

Gerald Eckel

Appellant

v.

The Board of Inland Revenue

Respondent

FROM

THE COURT OF APPEAL OF
TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
25TH JANUARY 1989

Present at the hearing:-

LORD GRIFFITHS
LORD ACKNER
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY
SIR ROBERT MEGARRY

[Delivered by Lord Jauncey of Tullichettle]

This is an appeal by a taxpayer from a judgment dated 17th December 1985 of the Court of Appeal of Trinidad and Tobago allowing an appeal by the Board of Inland Revenue against a judgment of the Tax Appeal Board of 31st July 1984. The appeal is brought with the leave of the Court of Appeal.

The facts giving rise to this appeal are not in dispute.

- (1) On 26th September 1969 the taxpayer's wife ("the wife") entered into an agreement with Messrs. Bryden and W.F. Bryden Ltd. ("Brydens") for the purchase of six parcels of land extending *in toto* to 265,435 square feet at a price of \$160,000.
- (2) On 26th September 1970 the wife entered into an agreement with Gerald Eckel Ltd. ("the company") for the sale of the six parcels of land at a price of \$310,000. At all times relevant to this appeal the taxpayer and the wife were the only directors of the company. The agreement with the company was in the following terms:-

" An Agreement made this twenty-sixth day of September in the year of Our Lord One Thousand Nine Hundred and Seventy between ROSEMARIE LAWFORD ECKEL of No. 22 Queen's Park West in the City of Port of Spain in the Island of Trinidad housewife, (hereinafter called "the Vendor") of the One Part and GERALD ECKEL LIMITED a Company whose registered office is at 11 Rookery Nook, Maraval, in the said Island of Trinidad (hereinafter called "the Purchaser") of the Other Part.

W H E R E B Y it is agreed as follows:

1. The Vendor will sell, the Purchaser will buy the unencumbered fee simple in possession of the lands described in the Schedule hereto (hereinafter called "the Said Lands").
2. The price shall be Three Hundred and Ten Thousand Dollars of which the sum of Ten Thousand Dollars shall be paid so soon the Purchaser shall have accepted the title to the Said Lands and upon payment of the said sum of Ten Thousand Dollars the Purchaser shall be let into possession of the Said Lands and thereafter shall be responsible for and shall discharge all outgoings of whatever kind in respect of the Said Lands whether payable by the owner or by the occupier or otherwise.
3. The balance of the purchase price shall be payable on or before the twenty-sixth day of September 1972 at which time the Vendor will execute the proper assurance to the Purchaser of the property sold such assurance to be prepared and perfected by and at the expense of the Purchaser but the Vendor will at the Purchaser's request from time to time convey to the Purchaser or to whom it may direct portions of the Said Lands upon prior payment to the Vendor as part of the said purchase price of a sum calculated at Eighty Cents per square foot of each part to be conveyed.
4. Any unpaid part of the purchase price shall carry interest at the current bank rate for overdrafts from time to time from the date possession of the Said Lands was given to the Purchaser.
5. Should the Purchaser fail to observe or comply with any of the foregoing stipulations on its part the Vendor may rescind the sale and resell the Said Lands either by public auction

or by private contract subject to such stipulations as she may think fit and any deficiency in price which may result on and all expenses attending a resale or an attempted resale shall be made good by the Purchaser and shall be recoverable by the Vendor as liquidated damages. Any increase of price on a resale shall belong to the Vendor."

- (3) During 1971 the wife acquired title to the six parcels of land.
- (4) Notwithstanding the terms of clause 3 of the agreement, the balance of the purchase price was not paid on or before 26th September 1972 by the company to the wife.
- (5) During the fiscal years 1973 and 1974 the wife, at the request of the company, conveyed to third parties pieces of the land extending respectively to 60,565 and 32,470 square feet. No reference was made by the taxpayer to these transactions in his returns for the fiscal years 1973 and 1974.
- (6) Following upon an audit examination of the affairs of the taxpayer in 1978 the Revenue re-assessed his taxable income in the years 1973 and 1974 to reflect profit accruing to the wife from the conveyances of the two pieces of land. The assessments were estimated and the two figures were arrived at by applying to each portion the rate per square foot calculated by dividing the sum of \$310,000 by the total area of 265,435 square feet. The taxpayer did not challenge this method of computation.

