IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

14/5

M. No. 1070/82

X

NZLR

[redacted]

438

BETWEEN ARTHUR HARCOURT AUBREY
of Whangarei, Farmer

Objector

A N D THE COMMISSIONER OF INLAND REVENUE

Commissioner

Hearing: 8th December and 9th December, 1983.

Counsel: Grierson for Objector.
Robinson for Commissioner.

Judgment: 27 March 1984.

JUDGMENT OF TOMPKINS, J.

The Objector has objected to an assessment issued by the Commissioner. The objection has been referred directly to this court by way of Case Stated in accordance with s.33 of the Income Tax Act, 1976 ("the 1976 Act").

BACKGROUND:

In 1950 the Objector acquired from other members of his family a 243 acre farm at Pataua, a coastal settlement east of Whangarei.

For some years prior to 1964 people had, with the Objector's permission and in consideration of a low rental, occupied a portion of the Objector's farm that fronted on to an ocean beach. By 1964 the settlement had grown to some 50 or 60 families.

During 1964 the Objector decided to subdivide part of that portion of his farm that fronted on the beach. In October, 1964, there was presented to the Whangarei County Council

a scheme plan that provided for 105 residential sections of an area of some 17 acres, together with the requisite roadways, access ways and esplanade reserve.

On the 11th December, 1964, the County Council gave its approval to the subdivision set out in the scheme plan, subject to conditions set out in the notice of approval. Two deposited plans were prepared to effect the subdivision set out in the scheme plan. D.P.57631 was deposited in the Land Registry Office on the 3rd March, 1967, and D.P.58679 was deposited on the 24th August, 1967. By November, 1967, the Objector had sold 32 sections for a total price of $52,278, or an average of $1,634 per section.

The Objector described the work that was necessary to effect the subdivision and to comply with the County Council's requirements. He referred to the need for work to prevent erosion since a portion of the subdivision was on raw sand - this work included grassing the raw sand. Stormwater drainage was installed, the base course metal for the roading was taken from a hill on the Objector's farm, some 600 yards of blue metal chips were brought in from outside, and there was required boxing and concreting of manholes. Although power had been brought to the area prior to subdivision, this was extended in the course of the subdivision work.

A proportion of this work was undertaken by the Objector and his son using their farm machinery. A proportion was undertaken by outside contractors.

The Objector produced bundles of invoices and accounts for materials supplied and work done by contractors. These totalled $20,280.34. These included electric power, surveyor's costs, insurance and legal expenses, but did not include reserve contribution, nor did it include the value of

the work undertaken by the Objector and his family.

By present day standards the County's conditions of approval were what the then County engineer described as very low. The roads were not sealed. There was no kerbing and channelling. There was no water or sewerage. The depth of metal required on the roadway was minimal.

All the work required by the Council was completed by the 16th December, 1968. The bond that the Objector had given to the Council was then released.

Sales of sections have continued. At the time of the hearing some 30 sections remained unsold. Some of those were for members of the Objector's family.

THE COMMISSIONER'S ASSESSMENT:

Following a tax audit carried out by an audit examiner, the Commissioner, on the 25th November, 1979, made amended assessments, particulars of which are:-

	Year Ended 31 March			
	1974	1976	1977	1978
Income as returned	$ 6,781.85	$5,696.69	$ 8,544.37	$8,525.80
Add profit from sales of sections	10,643.65	1,599.68	20,935.11	1,013.50
	$17,425.50	$7,296.37	$29,479.48	$9,539.30
Income Tax	$6,187.07	$1,765.96	$13,605.50	$2,709.90

The Objector objected to these assessments. The Case Stated to this court followed.

The method used by the Commissioner to calculate the

profit from the sales of sections is this.

In respect of each of the four years (the first being for the period from the 10th August, 1973, to the 31st March, 1974) he ascertained the gross proceeds that the Objector received from the sale of sections.

