

Syed Shah

IN THE COURT OF REVIEW

Appeal No. 13 of 1985.

Between:

BETTY MERL FERGUSON

Appellant

- and -

THE COMMISSIONER OF INLAND REVENUE

Respondent

Mr. D. Whippy for the Appellant
Mr. S. M. Shah and Miss Madhuri Singh
for the Respondent.

J U D G M E N T

In this case the original appellant was Betty Merl

Ferguson of Hamilton New Zealand, but Mrs Ferguson died after the appeal was lodged, and the appeal is being prosecuted by her husband and executor Robert Francis Ferguson. Mrs Ferguson died on 30th June 1986, leaving her surviving her husband above mentioned, and one son aged 42 and one daughter aged 35. Mr. Ferguson gave his present age as 65 and said that he was a retired chief postmaster. He was married to Betty Merl Ferguson, then a resident of Savusavu, Vanua Levu, on 24th December 1942. She was the stepdaughter of a man named Sydney Herbert Wilson, at one time a member of the Legislative Council of Fiji, who owned inter alia two properties at Savusavu, one a freehold of about 290 acres called Naseva and the other a leasehold of about 108 acres called Korogo, both of which he bequeathed to his stepdaughter Betty Merl Ferguson.

Sydney Herbert Wilson died on 16th November 1971 but the titles to the two pieces of land which he had bequeathed to his stepdaughter did not become vested in her until 1979. By this time she was living in New Zealand, having left Fiji in 1945. For several years after her stepfather's death the properties were conducted as a copra plantation, first by Wilson's executors and then by Burns Philip Trustee Co. Ltd. on behalf of Mrs Ferguson, but the results were unsatisfactory, and she decided to sell. She had come twice to Fiji, in November 1980 and September 1982. She wanted to retain a five acres block from the freehold for herself and give her husband a sixteen acre block, so she decided upon a survey. That was completed, according to the surveyor, who was called as a witness, in 1981, and instructions were then given to Burns Philip Trustee Co. Ltd to sell the properties excluding the two blocks above mentioned for \$175,000. The Manager of that company gave evidence that he had advertised the properties, both locally in Fiji and through his company's agents abroad. He received some enquiries and eventually in September 1982 the two properties, plus the 16 acre block, were sold to a man named Ryffel who incorporated a company which he called Naseva Ltd. The Court was told that he insisted on the 16 acres block being included in the sale, threatening to pull out altogether unless it were included, but was prepared to pay \$25,000 for it. So the whole block less the five acres reserved by Mrs Ferguson, was sold for \$200,000. The Commissioner has reduced that amount by the value of the properties as returned in the death duty schedules of Sydney Herbert Wilson

deceased and has allowed survey and legal expenses of the sale, together with advertising and agent's selling commission, amounting in all to \$82,404, but has deducted from that sum the value of the five acre block, which he fixes at \$1325, retained by Mrs Ferguson, at 1968 figures, thus bringing a taxable figure of \$200,000 less \$81,079 that is to say \$118,921 on which he requires tax to be paid under Section 11(e) of the Income Tax Act Cap. 201. Section 11(e) has to be read with the preliminary part of Section 11 defining 'total income'. The Section 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. Then there 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 there are over twenty matters listed of which (e) reads:-

"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 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 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."

I think there is no doubt that Mrs Ferguson resided out of Fiji, and I so hold. Indeed, the matter is not disputed.

However, Mr. Whippy for the appellant relies on the Court of Appeal's decision in Weller v. C.I.R. (1982) Civil Appeal 75 of 1981 and submits that Weller's decision indicates that a single sale, unless it is protracted, escapes tax, and the more so where the land is inherited. He says that there is indeed no profit or gain for that reason. Mr. Whippy concedes that the question is whether the appellant engaged in the sale of land in Fiji. He points out that there was but one sale and that the appellant decided to sell and thereafter completed the transaction in a straightforward way. Mr. Shah for the Commissioner submits that when the decision was made to sell, it was followed by a survey to cut off the parts which Mrs Ferguson wanted to retain, and the advertisement then followed. He points too, to the fact that the method of advertisement was not merely in the local papers, but through the appellant's agent's means of disseminating information of sales etc. Mr. Whippy finally submitted that Mrs Ferguson had very serious reasons compelling her to the sale. First, she had taken out New Zealand citizenship, secondly she had attempted to continue to conduct the business of a copra plantation from abroad, first through the executors

and then through Burns Philip Trustee Co. Ltd, over a total period of nine years. Thirdly she was getting older and as the medical certificate produced indicates she was becoming progressively unwell. At the end he submitted that Weller's case shewed that each case must be dealt with on its merits.

I think that is, perhaps, a true characterisation of Weller's case. I must go back, then, to the meaning of the phrase 'engage in', and find whether the appellant engaged in the sale of land. To begin with, I do not think that it makes any difference whether the land is inherited or whether it has been purchased. Its sale is crucial. Did Mrs Ferguson engage in selling it? The evidence is that

she decided to sell in July 1980. She instructed Burns Philip Trustee Co. Ltd, but before they could proceed with the sale a survey had to be done to cut off the two areas Mrs Ferguson wanted to retain, namely the sixteen acres for her husband and the five acres for herself. All this seems to me preparing for the sale. Then the land was advertised in August 1981. Ryffel did apparently not become interested until April 1982, and then it took five months to obtain the Minister's consent. That, I take it, was necessary because Ryffel was not a Fiji citizen. So it was September 1982 before a transfer was signed. I would have thought that during the period from July 1980 to September 1982 Mrs Ferguson was 'engaged in' selling her land. So she is deemed to have been carrying on business in Fiji.