In Trinidad and Tobago, as in the United Kingdom, the income of a married woman living with her husband is aggregated with his income for tax purposes. Similarly, the Revenue cannot normally reopen an assessment more than six years prior to the notice seeking so to do. The reassessments sought to charge the sums therein to tax under section 5(1)(c) of the Income Tax Ordinance (as amended) 1938 which is in the following, *inter alia*, terms:-

"Income tax shall, subject to the provisions of this Ordinance, be payable at the rate or rates specified hereafter for each year of income upon the income of any person accruing in or derived from Trinidad and Tobago or elsewhere, and whether received in Trinidad and Tobago or not in respect of -

(c) gains or profits from any other trade or business."

Trade is defined by section 2 of the Ordinance as including "a business, and every trade, manufacture,

adventure or concern in the nature of a trade or business". The other relevant provisions of the Ordinance are subsection (2) of section 43E, which places upon the appellant the onus of proving that an assessment is excessive or wrong, and subsection (7) of that section which makes the decision of the Appeal Board final on a question of fact.

The taxpayer objected to both assessments and contended that the wife was not in the business of trading in land and had not traded in land during the years 1973 and 1974. After a careful analysis of the relevant authorities the Tax Appeal Board concluded that the evidence showed that the wife had purchased the land with a view to trade. The Board then went on to conclude that although she had traded in land in 1970 she had not done so in 1973 and 1974. The Board's conclusion was in the following terms:-

" Mrs. Robinson-Walters had contended and we agree with this contention that it was not necessary for Mrs. Eckel to have developed land in order to trade. Accordingly, it could have been found that in 1970 in regard to the agreement to sell for \$310,000, she had traded.

The fact that we so find must now be considered in relation to the assessment for 1973 and 1974.

The Appellant testified that the lands had been developed by the Company and that the profits on sales had been assessed to tax as profits of the Company. This evidence was not controverted.

There is no evidence that Mrs. Eckel did sell lands in 1973 and 1974. Any lands conveyed by her in 1973 or 1974 had been so done in accordance with clause 3 of the agreement which required her to convey to the Company, or such person as it might have directed, portions of the land, upon prior payment to her as part of the purchase price, a sum calculated at the rate of eighty cents per square foot.

It is apparent that the Respondent had treated amounts received by Mrs. Eckel from the Company in settlement of the purchase price under the agreement as being proceeds from the sale of land by her. The factual position, however, was that she was being paid off by the Company as and when proceeds from sales of land were received.

We find on the evidence that Mrs. Eckel did not trade in land in the years of income 1973 and 1974."

The Revenue appealed by way of case stated to the Court of Appeal and in the case the Board expressed themselves as follows:-

" From the totality of the evidence, we were satisfied that the land had been purchased by Mrs. Eckel not for the erection of a residence, but with a view to trade, and that its realisation in 1970 could have been adjudged a trading transaction. However, the development and subsequent sales in 1973 and 1974 had been carried on not by Mrs. Eckel, but by the Company at a profit, on which the Company had paid taxes. We accordingly, found that Mrs. Eckel had not traded in land in the years 1973 and 1974."

The Court of Appeal held that the Tax Appeal Board had misdirected itself in finding that there were no sales by the wife in 1973 and 1974 and consequently that she did not trade in land in those years. The court concluded that the two sums estimated to have been received by her in 1973 and 1974 were income derived from trading in land in those years and accordingly confirmed and restored the reassessments. The taxpayer now appeals to this Board. He no longer contends that the wife was not in the business of trading in land, and accordingly the only issue is whether she was trading in 1973 and 1974.

