

**IN THE COURT OF REVIEW
AT SUVA**

IN THE MATTER of an Appeal to
the Court of Review by Warren
Williams & Vanessa Williams
(Appeal No. 10 of 2007)

AND THE MATTER of the Income
Tax Act (Cap 201)

BETWEEN: WARREN WILLIAMS & VANESSA WILLIAMS
Appellants

AND: COMMISSIONER OF INLAND REVENUE
Respondent

Ms. P. Salele for the Appellants
Ms. F. Gavidì for the Defendant

Date of Hearings & Submissions: 22nd & 29th November, 2007
Date of Judgment: 6th June, 2008

JUDGMENT

This is an appeal by the appellants against the decision of the Commissioner of Inland Revenue to assess them for Income Tax on the sale of their property at Lot 28 Sovereign Quays Denarau, Nadi. A statement of agreed facts has been filed into Court. The chronology of events relevant for the case can be summarized from this:

- 1) The Appellant Warren Williams, an Australian citizen, was granted a work permit on 2nd August, 2000 to work for Trans Pacific Seafood (Fiji) Limited until June 2003.

- 2) The Appellant owns an Australian incorporated fishing company Tatevale Pty Limited. This company owned two fishing vessels the FV Merlin and the Roden Lee.
- 3) On 14th January 2004, the Appellants purchased a plot of land at Lot 28 Sovereign Quays, Denarau, Nadi. (CT 35944) for a sum of \$295,000.00
- 4) On 31st March, 2004 the Appellants' Company, Tatevale Limited, signed a contract with Trans Pacific Seafood (Fiji) Ltd to work in Fiji. According to the Appellant Mr. Williams, Trans Pacific Seafood never honoured the contract and it was terminated.
- 5) Subsequently, Mr. Williams and one Iliesa Tuvatua formed a company Willies Seafood Company Limited which was incorporated under the Companies Act on 13th December 2004.
- 6) Prior to the above, on 22nd October, 2004 the Fiji Trade and Investment Board had issued a Foreign Investment Registration Certificate to Willies Seafood Limited to carry on the business of "fish wholesale and retail and fishing including crab and prawns".
- 7) On 10th December, 2005 the Appellants sold their said property at Denarau for \$550,000.00.
- 8) On 21st April 2006, the Respondent Commissioner issued a Notice of Assessment for Income Tax of \$47,744.92.

- 9) On 1st June 2006, the Appellants filed an objection to the said assesment. The Respondent wholly disallowed the objection. The Appellants then filed their Notice of Appeal to the Court of Review.

The basic issue for determination before this Court is whether tax is payable on the proceeds of sale on the Appellants' said property in Denarau, under the **Income Tax Act**, more particularly under S11 (a) of the **Act**.

The Evidence

The Appellant Mr. Williams and his partner in Willies Seafood Limited, Mr. Iliesa Tuvatua, gave evidence for the Appellants. In his evidence Mr. Williams gave an account of his dealings with Trans Pacific Seafood Limited both as an employee and as a contractor. He worked for Trans Pacific for only 12 months then went back to Australia. He then came back in 2004 to work as a contractor for Trans Pacific Seafood. It is clear from his evidence that his experiences with Trans Pacific Seafood was not satisfactory, he received no income. His own company Willies also met with obstacles, and was given the run around by the Fisheries Department. The result was that none of his ventures into Fiji were successful and he sustained losses.

Mr. Williams also stated that he bought the land at Denarau in January 2004 because he wanted to bring his family to Fiji and build a house. He said that Denarau was the safest place for his family. He did not buy to sell the land. He did not know that the value will go up. He only sold the land because he did not have any income in Fiji.

Mr. Tuvatua basically confirmed much of what Mr. Williams stated in regards to their business dealings in Fiji. He had initially worked with Mr. Williams at Trans Pacific Seafoods then formed Willies Seafood with him.

According to him Mr. Williams wife Vanessa Williams and their two kids came to Fiji. They all liked Fiji and wanted to settle here.

The Respondent called one witness, Aka Hoeder. She is the Chief Assessor for FIRCA. She stated that in 2006 she did the assessment on the sale of the Williams' property at Denarau. She assessed their tax liability under S11 (a) of the **Income Tax Act**. The basis of her assessment was the short period of time within which the property was sold, that is, less than 2 years after buying, and at a profit. The assessments and reconsideration of expenses were based on the information provided by the Appellants. She stated that she did consider the circumstances under which the Appellant worked in Fiji and his business interests. In her view the short period of time the property was held raised a presumption that it was purchased for disposal at a profit. There was an inference of an intention to sell.

