RAMESH SAMJI

v

THE COMMISSIONER OF INLAND REVENUE

[HIGH COURT, 1993 (Fatiaki J), 30 April]

Appellate Jurisdiction

Income tax-sale of land-whether vendor "normally resident" in Fiji-whether vendor "engaging in" sale-Income Tax Act (Cap. 201) Section 11(e).

On appeal to the Hich Court from the Court of Review for taxation it was HELD: that the Court of Review had properly concluded that the taxpayer was normally resident as Fiji at the relevant time and that the profits from the sale of the land in question was a gain from a business venture.

Cases cited:

CIR v. Woodward (Civ App 27 of 1987)
Edwards v. Bairstow [1956] AC 14
Leveridge v. Kennedy (1960) NZLR 11
McClelland v. F.C.T. (1970) 120 CLR 487
Shah v. Barnet London B.C. [1983] 1 All E.R. 276
Weller v. CIR (1981)

Appeal to the High Court from Court of Review.

F.G. Keil for the Appellant
G.A. Keay for the Respondent

Fatiaki J:

This is an appeal against the decision of the Court of Review upholding the assessment of the Commissioner of Inland Revenue in which a sum in excess of $135,000 was included in the taxpayer's income for the year 1984 on the basis that the gain or profit from the sale of the taxpayer's property was assessable for income tax in terms of Section 11(e) of the Income Tax Act. (Cap 201)

The facts in this case are not in dispute and are conveniently summarised in the judgment of the Court of Review as follows: (at pp. 13, 14 and 15 of the record)

> "Ramesh Samji is the son of Samji Jadavji some time storekeeper of Nadi Town. He was born in 1944 and went to India with his parents in 1948. There his father established a small clothing shop at Rajkot Bombay. He returned in 1965 and his uncle Manji as his father's attorney transferred to him his father's two lots of Vadawa Subdivision, then contained in one Native Lease No. 7190, although he was as yet not quite 21 years of age.

There is no evidence as to how he came, but when he got to Fiji he had himself issued with a Fiji passport. He left Fiji in March 1966, and returned to Bombay in that same month. He came again to Fiji in August, 1978 by which time he had a new Fiji passport. He was accompanied this time by his wife and daughter, both of whom were born in India, but had Fiji passports, but he did not bring his son. He said that the some had examinations in June in India and was to follow later. In the event he stayed in India. He also had a Fiji passport.

The taxpayer said in evidence that he came to Fiji to start his own business in the premises which he had bought from his father and which were occupied by his uncle Manji. I would mention here that when he bought the lease there were two buildings upon it, one a concrete building occupied for both business and private purposes by his uncle Manji who was conducting business as Samji Jadavji & Co., and one a wood and iron building. The taxpayer told the Court that he replaced the wood and iron building in 1972 with a concrete building containing four shops and offices; when he got here in 1978 he found that Manji refused to vacate the premises he occupied, and had further, used the taxpayer's powers of attorney granted to him in 1965 and 1973 to grant himself and his firm a ten year tenancy from 1976 with a right of renewal for a further ten years. The taxpayer said that he took counsel with his other relatives in Nadi and as a result in April 1979 advertised the whole property for sale, intending however, to sell only the building occupied by Manji. This would necessitate a further subdivision of the land. He accepted an offer from Karsanji, who also gave evidence, who agreed to give $200,000 for that part of the property occupied by Manji. The agreement between the taxpayer and Karsanji was at this stage oral only, and nothing was put on paper until 1981 when Karsanji came to India and was given an option in writing to buy the property. The taxpayer had returned to India in August 1979, and has not been to Fiji since until he came to give evidence in this appeal.

Among the terms upon which Karsanji bought the property were that taxpayer was to subdivide the lease, and also to get Manji and his family out and give him vacant possession of the building. The taxpayer was not able to do this until he had engaged in costly litigation, and it was not until March 1985 that the transfer to Karsanji's company was executed. A deposit of $20,000 had been paid in 1981 when the option agreement was signed, and the balance of $180,000 in 1985. The Commissioner of Inland Revenue took the view that at that time the taxpayer was normally

residing out of Fiji and he wished to tax him under section 11(e) of the Income Tax Act."