The taxpayer argued that the wife's trading venture was completed on 26th September 1970 when she concluded the agreement to sell the land to the company since she had then done all that was necessary to make her profit. Her right to payment under the agreement was a trade debt which fell to be charged to tax in the year in which it accrued. Anything which she required to do thereafter such as executing conveyances in favour of third parties was a matter of formality and did not amount to trading. The Revenue on the other hand maintained that as at the date of the agreement to sell much remained to be done before the wife could enjoy the profits of her venture and that she continued to trade until she had performed all the obligations incumbent upon her thereunder. No profit in relation to any portion of land could be earned until the land had been conveyed.

The wife purchased the land with a view to resale and profit. There is no suggestion that she was otherwise engaged in trade on her own account and accordingly she must be treated as having embarked upon a single trading venture. However the fact that it was a single trading venture does not necessarily mean that it was completed within a short space of time. Indeed the contract envisaged that it might last for at least two years, and in the event it continued longer, it remained an executory contract, with continuing rights and duties. On 26th September 1970 the wife had an

equitable, but not a legal, right to the land. In order that she could fulfill her obligations under the agreement with the company, she had first to obtain from Brydens a legal title to the land. Thereafter, since clause 3 of the agreement contemplated that prior to 26th September 1972 portions of the land would be conveyed to the company or its nominees, she had to execute the appropriate conveyances of such portions as well as a conveyance of the residue on the above date. She had a lien over so much of the land as had not been conveyed in respect of the unpaid purchase price thereof, and she was entitled to interest on any unpaid purchase money, as well as having the right to rescind the contract and resell the land on default by the company. In the event no part of the purchase price was paid to the wife on or before 26th September 1972. Furthermore although clause 3 provided that an advance on the purchase price of eighty cents per square foot would be payable by the company in respect of portions of land conveyed prior to 26th September 1972 the estimated assessments in respect of the portions conveyed in 1973 and 1974 were based on a substantially higher rate per square foot. Since these figures were not challenged by the taxpayer it may be inferred that such a rate or one even higher was in fact paid. Thus not only must the wife have agreed to waive her right to payment of the purchase price on 26th September 1972 but she and the company must have negotiated a new rate of payment for the portions of land conveyed in 1973 and 1974.

In the light of the foregoing circumstances their Lordships turn to consider the law which is relevant to the issue of whether the wife's profits were earned on 26th September 1970 or whether they were only earned as and when portions of land were thereafter conveyed. As a general rule a business is taxed on the basis of its receipts from which its profits may be calculated. To this general rule there is an exception in the case of trade debts which fall to be brought into account. What constitutes a trade debt has been considered in a number of cases. In *J.P. Hall & Co. Ltd. v. The Commissioners of Inland Revenue* (1921) 12 Tax Cases 382, Atkin L.J. at p. 390 said:-

".... It seems to me that no person here trying to ascertain these profits on the principles of ordinary commercial trading would dream of including profits in his yearly balance-sheet, which would not be made until the goods had actually been delivered in respect of some contract which was to run over a period of at least two years, and possibly more. To my mind the procedure of the Company was the ordinary commercial procedure in taking the profits that they made as and when the goods were delivered. Anything else, it appears to me, would

be quite contrary to commercial procedure, and would not be profits in the natural and proper sense"

In *Johnson (H.M. Inspector of Taxes) v. W.S. Try Ltd.* (1946) 27 T.C. 167, Lord Greene M.R. referred at p. 181 to the bringing of trade debts into a profit calculation as a departure from "the fundamental conception of Income Tax legislation - that you ascertain your profits in reference to your receipts". At p.185 he referred to the *J.P. Hall* case and said :-

