

THE COMMISSIONER OF INLAND REVENUE

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v.

MORRIS HEDSTROM LIMITED

[COURT OF APPEAL 1986—(Roper, J. A., O'Regan, J. A., Kermode, J. A. 17, 21 March)]

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Civil Jurisdiction

(*Land Sales Tax—Improvement—subdivision—dealing—profit on sale of part of such land exempted—cases*.)

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Appeal against the dismissal by Supreme Court on 12 April 1985 of an appeal to it from a decision of the Court of Review which on 8 December 1983 and allowed an appeal to it against an assessment of land sales tax by the appellant.

M. J. Scott for the Appellant

H. Lateef for the respondent

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In 1980 the respondent was the owner of land (acquired in 1963) containing 1 acre 1 rood 37.16 perches being the whole of the land in Certificate of Title No. 11364 on which was erected a residence occupied by the respondent's Manager. The respondent subdivided the land into four allotments. On lot 4 was the Manager's residence. A strip of lot 4, 120 metres long (the right of way) abutting lots 1, 2 and 3 became subject to rights of way in favour of the owners of those lots giving access to the public road. The strip was laid out in reinforced concrete. A wall was erected to retain the part of lot 4 not the subject of the right of way. On completion of the sub-division lots 1, 2 and 3 were sold, in each instance with access to and use of the right of way. The appellant assessed land sales tax on what he considered the profit on each dealing. The respondent tax payer appealed to the Court of Review which allowed the appeal. The appellant (Commissioner) appealed unsuccessfully to the Supreme Court thence to the Court of Appeal.

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The Land Sales Act (Cap. 137) s.3 so far as relevant stated:

"a tax known as the Land Sales tax shall be charged on any profits arising from all *dealings* (unless) exempted by the provisions of Section 5.....".

Section 5. so far as it is relevant provides:

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"Notwithstanding the provisions of section 3 no land sales tax shall be charged on any profits arising in any of the following *transactions or cases*:

(a) *any dealings* involving land that has been in the continuous ownership of a resident seller..... for not less than twelve years before the date of such dealing;

(b) *on land on which* there has been substantial development by the seller or any predecessor on title;

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(c) *land* acquired by the Government;

(d) *any dealing* involving agricultural land which has been in the seller's ownership for not less than twelve years immediately preceding the sale:

- (e) on the *sale of land* which was acquired by an individual in his capacity as a beneficiary under the estate of a deceased person, A
- (f) *any dealing* where the Minister considers that undue hardship will arise;
- (g) *any dealing* for a charitable purpose....
- (h) *any other dealing* which may be prescribed by the Minister by order. B
- (The emphasis was added by the Court)

The grounds of appeal were:

- (1) The Learned Supreme Court Judge erred in law in holding that, in order to ascertain whether there had been substantial development by the seller or his predecessor in title, in terms of section 5 (b) of the Land Sales Act Cap. 137, upon a lot the product of subdivision, he should consider not development upon that particular lot created by the said subdivision, but development generally upon the **entirely** of the area out of which such a lot was created. C
- (2) The Learned Supreme Court Judge erred in law in holding that "the land" on which substantial development in terms of section 5 (b) of the Land Sales Act must be demonstrated to have occurred, for the exemption therein set out to be invoked, was not the land the subject of the particular dealing the assessment in respect of which was the subject of each particular appeal before him. D

Appellant's submission noticed first that by s.3 the land sales tax was imposed on "dealings" further, the only dealings the subject of the disputed assessments were of the three lots sold, none of which themselves had been subdivided or developed. E

His written submissions included:

"For the tax exemption set out in section 5 (b) of the Act to apply to such dealings as being dealings in land "on which" substantive development had taken place, the only land to be had regard to was the land actually sold, which was subject of such dealings" F

and, later in the synopsis, he went on to submit that:

"...the land referred to in the exemption was the lots sold. Those lots after subdivision of the area out of which the same were created had a separate legal existence (as distinct from factual existence) which must be respected". G

Held: Section 3 of the act does refer to dealings. However, the exemptions referred to in section 5 are available in respect of "profits arising in transactions and cases i.e. those set forth in para. (a), (d), (f), (g) and (h) refer to "transactions" whereas (b), (c) and (e) are "cases" or "instances".

Accordingly by Section 5 no land sales tax was to be charged on cases (such as) 5(b) i.e. on land on which there had been substantial development. H

Applying this construction to the facts of the case, (dealing with or sales) the entire block being (as agreed by the parties) land on which there has been sub-

- A substantial development "by the seller", would be exempt from tax. Any part of that land when sold is likewise exempt from tax.

