

IN THE HIGH COURT OF FIJI

COURT OF REVIEW NO. 4 OF 1988

BETWEEN :

**THE TRUSTEES OF THE ESTATE OF
EVELYN MAY BARKER**

APPELLANT

AND :

**THE COMMISSIONER OF
INLAND REVENUE**

DEFENDANT

Mr N S Arjun for the Appellant
Mr S Banuve for the Respondent

JUDGMENT

Evelyn May Barker, the wife of Sir Thomas William Alport Barker, died in Suva on 27th November, 1951. Probate of her last will and testament was duly granted to her husband and her daughter Muriel Agnes Ryan the executors and trustees named therein. They were to receive the income from the estate provided that if her husband remarried (as in due time he did) his share of the income from his wife's estate was to pass to his daughter, so that at all times material to this appeal Muriel Agnes Ryan (who subsequently married a man named Gell, and after his death a man named Burrows) was entitled to the whole of the income from her mother's estate. Particulars of that income paper in the accounts annexed to the income tax returns for 1976 and 1977 exhibited among the agreed documents. At the time of her death Lady Barker was registered as proprietor of extensive lands in Suva, among them the land in Rodwell Road presently containing one rood 2.5 perches upon which the Phoenix Theatre complex and its mini-theatre are now erected. On 18th November, 1957 the trustees of Lady Barker's estate leased that land and buildings (the mini-theatre had not yet been built) to James Gibson Barron Crawford and Thomas Patrick Mullelly for a term of twenty years from 1st November, 1957 at an annual rent of \$2,800. That lease was transferred, with the consent of the lessors, to Sharan Brothers Limited on 22nd October, 1964. Sharan Brothers Limited desired to build an air-conditioned mini-theatre underneath the Phoenix Theatre, and on 1st March, 1976 entered into an agreement with Lady Barker's trustees whereby the company agreed to build the mini-theatre, which was, upon completion to become the

property of the Estate, and the trustees agreed to grant the company a new lease of the land, together with the two theatres, for 23 years from 1st January, 1976. It will be noted that the former lease had not yet expired. The rent of the whole was to be \$800.00 a month or \$9,600.00 a year, and a draft copy of the proposed lease was annexed to that agreement of 1st March, 1976. The draft agreement subsequently became the agreement to lease dated 5th October 1977, which provided that the lease envisaged by the agreement of 1st March, 1976 was to ensure for 20 years from 1st November, 1977. Presumably in pursuance of the draft lease, articles of agreement were signed on 6th October 1976, between Sharan Brothers Limited and Raghwan Construction Co. Ltd for the construction of the mini-theatre for a price or sum of \$104,000.00. The Commissioner claims to assess upon the Trustees, first under Section 11(t) of the Income Tax Act (Cap 201) and also under Section 14(b), the amount of the cost of the building of the mini-theatre, but the claim under Section 11(t) was first raised in a letter to the trustees' accountants on 3rd March 1982. By that time the Commissioner had obtained from the lessees (Sharan Bros Ltd) figures which enable him to value the improvements at \$156,212.00 and he issued an amended assessment for 1977, but against the estate of Mrs M A Burrows, the daughter of Lady Barker, who was at once the life tenant and a trustee of her mother's estate, not against the estate of Lady Barker. Mrs Burrows' accountants objected, upon the ground, inter alia, that the construction of the Phoenix mini-theatre was a right which accrued to the estate of Lady Barker under the terms of the agreement of 1st March, 1976 and as such the right did not accrue to Mrs Burrows who was the life tenant or to any of the beneficiaries. That objection was allowed, and an assessment was later issued against the estate of Lady Barker for the same amount of \$156,212.00. That was on 16th May 1983, and the estate's solicitors duly filed an objection. The objection then raised was wholly disallowed. By that time the Commissioner had stated that he was also claiming tax under Section 14(b) of the Act. The year of claim was 1977. An appeal was lodged against the assessment. On 18th April 1986 the Commissioner advised the solicitors for the estate that the assessment for 1977 was being withdrawn, and that a fresh assessment for 1976 would be issued, and the appeal was accordingly allowed, the appellants being awarded costs. A new assessment was then issued for \$156,212.00 against the estate of Lady Barker. Objection was lodged, and disallowed, and this appeal set in train. The appellants sent in train. The appellants sent to the Commissioner, by letter dated 26th September – 1986 what was in effect a set of interrogatories and the Commissioner's answers thereto are set forth as exhibits among the agreed documents.

