) N.Z.L.R. 52 - a decision of the Privy Council. Where a taxpayer relies on his own evidence as to his intentions at an earlier time he has a vital interest in the result. This type of evidence has been called "subjective evidence" and required careful and critical scrutiny. Lord Buckmaster in J & R O'Kane v. C.I.R. XII RTC 303, 347 said :-

> "It may well be accepted that (they intended to retire); yet the intention of man cannot be considered as determining what it is that his acts amount to, and the real thing that has to be decided here is what were the acts that were done in connection with this business and whether they amounted to a trading ....."

So approaching my task I must consider in an objective way the facts of this case and the statements of intention or reason given by respondent for his actions. In considering those statements they must, in a case such as this, be measured against and in the light of proved circumstances existing at the material time. Just to repeat some of the more important features which are not in dispute. Respondent did, as early as 1957 buy a property for use as an income producing asset. An early intention to provide for

himself and his family in this manner appears at this time. His health was bad and he was ultimately forced to retire prematurely. He could be said reasonably to have foreseen this and put his uncertain future to the forefront of his activities. He had a family including a disadvantaged daughter. He had no occupation other than the use of his own labour as a building contractor in a modest way. In June 1971 he ceased work. He then owned three properties. One was income producing and he had had it for some years. The second was his home. The third was Nakavu. For reasons which he advanced including unsatisfactory tenants, ill-health and a desire to get medical treatment he decided to sell this property and to use some of the cash. A few months later he bought another property which replaced his earlier asset. The matters he advanced were by no means unreasonable in themselves and were supported by surrounding circumstances. He was not always adept at meeting questions. I have a clear opinion on a review of the totality of the evidence, and after giving every consideration to the submissions to the contrary, that there was ample acceptable evidence to support the conclusion of the Court of Review that Nakavu was not acquired with a view to selling it. Its sale can properly be held to have resulted from circumstance which, in 1972, operated on the mind of respondent in his then state of health and it was then proper and sensible for him, to his financial advantage be it said, to sell one income producing asset and use the proceeds

as he did including the later acquisition and improvement of what he considered was a better letting proposition than Nakavu. In my judgment, therefore, it was correct for the Court of Review to hold that Nakavu was not, in 1969, when respondent was still working, acquired for the purpose of selling it. The crucial date is, of course, 1969.

The other two limbs of Section 21(a) can be dealt with very shortly. In view of the findings already made it follows that the course of conduct of respondent was not a business. Indeed he was not assessed on this basis because it appears there was just a single assessment of expenditure and receipts on this one property. This ground was not pressed in this Court. However, the finding already made disposes of this limb of Section 21(a). As to the third limb recent cases show that there must be something in the nature of trading. There was no such thing in this case. Moreover I have dealt with "purpose" when dealing with the second limb. I do not overlook the fact that this limb may embrace all activities of respondent and not just the Nakavu transaction, but the assessment was on Nakavu only. It is clear from what I have already said about purpose that what respondent did was neither an arrangement nor a scheme devised for the dominant purpose of making a profit whether considered as an individual venture or as part of his overall activity.

Before leaving this appeal I consider it proper, in view of the submissions made in this case to make some observation on findings by a court at first instance. In Taylor v. Good 49 R.T.C. 277, 283 Mergarry J. said :-

> "A mere assertion of the terminus ad quem, with no indication of the process of reasoning whereby that terminus is reached, is a poor record of an argument. A Case Stated should not, of course, record in full every fine point that was taken: but it should at least give some indication of the main reasons advanced for reaching the conclusion asserted. If, as I understand often happens, the Commissioners simply insert summaries of the argument as drafted by the parties themselves, primarily any shortcomings are the responsibility of the parties: but no matter whose the responsibility, it is important for this Court to have a note of the main reasons urged by each side before the Commissioners in support of the conclusion put forward."

This matatis mutandis would apply to findings by Courts at first instance. Further where a substantial conflict or inconsistency appears in testimony it ought to be adverted to and resolved so that an appellate court may consider the matter on appeal. These remarks apply particularly to taxation cases of the present kind.

I would dismiss the appeal with costs.

(Sgd.) T.E. Henry
Judge of Appeal.

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Appellant

- and -

SHANKAR LAL
s/o Ram Tahal Respondent

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

Date of Hearing : 10th March, 1977
Delivery of Judgment: 25th March, 1977

JUDGMENT OF MARSACK J.A.

I agree with the judgment of Mr. Justice Henry and have nothing to add.

(Sgd.) Charles C. Marsack
JUDGE OF APPEAL

SUVA,

25th March, 1977

IN THE FIJI COURT OF APPEAL

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Date of Hearing: 10th March, 1977

Date of Judgement: 25th March, 1977

JUDGMENT OF GOULD V.P.

I have had the advantage of reading the Judgment of Henry J.A. in this appeal. I fully agree with his reasonings and conclusions and have nothing to add.

All members of the Court being of the same opinion the appeal is dismissed with costs.

(Sgd.) T.J. Gould
VICE PRESIDENT