IN THE SUPREME COURT OF FIJI
CIVIL JURISDICTION

Action No. 306 of 1974

BETWEEN:

IN THE MATTER of an Application by BERENDON GARDENS (FIJI) LIMITED to apply for an Order of Mandamus — Applicant

- and -

IN THE MATTER of the Income Tax Act, 1974

- and -

IN THE MATTER of an objection to an assessment made on the applicant by the Commissioner of Inland Revenue, Surendra Singh. — Respondent

Dates of Hearing : 4th December, 1974
21st January, 1975
25th April, 1975

Mr. P.I. Knight, Counsel for the Applicant
Mr. M.J. Scott, Counsel for the Respondent

JUDGMENT

This is an application for an order of mandamus directing the Commissioner of Inland Revenue to comply with the provisions of section 61(4) and 61(5) of the Income Tax Act 1974 and in particular to consider an objection in writing dated 15th May 1974 which the applicant Berendon Gardens (Fiji) Limited had lodged in response to certain assessments of tax dated 1st May 1974 and to allow or disallow the objections. It is perhaps desirable to point out that at the time when the objection in question was lodged, the Income Tax Act 1974 had not come into force and this application is governed by the provisions of the Income Tax Ordinance (Cap. 176), of which the relevant provisions corresponding to section 61(4) and (5) are s. 67(4) and (5). The applicant Berendon Gardens (Fiji) Limited, it appears, is a company which was incorporated in Fiji in October 1968 with the object of buying and developing land at Korolevu, Nadroga. It erected 84 residential hotel units

at a cost of some $408,252.30. It sold 34 units at $8500 each, a total of $289,000, but the remaining 50 were disposed of for $105,000. I was told that the total amount received for these units was $408,252.30, exactly the same sum as the cost of the buildings, and although that does not appear to be arithmetically correct, I will accept it for the purposes of this application. At all events, the applicant was assessed for tax in the year 1970 in a sum of $19,014.87 based on an income of $58,172 and in the year 1971 in a sum of $20,823 based on an income of $64,483. Those two figures of income were figures raised by the Commissioner of Inland Revenue by taking one sixth of $379,478 which was the income received from the licence holders for that year, and allowing 1½% on $405875 for depreciation for 1970, and for 1971 he used the same figures and added an additional $4796 less $30 depreciation. The applicant appealed to the Court of Review, and the learned Magistrate allowed the appeal. He purported to vacate the assessments and referred them back to the Commissioner with a direction that he reopen the matter and allow a deduction for improvements under section 30 of the Income Tax Ordinance. Neither party appealed against the decision of the Court of Review.

The Commissioner then issued two new notices of assessment in which he showed the chargeable income for 1970 as being $37,879 being one sixth of the income as shown in his original assessment less an allowance of $25367 under section 30(a) of the Income Tax Ordinance. For 1971 he took his original assessment of $68,042 and allowed $25,516 under section 30(a), the resultant chargeable income being $44,026. This meant that the applicant was assessed for tax at $12,381.66 for 1970 and $14390.97 for 1971. I was told by Counsel for the Commissioner that these were amended assessments, but there is nothing on the face of them to say so. The applicant was not happy with these new notices of assessment and he objected to them in the manner provided by the Income Tax Ordinance section 67(1) to be met with the reply that since there were amended assessments an objection could not be entertained.

That reply was sent on 14th June 1974. It is then, a matter of surprise that the applicant did nothing until 4th November 1974 when he applied ex parte for leave to issue an order of mandamus. The order was granted at that time because although there might have been some question as to whether the applicant was entitled to mandamus against the Commissioner and also a considerable delay to be explained, it seemed possible on the papers then placed before the Court, that the applicants might have some matter of just complaint.

When the application came on for hearing, Mr. Knight for the applicant asked for an adjournment because Mr. Bond who had at all times acted for the applicant, was otherwise engaged. That application was rejected, and I would make it clear that in this Court no adjournment will normally be granted solely for the convenience of counsel. Counsel for the Commissioner expressly disclaimed both the matter of the right to a mandamus against the Commissioner and the matter of delay, and wished to resist the application solely on the ground that the notice of assessment issued by the Commissioner after the decision of the Court of Review, related to an amendment of the original assessment and that since it did not raise a fresh liability or increase the taxpayer's existing liability, the taxpayer could not be heard to object, the proviso to section 67(1) being applicable. That section reads :

> "Any taxpayer dissatisfied with an assessment may personally or by his agent within sixty days of the date upon which the notice of assessment has been served upon him or his agent or, where such notice has been posted, the date of posting, lodge with the Commissioner an objection in writing to the assessment in the form set out in Form 2 in the First Schedule to this Ordinance stating the grounds on which he relies :
>
> Provided that where the assessment is an amended assessment the taxpayer shall have no further right of objection

"except to the extent to which by reason of the amendment a fresh liability in respect of any particular is imposed on him or an existing liability in respect of any particular is increased."

The applicant, on the other hand, points to the concluding paragraphs of the decision of the Court of Review.

"In these circumstances I vacate the assessments and refer them back to the Commissioner with a direction from this Court that he reopen the matter and give attention to the assessment of profit or gain by allowing a deduction for improvements under his discretion and powers as set out in section 30. It is clear that whatever assessment results from this reconsideration will be a new one and as such open to objection and appeal either to this Court or to the Discretions Review Board. The assessments are set aside and to the extent set out above the appeal is allowed. Appellant is allowed costs of appeal $50,000."

To this argument the Commissioner retorts that the Court of Review under Fiji law has power only to confirm or amend, and since the Court did not confirm it must be held to have amended.

My first impression of this matter in view of the concluding paragraphs of its judgment was that the Court of Review might have acted outside its jurisdiction and the application was put down for further consideration, at which stage my attention was drawn to s. 2 of the Interpretation Ordinance 1967 as reprinted where the meaning of the word "amend" is given as follows : "amend" includes repeal, revoke, rescind, cancel, replace, add to or vary and the doing of any two or more of such things simultaneously or in the same written law or instrument.

So that when the Court of Review made its finding which I have set out above, it was merely amending the taxpayer's assessment, as it had power to do, and directing the Commissioner to replace it with another in which he gave the taxpayer an allowance for improvements under s. 30.

The King v Federal Commissioner of Taxation ex parte Hooper (1926) 37 C.L.R. 368, shows that there is but one assessment and one assessment only, under Australian Commonwealth Income Tax Legislation, and the position in Fiji is similar. Section 54 of the Ordinance provides for a return of income to be made each year, and on that return an assessment is made. There can be additional assessments, and an assessment can be amended, but there is one assessment. In the case above cited, Isaacs J. said at p. 274

> ". . . it appears that there is one main or basic assessment which is amendable. If any amendment increases the liability, that is separately open to objection and appeal. If an amendment decreases liability there is nothing in itself to object to, and it does not affect the reduced assessment."

I adopt, with respect, those words and apply them to the present case. Mr. Knight has not suggested that the amended assessment increased the taxpayer's liability, and the matter thus falls within the proviso to section 67(1) of the Ordinance which has been set out. There is no right of objection to an amended assessment. The application accordingly fails and must be dismissed with costs.

LAUTOKA,

June, 1975.

(K.A. Stuart)

JUDGE

Messrs. Cromptons, Solicitors, Suva Solicitors for the Applicant;

The Crown Solicitor for the Respondent.