IN THE COURT OF REVIEW

CIVIL JURISDICTION

ACTION NO. 10 OF 1971

BETWEEN : THE COMMISSIONER OF INLAND REVENUE

PLAINTIFF

AND : ALEC EDWARD ALLISON

DEFENDANT

Mr Sahay for the Appellant.
Mr Hinton for Respondent.

Hearing: 19th February 1974

JUDGMENT OF ROTHWELL, J

Appellant was assessed for tax on profits arising from sale of land and objected to such assessment on the ground that the profits were capital gains and not assessable. His objection was wholly disallowed and he then filed this appeal, stating as his grounds:-

(a) That the Appellant was not a dealer in land.

(b) The property was not acquired for the purpose of selling or disposing of to make a profit.

(c) **FURTHER AND ALTERNATIVELY** the profit or gain derived by the appellant was from a transaction which did not form part of a series of transaction which did not form part of a series of transactions and which was not in itself in the nature of trade or business and so it did not form part of the Appellant's "***total income***" by virtue of Section 15(a) of the Income Tax Ordinance."

The following statement of agreed facts was supplied for the information of the Court.

STATEMENT OF AGREED FACTS

1. The Appellant arrived in Fiji from overseas on the 3rd day of May 1964 and was a business Manager employed by Burns Philip (South Sea) Company.

2. During the year 1966 the Appellant left the employ of Burns Philip (South Sea) Company Limited and on 8th day of July 1966 became Company Manager in Fiji for Lewis Berger & Sons (NSW) Pty Ltd and continue in the employ of this Company until he left Fiji on 31st day of January 1970.

3. On the 19th day of April 1968 the Appellant for a consideration of $50 signed an option to purchase Certificate of Title 9595 known as "Qoya" (Exhibit 1).

4. On the 19th day of September, 1968 Wong Sien (the original vendor) made an application to the Subdivision of Land Board for the approval of a plan of subdivision of CT 9595 into 15 separate lots (Exhibit. 2).

5. On the 20th day of September 1968 plans for subdivision prepared by Harrison, Grierson & Partners were forwarded to Subdivision of Land Board for approval (Exhibits 3 and 4).

6. On the 31st day of October 1968 the Appellant with Messrs B P Smith, D Dignan and S Narain (as members of a Syndicate) entered into an agreement to purchase a parcel of land known as Qoya part and being lot 1 on Deposited Plan No. 2313 situate in the District of Suva containing an area of 5 acres and 1 perch being whole of the land comprised in CT 9595 together with the improvements erected thereon (Exhibit 5). The balance of the deposit of $9,800 was to be paid on the execution of the "Agreement.

7. On the 7th day of November 1968 the Appellant and his wife entered into a Sale and Purchase Agreement with Mr N H C Duggin to purchase a residence situated on CT 9242, Ragg Avenue, Lot 32 DP 2246 for a price of $12,500 and a deposit of $5,000 was paid, the balance to be paid as arranged, with interest at 7% per annum.

8. On the 28th day of November, 1968 the Subdivision of Land Board approved the plan for subdivision (Exhibit 6).

9. On the 3rd day of March 1969 contact documents and specifications for the proposed subdivision were submitted to Subdivision of Land Board (Exhibit 7).

10. On the 4th day of April 1969 amended specifications were submitted in response to changes requested by the Subdivision of Land Board.

11. The transfer was to be completed on 19th day of April 1969 when the balance of purchase price of $19,000 was to be paid. The transfer in favour of the Appellant

and the other three members of the Syndicate was registered in the Land Titles Office on the 22nd day of April 1969.

12. The property referred to in paragraph 7 was transferred in the joint names of the Appellant and his wife on the 6th day of May 1969. On the same date mortgage no. 108562 for $12,800 was registered in favour of the Bonk of New South Wales.

13. On the 9th day of May 1969 the amended engineering plans were approved by the subdivision of Land Board (Exhibit 8).

14. On the 9th day of May 1969 a letter from Harrison, Grierson & Partners to the District Engineer Southers advised that Earlows Limited were doing the construction work (Exhibit 9).

15. On the 6th February 1970 the sale for $25,000 of the property referred to in Paragraph 7 was registered in the Titles Office and up to the date of the sale the Appellant and his family occupied the house.

16. On the 23rd day of January 1970 the Appellant submitted a return of his income derived in Fiji in respect of the year ended 31st day of December 1970 (Exhibit 10).

17. On the 29th day of January 1970 the Appellant advised the Respondent that Mr D Dignan was empowered to pay any taxes due out of funds due from the sale of land at Lami (Exhibit 11).