S11 (a) of the Income Tax Act

The grounds of appeal, as originally filed, included much that is not relevant to the issues for determination. However, in submission both the Appellant and Respondent Counsels did agree that the basic issue for determination is whether the property in question was "..... acquired for the purpose of selling or otherwise disposing of the ownership of it," . This is the relevant limb of S11(a) of the **Income Tax Act** that the Court needs to consider in arriving at its decision.

The Relevant Principles of Law

In all appeals before this Court the tax payer has the onus of proof. Section 71(2) of the **Act** states: "On the hearing and determination of all objections to assessments under this Act, the onus of proof shall be on the taxpayer". As

was stated in CIR v National Distributors Limited (1989) 11NZTC 6346, a case referred to by both Counsels, it is the tax payer who must establish: "on the balance of probabilities that the property in question was not acquired for the purpose of sale or other disposal. Where subjective purposes are in issue the statements of the taxpayer, or of someone who can speak for the taxpayer, are obviously important evidence. But for obvious reasons they must be assessed and tested in the totality of circumstances which will include the nature of the asset, the vocation of the taxpayer, the circumstances of the purchase, the number of similar transactions, the length of time the property was held and the circumstances of the use and disposal of the asset. Actions may speak louder than words and the totality of circumstances may negate the asserted purpose of the purchase" (p.6351).

It is not clear from the submissions of Appellant counsel on "Discussion of the Law" what her basic contentions are. She makes extensive quotes from various judgments but does not distil the essence or ratio from the cases. Both Counsels refer essentially to the same cases but with differing emphasis. The court notes in particular the references to the case of National Distributors Limited (opcit), Gauci and Masi v Federal Commissioner of Taxation 5ATR 672; CIR v F.A Weller 28FLR 46.

There is some confusing submissions on the question of "purpose" "intention" "motive". It is perhaps pertinent to note that the National Distributors case, cited by both Counsels, has a very succinct discussion on the question of "purpose" in relation to the critical issue of "..... for the purpose of selling or otherwise disposing of the ownership of" (see in particular pp 6,358ff). In essence the word "purpose" in its ordinary and natural meaning indicates "the object of an activity". For our purposes it is not necessary to get involved in a very intricate discussion or fine destinations

between "purpose", "intention", "motive", "dominant purpose", "conditional purpose" and so on. A succinct definition useful for our analysis may be gleaned from the Court of Review decision in, K.R Latchan v CIR (No. 6 of 1986). In summarizing relevant English authorities, the Court simply states that "motive" equals "the reason why" and "purpose" equals "the end view". It is also clear from the authorities cited that "purpose" refers to the subjective purpose of the taxpayer (see also Kelton Investments Ltd v CIR, Court of Review No. 1 of 1979).

The Appellants' have also submitted that it is the duty of the CIR to seek further information and documentation or sufficiency or otherwise of the information provided. In the Gauci case, which considered similar Australian provisions as that before this court, it was stated: "The Act does not place any onus on the Commissioner to show that the assessments were correctly made. Nor is there any statutory requirement that the assessments should be sustained or supported by evidence" (p. 676). As noted earlier, section 71(2) of the Income Tax Act places the onus on the taxpayer. It is also pertinent to note that S 71(1) provides that no assessment be set aside for technical reasons.

The Law and the Evidence in this case.

The evidence of the Appellant Warren Williams and his witness and business partner, Mr. Tuvaluva, was not persuasive, on a balance of probabilities, that the purchase of the said property was not for selling in order to make a profit. The court cannot understand what was the "change of circumstance that was beyond the appellants' control which left them no choice but to sell" (p 10 of Appellant submissions). It is clear from the Appellant's own evidence that his business dealings in Fiji were less than satisfactory. He acquired the said property on 14th January 2004 when he had no work

permit. His work permit expired on 03/06/03. He only signed a contract to do business with Trans Pacific Seafood (Fiji) Limited on 31st March 2004.

No evidence was presented in the Statement of Agreed Facts nor in oral evidence as to what was the residence status of the Appellant in Fiji between June 2003 and January 2004 when the said property was purchased. In his evidence he stated that the money for the land came from Australia. He also said he initially borrowed from Westpac. No details of any loan arrangement from Westpac were provided, for example, what were the financing arrangements? It is evident that no income was forthcoming from any "anticipated business" in Fiji. One may, therefore, assume that financing was sourced from Australia.