The taxpayer has appealed against the decision of the Court of Review on the following 3 grounds:

"1. The Court of Review erred in law and in fact in holding that the taxpayer was "normally resident outside Fiji" for the purpose of Section 11(e) of the Income Tax Act at the relevant period.

2. The Court of Review erred in law and in fact in holding that the steps the taxpayer took at the relevant periods to sell the said property comprised "engaging in" for the purposes of Section 11(e) of the Income Tax Act.

3. The Court of Review erred in law and in fact in holding that Section 11(e) of the Income Tax Act applied to the taxpayer's transaction concerning the sale of the said property being Lot 2 on Plan N.D. 5772 now N.L. 18128.

It is clear from the above grounds that the outcome of the appeal rests upon the interpretation of Section 11(e) of the Income Tax Act and its application to the undisputed facts of the case (including any inferences drawn from those facts).

Section 11 of the Income Tax Act begins with a wide definition of "total income" from various well known sources. This is then followed by a proviso which in clear terms seeks to widen the meaning of the phrase "total income" by including income from various less-obvious sources and of less obvious taxpayers. It is in this latter category that paragraph (e) occurs. It refers to non-resident taxpayers in the following terms:

"Non-resident

(e) 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 such 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 any 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."

In order to better understand the meaning of the paragraph it is necessary to break it down into its component elements or parts of which there are 2 - a general part which identifies the "taxpayer" and the source of taxable income and a proviso which in turn may be broken down into 2 mutually exclusive limbs - the first, which clarifies the meaning of the phrase "residing outside Fiji" and extends the meaning of "carrying on business in Fiji" and the second, which identifies a particular source from which a taxable profit or gain may be derived.

It will be immediately obvious that the specific type of transaction or activity in the contemplation of the 2 limbs of the proviso relates to dealings with land (to adopt as neutral a term as possible).

In his written submissions in support of the appeal learned counsel for the taxpayer identifies 4 elements which may be adopted for convenient analysis, in the general part of Section 11(e) as follows:

> "(i) a person, residing ... outside Fiji;
> (ii) That person "carrying on business in Fiji";
> (iii) The obtaining of "net profit or gain arising from the business of such person in Fiji"; and
> (iv) The existence of each of the elements (i), (ii) and (iii) at the same time."

In dealing with the first element the Court of review said: (at p.15 of the record)

> "The word `normally' in the Fiji Act has been held to correspond with the term `ordinarily' used in the English legislation See : Weller v. C.I.R. (1981) in the Court of Appeal."

Then after citing from 3 well known decisions of the House of Lords and outlining the relevant evidence on the matter, the Court of Review said: (at p. 17 of the record)

> "In my view, although it seems rather hard, he is habitually and normally resident outside Fiji ..."

Learned counsel for the taxpayer however seeks to challenge that view by drawing a distinction between the expression "residing outside Fiji" to be found in the general part of Section 11(e) and "normally residing outside Fiji" as it occurs in the first limb of the proviso. Reference was also made to the definition of resident as incorporating the concept of domicile into the definition.

I cannot agree that such a distinction may be validly drawn between expressions or phrases that occur within the same Section. The clear undoubted purpose of the proviso is to clarify the principal provision to which it relates and not to enact or impose an entirely different basis for the liability of a taxpayer.

The use of the adverb "normally" in the proviso is not intended in my view to differentiate or distinguish the phrase "residing outside Fiji" but rather to clarify it so as to exclude a temporary absence or presence in Fiji.

The head note in Leveridge v. Kennedy [1960] NZLR 1 reads in part:

> " ... it is a general rule of statutory interpretation that a proviso is intended to operate by way of qualification on, or exception out of, something which would otherwise be within the ambit of the substantive or enacting provision, the object of that rule is to ensure that effect shall be given to the true intention of the Legislature, and is not designed for the purpose of defeating that intention."

I am satisfied that the Court of Review correctly directed itself in law and was perfectly entitled to form the view that the taxpayer was normally resident outside Fiji based on the evidence in the case.

