

Paul Douglas Lowe, Herbert Monty Lowe
and Keith Lowe

Appellants

v.

The Commissioner of Inland Revenue

Respondent

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 21ST NOVEMBER 1983

Present at the Hearing:

LORD DIPLOCK
LORD SCARMAN
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN
LORD TEMPLEMAN

[Delivered by Lord Templeman]

The Land and Income Tax Act 1954 of New Zealand charged assessable income to income tax. Assessable income was defined by section 88. Amendments to the Act made in 1973 introduced as an item of assessable income under section 88(1)(cc) and 88AA of that Act all "profits or gains derived [after 10th August 1973] from the sale....of land where....an undertaking or scheme....involving the development or division into lots of that land has been carried on or carried out....and....that undertaking or scheme was commenced within 10 years of the date on which that land was acquired by the tax payer". The appellant tax payers acquired 10 acres of land in 1961 for market gardening but decided in 1963 to divide the land into lots for development and sale as housing sites. The appellants created 36 lots. The total cost to the appellants of the initial purchase price of the land and the subsequent development costs, interest, legal fees, rates and other expenses of holding the land amounted to an average sum of \$2,300. for each lot. In the income tax year beginning on 1st April 1973 the appellants sold six lots for a total net sale price of \$29,366.50. The appellants were assessed to income tax by the respondent Commissioner of Inland Revenue on a profit of

\$15,566.50 being the difference between the net sale price of \$29,366.50 and the purchase and development costs of \$13,800. attributable to six lots at the average rate of \$2,300. per lot. The appellants appealed against the assessment and their appeals were rejected by Roper J. and by the Court of Appeal (Cooke J., Richardson and McMullin JJ.). The appellants now appeal with the leave of the Court of Appeal to Her Majesty in Council. The only ground of appeal is that the profit derived by the appellants from their six lots was not \$15,566.50 based on historic cost accounting but some lesser sum to be determined and to be based on some current cost accounting method which would reflect the effect of inflation between 1961 and 1973.

In the Court of Appeal Cooke J. mercifully described the appellants' submissions as lacking nothing in boldness. Apart from the fact that all current cost accounting methods are based on shifting sands and provoke more argument than agreement, the appellants are faced with the fact that in New Zealand the calculation of "profits or gains" for income tax purposes has, in default of express legislation to the contrary, ignored the effect of inflation or deflation. Thus Cooke J. in his judgment at page 129 of the record said:-

"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."

This statement was supported by the other members of the Court of Appeal, is not disputed by the appellants, and led to the conclusion reached by Richardson J. at page 151 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."

The appellants submitted that parliament could not have intended that an unfair and unjust method of computing profits or gains should be employed, and that in connection with disposals of land over a lengthy period, historic cost accounting was unfair and unjust because it only provided an illusion of profit without a corresponding increase in wealth. Therefore, it was argued, the courts are entitled to recognise and reject the illusory profit deduced from

historic cost accounting and to substitute the true profit calculated by an appropriate method of current cost accounting which takes inflation into account.

This appeal must however be determined not by fashionable theories but by practice and law. It is clear that by the practice and law of New Zealand a profit or a loss for income tax purposes can only be measured in the present circumstances by the difference between dollars expended and dollars received. The Board will therefore humbly advise Her Majesty that the appeal ought to be dismissed with costs.