The Appellant also stated that he spent considerable sums on obtaining consent from "qoliqoli" owners. When he bought the said property he had not got the necessary approvals to undertake any business in Fiji. The court regrets to note that Appellants' case was short on relevant evidence. Much of the "evidence" attached to the Statement of Agreed Facts were neither relevant nor persuasive. The "Foreign Investment Registration Certificate (No. 0181); and the Certificate of Registration under the Companies Act (Co No. 17098) may suggest some intension to do business in Fiji but are not tangible evidence of business activities. This court can take judicial notice that many FTIB approved foreign investments do not eventuate.

The Court also notes the business contract made between Trans Pacific Seafoods and Tatevale Pty Limited, an Australian Company. It is stated in the Contractual Agreement (Annexure "B" to the Statement of Agreed Facts) that it was Trans Pacific Seafood that "will structure all fishing rights and associated licenses to allow vessels associated with this joint venture to

operate in the identified fishing areas" (page of 2 of Annexure "B"). This contradicts the evidence of the Appellant Mr. Williams.

The evidence of both Mr. Williams and Mr. Tuvatua pertaining to the Appellant and his wife Vanessa Williams (2nd Appellant) desires to live in Fiji was also very flimsy. The evidence only suggests one visit by Mrs. Williams to the site of the said property and her desire to live/settle in Fiji. The Appellants' case is distinguishable from the case of CIR v Weller (28 FLR46). In that case the Respondents had actually erected a villa on their property. The couple concerned did reside in Fiji for sometime before Mrs. Weller found it difficult to live in Fiji due to the climate, lack of friends and loneliness. The couple rented out the villa and left Fiji. Subsequently they accepted an offer from an interested buyer and sold the property. In this case there was no evidence of any residence by Mrs. Williams or her children in Fiji. The concerned witness only suggests that they "all liked Fiji and wanted to settle here".

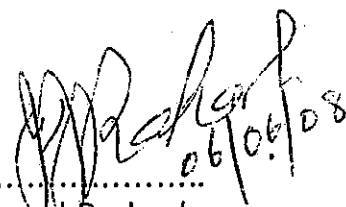
The Appellant Mr. Williams also contended in his evidence that he did not know that the value of the property will go up. He had earlier stated that Denarau was "the safest place for his family". Given his business background it is difficult to accept that he did not know the nature of developments pertaining to Denarau. In this regard the New Zealand Court of Appeal discussion on "purpose of selling or otherwise disposing of" is relevant (National Distributors case, opcit). As Doogue J states: "In the ordinary world property is not acquired for sale at any price..... No one is likely to assert that any taxpayer would acquire property for the purpose of resale for a loss" (p6,359). The case of Williams Property Developments Ltd v CIR [1980] INZLR 280 is also relevant to the discussions of relevant principles pertaining to this case. Quoting the Australian High Court case of McCormack v Federal Commissioner of Taxation (1979) 9ATR 610, Richmond R quotes the

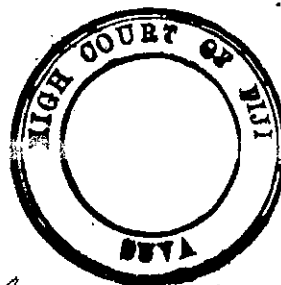
reasoning of Gibbs J stating: "..... The taxpayer will succeed if the proper inference from the evidence is that the property was not acquired for the relevant purpose, but if there is no evidence as to the purpose for which the taxpayer acquired the property the appeal must fail (at p 284).

The situation in this case, given the evidence, suggests an "adventure" in the nature of trade or a realization or disposal of property of an economic nature (see National Distributors Ltd case, 6,361). Further it was stated in Pascoe v FCT (1956) 6 AITR 315 that while "..... a person's sworn testimony may be the best evidence of his purpose, object or state of mind in entering into a transaction, such evidence should be treated most closely and received with the greatest caution".

In considering the totality of the evidence in this case the Court is guided by the statement of Casey J in the National Distributors case: "Unless the taxpayer could show that the main or dominant purpose which led him or her to acquire the property was not to sell or otherwise dispose of it, then the profits or gains will be taxable" (at p6, 355).

The Appeal is dismissed. Each party is to bear its own cost.


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Jayant Prakash
Court of Review



(Delivered in Court 19/06/08)

6th June, 2008