18. Details of the sales of various lots in the subdivisions of CT 9595 DP 3446 are set out in the following table –

	Date of Sale and Purchase Agreement	Date of Transfer	Deposit	Balances paid on Transfer	Total sale price
		3.12.69		1150	1150
		3.12.69		2350	2350
		3.12.69		2300	2300
		4.12.69		6000	6000
		8.12.69	600	5400	6000
		10.12.69	500	4500	5000
		23.12.69	550	4950	5500
	15.10.69	29.12.69	550	4950	5500
	1.8.69	21.1.70	1200	4800	6000
		22.1.70	200	4400	1000
		23.1.70		2000	2500

	14.10.69	29.1.70	520	4880	5200
	15.8.69	9.3.70	850	7400	8250
	3.10.69	28.4.70	582.47	5,417.55	**6000**
					$63,350

1. Accounts dated the 30th day of June 1971 were submitted to the Respondent showing proceeds of sales, less expenses, and allocation of profit to each member of the Syndicate (Exhibit 12). The Appellant's share of the surplus was $6,068.58.

2. On the 29th day of September 1971 the assessment was issued to Mr D L Digaan as agent for the Appellant on total income of $7,507 which includes share of surplus from the sale of CT 9595 plus commission. (Exhibits 13 and 14).

3. On the 14th day of October 1971 the Appellant wrote a letter objecting against the inclusion of land sale profits in the assessment raised on his 1970 income (Exhibit 15).

4. By a letter dated the 24th day of November 1971 the Respondent wholly disallowed the objection and allowed the Appellant 26 days within which to exercise his right of appeal to the Court of Review. (Exhibit 16).

5. A notice of appeal to the Court of Review was filed on the 17th day of December 1971 on behalf of the Appellant by his Solicitors, Messrs Cromptons and a copy was served on the Respondent on the same day.

6. The exhibits provided herewith tot he Court and marked "Exhibit 1" to "Exhibit 16" inclusive and the statement referred to by the same letters are true copies of the documents, statements, accounts , and letters of which they

There are 16 documentary exhibits to the statement, but in all cases except one the paragraph in the statement gives a sufficient summary of the document. The exception is exhibit 15 which is the copy of the appellant's letter of objection containing statements of his intention, which he now realise on in support of this appeal.

Counsel for the Respondent contends that the inclusion of this letter as an exhibit to the statement goes only so far as to agree that it was written by the appellant to the Commissioner, and not to agree that its contents are true. Counsel for the appellant was not disposed to conclude this view, but clearly I must rule against him.

Appellant now resides in foreign parts and has tendered no sworn evidence of his won on this appeal, either oral or written. Evidence was given by two of his associates in the land transaction as to what their intention was and what they understood or were told as to the intention was and what they understood or were told as to the intention of the appellant. That evidence is clearly hearsay in respect of appellant's intention, so that

there is no sworn evidence before the Court as to the intention of the appellant, and this must be gathered from a study of proved facts.

But this does not entirely dispose of exhibit 15, which has come in the same way as an exhibit produced by a witness in the box. It is before the Court for what it is worth as unsworn testimony not subject to testing by cross-examination. It is acknowledged to be the appellant's letter and to the extent that it contains any statements against interest, it is admissible against him. Apart from that , it is evidence of his asserting its contents, but not of the truth of those contents.

W should now examine the letter in some detail to see what can be properly gleaned from it.

In paragraph 2 appellant says ***"in fact this was my only land transaction in Fiji".*** That is not true. Agreed from 7 and 15 establish purchase of a house, over a year of resale.

In paragraph 5 appellant said:

> ***"on the week before I would have lost my option, Mr S Narain was kind enough to agree to finance the remaining two shares. We <u>then</u> approached a local civil Engineering Company, Messrs Harrison, &Grierson and asked them to give us plans for dividing the land into five blocks (one each) but they recommended that the land be divided into fifteen separate blocks and we take three each so that we could enjoy the privilege of a large block, block only we could then sell the land without further reference to the Lands Board or sub-divisional work. This seemed a sensible plan and we proceeded to sub-divide into fifteen blocks."***

This is in total conflict with some important matters set out in the agreed facts. The six-month option would have expired on October 19, 1968. "The week before" would have been well within the month of October. Appellant says-

> ***"We <u>then</u> approached Harrison & Grierson and asked them to give us plans for …………… five blocks …….. but they recommended ………….. fifteen".***

Agreed facts establish that application for a 15-lot subdivision was made on September 19 and a plan dated September 20 which must have been commenced an appreciable time before that date was lodged under cover of a letter dated September 20 by Harrison & Grieson. That was a month or more before the option was to expire.

