IN THE COURT OF REVIEW
Civil Jurisdiction
Action No. 3 of 1972

Between: IN THE MATTER of an appeal to the Court of Review by VIMLA WATI REDDY w/o Yanktesh Permal Reddy — APPELLANT

- and -

THE COMMISSIONER OF INLAND REVENUE — RESPONDENT

D E C I S I O N

The facts relating to a series of transactions in connection with the acquisition of certain lands at Tamavua, Suva by the Appellant, Mrs. Vimla Wati Reddy, the financing of the purchase of the land, and the subsequent sale of portions of it are not in dispute and can be set out briefly as follows, that is to say that on the 27th January, 1969 the Appellant purchased 2 acres and 26 perches of land at Tamavua being lots 28 to 33 on Deposited Plan registered in the Office of Titles and numbered 2344 from Mrs. A.M. Walker of Suva for the sum of $12,000. The Appellant did not immediately prior to date of settlement have sufficient money to finance the purchase, and the Appellant with the advice and assistance of her husband, Mr. Yanktesh Permal Reddy, obtained the necessary finance in the following manner -

Loan from Chabildas Ltd. repayable on demand	$10,000
Gift from mother-in-law in cash	300
Gift from mother in cash	500
Refund of money deposited previously with her husband, Mr. Y.P. Reddy	1,200
	$12,000

These financial transactions are, if the evidence placed before

the Court is accepted, confirmed to a certain extent by reference to the Appellant's statement of current account with the Bank of New South Wales tendered at exhibit "G", as it can be ascertained from a perusal of the exhibit referred to that sufficient deposits were made on the 22nd and 24th January, 1969 to enable the Appellant to pay out by cheque numbered 121 the sum of $12,000. The Court must conclude on the evidence that the sum of $12,000 was paid out to the vendor of the land or to an agent on her behalf.

On the 22nd September, 1969 the Appellant through her husband, Mr. Y.P. Reddy, instructed surveyors to prepare a subdivision of lots 32 and 33 on D.P. 3510 and the subdivision was approved by the Subdivision of Lands Board on the 8th January, 1970 and following this approval, the Appellant sold Lot 29 on D.P. 2344 for the sum of $7,000 to Mr. and Mrs. F.W. Moore. This sale took place on 24th March 1970 when a deposit of $100 was paid by the purchasers, the balance being paid on 9th April, 1970. The payment of the sum of $6,900 is confirmed by a credit to the Appellant's current account on the day mentioned.

Lot 4 on D.P. 3510 was on the 31st March, 1970 sold to Mr. and Mrs. F.I.E. Coulson for the sum of $11,000 and the proceeds of sale were received and credited to the current account of the Appellant on 21st May, 1970.

A further lot namely Lot 28 on D.P. 2344 was on the 11th July, 1970 sold to Island Builders Ltd. for the sum of $5,000. A deposit of $1,000 was paid by the purchasers and reflects in the Appellant's bank statement on that day, and the balance of purchase money was paid to the Appellant's account with the Bank of New Zealand Savings Bank on the 17th August, 1970.

The Commissioner of Inland Revenue on the 17th September, 1971 forwarded to the Appellant a notice of assessment of tax based on income alleged to have been earned by the Appellant for the year ended 31st December, 1971. Included in that assessment as income were the profits made by the Appellant and arising from the sale of the three blocks of land previously referred to. The appellant through her solicitors lodged

formal notice of objection to the assessment on the ground that the profit of $16,137 made in respect of the sale of the land represented not income but a capital gain, as the land was not acquired for purposes of sale or disposal and the Appellant was not and had not been at any time a dealer in land.

The objection referred to was disallowed by the Commissioner on 18th April, 1972 whereupon the Appellant exercised her right of appeal to the Court of Review under the provisions of the Income Tax Ordinance.

The Commissioner of Inland Revenue in arriving at his decision to treat as income the profits received by the Appellant from the sale of the land was relying on the provisions of paragraph (a) of the proviso to section 15 of the Income Tax Ordinance which is quoted as follows -

> " Provided that, without in any way affecting the generality of this 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 a trade or business shall be excluded. "

Paragraph (a) of sub-section (1) of section 88 of the Land and Income Tax Act of New Zealand is almost identical to the provision of the Fiji Ordinance quoted above and sub-section (a) of section 26 of the Income Tax and Social Services Contribution Assessment Act of the Commonwealth of Australia is similar, thus decisions made by the Courts of these countries relating to interpretation of the above quoted sections of the New Zealand and Australian Acts must have at least persuasive authority.

