

34/83

ON APPEAL
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN :

PAUL DOUGLAS LOWE, HERBERT MONTY
LOWE and KEITH LOWE Appellants

- and -

THE COMMISSIONER OF INLAND
REVENUE Respondent

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CASE FOR THE RESPONDENT

RECORD

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1. In these proceedings the above-named PAUL DOUGLAS LOWE, HERBERT MONTY LOWE and KEITH LOWE ("the Appellants") appeal against the decision of the Court of Appeal of New Zealand (Cooke J. presiding, Richardson J. and McMullin J.) given on 13 March 1981. The Court of Appeal thereby dismissed an appeal by the Appellants from the decision of the Supreme Court of New Zealand (Roper J.) given on 8 June 1979 dismissing the appeal of the Appellants made by way of Case Stated from the decision of the Chief Deputy Commissioner of Inland Revenue disallowing the objection of the Appellants to assessment to income tax.

pp.112-154

p.81

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2. There is now only one question in issue in this appeal: whether profits of the Appellants being assessable income realised in New Zealand of their partnership computed in the currency of New Zealand should in law be modified so that calculation of the profit takes account of inflation in property values generally over the relevant period, and of inflation so far as it reduced the value of money over the relevant period.

3. The facts are set out in the Amended

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pp.2-4
pp.31-33

Case Stated of the Chief Deputy Commissioner of Inland Revenue (dated 10 May 1978), paragraphs 1 to 9 inclusive, and in an Agreed Statement of Facts and Issues, undated but presented to the Supreme Court, paragraphs 1 to 4 inclusive. Very briefly, the Appellants carried on in partnership a fruiterers business until March 1963, when the business was sold to a company, although the partnership retained the business premises, letting to the said company in return for rent. During the year ending 31 May 1962 the partnership purchased a block of land of some ten acres, which it subsequently sub-divided into 36 housing sections, which were offered for sale, the first sale being effected in January 1964. The block was not acquired with intention of resale. The partners carried out work on the block, e.g. construction of roads and footpaths and provision of services. On or after the 10 August 1973 from which date section 88AA (1)(d) of the Land and Income Tax Act 1954 had effect the partnership derived profits from realising sections of the said block. The Commissioner made assessments on the partners to income tax for the year ending 31 March 1974, including inassessable income sums in respect of the profits on realisation of sections of the land, considered to be chargeable under the said section 88AA (1)(d). The relevant figures are contained in the Amended Stated Case, paragraphs 6 and 7.

p.3-4

pp.31-33

p.36
p.56
p.78

4. In the above-mentioned Agreed Statement of Facts and Issues five questions are set out, and in his judgment Roper J. dealt with each question in turn, answering each in favour of the Respondent. Only the fifth or final question (relating to inflation) is still in issue. Roper J. took account of affidavit evidence sworn by Mr. D.T.Brash an economist, Mr. W.Wilson, a chartered accountant and Mr.G.J.Schmitt, a Professor of Management Studies. Roper J. approved and followed (rightly, it is submitted) the decision in the Chancery Division of the High Court in England of Buckley J. (as he then was) in Secretan v. Hart 1969 1 WLR 1599, refusing to make an adjustment to a capital gain to take account of an alteration in the value of money; and stated at the end of his judgment :-

pp.108-109

"....the profit from the sale of land by a person not in the business of dealing in land has always been computed on the basis of the purchase price, and it would be a bold step to depart from that accepted

as well established basis. Like Buckley J., whose reasoning I adopt, I feel sympathy with Objectors (the Appellants) but feel unable to come to the conclusion that their view is the correct one."

10 When the matter came before the Court of Appeal, there was a certain formal change in the questions, so that the inflation point was the subject matter of the fourth and fifth contentions made on behalf of the Appellants. The Court of Appeal unanimously decided against the Appellants on all the questions. The following extracts from the judgments summarise the reasoning of the learned Judges.

Cooke J. states at page 337, line 48 :- p.129

20 "There can be no doubt that traditionally inflation has been disregarded in calculating profits in New Zealand for the purposes of the income tax legislation, not only by the Commissioner but also by the Taxation Review Authority and the Courts. Walker's (1963 NZLR 339) is but one of countless cases in which it has been assumed that historical cost (or "nominalism") is the only appropriate approach. It is impossible to suppose that in the 1973 Amendment Act Parliament intended to introduce a radical departure from this approach without signifying in any way that the point was even in mind. The same applies to the Property Speculation Tax Act of the same year."

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Richardson J. states at page 350 line 53:- p.151

40 "Against that background I am satisfied that it cannot reasonably be argued that in enacting the new section 88AA in 1973 the legislature intended that the profits brought to charge for income tax purposes should be calculated on other than the historical cost basis that had for so long been adopted in the calculation of profits and gains of business and other income earning activities under the income tax legislation."

McMullin J. states at page 360 line 31 :- p.168

"If account is to be taken of inflation, and the apparent gains and profits reduced

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in the present case by some percentage for inflationary increases, then the principle must have a wider application for many other forms of income. If accepted, it could wreck the present tax structure and greatly alter what has been treated as assessable income under successive statutes. I know of no legal principle which allows a debtor to calculate an internal debt by reference to changes in the value of money and there is no indication in the tax legislation that any different approach is to be taken there." 10

5. Since in the present proceedings the Appellants have advised the Respondent that they do not seek to challenge the findings of the Supreme Court and the Court of Appeal on anything but the inflation question, their appeal is now limited to that question. Therefore, no submission is now made on behalf of the Respondent on any save the inflation question. 20

6. On the inflation question, it is submitted that, however much hardship may be caused by taking no account of inflation in fiscal matters, the question is one for the legislature, and not for judicial law making. The existing law is clear both in principle and on the authorities, that in New Zealand the currency of New Zealand is the correct yardstick by which profits are measured, and that yardstick must be applied consistently throughout, particularly in a case where persons resident in New Zealand realise profits or gains in New Zealand from the sale of New Zealand land. The reasoning of the Court of Appeal is correct. 30

pp. 128-130
150-153;
166-168

7. The Respondent humbly submits that the decision of the Court of Appeal should be confirmed, and the appeal of the Appellant should be dismissed with costs for the following (among other) :- 40

R E A S O N S

- (1) THAT the scheme of the Land and Income Tax Act 1954 in general and section 88AA in particular is incompatible with the contention by the Appellant that an adjustment for inflation should be made in calculating profits or gains for income tax purposes.

- (2) THAT the currency of New Zealand is generally the proper yardstick for the measurement of profits or gains for income tax purposes. There is no exception that governs the present case.
- (3) THAT any change in the law is in the province of the legislature and not that of the Courts.

D.C. POTTER

P.J.H. JENKIN

No.16 of 1982

IN THE PRIVY COUNCIL

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- and -

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CASE FOR THE RESPONDENT

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