In paragraph 6 of his letter appellant says-

> ***"it was finally resolved that all land** **would be put for sale at agreed prices but that any one of us could then buy the buildings block he preferred. This seemed a reasonable way out of our dilemma and it was agreed that this would be done. However, by this time, it was approximately a year and a half since I first obtained my option and my need for a home of my own was becoming desperate as the lease of my rented house would shortly expire and would not be renewed. At this structure, I engaged to buy a house in Suva with funds from the sale of my house in Australia, but it was still my intention to build on the land at Qauya after completion".***

A year and a half since the option was granted would be a year after the purchase of the block for subdivision – say October 1969. Agreed fact 7 establishes that the house in Ragg Avenue had been brought nearly a year before that and occupied by the appellant and his family.

I must now give some attention to the evidence for what it is worth of the two collaborators with the appellant in the scheme for subdivision.

Mr Robin Retchford testified that he was approached by appellant to join in a scheme for purchase of a 5-acre block and subdivision into 5 homesites, of which the witness intended to take one. He said the scheme was later altered to one of 15 sectors, because the contours of the land made much of the land unsuitable and a division into 5 was not practicable. No withdrew before the purchase was carried out, but not before the change to 15 sections was decided on. He said he was for a period from July to September approximately.

Mr David Dignan said he was also associated with appellant in the venture and was in fact a party to the purchase, subdivision and sales of the sections. He also was anxious to get a block to build his own house, and he said –

> ***"The land was of unevent value. Part very steep. We intend to get a large block each and perhaps sell off some.***
>
> ***The surveyors said large blocks of equal value not practicable. It think they had already prepared a plan for 15 sections. We would take 1 or 2 sections cash and sell the rest ……………. There was a dispute about who got which. All wanted the top".***

In the event, hence of the numbers of the syndicate bought or took over anything. Aoll 15 sections were sold to outsiders.

I have commented above that what those witnesses sold as to the intentions of the group is clearly hearsay as far as the intention of the appellant was concerned. I think it is fair to say that it appears a division into 5 acre blocks was contemplated at an early stage, but was quickly abandoned with the surveyors came into the picture. When this was in uncertain, but at any rate it must have been substantially before September 19, when the 15 section subdivisional land had been completed.

Now as to the grounds for the appeal. It is clear that the appellant was not a dealer in land. He was a Business Manager for Burns Philip and then a Manager for Lewis Berger & Sons.

As to the second ground of appeal. The relevant part 15 of the section reads:-

> ***"15(a) All profits or gains derived from the sale or other disposal of any real or personal property or any interest therein ………. was acquired for the purpose of selling or otherwise disposing of the ownership of it ……………."***

Appellant's grounds paragraph (b) have the further words added "to make a profit'. Those words are not in the Ordinance.

Now, having again regard to the fact that there is no sworn evidence before the Court as to the purpose of the appellant, let us examine admitted or proved facts in an attempt to ascertain the appellant's purpose therefrom.

1. Appellant had an option on the land expiring on October 19, 1968.

2. Two other persons were associated with appellant to the extent of one-fifth share each with the expressed intention of obtaining in each case a house-site for himself.

3. At lease six weeks before the land was acquired, a plan for division into 5 blocks of 1 acre each had been abandoned, and a plan had been prepared for subdivision into 15 lots.

4. One S Narayan was to take the remaining two-fifths share and there was no suggestion that he would retain any land for himself.

5. Land not taken by to be sold off. Mr D Dignan said ***"We would take 1 or 2 sections each and sell the rest".***

6. All 15 sections were in fact sold to outsiders.

7. The land was bought on 31 October 1968.

8. Seven days later, appellant concluded an agreement to buy a house for his own occupation in Ragg Avenue, Tamavua.

There are two grounds upon which the assessment of tax can be supported unless the appellant is successful in resulting them:-

1. That the property was acquired for the purpose of selling or otherwise disposing of the ownership of it.

2. That the profits or gains were 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 both of these grounds are excluded if the transaction of purchase and sale does not form part of a series of transaction and is not in itself in the nature of trade or business.

1. The profits were derived from the carrying out of an undertaking or scheme for sub-division of the whole land into 15 lots and sale thereof devised for the purpose of making a profit and it is immaterial that some of the lots could have been purchased by his co-members of the syndicate.

2. The profit figure upon which the tax was assessed is admitted.

3. The transaction was clearly in the nature of trade skin to the business of dealing in land. This defeats the exclusion provide and it is not necessary to determine whether the transaction as single or as contended by Mr Hinton, multiple. An instance of a transaction not in the nature of trade or business was the purchase by the appellant of a dwelling as such for his own use and occupation.

The appellant has not even come close to discharging of ones of proof which rests on him, and the liability of the profits to tax is confirmed.

It appears however that the assessment was made to income derived in the year 1970, whereas the record of sales and receipts of purchase price show receipts in respect of 9 sections to have been paid in 1969.

The assessment is referred back to the Commissioner to be divided between these two years. Leave to party to apply for a further supplementary order if necessary.

Appellant ordered to pay respondent's costs of $75.00.

E F ROTWELL
JUDGE