Judgment Book

J U D G M E N T

IN THE REVENUE COURT

NO 4 OF 1986

BETWEEN SOLNAR LIMITED APPELLANT

A N D THE COMMISSIONER OF INCOME TAX RESPONDENT

CORAM: MARSH J.

FOR APPELLANT — ANGELLA C. HUDSON-PHILLIPS Q.C. and CHRISTINE ISAACS instructed by Myers Fletcher and Gordon Manton and Hart

FOR RESPONDENT — WILLIAM ALDER ESQ. and HEATHER DAWN HYLTON

The 1st, 2nd, 3rd, 4th and 5th February, 1988

NOTE OF ORAL JUDGMENT DELIVERED ON THE 5TH DAY OF FEBRUARY, 1988 AND TAKEN BY COUNSEL

This appeal, although lasting the better part of a week with arguments ranging over a wide area, nonetheless reduces itself to one basic point, namely, whether the proper taxpayer has been assessed.

I start by stating that the only evidence before me is that given by Messrs Ivor Alexander and Paul Doyle on behalf of the Appellant. There is also on the record an Affidavit from Mr. Moore on behalf of the Respondent; however, it has not been referred to and Mr. Moore was not called either by Counsel for the Respondent or for the Appellant. The Revenue's case, as I understand it, is predicated on principles of law rather than facts supported by evidence.

However, evidence on behalf of the Appellant is before me and I have to deal with it. What this reveals is that Mr. Doyle had an attractive business opportunity but no means of financing it. As a result, he approached a senior partner in the well-known legal firm of Myers

Fletcher and Gordon Manton and Hart (hereinafter referred to as the partnership) and suggested that they put up the finance and come in with him on the transaction - which was to purchase the loan portfolio of Laurentide Finance Company Limited which at the material time was a company dealing in consumer loans. The value of the portfolio was just under $2,000,000 but an offer from Mr. Doyle had been accepted by Laurentide to purchase the same for $425,000.- a considerable discount on the book value of the portfolio.

Mr. Doyle and the relevant members of the partnership discussed the matter and decided that it was a viable proposition with good possibilities for profit making. They therefore agreed to form a special partnership or consortium to carry out the transaction. However, after further discussion they decided that they would instead set up a separate corporation (in fact an Industrial and Provident Society) through which the business would be conducted. This apparently was the normal practice of the partnership in such matters. A snag arose however. On the one hand it turned out that Laurentide Limited (principally Mr. Beares the Chief Executive Officer thereof) were anxious to have the matter concluded with the greatest possible urgency as he was due to leave the island in a few days time; on the other, the proposed Industrial and Provident Society which Messrs Doyle et al had in contemplation could not be brought into existence in so short a time. A decision was therefore made to effect a slight modification to the plan. It was decided that they would use the Appellant, (an existing company owned by two members of the partnership) as an interim measure or intermediary, until the proposed Industrial and Provident Society could be brought into existence.

in respect of the portfolio. It hired no staff, lent no money and it received no money. The only evidence of its involvement in fact was that it had signed the purchase agreement as indicated earlier.

After 8th January, 1980 when Consumer Finance Limited was established they and not the Appellant proceeded to manage the portfolio. This management was of a limited nature in the sense that Messrs Doyle et al had taken a decision from the outset not to grant any further loans and confine their activities merely to collecting the existing loans on the portfolio. This was done and as the payments came in they were processed through the accounts of Consumer Finance Limited and disbursed by way of capital dividends to its shareholders who were of course Messrs Doyle et al. Since the portfolio had been purchased at a discount the result was that a considerable profit was distributed and it is that profit having been distributed as capital dividends that has given rise to this appeal.

The Respondent has not disputed the foregoing facts. Nevertheless, it has been contended on her behalf that those profits were not earned by Consumer Finance Limited or Paul Doyle et al, but by the Appellant and no one else. Everything done, so the argument ran, by the Industrial and Provident Society or Paul Doyle et al could only have been done as agents on behalf of the Appellant. It was contended that as a matter of law, the Appellant (having signed the agreement) was the sole and only owner of the portfolio and accordingly was properly assessed in respect of the dividends; which, it was further contended, were not of a capital nature but income and therefore liable to tax.