Then from this figure he made two deductions. The first was the value of these sections which he ascertained at the date of the commencement of the undertaking or scheme at $1,600 per section. This figure was taken from the average per section price realised by the Objector from the initial sales. By using this method the Commissioner allowed for the pre-subdivision land value, the cost of subdivision and profit. Mr. Grierson, for the Objector, accepted that $1,600 per section was a fair value of the land at the date of the commencement of the Objector's undertaking or scheme, allowing for the costs of development - this acceptance, of course, in no way derogating from his submission that sub-s.(10) could not be applied by the Commissioner in the circumstances of this case.

Secondly, the Commissioner deducted in each year an appropriate assessment of solicitor's costs.

At the hearing before me there was no challenge made to the figures that the Commissioner had used in calculating the profit from the sales of sections. What was at issue was whether sub-s.(2)(f) applied at all, and whether the Commissioner had correctly applied sub-s.(10).

During the first three years of the relevant period s.88AA of the Land and Income Tax Act, 1954 ("the 1954 Act") was in force. During the fourth year the relevant section is s.67 of the 1976 Act. For convenience I shall, except where otherwise expressly stated, refer to the sub-sections and paragraphs in

s.67 of the 1976 Act.

THE RETROSPECTIVE SUBMISSION:

Mr. Grierson, for the Objector, submitted that para. (f) of sub-s. (4) and sub-s. (10) of s.64 should be interpreted in a way that results in their having no retrospective effect. In support he referred first to the general rule that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction (Lauri v. Renad (1892) 3 Ch. 402, Lindley, L.J. at 421, Craies on Statute Law, 7th Ed.)

Accepting that the legislation can be retrospective by express enactment, he submitted that there is in s.67 significantly no express provision such as "whether before or after the commencement of this Act".

In submitting that s.67 can be applied only to a state of affairs coming into existence after the commencement of the section, he referred to R. v. Ipswich Union (1877) 2 Q.B.D. 267, and in particular the passage from the judgment of Cockburn, C.J. at p.270, where he said:-

> " It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act. "

These general submissions he then applied separately to sub-s.(10) and to para. (f) of sub-s. (4).

Sub-s. (10) provides:-

> " (10) For the purposes of paragraph (f) of sub-s. (4) of this section, the Commissioner may ascertain the value of any land at the date of the commencement of any undertaking or scheme referred to in that paragraph in such manner as he thinks fit. "

Mr. Grierson submitted that the Commissioner's power to ascertain the value of the land can relate back no further than the 10th August, 1973, being the date that the section came into force. Therefore, the argument went, the Commissioner could only value land at that date or, if the undertaking or scheme commenced after that date, at that later date. The Commissioner was not entitled to go back to a date earlier than the 10th August, 1973 (even though that may have been the date of the commencement of the undertaking or scheme involved) because to do so would be to give the sub-section retrospective effect in the absence of express language doing so.

I cannot accept this submission. I consider the plain language of sub-s. (10) puts the matter beyond doubt. It empowers the Commissioner to fix the value of any land "at the date of the commencement of any undertaking or scheme" referred to in para. (f). This is unqualified as to time. To that extent the Commissioner can take into account a state of affairs that came into existence, i.e. the value of the land at the relevant date, before the section was enacted. In my view the language of the sub-section is such as plainly to require such a construction.

Further, I do not consider that applying the sub-section in this way is giving it retrospective effect. The sub-section provides the method by which the Commissioner assesses taxable profit or gains from sales made after the section has come into effect. A similar method is adopted in other parts of sub-s. (4). For example, para. (a) makes assessable income all profits or gains derived from the sale or other disposition of any land, if the land was acquired for the purpose or intention of selling or otherwise disposing of it. The sale or other disposition from which the profits or gains are derived must occur after the section came into effect, but

the acquisition of the land can pre-date the enactment of the section.