The next question is as whether there was an undertaking or scheme connected with the disposition of the land, and if there were, whether there was a profit or gain derived therefrom. I think that there is no question but that there was an undertaking or scheme connected with the disposition of the land, namely the subdivision and the advertisement by Burns Philip Trustee Co. Ltd., but I cannot see that such undertaking or scheme was entered into or devised for the purpose of making a profit. It was, it seems to me a scheme to obtain for Mrs Ferguson the five acres she wanted for herself and the sixteen acres she wanted to give her husband and she was after that ~~provision merely conducting a business of selling her land~~ to the best advantage. But, of course, since Mrs Ferguson was resident outside Fiji I have to come back in the end to the question as to whether there was a profit or gain. The section throughout talks of profits or gains. First it says that a person who resides out of Fiji and carries on business in Fiji is to pay tax on the profits or gains of such business. It is the proviso which is of vital importance to the taxpayer. That provides that a person residing out of Fiji who sells land in Fiji is deemed to be carrying on business in Fiji. The taxpayer here undoubtedly falls within this category. But then comes the difficulty. The section does not provide that all receipts from the sale of land are taxable but any profit or gain is taxable. Mr. Shah for the Commissioner argues that it does not matter that the land is inherited, and

says that the tax imposed by section 11(e) is in fact a tax on capital gains. Mr. Shah pointed to the opening words of the judgment of the Court of Appeal in Weller v. C.I.R. (1982) Civil Appeal 75 of 1981:-

"Respondent was assessed by the appellant Commissioner as being liable to pay income tax in respect of a capital gain which he made on the sale of a house in Fiji on the basis that it formed part of his total income.....".

The question of profit or gain was not really discussed in Weller's case which turned upon the meaning of the phrase 'engaged in'. I am satisfied, as I have said, that the

taxpayer in this case engaged in the sale of land, but that does not mean that her receipts from the sale become liable to tax. It is the 'profit or gain' which is liable to tax. The Commissioner has arrived at a profit or gain by postulating the value of the land at the time when the late Sydney Herbert Wilson deceased gave it to the taxpayer, under his will namely the date of his death, as the cost price, and calculating the difference between that and the price received for the land as a profit. That approach has been used in two cases in Australia McClelland v. Federal Commissioner of Taxation (1970) 120 C.L.R. 487 : 2 ATR 21 : (1971) 1 WLR 191 : 1 AER 969 : turning upon an inheritance, and the other Williams v. Federal Commissioner of Taxation (1972) 127 C.L.R. 226 : 3 ATR 283 turning upon a gift, and in both cases it was rejected. It must be remembered that the Commonwealth legislation in this matter

is quite different from our own, but the essential part is that both deal ^{with} ~~of~~ profit or gain. McClelland's case went through the courts in Australia to the Privy Council which allowed an appeal from the Federal High Court. Mrs McClelland and her brother received a devise of a piece of land under the will of an uncle. She and her brother told the executors they wanted the land in specie. Mrs McClelland then bought her brother's share, selling some part of the land to raise the purchase price. She retained the rest. The Commissioner assessed her to duty on the sum she received from the sale, some \$56,951 treating it as profit earned from the land. Lord Donovan delivered the leading judgment in the Privy Council, allowing the appeal. It should be said that two law Lords delivered a dissenting judgment. Lord Donovan said in the course of his judgment:-

"Barwick C.J. in the Full Court took the view that the realisation of an inheritance, even though carried out systematically and in a businesslike way to obtain the greatest sum of money it will produce does not..... make the proceeds either profit or income for the purpose of the Act" to which Lord Donovan adds:

"It would be different if the inheritance had been adventured in the capital of a business, for example land jobbing or development, but no such thing had been done here."

Here also there is no question of the inheritance having been adventured in the capital of a business, indeed here clearly the land had been merely sold. The survey

was not undertaken to augment the price to be obtained.

In Williams' case Mrs Williams in 1962 received as a gift from her husband land which he had purchased in company with two others in 1959. It was just simply a transfer of a one-third share, the total area involved being about 10 acres. Mrs Williams took the land with her husband's co-owners, and she held it until 1968. In that year, on her husband's advice, she and one of the co-owners decided to sell and for that purpose subdivided the land into thirty five lots, of which the third co-owner received eight and twenty seven were offered for sale by auction. Mrs Williams' share of the profit was \$72,400.

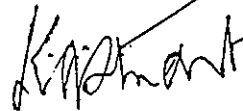
The Commissioner taxed her on this sum, and she appealed.

Stephen J. at first instance in the High Court allowed her appeal. The Commissioner appealed to the Full Court who dismissed the appeal, McTiernan J. dissenting. Gibbs J. said in the cause of his judgment at page 246:-

"It is not a natural use of language to say that a person who becomes the owner of property as the result of an unsolicited and unconditional gift has acquired that property for the purpose of profit-making by sale, even if he intends to sell the property after he gets it."

Likewise it cannot be said that, in the words of the Fiji Act, the property was acquired for the purpose of selling or otherwise disposing of the ownership of it.

Nor can it be said that the taxpayer here in the realisation of this land was carrying on a business or was engaged in an adventure in the nature of trade. Mr. Shah also relied upon Woodward's case No. 1 of 1983, which I decided against the taxpayer. I am afraid that I have misled Mr. Shah, for although there I did not see the application of either of McClelland's or Williams' case, I have come to the conclusion that I was wrong, and I think on reflection that Woodward's decision can only be defended on the basis that the taxpayer 'adventured his inheritance' in developing the remainder of it. Even that is not clear. At all events it seems to me that the present appeal must be allowed, with the usual result, that the appellant is entitled to his costs.



COURT OF REVIEW

16th October, 1986

Solicitors : David Whippy & Co., Suva
Solicitor to the Department of Inland Revenue.