".... That merely enunciates the proposition that money must not be taken as being, so to speak, in hand until all the conditions necessary to earn it have been fulfilled. Delivery was a necessary condition for the appellant company to be entitled to be paid. It was not until the gear was delivered by the sub-contractors that the right to payment became fixed, and, therefore, a matter which could be treated in the ordinary way as a trade book debt"

Finally in *Commissioners of Inland Revenue v. Gardner Mountain and D'Ambrumenil Ltd.* (1947) 29 T.C. 69 Viscount Simon, at p. 93 said:-

".... In calculating the taxable profit of a business on Income Tax principles services completely rendered or goods supplied, which are not to be paid for till a subsequent year, cannot, generally speaking, be dealt with by treating the taxpayer's outlay as pure loss in the year in which it was incurred and bringing in the remuneration as pure profit in the subsequent year in which it is paid, or is due to be paid. In making an assessment to Income Tax under Schedule D the net result of the transaction, setting expenses on the one side and a figure for remuneration on the other side, ought to appear (as it would appear in a proper system of accountancy) in the same year's profit and loss account, and that year will be the year when the service was rendered or the goods delivered"

It is clear from these authorities that money will only be treated as being notionally in hand and hence as a trade debt when the trader has done all that is required of him to earn it. Delivery of goods or completion of services to be rendered are examples of events which may give rise to taxation in a fiscal year in which they occur, albeit payment is not made until a subsequent year. In the present case their Lordships have no doubt that a stage comparable neither to delivery of goods nor to completion of services had been reached on 26th September 1970. The wife then had no legal title to the land and could not therefore convey any part thereof. After that date she was not

entitled to receive any payment from the company until she had satisfied it as to her title and had executed one or more conveyances. Furthermore, her right to receive payment of any part of the purchase price prior to 26th September 1972 was contingent upon the company requesting her to execute a prior conveyance. In all these circumstances their Lordships are satisfied that the wife had not done all that was required of her to reap the profit of her venture when she executed the agreement of 26th September 1970. Indeed, it appears that a continuing contractual relationship subsisted between the wife and the company throughout the relevant period during which time both parties had to perform certain obligations. The fact that the method of performance provided for in clause 3 was departed from by mutual consent reinforces this view. It follows that when the wife conveyed portions of land in 1973 and 1974 she was still trading and accordingly her entitlement to receive the sums due in respect of the conveyances fell to be taken into account in computing her trading profits for those years. The figures in the two reassessments were not challenged and accordingly the reassessments were correctly made.

In reaching the foregoing conclusion their Lordships have had regard to the consequences which would, in the normal course of events, have followed from sustaining the taxpayer's argument. The taxpayer would, in respect of the fiscal year 1970, have been required to pay tax in respect of the wife's trading venture on a sum of \$150,000 although in that year the venture would have produced a maximum return of \$10,000. This would have involved considerable hardship to a man who, to judge by his declared income for the years 1973 and 1974, was of modest means. Furthermore, both parties were agreed that if the wife's trading ceased on 26th September 1970 there was no mechanism for reopening an assessment in that year unless she subsequently embarked on a further trade of a similar nature. Thus if it should ultimately transpire that the wife's expenses in obtaining a good title from Brydens exceeded the estimate thereof made in 1970, or if she was ultimately forced by supervening circumstances to accept a smaller overall purchase price from the company there would be no means whereby the taxpayer could recover the tax which would have been overpaid. Such unjust consequences would not flow from assessing the taxpayer in respect of conveyances executed by the wife in the year of assessment.

Although their Lordships have reached a conclusion as to how the taxpayer should have been assessed for tax in respect of the wife's conveyances in 1973 and 1974, it remains to consider whether effect can be given to these views having regard to the taxpayer's argument that whether or not the wife was trading in the relevant years was a question of fact upon which the

finding of the Tax Appeal Board was final. Kelsick C.J., in delivering the judgment of the Court of Appeal, referred to the well known passage from the speech of Lord Radcliffe at p. 36 in *Edwards (H.M. Inspector of Taxes) v. Bairstow & Another* [1956] A.C. 14:-

" When the case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur."