Appeal dismissed.

Cases Referred to:

- B *Attorney-General v. Carlton Bruce* (1899) 2 Q.B. 158.
Lowe v. Commissioner of Inland Revenue (1981) 1 N.Z.L.R. 343.

O'REGAN, J. A.

Judgment of the Court

- C In 1963 the respondent became the registered proprietor for an estate in fee simple in a parcel of land containing one acre one rood 37.16 perches and described as the whole of the land in Certificate of Title Number 11364. Erected on the land was a substantial residence occupied by the respondent's manager.

- D In 1980 the respondent subdivided the land into four allotments. The manager's residence was situated on Lot 4. A strip of lot 4, some 120 metres long, abutting lots 1, 2 and 3 became subject to rights of way in favour of the giving two of them their only access to the frontage to the public road and one of them alternative access to it. The right of way was laid out in reinforced concrete and on the side of it opposite the frontages of lots 1, 2 and 3 to it was erected a substantial wall to retain that part of Lot 4 not laid out as right of way. Other improvements were effected. Drains were laid on the Eastern boundary of lots 1, 2 and 3 and some trees and shrubs were cleared from the part of Lot 4 laid off as right of way. When the subdivision was completed, the respondent sold lots 1, 2 and 3 in each instance together with a right of way over the part of Lot 4 which we have already referred as the right of way. The price of each section was \$15,000.

- E The appellant being of the opinion that such dealings in the land attracted the land sales tax payable pursuant to section 3 of the Land Sales Act, Cap. 137, assessed such tax on what in his opinion was the profit on each dealing. The appellant duly objected to the assessments and, on the objections being disallowed, appealed to the Court of Review. The grounds of appeal in each instance were:
- F "that the Commissioner has erred in assessing Land Sales Tax as the transaction was exempt from tax by virtue of sections 5(b) of the Land Sales Act in that there has been substantive development by the seller to the land in question".

- G In a reserved judgment delivered on 8th December 1983, the Court of Review allowed the appeal. From that determination the present appellant appealed to the Supreme Court which, on 12th April 1985 dismissed the same. The appellant next appealed to this Court. The grounds of appeal to this Court are:

- H (i) The Learned Supreme Court Judge erred in law in holding that, in order to ascertain whether there had been substantial development by the seller or his predecessor in title, in terms of section 5(b) of the Land Sales Act Cap. 137, upon a lot the product of subdivision, he should consider not development upon that particular lot created by the said subdivision, but development generally upon the entirety of the area out of which such a lot was created.

- (2) The Learned Supreme Court Judge erred in law in holding that "the land" on which substantial development in terms of section 5 (b) of the Land Sales Act must be demonstrated to have occurred, for the exemption therein set out to be invoked, was not the land the subject of the particular dealing the assessment in respect of which was the subject of each particular appeal before him. A

The issue thrown up by this appeal falls within a very narrow compass. To provide an appreciation of what is involved we set forth first the provisions of the third section of the Land Sales Act which, so far as it relevant provides: B

"a tax known as the Land Sales tax shall be charged on any profits arising from all *dealings* (unless exempted by the provisions of section 5....)".

Section 5, so far as it is relevant provides:

"Notwithstanding the provisions of section 3 no land sales tax shall be charged on any profits arising in any of the following *transactions or cases*;" C

- (a) *any dealings* involving land that has been in the continuous ownership of a resident seller..... for not less than twelve years before the date of such dealing; D
- (b) *on land on which* there has been substantial development by the seller or any predecessor on title;
- (c) *land* acquired by the Government;
- (d) *any dealing* involving agricultural land which has been in the seller's ownership for not less than twelve years immediately preceding the sale;
- (e) *on the sale of land* which was acquired by an individual in his capacity as a beneficiary under the estate of a deceased person; E
- (f) *any dealing* where the Minister considers that undue hardship will arise;
- (g) *any dealing* for a charitable purpose.....
- (h) *any other dealing* which may be prescribed by the Minister by order.