Needless to say it is not the function of this Court to seek to substitute its own view of the evidence unless it is shown that the Court of Review misdirected itself in law or made a finding inconsistent with and unsupported by the evidence. On neither footing has the taxpayer succeeded in this instance.

Learned counsel's reference to "domicile" is best answered by Lord Scarman when his lordship said in Shah v. Barnet London B.C. [1983] 1 All E.R. 276 at p. 236h :

> " ... The long and notorious existence of this difficult concept in our law, dependent on a refined, subtle and frequently very expensive judicial investigation of the devious twists and turns of the mind of man, must have been known to Parliament when enacting the ... Act ... the language of the regulation lays emphasis not on intention or expectation for the future which is implicit in the idea of permanence, but on immediately past events, way of life and the place where in fact he has lived ..."

There is no merit in the taxpayers first ground of appeal which is accordingly dismissed.

A

I turn next to the second and third grounds which may be conveniently dealt with together as being matters arising from a detailed consideration of the 2 limbs of the proviso as earlier discussed.

In this regard the Court of Review properly asked itself the question appropriate to the first limb of the proviso, namely : (at p. 17 of the record)

B

> "The question is, can it be said that the taxpayer has engaged in the sale of land in Fiji."

The Court of Review next considered the meaning of the phrase "engages in" by citing a passage from the judgment of the Court of Appeal in Weller's Case (op. cit) and then after setting out the evidence relating to this limb, concluded

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that the cumulative effect of the evidence was that the taxpayer:

> " ... must be considered to be engaging in sale and it seems to me that the requirements of the section are complied with. Hence the taxpayer is deemed to be carrying on business in Fiji."

D

In so far as that conclusion establishes that the taxpayer was "carrying on business in Fiji" there can be no dispute that that was a reasonable inference which the Court of Review was entitled to draw from the various items of evidence that it identified in its decision (at pp. 17 and 18) but in so far as the conclusion seems to assume that any profit or gain from such a sale was necessarily taxable income the Court of Review fell into error. Indeed the

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Court of Review appears to have completely overlooked the second limb of the proviso.

This is clear from the following passages of the recent judgment of the Court of Appeal in C.I.R. v. Woodward Civil Appeal No. 27 of 1987 (delivered after the judgment in the present case) where the Court said at p.12 of its judgment:

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> "Where error appears to have crept in is in the interpretation of the proviso to 11(e) which is in two parts. It has been assumed in our view erroneously, that if by selling land in Fiji a non-resident makes a profit or gain, ipso facto that profit or gain is taxable. The second part of the proviso is intended to cover

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> different situation. It does not refer to carrying on business which would link it to the first part. There must be an undertaking or scheme connected with land entered into or devised for the purpose of making a profit before a profit or gain becomes taxable.
>
> All the first part of the proviso does is to put a non-resident with no actual business in Fiji on a par with a non-resident who

actually operates a business in Fiji. The "income or gain" of both types of non residents must be ascertained in the same manner. The final part of the proviso does not state nor can it be interpreted to mean that the profit or gain merely from a sale is taxable. There must be the carrying on or carrying out of an undertaking or scheme for the purpose of making a profit.

Where a non-resident taxpayer has purchased and sold property, tax on a single sale will depend on whether the taxpayer can be considered to have "engaged" in selling the property in the course of conducting his business or whether he was carrying out an undertaking or scheme entered into or devised for the purpose of making a profit."

and later at p.13:

"While a non-resident selling land or an interest in it must be deemed to be carrying on business in Fiji, the sale by him of land need not necessarily be a business sale.

The sale must be in the nature of a business transaction or one designed to make a profit from which arises a profit or gain, ... before such profit or gain becomes liable to tax."

Having thus failed to consider the second limb of the proviso the Court of Review inevitably failed to go on to consider the next relevant question approved by the Court of Appeal in Woodward's case (at p.10) namely:

"Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit."

Or as formulated by their Lordships of the Privy Council in McClelland v. F.C.T. (1970) 120 CLR 487 when they said at p. 496:

" ... The question to be asked and answered is still whether the facts reveal a mere realisation of capital, albeit in an enterprising way, or whether they justify a finding that the appellant went beyond this and engaged in a trade of dealing in land albeit on one occasion only."

