IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CIVIL APPEAL NO: HBT 03 of 2013
Tax Tribunal Civil Action No. 6 of 2010

BETWEEN : Vidya Nand Singh

APPELLANT

AND : Fiji Revenue & Customs Authority

RESPONDENT

BEFORE : The Hon. Mr Justice David Alfred

Date of Judgment : 4 March 2016

JUDGMENT

1. This Appeal was heard by Kotigalage J on 22 July 2013 when judgment was reserved.

2. The matter was called before me on 6 August 2015, when Ms B Malimali of Counsel for the Solicitors for the Appellant, Anil Singh Lawyers, and Mr O Verebalavu of Counsel for the Respondent, consented to my delivering judgment based on the written record, and did not require any further submissions to be made.

3. In the course of reaching my decision, I have perused:
   (1) Minutes of Pre-Trial Conference (Minutes) dated 15 August 2011.
   (2) Judgment dated 17 December 2012 of the Tax Tribunal (Decision).

(3) Notice of Appeal dated 9 January 2013.

(4) Appellant's Written Submission.

(5) Respondent's Written Submission.

(6) The Authorities cited by both Counsel.

4. I now proceed to deliver my judgment. My starting point is the Minutes.

(A) The Agreed Facts include:

(1) The Appellant, a farmer, purchased about 191 acres of freehold agricultural land in 1964.

(2) In 2000, he subdivided the aforesaid land into 33 separate lots under 4 deposit plans.

(3) Through the years, he had sold 25 of the initial 33 Lots, for which he filed Land Sales Act Declaration Forms and obtained individual titles for each of the new owners of the lots.

(B) Fact in Dispute:

Due to his declining health and resulting declining revenue he decided to subdivide part of his land for future financial security.

(C) Issues to be Decided:

(1) Whether the Appellant is entitled to tax exemption under section 5(a) and (b) of the Land Sales Act 1974.

(2) Whether any gain or sale of the land does not fall under any of the 3 limbs of Section 11(a) of the Income Tax Act 1985.

5. I note from the Notice of Appeal that the grounds of appeal are that the Tribunal was wrong in fact and in law:

(1) To hold the Appellant was conducting any business of land subdivision for sale of lots - 1st limb of section 11(a).

(2) To hold he was conducting a venture – 3rd limb of section 11(a).

(3) In not correctly applying the "California Copper Syndicate" principle in that the Appellant did not carry on the development process over a 5 year period.

(4) Alternatively, the Tribunal was wrong to ignore that the Appellant was entitled to have the land revalued to its then market value, if the Tribunal was correct to hold the Appellant had transitioned from farmer to land developer, meaning the assessable profit had been wrongly calculated.

6. I turn now to consider the Decision. The Tribunal in essence concluded as follows:

(a) As the Taxpayer had converted his farming property into several lots of real estate and progressively disposed of the parcels, this was a well planned activity.

(b) The Taxpayer had made it his business to prepare the land for sale and then advertising it. Thus, he had transitioned from being a farmer to becoming a land developer as his new source of income.

(c) The sales of the parcels were caught by Section 11 of the Income Tax Act (Cap 201 Rev 1985) (ITA), as they arise from profits from a venture of the Taxpayer (Appellant) as a business or a calling.

7. The Tribunal accordingly determined the Appellant had been taxed appropriately and dismissed his application.

8. In the Appellant's Written Submission, he makes the following points:

(i) The Appellant purchased the farmland in 1964 with the intention of farming and he did that for about 40 years. At the time of purchase, he did not have the intention of subdividing and selling.

(ii) The roads were constructed about 30 years before the subdivision and no roads were made for the subdivision.

(iii) The subdivision was only done after the Appellant's health declined and he was unable to sell the land as one parcel.

(iv) After subdivision approval was given in 1997, the 1st sale only took place in 2000.

(v) Section 11(a) of the ITA did not apply here.

(vi) The Appellant was only realizing his capital asset and therefore was not subject to income tax.

(vii) The Tribunal was wrong to state that the Appellant was also doing the business of dealing in property during the 40 years he was farming.

(viii) The Tribunal was wrong to ignore the Appellant's alternative submission that he was entitled to have the land revalued to its then market value in the calculation of any assessable profit.

9. The Appellant therefore asked for this Appeal to be allowed as he was merely realizing his capital assets and should not have been taxed pursuant to section 11(a) of the ITA.

10. The Respondent in its Written Submission made the following points:

(i) The Appellant was conducting a business of land subdivision for sale within the 1st limb of section 11(a) of the ITA and was conducting a venture within the 3rd limb of section 11(a). He had testified it took him 2 years to clear the land and convert it into several lots of real estate.

(ii) The Tribunal had correctly applied the "California Copper Syndicate" principle, to determine if the Appellant was carrying on a business and whether the profit in question was derived from it. He had not placed the property in the hands of a real estate agent. His intention was clearly to venture into a business to make profits.

(iii) The Appellant is raising a new issue of the re-valuation of the land, which was never initiated by the Appellant when the matter was heard by the Tribunal.

11. The Respondent submitted that the Appeal should be dismissed.

12. At the outset, I think it is proper for me to dispose of the alternative contention of the Appellant that he was entitled to have the land revalued to its then market value.

13. It is trite law that a party is bound by its pleadings and this applies to parties before a Tax Tribunal. A trawl of the relevant pleadings, i.e. the Application for Review to the Tax Tribunal dated 22 July 2010, and the Minutes of the Pre-Trial Conference dated 15 August 2011, do not disclose any contention relating to any revaluation of the land.