The relevant parts of sub-s. (4), including para. (f), are:-

> " (4) For the purposes of s.65(2)(f) of this Act, the assessable income of the taxpayer shall be deemed to include -
>
> (f) All profits or gains, not being profits or gains which are included in the assessable income pursuant to any of the paragraphs (a), (b), (c), (d) and (e) of this subsection, derived from the sale or other disposition of any land to the extent that those profits or gains are derived from the carrying on or the carrying out of any undertaking or scheme, whether or not an adventure in the nature of trade or business, involving the development or division into lots of that land, and the Commissioner is satisfied that that development or division work (being work involving significant expenditure on earthworks, contouring, levelling, drainage, roading, kerbing or channelling or on any other work, service, or amenity customarily undertaken or provided in major projects involving the development of land for industrial, commercial, or residential purposes) has been carried on or carried out by or on behalf of the taxpayer on or in relation to that land. "

Mr. Grierson submitted, again because para.(f) should apply only to a state of affairs coming into existence after the enactment of the section, that it applies only where the development or division has taken place after the 10th August, 1973. He emphasised that to interpret it as applying to development and division work that had occurred earlier, means that the taxpayer is stuck with a sub-division he undertook when selling the proceeds would not have attracted tax. He contended that the proper prospective interpretation meant that para. (f) would apply only to a state of affairs coming into existence, and then only by the design of the taxpayer, after the new taxation liability had been enacted.

This submission too I am unable to accept. An examination of para. (f) in the context of s.67 makes it clear that the profits or gains rendered taxable are not limited to those arising from development or division work carried out after the section came into effect.

The effect of the opening words of sub-s. (4), and of para. (f), is that the assessable income of the taxpayer is deemed to include all profits and gains derived from the carrying on or carrying out of any undertaking or scheme involving the development or division into lots of the land. It is the carrying on or carrying out of the undertaking or scheme - not the development or division into lots - with which the paragraph is concerned. In the present case the profit or gain derives from carrying out the undertaking or scheme when the sections are sold, not when the development or division into lots took place.

That the application of para. (f) is not affected by when the undertaking or scheme was commenced (that is, when the development or division work was undertaken) is apparent from the absence of any such time limitation as is contained in sub-para. (ii) of para. (e). This requires that the undertaking or scheme be commenced within ten years of the date on which the land was acquired by the taxpayer. It would also seem to follow from sub-s.(9) of the 1973 Amendment, being the Amendment that enacted s.88AA of the 1954 Act. Sub-section (5) reads:-

> " This section shall apply with respect to any profit or gain derived from any sale or other disposition made on or after the 10th August, 1973. "

Thus it is the deriving of the profit or gain from any sale or disposition occurring on or after the 10th August, 1973, to which the section applies. I can see no justification

for reading into the section a further stipulation that, for the section to apply, the development or division into lots must also have occurred on or after the 10th August, 1973.

THE SIGNIFICANT EXPENDITURE SUBMISSION:

Mr. Grierson submitted that the Objector's profits or gains from the sales of the sections were not caught by para. (f) because the development or division work did not involve significant expenditure on work of the kind described in the paragraph. He accepted that there was expenditure of that kind - his contention was that that expenditure was not significant.

I am not aware of any decision where the meaning of "significant expenditure" in para.(f) has been considered. I adopt with respect the same approach to that phrase as Ongley, J. did to the phrase in para.(e) "work of a minor nature" in Wellington v. Commissioner of Inland Revenue (1981) 5 T.R.N.Z. 151. At p.155 he said that whether work came within the phrase will depend on the circumstances of the particular case. So too will the circumstances of the particular case determine whether expenditure is significant. That must in the end be a matter of fact and degree.