A second and somewhat separate point was also

raised, namely, that the transaction between the Appellant and Messrs Doyle et al, was a transaction between "connected persons" under Section 17 of the Act; and that there was therefore a duty on the Appellant to file a certificate thereof pursuant to the aforesaid Section 17; that it failed to do so, which failure gave rise to the imposition of Statutory penalties. Assessments were therefore raised on the Appellant for the Years of Assessment 1980 - 1981 together with penalty at 100%.

The Appellant objected to the assessment and in its Notice of Objection stated the following at paragraphs 4 & 5:-

> "The transactions on which the Commissioner has assessed Solnar Limited in respect of the aforesaid years of assessment were not in fact carried out by Solnar Limited and were, in fact, carried out by Consumer Finance Limited, which Society assumed all obligations of Solnar Limited in respect of the loan portfolio of Laurentide Finance Company Limited. Consumer Finance Limited and not Solnar Limited conducted the business and carried out the transactions which have given rise to the said assessments."
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> "In any event, the transactions which have given rise to the aforesiad assessments did not result in chargeable profits of $1,247,904 and $257,719 as alleged, the profits made therefore from being in the nature of capital gains."

I mention these paragraphs because I might have to turn to them later on the question of penalties. Nevertheless, the Respondent rejected those arguments, confirmed the assessments and penalties and it is against these decisions that the Appellant now appeals to this Court.

Before stating my conclusions perhaps I should say a word about the evidence, which is, that I accept Messrs Doyle and Alexander as witnesses of truth. They

were not seriously shaken under cross-examination and I therefore find that the transaction was approached in precisely the manner stated by them and that the role of the Appellant therein was extremely marginal.

CONCLUSION

In such a situation, the evidence would seem to suggest that the Appellant at best had acted merely as a Trustee, the purchase money having been provided either by Messrs Doyle et al through Consumer Finance Limited or by Consumer Finance Limited simpliciter. As I understand it, the fact is that the loan from Myers Fletcher and Gordon Manton and Hart was repaid NOT by the Appellant, but by Consumer Finance Limited. Mr. Alder however insisted that the only way that the Appellant could rid itself of ownership of the portfolio was by the legal device of novation and since this was never done, then everything done by Messrs Doyle and/or Consumer Finance Limited would have been as nominees or agents of the Appellant.

There is a passage from SNELL'S cited by Mrs. Hudson-Phillips which is in my judgment very much to the point on the question of the creation of resulting trusts. The learned author of SNELL (17th edition at p. 175) states first of all the principle and its application as follows:-

> "The doctrine applies to pure personalty as well as land. It also applies where two or more persons advanced purchase money jointly and the purchase is taken in the name of one only, in which case there is a resulting trust in favour of the other or others as to so much of the money as he or they advanced. Further, the contribution may be indirect, as where one party pays expenses which the other would otherwise have to pay."

There is also a passage in Dyer v. Dyer (1775 - 1802)

ALL ER per Eyre C.B. at page 205 - 206

> "The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold whether taken in the names of the purchaser and others jointly, or in the name of others without that of the purchaser, whether in one name or several, and whether jointly or successively, results to the man who advances the purchase money. This is a general proposition supported by all the cases and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feeofment is made without consideration, the use results to the feeoffer."

The only possible doubt which might have arisen in the instant case was whether the principle applied equally to transactions other than those involving real estate. The passage cited earlier would seem to remove any such doubt.

If, therefore, I am right in suggesting that the true owner of the portfolio is not the Appellant but Messrs Doyle et al or Consumer Finance Limited (it does not seem to matter which one) as beneficiaries under a resulting trust, then that would be sufficient to dispose of this appeal since the Appellant Solnar Limited has been assessed in its own right and not as a Trustee.

Incidentally, there was a further passage in SNELL at page 175 sub-paragraph (b) to which it may be useful to refer:-

> "If the advance of the purchase money by the real purchaser does not appear on the face of the deed, and even if it is stated to have been made by the nominal purchaser, parol evidence is admissible to prove by whom it was actually made, for such evidence in effect shows that the nominal purchaser was really the agent of the true purchaser, a purpose for which parol evidence is always admissible."

Having looked at the authorities cited, against the

background of the uncontradicted evidence in the case, I have taken the view that the money for the purchase of the portfolio having been provided by persons other than the Appellant, a resulting trust was created in favour of those persons and it is they, and not the Appellant, who are entitled to the profits derived from the transaction.