(The emphases are ours)

Section 2 of the Act, *inter alia* provides that:

"dealings" means "any transaction of whatsoever nature....." F

and

"development" means

- (a) substantial building operations on any land or the laying out of plots, roads, yards, drains, sewers, parks garden, orchards or the like; G
- (b) re-building operations, material alterations or additions to or major structural repairs to any building or structure;
- (c) subdivision of any land by dividing the same and the laying out of plots, roads, yards, drains, sewers, parks, gardens, lawns, orchards or the like, and shall include any development of land used or proposed to be used for agricultural development" H

Mr Scott's submissions on behalf of the appellant were commendably brief and succinct. He invited notice to the fact that by the third section the land sales tax is

A imposed on "dealings" and submitted that the only dealings which were the subjects of the disputed assessments were dealing in the three lots actually sold none of which had themselves been subdivided or developed. He next proceeded to contend—and we quote from the written synopsis of his submissions with which he provided us..... that:

B "For the tax exemption set out in section 5 (b) of the Act to apply to such dealings as being dealings in land "on which" substantive development had taken place, the only land to be had regard to was the land actually sold, which was the subject of such dealings"

and, later in the synopsis, he went on to submit that:

C "...the land referred to in the exemption was the lots sold. Those lots after subdivisions of the area out of which the same were created had a separate legal existence (as distinct from factual existence) which must be respected".

In our view there is a fallacy in this argument. Undoubtedly the third section refers exclusively to "dealings" but when we come to a consideration of the exemptions provided by the fifth section they are available in respect of ".....profits arising in any of the following *transactions and cases*" set forth in paragraphs (a) to (h) of that section.

D In that section, the word "transactions" creates no difficulties. As we have seen, section 2 has provided that "dealing" means "any transaction whatsoever.....". Each of the subsections (a), (d), (f), (g) and (h) are concerned with either "any dealing" or, in the case of subsection (h) with "any other dealing". In each of those provisions in the light of the definition set forth above the word "transaction" can be substituted for the word "dealing" and the word "dealings" can readily be substituted for the word "transactions" in the body of the section. But the word "cases? It seems to us clear that it must refer to the subsections other than (a), (d), (f), (g) and (h) which clearly relate of "dealings" or "transactions". It accordingly follows that the exemptions provided by the fifth section are not as Mr Scott submitted, exclusively referable to "dealing". Some of them are referable to "cases" falling within the purview of the section.

F Before we proceed to consider the significance and meaning of the word "cases" in the context of the Act we think it well to recall the off-cited observations of Lord Russell of Killowen C. J. in *Attorney-General v. Carlton Bruce* (1899) 2 Q.B. 158. 164:

G "I see no reason why any special canons of construction should be applied to any Act of Parliament, and I know no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, viz to give effect to the intention of the legislature, as that intention is to be gathered from the language employed, having regard to the context in connection with which it is employed. The court must no doubt ascertain that subject matter to which the particular tax is by the statute intended to be applied but when once that is ascertained, it is not open to the court to narrow and whittle down the operation of the Act by consideration of hardship or business convenience, or the like."

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Mindful of those canons, we think that the words "cases in the context broadens the scope of the fifth section beyond that of the third section in those cases where the exemption sought is not in respect of dealings—that is under one or other or paragraphs (b), (c) or (e) of the latter section. In such cases the Commissioner on a consideration of any such application for exemption, and, if necessary, the hierarchy of judicial bodies called upon to review his decision and the decisions, the one of the other, must go beyond a mere consideration of the "dealing" under assessment. In our opinion the appropriate shade of meaning for the word "cases" in the context of the section is "instances" (see shorter Oxford Dictionary p.270). Applying that shade of meaning on a consideration of s.5(b) we are of the view that in instances of the sale of land on which there has been substantial improvement "no land sales tax shall be charged on any profit arising "on such sale".

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In our paraphrase of the subsection we have imported the words "sale of land" so that the words "profits....on land" appearing in this section are taken to mean profits on the sale of land. We hold ourselves justified in so doing for the reason that "profits.... on land" in the context of this Act, dealing as it does exclusively with taxation of profits on the sale of land, must relate solely to such profits.

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Applying the construction of the subsection upon which we have settled, to the facts of the case we think that the entire block being, as it is agreed by the parties to be, land on which there has been substantial development by the seller, falls within the prescription of the section and is exempt from the tax, and we think that any part of that land which is sold, likewise, is exempted from such tax.

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Our interpretation of the subsection has the collateral effect of avoiding an absurd result. Mr Scott allowed that if the whole block was sold after the subdivision and the ancillary works had been completed, that "dealing" would not have attracted the tax. If his submission as to the construction of the subsection had prevailed the "dealing" involved in the sale of each of three allotments, which were part of the whole block, would have attracted the tax. A surprising result to say the least of it. In this regard we invite comparison with the observation of Richardson J, in *Lowe v. Commissioner of Inland Revenue* (1981) 1 NZLR 343 1.53 and p.344.

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In the result, the appeal must be dismissed and it is dismissed accordingly and the appellant is ordered to pay respondents costs.

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Appeal dismissed.