I now set out the appellant's objections as stated in the agreed facts at paragraph 31 thereto:

1. The amount of \$156,212 is not either in whole or in part income according to ordinary concepts and is not in whole or in part made total income provision of the Income Tax Act.
2. In particular the said amount is not in whole or in part made total income with section 11(t) of the Act.

3. Alternatively if (which is denied) some amount is by section 11(t) of the Act made total income of the appellants then that amount (if any) is not the said amount by some other and lesser amount.
4. Further in the alternative if (which is denied) the said amount or some other amount is in whole or in part income or made total income of some person then-
 - (a) the was not wholly derived in year ended 31st December 1976; or
 - (b) alternatively the sum was not derived by the appellants and in particular was not derived by them in their capacity as the trustees of Evelyn May Barker deceased.
1. Section 14(b) of the Act did not entitle the Commissioner to assess the appellants whether as Trustees of the estate of Evelyn May Barker deceased or otherwise on all or any part of the said amount or any other amount.
2. Further, and in the alternative, the Act did not empower the Commissioner to issue an assessment after the expiry of six years from 31st December 1976, the year of assessment.

I cannot refrain from observing, at this stage that, while in a statement of defence the points made by the appellants no doubt, have their relevance, they do not bear the same weight when the onus of proof lies upon the appellants, vide section 71(2) of the Act.

It is now probably desirable to set out Sections 11(t) and 14(b) of the Act. They are:

11. For the purpose of this Act “total income” means (and then follows a very full definition followed by a proviso). Provided that without in any way affecting the generality of this section total income, for the purposes of this Act, shall include

(t) in the case of any person to whom, in accordance with the terms of any agreement relating to the grant, licence, concession or permission in favour of any other person of the right to use or occupy, or over any land buildings, or by virtue of the cession to him of any such rights, there has accrued in any year or period the right to have improvements effected on the land or to the buildings-

(i) the amount stipulated in the agreement as to the value of the improvements or the amount to be expended on the improvements: or

(ii) *if neither amount is stipulated, the amount representing in the opinion of the Commissioner the fair and reasonable value of the improvements:*

14. *Subject to the provisions of this Act the following classes of income shall be deemed to have been derived from Fiji-*

(a) *is not relevant to this appeal. Income of beneficiaries and estate of deceased persons.*

(b) *any income received by, or accrued or in favour of, any person in capacity as the person representative of the estate of a deceased person, and any amount so received or accrued which would have been income in the hands of he deceased person had it been received by or accrued to him or in his favour during his life time. Such income or amount shall, to the extent that the Commissioner is satisfied that it has been derived for the immediate or future benefit of any beneficiary under the estate of such deceased person, be deemed to be income received by or accrued to or in favour of such beneficiary, and satisfied, shall be deemed to be income of such estate.*

The subsection goes on to deal with expenditure but since it has not been suggested that any expenditure is relevant to this appeal, I propose to disregard the remainder of the subsection.

Mr Arjun for the appellants argued that the agreement of 1st March 1976 marks the initiation of the relation between lessor and lessee, that to say, between the estate and Sharan Bros. Ltd but that that is to say, between the estate and Sharan Bros, Ltd but that that agreement gave Sharan Bros who were at that time the lessees of the Phoenix Theatre, no right to use or occupy the land or buildings. I do not think that he is correct, for the whole basis of the agreement of 1st March 1976 is the two collateral agreements – on the one hand to build the mini-theatre, on the other to grant a new lease. It is true that clauses 11 of the agreement of 1st March provides that on the completion of the buildings and the execution of the new lease, the lessee is to be entitled to possession of the land and buildings. Nevertheless, the lessee, in consideration of building was given the promise of a new lease, and that, in equity, is sufficient to found a contract. Assuming, however, that Mr Arjun is right, I take the view that the agreement of 1st March 1976 must read together with the leasing agreement of 5th October 1977. Mr Banuve suggests that the original leasing agreements of November 1957 is to be read together with the agreements of 1st March 1976 to provide the initiation of the relationship between lessor and lessee, but those two are separated in time and intention whereas the agreements of