The significant expenditure referred to in the paragraph can be on one of two categories. The first category is that described as "earthworks, contouring, levelling, drainage, roading, kerbing or channelling". The second category is that described as "any other work, service, or amenity customarily undertaken or provided in major projects involving the development of land for industrial, commercial, or residential purposes. "

It was accepted by the Objector that the costs of survey is included in the latter category. So too, in my view, are legal costs that are incurred in relation to a subdivision. The Crown contended that a reserve fund contribution paid in cash would also be in the second category, because the provision of reserves was an amenity customarily provided in major projects. It must be remembered that all the words in brackets are describing the kind of development or division work that has been carried out or carried on or in relation to the land. The division work involves the preparation and obtaining of the requisite approval of the scheme plan of the subdivision, then the lodging in the Land Registry Office of the deposited plan. The legal and survey costs involve expenditure on that work. But although a reserve fund contribution may be required to obtain the approval of the subdivision, I do not consider that it can be regarded as expenditure on that work. Nor do I consider that it can be regarded as expenditure on an amenity customarily provided in major projects.

What then was the relevant expenditure? It includes the $20,280.34 to which I have already referred. In assessing to-day the significance of this sum, it must be borne in mind that it is expressed in 1967 dollars. Evidence was called by the Commissioner that a sum of equivalent purchasing power in 1983 dollars would be $109,620.

To my mind the relevant expenditure also includes the expenditure by the Objector and his family on time and the use of farm machinery on the physical work of the subdivision. This latter cannot be quantified in money terms. However, my general impression from the Objector's evidence is that this work could not be regarded as minor.

It is of some assistance to set this expenditure in context to consider the value of the land to which it related.

On the values adopted by the Commissioner, and accepted by the Objector, this value was $168,000, being 105 sections at $1,600 per section.

The Objector called evidence from Mr. Dickson, an experienced registered surveyor. He analysed the costs the Objector had incurred on the physical work of the subdivision. This analysis did not include any allowance for the value of the time and machinery supplied by the Objector and his family. It resulted in an average of $103 per section. Then he analysed similar costs in six other subdivisions carried out about the same time. These showed costs ranging between $690 to $2,006 per section. From this comparison the court was invited to conclude that in the Objector's case the expenditure was not significant.

There are some difficulties in this approach. First, all six subdivisions were carried out in or near metropolitan Auckland. They were all for permanent residential homes. None were seaside holiday subdivisions. The standards applicable were therefore far higher.

Secondly, in all cases the survey, legal, electrical and insurance costs were excluded. This was because they would be much the same in all cases. But their omission tends to dramatise the difference.

Thirdly, as I have stated, in the case of the Objector's subdivision no allowance was made of the value of the Objector's time and machinery.

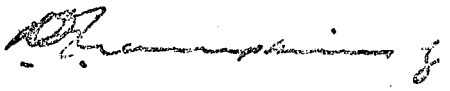
For these reasons I do not find this comparison to be of much assistance.

In weighing up whether the work involved expenditure that was significant, I have had regard to the size of the resulting subdivision (105 sections), the nature and extent of the physical work carried out as described in the evidence, the value of the land that resulted from the expenditure ($168,000), and the circumstances and location of the subdivision and the standards considered appropriate. In doing so I have not found it helpful to use dictionary definitions to translate "significant expenditure" into other words. I prefer to consider those words in their plain and ordinary meaning.

Having done so, I am satisfied that the expenditure was significant in the contexts to which I have referred. It resulted in the completion of a relatively large subdivision. That involved some considerable roading and the formation of rights-of-way. It also required the provision of stormwater drainage. Ignoring the expenditure of time and equipment by the Objector, $20,280 is 12% of the resulting value of the land. It would be a considerably higher proportion of the pre-subdivision value. In my opinion, viewed in relation to a seaside holiday subdivision requiring only modest subdivisional standards, an expenditure in 1967 of $20,280 or in 1983 of $109,620 (both increased by the value of the Objector's work and machinery) can hardly be regarded as insignificant.

For these reasons I am satisfied that the Objector has failed to discharge the burden resting on him of proving that the decision of the Commissioner to regard the expenditure as significant was wrong.

The appeal is dismissed. Costs are reserved.



Solicitors:

Rishworth, Kennedy & Co., Whangarei, for Objector.
Crown Solicitor, Auckland, for Commissioner.