Paragraph (a) of the proviso to section 15 of the Income Tax Ordinance of Fiji is, as can be readily seen, divided into three parts or barbs somewhat analogous to a treble hook and it is on one of these barbs or perhaps more that the Commissioner relies upon to bring certain classes of taxpayers within the ambit of the section. At the hearing of this appeal on the 30th March, 1973 it did appear to the Court, as is abundantly clear from the evidence, that the Commissioner in his submissions was relying on the third barb whereas learned counsel for the Appellant was directing his arguments towards the second barb and indeed the evidence of the Appellant and her witness tend to confirm this observation. However, as this is merely an observation, the Court must on the evidence placed before it ascertain whether the Appellant in carrying out the transactions has earned income from profits made on such transactions or merely added to her capital.

The evidence of the Appellant herself does not take the Court very far except insofar as the Appellant maintains that the land was purchased in order that houses could be erected upon it, and let, in order that the rental thus obtained would form a source of income. C other matters concerning the purchase of the land, arranging of finance, repayment of loans, erection of houses and general financial transactions, the Appellant was extremely vague. This is of course understandable in view of the limited education which she received, and it was abundantly clear from her evidence that she relied completely upon her husband on all business matters and was subject to his absolute control and guidance. On the other hand, it is obvious from the evidence of Mr. Yanktesh Permal Reddy, the Appellant's husband, that he is an astute business man of long standing who did in fact carry out all transactions in relation to the subject land on his own initiative, and in some cases after advising his wife on the course of action which he proposed to adopt. Appellant's husband, as can be seen from the evidence is a landowner, was not at present developing land, but had done so in the past. In his evidence, he also stated that the land had been purchased in order that houses may be erected upon it and the houses let; the rental

for same to be a source of income for his wife. Further in his evidence he admitted that the land was for development but whether he meant to use that expression in the context of its modern day usage is not clear. This witness surprisingly enough was, on some aspects of the financial transactions which took place during the period under review, rather hazy and the Court refers particularly to that part of his evidence relating to a loan to his mother-in-law and the part repayment of same. It is clear from his evidence that shortly after the land was purchased, certain portions were subdivided and plans submitted for approval prior to any demand being made by Chabildas Ltd. for repayment of the loan. Even after repayment of the loan further plans of subdivision were prepared, approved and a sale made. It is clear also from the evidence that at or about the time when Chabildas Ltd. demanded repayment of the loan the Appellant had sufficient money in her account or was in the process of paying it in to her account to satisfy the loan. Instead of satisfying such loan, the Appellant's husband paid off the same with money obtained from Tanoa Hotel which was deprived of the sum of $10,000 for a period of some twelve months.

Having referred to the subdivision of the land and noting that sales of certain lots were made through an agent, I refer to the case of Australian Consolidated Press Ltd. v. Australian Newsprint Mills Holdings Ltd. (1960) 105 C.L.R. 473, 479 per Dixon C.J. - "It is difficult to regard the causing of a subdivisional plan to be completed and deposited and thereafter sales to be made through land agents as other than a set plan for securing profits from the disposal of the land in this manner." Again in the case of Clowes v. Federal Commissioner of Taxation (1954) 91 C.L.R. 209 per Taylor J. - "the carrying out of a 'scheme' does require that there should be 'some programme or plan of action' " and per Kitto J. - "Further to determine whether there has been a 'profit making scheme' one must apply 'a business conception to the facts of the case'."

Appellant's husband was an astute business man and although in his evidence he has attempted to justify, in the interests of the taxpayer, the actions which he took, such

evidence has not the ring of truth, the money to pay off Chabildas Ltd. was available through Tanoa Hotel, there is great doubt from the evidence as to whether the Appellant's mother was really pressing for the loan, and it is apparent that the Appellant's husband was doing what any prudent business man would do, that is sell some portion of the land at a profit in order to cover the purchase price of the whole.

What the Court has in effect done is to scrutinize carefully the actions and statements in evidence of the Appellant and her witness as it is required to do in accordance with the decision in Minister of National Revenue v. Spencer [1961] C.T.C. at p. 109 per Thorson P. - "It is well established that a taxpayer's statement as to what his intention was in entering upon a transaction made subsequent to its date, should be carefully scrutinized. What his intention really was may be more nearly accurately deduced from his course of conduct and what he actually did than from his ex post facto declaration."

The alacrity with which the appellant subdivided portions of the land and disposed of some portions and the fact that since purchasing the original area the appellant had, save for two rough sketch plans, done nothing about constructing rental houses must, bearing in mind that the Appellant had been at all times advised by a person with a wide knowledge of land, development and land dealings, lead the Court to conclude that the Appellant had in mind the thought of making a profit if the opportunity arose.