March 1976 and October 1977 are, in effect, part of same transaction. Mr Arjun then submits that the present facts fall rather within section 11(b) dealing with premiums in respect of leases, rather than within section 11(t). He refers to the South African case of **Commissioner of Inland Revenue v Butcher** (1944 S.A.T.C. 21, where the facts are not entirely dissimilar from the present and which clearly is decided under the South African Section corresponding with Section 11(b). I confess that I cannot see that that case helps Mr Arjuna a great deal when the tax charge is made under Section 11(t). I keep in mind another case cited to me by Mr Arjun, **Russell v Scott** (1948) 2 All ER 1, particularly the dictum of Lord Simonds at page 6, where he says that a subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him. The appellant's interrogatories were answered by the Commissioner specifying that the persons first mentioned in the section are the trustees, that is the appellants, and the term 'person' second mentioned referred to Sharan Bros. Ltd and the agreement is that of 1st March 1976. I would have thought that with these explanations Section 11(t) becomes tolerably clear. Mr Banuve has referred to another South African case, No. 767 in the Transvaal Income Tax Special Court in 1953. It is difficult to assess the value of this case because the Section of the Act upon which it was decided is not set out and without that, there are too many imponderables. Mr Arjun also submitted that the real purpose of Section 11(t) was to tax lessors who impose upon their lessees the cost of improvements rather than a proper rent. But here the lessor is getting not only a proper rent - \$9,600.00 in place of 2,800 which would be \$5,600.00 under the original leasing agreement – but also making the lessee pay the cost of improvements. Then Mr Arjun submits that the improvements have to be valued in the absence of their cost being stipulated in the agreement, and that the word "period" as an alternative to 'year' in the section means the period of the lease. With respect to Mr Arjun I find myself unable to accept either of those submissions. The section does not require the improvements to be valued. It merely requires the Commissioner to set upon them, as a matter of opinion, a fair and reasonable value. Here the Commissioner obtained the cost of the building works as paid by lessees. It is true that this figure was not given in evidence but tendered from the Bar. However as I understand the matter, Mr Arjun, while disputing the way by which the Commissioner arrived at his opinion, did not demur to the manner of its production to the Court. He did, however, complain that the Commissioner had given the appellants no opportunity to be heard, and submitted that here there was denial of natural justice. In my view that could have been cured by the appellants calling evidence. Again, Mr Arjun submitted that the criterion was not the value of the building, but the value of the right to build, but he produced no authority on the subject, nor did he call evidence. I cannot accept that submission in view of the words the amount stipulated in the agreement as the value of the improvements or the amount expended on the improvements. Those words seem to me to indicate clearly the criterion to be applied.

This subject of the exercise of a discretion or the opinion of the Commissioner has been discussed both in England and Australia. In England, in the House of Lords, Lord Thankerton in *Inland Revenue Commissioner v Ross and Coulter* (1948) 1 All ER 616, 629 said:-

“It is often a delicate question as to how far the courts are entitled to interfere with the exercise of a discretionary power, but I apprehend, generally speaking, the courts are not entitled to interfere unless (a) the exercise of the discretion has not complied with the conditions provided by the statute for the exercise of the discretionary power or (b) the power has not been exercised judicially.”

In Australia Latham, CJ in MacCormick v Federal Commissioner of Taxation (1945) 71 CLR 283, 299, said –

“This Court has, in a series of cases involving the interpretation of taxation statutes, held that certain matters are to be determined by the exercise of a discretion by the Commissioner of Taxation, or in accordance with an opinion formed by him, and upon an appeal the Court cannot substitute the opinion or discretion of the Court for that of the Commissioner. But in those cases the Court has also held that if he shows that the discretion was exercised or the opinion formed upon a wrong construction of the relevant statute or that the discretion exercised or the opinion formed was so irrational as to be not a discretion or opinion of the character contemplated by the statute, an assessment should be set aside and remitted to the Commissioner for reconsideration in accordance with law.”