Learned counsel for the respondent however sought to distinguish Woodward's case from the present on the ground that the taxpayer in that case merely dealt with an inheritance. Further counsel boldly submitted that the Court of Appeal in Woodward's case "took a very hostile view to Section 11(e) in that they saw it as an attempt to impose a tax upon capital". Finally reference was made to the narrower meaning given to "profit" by the Court of Appeal than that which was given by Lord Donovan in McClelland's case.

With all due regard to counsel's submissions I cannot agree. True the manner in which the taxpayer acquired the land in the cases of Woodward and McClelland differs from the present but that is but one of numerous factors that must be considered in seeking to arrive at a finding as to true nature of the profit or gain derived by the taxpayer.

I am content to say nothing as to the view (if any) that the Court of Appeal may or may not have towards Section 11 (e) but I disagree that there is a conceptual difference to be found in profit that is derived from a business venture and one derived from an adventure in the nature of trade. In my view the difference (if any) is semantic. Ultimately the determination must depend on the facts and circumstances of each case.

What then should be done in this case with the above-mentioned omission or failure (s) of the Court of Review? In my view in the absence of any findings in that regard this Court is entitled to proceed to determine the issue based upon the evidence and exhibits produced in the case and which both counsel have sought to highlight in their respective submissions.

Counsel for the taxpayer submits that the land was not acquired with a view to selling it at a profit, and even if steps were taken to develop the land (which does not appear to be conceded) that was merely to achieve the benefit of capital accretion to the property over the years. All the taxpayer did was to advertise the property and very quickly enter into an agreement with Karsanji for the sale of it.

With respect the submissions of learned counsel for the taxpayer is an attempt to describe the conclusion which the taxpayer would wish to see arrived at on the whole of the evidence and in the course of which the nature of the transactions has been down-played and generalised.

Counsel for the respondent on the other hand laid emphasis on the following items of evidence and the judgment of the Court of Review:

(i) The taxpayer purchased the property from his father and paid $20,172 for this. The price required him to grant a mortgage over the lease;

(ii) In 1972 the taxpayer demolished the wood and iron buildings thereon and constructed a substantial concrete building containing 4 shops and an office;

(iii) The property was subdivided;

(iv) The residence of the taxpayer in India with his family, apart from two short stays in 1965 and 1978;

To this may be added the dual findings of the Court of Review (as earlier sustained in this judgment) that the taxpayer normally resided outside Fiji and was engaged in the sale of land and thereby deemed to be carrying on business in Fiji.

Needless to say the evidence to which the Court of Review referred (at p.17 of the record) in arriving at this latter findings is not completely irrelevant to a consideration of whether or not the sale of land by the taxpayer was one in the nature of a "business sale".

Further the court of Review found that the taxpayer derived all his income from Fiji and has done since 1965. The taxpayers income tax returns also reveals that his income was exclusively derived from rental charged on his property.

In my view this was not a taxpayer who had a separate business or trade such as a grocery store or tailoring shop from which he derived taxable income. Nor was this sale of land an isolated dealing with an inheritance.

The taxpayer in this case was an absentee landlord and property developer whose sole business and income was derived exclusively from his ownership of and dealing with his land and the buildings he had built thereon.

As was said by Lord Radcliffe in Edwards v. Bairstow [1956] AC 14 at p. 38:

> "The true question in such cases is whether the operations constitute an adventure (in the nature of trade) not whether they by themselves or they in conjunction with other operations, constitute the operator a person who carries on a trade. Dealing is, I think, essentially a trading adventure, and the respondent's operations were nothing but a deal or deals in plant and machinery."

In the circumstances I prefer the submissions of learned counsel for the respondent and find that the profit from the sale of the taxpayer's land (as calculated by the Commissioner if Inland Revenue) "is a gain from a business venture" and therefore taxable income.

I uphold the assessment of the Commissioner of Inland Revenue and accordingly dismiss the taxpayer's appeal with costs.

(Appeal dismissed)