Kelsick C.J. also referred to the speech of Lord Reid in *Griffiths v. J.P. Harrison (Watford) Ltd.* [1963] A.C. 1. at p.16:-

" But if the decision of any tribunal on a question of fact is unreasonable, looking to the facts on which it is based, the court can and must intervene. The question in this case is, therefore, not whether the commissioners were wrong, but whether their decision was unreasonable."

He also cited the words of Lord Denning at p. 19:-

" Now the powers of the High Court on an appeal are very limited. The judge cannot reverse the commissioners on their findings of fact. He can only reverse their decision if it is 'erroneous in point of law'. Now here the primary facts were all found by the commissioners. They were stated in the case. They cannot be disputed. What is disputed is their conclusion from them. And it is

now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that it can be dismissed as one which could not reasonably be entertained by them. It is not sufficient that the judge would himself have come to a different conclusion".

Kelsick C.J. concluded:-

"The Tax Court misdirected itself (i) in finding that there were no sales by the wife in 1973 and 1974 and consequently that she did not trade in land in those years and (ii) in holding that there was such trading by her in 1970 at a time when the title to the property and no money had been received by the wife from the Company. The trading in my judgment took place when under clause 3 of the Contract the money came in to her, on her executing the conveyances of the lots to the purchasers from the Company in 1973 and 1974. The lot could not be conveyed until the money was paid and the money became payable only after such conveyance."

Counsel for the Revenue emphasised a passage in the Case Stated to the Court of Appeal which has already been cited:-

"From the totality of the evidence, we were satisfied that the land had been purchased by Mrs. Eckel not for the erection of a residence, but with a view to trade, and that its realisation in 1970 could have been adjudged a trading transaction. However, the development and subsequent sales in 1973 and 1974 had been carried on not by Mrs. Eckel, but by the Company at a profit, on which the Company had paid taxes. We accordingly, found that Mrs. Eckel had not traded in land in the years 1973 and 1974."

He argued that the use of the word "accordingly" demonstrated the fallacy of the Tax Appeal Board's reasoning. It was, he said, entirely irrelevant that at the material times the company was developing and making a profit out of the land in question. The de quo was whether the wife was making a profit and there was nothing to suggest that both could not be making a profit at the same time in different ways. Their Lordships consider that this submission is well founded and would only add that the conclusion of the Tax Appeal Board that sales in 1973 and 1974 "had been carried on not by Mrs. Eckel, but by the company at a profit" overlooks the fact that without the intervention of the wife the company could have conveyed no part of the land to anyone. Their Lordships therefore

consider that the Court of Appeal correctly concluded that the Tax Appeal Board misdirected itself in finding that the wife did not trade in land in 1973 and 1974.

However their Lordships consider that the further conclusion of the Court of Appeal that there was no trading by the wife in 1970 was erroneous. The wife was trading in 1970 when she executed the agreement with the company and she remained in continuous contractual relations with the company thereafter. Thus although the conveyance executed by her in 1973 threw up a profit for the first time it did not constitute the commencement of trading.

At the conclusion of the judgment the Court of Appeal held "that the portion of the sale price forming part of the purchase price of the lots was property chargeable to tax in the year of receipt by the taxpayer in accordance with the accounting practice on a receipt basis". In their Lordships' view it is in this case the date of the conveyance when the right of the wife to receive payment arose that is important rather than the date when that payment was received. It may very well be that both dates occurred in the same fiscal year but the authorities to which reference has already been made show that it is the emergence of the right to receive payment after the trader has done all that is necessary rather than the actual receipt of that payment which gives rise to tax liability.

Subject to the foregoing qualifications, their Lordships affirm the decision of the Court of Appeal and dismiss the taxpayer's appeal to this Board with costs.