I cannot see that the opinion formed here by the Commissioner was irrational, and in the absence of countervailing evidence, I think that I must accept it as a proper exercise of the discretion given to the Commissioner. Mr Banuve submitted that the Commissioner is not bound to furnish the appellants with the figures upon which he reached his conclusions, but I do not accept that. The appellants did get an answer to the question posed by their interrogatories, albeit that it was evasive. They could have pressed the matter further, but they did not or, as I have said, they could have called evidence. As to the word ‘period’ whatever else it may mean, I do not think it can possibly mean ‘the period of the lease’ I would think that the word ‘period’ must be equated with the word ‘year’ and is probably a period of taxation.

Mr Arjun submitted that Section 14(b) is inapplicable because the administration of the estate of Evelyn May Barker was completed, as is agreed by paragraph 13 of the statement of agreed facts. I am not happy about this allegation, because I do not think that paragraph 13 contains an explicit statement that administration has been completed. It is a statement introduced, as it were, by a side-wind. No attempt has been made since the death of Mrs Burrow, Lady Barker’s daughter and the life tenant, to amend the papers before the Commissioner. Mr Banuve submits that the assessment is presumed to have been made in 1976, and it is true that the 1977 assessment was withdrawn in 1983 and

the Court was told then that a fresh assessment would be issued. Yet the fresh assessment was allowed to be issued in the name of the Barker estate. The agreed statement of facts says that Mrs Burrows' death occurred long after administration had been completed and, the assessment should then have been issued in the names of the beneficiaries. But, here again, Mrs Burrows was still alive in 1976 and 1977, and her accountants had already had an assessment against her withdrawn, and that same assessment issued against the estate. I am not able to accept Mr Arjun's submission that administration of Lady Barker's estate had been completed, or that it is so agreed in the agreed facts. In any event, quite irrespective of whether or not administration was completed, it seems to me clear that this sum of \$156,212.00, if Section 11(t) is applicable to it, would have been income in the hands of Lady Barker had it accrued to her during her lifetime.

Then Mr Arjun says that the Income was not wholly derived in 1976 and alternatively that it was not derived by the appellants, but by the beneficiary, who so far as the land upon which the Phoenix Theatre buildings are constructed, is Frank Alport Ryan. But Frank Alport Ryan was not entitled to the income until after the death of his mother, who was still alive in 1976 and 1977, and according to the statements annexed to the returns in 1976 and 1977 received the income of Lady Barker's estate. Both these contentions appear to involve putting the Commissioner to the proof, contrary to Section 71(2) of the Act. So far as this Court can see, the only documents available are the agreement of 1st March 1976 and the building agreement dated 6th October 1976. The former contains a provision that the Mini-Theatre was to become the property of the lessors, that is the appellants, on completion, although, of course it might be argued that it was the property of the appellants from the moment the building works were begun, because the work was being done on the appellant's land, and by that very fact, became the property of the appellants. If the appellants assert that the income was not wholly derived in 1976, it behoves them to prove it.

The alternative submission is in much the same position, Here the appellants are saying that the income was not derived by them, but, presumably, by the beneficiary. As I have shown, in 1976 and 1977 Mrs Burrows was still alive, and in receipt of the income. The ultimate beneficiary's right did not accrue until after her death.

Mr Arjun dealt with his sixth and seventh grounds of appeal together. They both arise out of the allowance of his client's first appeal in 1986. The facts in connection with that first appeal are, briefly, that Mrs Burrow filed an income tax return for 1977 showing the income arising from her mother's estate and accruing to her as life tenant, but not including the cost of the building of the Phoenix Mini-Theatre. Tax was assessed upon that return and duly paid. In March 1982 it appears that the Commissioner became aware of the cost of the Phoenix mini-Theatre, and issued an amended assessment against Mrs Burrows for 1977, to which her accountants, who were also the estate accountants, objected, upon the ground, inter alia, that if the