The Appellant, having signed the agreement, did nothing else. The Promissory Notes were endorsed to Consumer Finance Limited not the Appellant. The staff were employed by them not the Appellant. The only input by the Appellant in this entire affair is the fact that it signed the purchase agreement. Mr. Alder for the Respondent contends that that is a sufficient thread with which to link the Appellant with the assessments. In my judgment I think that such a thread is too slim to hold such a weight.

As I said earlier, the evidence supports the view that the Appellant was a mere Trustee for the true owners and unless it had been assessed in its capacity as Trustee in accordance with such a situation, the assessment and resulting penalties may have to go.

The Appellant has not been so assessed. I therefore hold that the wrong Appellant is before the Court.

That is sufficient to dispose of the present appeal. Nevertheless, I have been pressed by Counsel to express a view on the much argued question as to whether the receipts were of an income or capital nature. However, I refuse (politely I hope) to come down on one side or the other of that issue. Partly because I have not had enough evidence before me of the details of the transactions involved and; partly because anything said by me on that subject here would

be obiter.

There is also the question of a "connected person" transaction - to which the foregoing may equally apply. However, for what it is worth, I understand the following to be the position:-

The transaction was between Laurentide and either

(1) The Appellant, or

(2) Doyle et al, or

(3) Consumer Finance Limited

None of these three persons is on the evidence connected to Laurentide. Furthermore, there is no element of tax avoidance in terms of Section 17 aforesaid since the parties were at arms length and the price was market price or possible above such price since National Commercial Bank had made an offer of $300,000 to Laurentide for the portfolio.

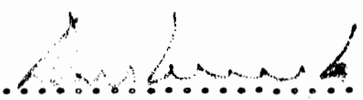
I have also been asked to say a word about the provisions relating to penalties. I have elected to do so in the remote possibility that anything said by me may be of assistance to the parties.

In my opinion, the right conferred on the Commissioner under Section 72(6)(a) of the Income Tax Act to impose penalties is not at large and does not depend merely on the omission by the taxpayer to include an item of income in his return. As I understand the sub-section, the imposition of a penalty under this provision is not automatic but arises only in cases where the Commissioner is satisfied that the omission results from any of the fraudulent acts or omissions set out in the sub-section. In other words there is an element of "MENS REA" involved; and it would be wrong for the Commissioner to impose penalties merely on the 'actus reus' of the taxpayer in omitting a taxable item of income from his return; without

first enquiring whether such an omission was due to any fraud, covin, art or contrivance etc. as set out in the sub-section. All of which suggests that some enquiry must be held by the Commissioner in which the taxpayer is offered an opportunity to satisfy her that the omission did not arise from any of the fraudulent acts adumbrated in the Statute. There are other provisions in the Act under which such an enquiry is not apparently required and in which the mere act of omission is sufficient to invoke the penalty. It would therefore be prudent if the Commissioner when imposing penalties would bear this distinction in mind.

For the reasons stated the Appeal is allowed with costs to the Appellant to be agreed or taxed.

Approved,



The Hon. Mr. Justice W.D. Marsh
Judge of the Supreme Court and
of the Revenue Court

In pursuance of that objective the following was done:-

1. Arrangements were made for the partnership to lend the money to Messrs Doyle et al to purchase the portfolio;
2. Specifically, it was provided through another company owned by the partnership as a loan to Messrs Doyle et al.
3. As the Industrial and Provident Society was not then in existence the purchase price of $425,000 was paid to Laurentide and the Appellant company signed the agreement as the purported purchaser.

I pause here to point out that although the Appellant company signed the agreement it did not provide the purchase price from its own resources. In fact, there is no evidence that it had any funds to carry out such a transaction.

Mr. Alexander testified further that the intention to form an Industrial and Provident Society and the necessity to do something in the interim through the Appellant was made clear to Mr. Beares who agreed thereto and signed the agreement on behalf of the vendors - Laurentide. Mr. Alexander said also that he used an existing agreement which had been prepared by Laurentide for another purchaser and amended it by adding the words "or its nominee" (See Exhibit 1). The money was then paid and the agreement signed but the Industrial and Provident Society was not incorporated until 8th January, 1980 approximately two weeks later. He further stated that between 21st December, 1979 and 8th January, 1980 when the Industrial and Provident Society - "Consumer Finance Limited" came into existence, the Appellant did absolutely nothing