14. This is confirmed in the Decision, where the Issues before the Tribunal are:
    (1) Whether the gain or sale of the land is assessable income.
    (2) The Application is heard in accordance with the Decrees. This is NOT relevant for our present purposes.

15. It is also clear that before the Tribunal, the Appellant was no longer pursuing issue No. 1 in the Issues in Dispute in the Minutes.

16. The Tribunal heard the issues before it based on the Application. The Appeal before me is from the Tribunal's decision on the issues before it. And because revaluation was not an issue before the Tribunal, it cannot therefore now be an issue before me in this Appeal.

17. I am only required to consider if the Decision is correct with regard only to whether the Appellant was conducting any business or venture, whether there was any gain or profits arising from it, and whether these gains or profits are taxable, under section 11 of the ITA.

18. The above being what I have framed as the issues before me, I now proceed to deliver my judgment. The lodestar for me is the decision of Rowlatt J in: The *Cape Brandy Syndicate v The Commissioners of Inland Revenue* (12 T.C. 1917 – 1926) at page 366, where he said: "*Now of course it is said and urged by Sir William Finlay that in a taxing Act clear words are necessary to tax the subject. But it is often endeavoured to give to that maxim a wide and fanciful construction. It does not mean that words are to be unduly restricted against the Crown or that*

there is to be any discrimination against the Crown in such Acts. It means this, I think; it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment; there is no equity about a tax: there is no presumption as to a tax; you read nothing in; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax."

19. The crux of the Appeal is the judicial construction of Section 11(a). I reproduce below the relevant proviso thereto which reads as follows: "*Provided that, without in any way affecting the generality of this section, total income, for the purpose of this Act, shall include-*

    (a) Any profit or gain accrued or 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 any profit or gain 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 trade or business shall be excluded."

20. This can be dissected into 3 limbs as follows:

    1st : Any sale of real property if the taxpayer's business comprises dealing in such property.

    2nd : The property was acquired for the purpose of selling or disposing of its ownership.

    3rd : Any profit or gain derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit.

21. It would appear from the factual matrix of the Appeal that we are not concerned with the 2nd limb, but with the 1st and 3rd limbs. This raises the question, did the

evidence before the Tribunal support the Tribunal's determination that there had been a business or undertaking of selling land by the Appellant.

22. The Appellant's case in the Application For Review can be summarized as follows:
    (a) The Applicant was 74 years (in July 2010), had lived and farmed on the land all his life.
    (b) In the 1990s due to "his declining health and the resulting declining revenue from his farm, he then decided to subdivide part of his land."
    (c) This was not done for profit but simply as a financial security for him for the future.
    (d) There was no profit from the sale of the land as his business did not comprise dealing in real property.
    (e) The land was not initially acquired for the purpose of selling but for agricultural purposes way back in November 1964. There was therefore no undertaking or scheme by the Appellant with the intention of making a profit.

23. I am of opinion that here we have something which may originally have been ostensibly in the nature of a financial provision for the future which soon was translated into something which was undeniably the carrying on of a business for profit. There is no better evidence for this that the Agreed Fact which states: "*Throughout the years, the Applicant (Appellant) has successively sold 25 of these initial 33 subdivided lots.*"

24. The choice of language and the clear implication that the remaining lots and other lots would also be sold in due course clearly evince the Appellant's intention to acquire profit from the business or undertaking devised.

25. It is laudable that in the evening of his life, the Appellant sought apparently to acquire a nest egg to provide for his future. But such a laudable purpose does not ipso facto translate into an exemption from being assessed for income tax

and being required to pay the same if such business activity comes within the ambit of section 11(a).

26. I have accordingly been meticulous in my perusal of section 11(a) and find that the Appellant has failed to satisfy me that he is merely providing for his future. On the contrary, I find on a balance of probabilities the Respondent has succeeded in showing:

    (1) That the Appellant is now in the business of dealing in real property from which he derives profit or gain from the sale of parcels of the land; and

    (2) That the profit or gain he has derived is from carrying on or out of an undertaking or scheme entered into or devised for the purpose of making a profit.

27. I now turn to consider the issue whether the gains that the Appellant obtained from the sale of the lots were realized from the greater price of the lots, in which case the enhanced price is not profit assessable to tax or whether the enhanced values from the realization of the securities (the lots in the present case) were not merely a realization or change of investment but an act done in carrying on or out of a business.

28. In my view, the actions carried out by the Appellant as set out in the Agreed Facts and in the 1st 6 lines of para 40 of the Decision which are not challenged in para 17 of the Appellant's Submission are not merely the realization of an asset but are more carefully devised actions in carrying on a business for gain. These were: commencing this process after receiving advice from his accountant, lawyer and a firm of Consulting Surveyors, Planners and Project Managers; selling pockets of land after subdivision; installing a For Sale sign and releasing land when it suited.

29. I rely on the decision in: *Californian Copper Syndicate v Harris* (5 T.C. 1903-1911) at page 165 where Lord Justice Clerk said: *"It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an*

ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business."

30. At the end of the day, suffice it for me to say, these business activities came within the ambit of section 11(a). On a total review of the matter, I find the Tribunal committed no error of law or in fact and committed no error of principle in arriving at the Decision.

31. In fine, I uphold the Decision, dismiss this Appeal and order the Appellant to pay to the Respondent, the costs of this Appeal, which I summarily assess at $1,000.00.

Delivered at Suva, this 4th day of March, 2016.

DAVID ALFRED
Judge of the High Court, Fiji.