It is not for a moment suggested that the Appellant and her husband have set out deliberately to mislead the Court in the evidence which they have tendered. The Court admittedly accepts some of that evidence, but on the more vital matters, suffice to say it does not satisfy. It is tendered some years after the material time and the Court has concluded that as often happens, it represents at some material points reconstruction rather than recollection.

Australian Commonwealth Taxation Board of Review cases have at least persuasive authority and on the question of dominant purpose of acquisition reference is made to case No. 102, 9 C.T.B.R. (NS). In this case, the taxpayer purchased 18

acres of land and claimed that he had acquired the property for market gardening, however, in the year of purchase, he had the property subdivided, placed it in an agent's hands for subdivisional sale, made press advertisements and effected sales of some blocks. Some market gardening was done on unsold blocks in subsequent years but only in one year was a profit made. Held that the dominant purpose of acquisition was profit making by sale. This case is analogous to that now before the Court and as the Court has given its reasons supported by authority it finds that in the case now before it that the dominant purpose of the acquisition, as borne out by the actions of the appellant subsequent to purchase, was undeniably profit making by sale. This being the findin: of the Court it follows that the Appellant was correctly assessed under the provisions of the second barb contained in paragraph (a) of the proviso to section 15 of the Income Tax Ordinance.

Even if the Court had not reached the conclusion and made a finding as it has, it is apparent that the Appellant would have been correctly assessed having regard to the third barb contained in paragraph (a) of section 15 of the Ordinance. This provision mentioned refers to "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". Having previously referred to the findings of the Court in relation to the evidence of the Appellant and her husband when examined in the light of their actions subsequent to the purchase of the land from Mrs. Walker further reference is unnecessary. During the course of its dealing with the reasons for the findings, the Court has also dealt with the relevant authorities, and I refer in particular to the exerpts from the Judgments of Dixon C.J. and Taylor J. in Australian Consolidated Press Ltd. v. Australian Newspring Mills Holdings and Clowes v. Federal Commissioner of Taxation.

I refer now to the case of Gilmour v. Inland Revenue Commissioner, Australian and New Zealand Income Tax Reports Volume 10 per Henry J. This case is certainly persuasive authority for the proposition that it is immaterial what the expressed intention or intentions of a taxpayer are at the time of purchase of land for if he at any subsequent date carries on or carries out any undertaking or scheme entered into or

devised for the purpose of profit those profits are assessable as income. Henry J. states in dealing with a matter under the third barb of paragraph (c) of section 88 of the New Zealand Land and Income Tax Act which is the same as paragraph (a) of the proviso to section 15 of the Fiji Income Tax Act "It seems obvious enough that the third limb of section 88(c) does not refer solely to the point of time when the property which is brought in to the undertaking or scheme is acquired by the taxpayer. It may be acquired at varying times for varying reasons. The third limb says nothing about the acquisition of the property - it speaks of profits or gains derived from the carrying on or carrying out of the undertaking or scheme. It says nothing of the origin of the property to be used in the undertaking or scheme for the purpose of making a profit. Therefore, the commencing point is the coming in to existence of an undertaking or scheme which has as its purpose the making of a profit. The property brought in to any such undertaking or scheme may well be property which could, before then be realized without attracting tax. Nevertheless if property is brought within an undertaking or scheme as defined by paragraph (c) of section 88 it may thereafter attract tax although otherwise its earlier realization would not attract tax. I conclude, therefore, that the point of time at which the purpose of making a profit must be determined is at the point of time when the undertaking or scheme is entered into or devised for that purpose and not when the property which is used in the undertaking or scheme is acquired. This finding is in accordance with the opinion of North J. in Walker's case [1963] N.Z.L.R. at 363 where he states that the "purpose must be determined at the time when the land was acquired or the scheme was formulated."

From the evidence of the Appellant and her husband, on the basis of the authorities mentioned and on the actions of the Appellant and her husband, and the results of these actions, the Court can come to no other conclusion that the Appellant did make a profit or gain from the carrying on of an undertaking entered into for the purpose of making a profit and the Court finds that on this barb of paragraph (a) of section 15 of the Income Tax Act of Fiji also the profit

made on the sale of land by the Appellant was income thus the Appellant has been correctly assessed by the Commissioner. For reasons stated, the appeal by the Appellant is dismissed and it is so ordered. On the question of costs, it is ordered that the Appellant do pay the Respondent's taxed costs of this appeal.

A.D.S. Anderson
1/5/75