

IN THE COURT OF REVIEW

Appeal No. 1 of 2002

IN THE MATTER of s.17 (5) of the
Income Tax Act

AND IN THE MATTER of an appeal to
the Court of Review by RAJENDRA AND
SAHAY TRUST INCORPORATED ('the
Appellant') [TIN 60-00904-0-7] against
the decision of the Commissioner of
Inland Revenue dated 19 August 2002.

DECISION

The grounds of Appeal are as follows:

1. The Commission has failed to properly apply section 17(5) of the Income Tax Act to the facts of this case.
2. The Commission has failed to properly consider matters relevant to section 17(5) of the Income Tax Act and has been influenced by irrelevant matter in arriving at his decision to tax the Appellant.
3. The Commission is now estopped from denying the Appellant a charitable status for income tax purposes and from taxing the income earned by the Appellant for charitable purposes because the Appellant has acted on the Commissioner's advice contained in his letter dated 10th November 1992.
4. The Commissioner has wrongly applied VAT refunds due to the appellant against the Appellants disputed Income Tax Liability.

The first 2 grounds of Appeal will be dealt with together.

Sahay Brothers Supermarket Ltd ceased trading in late 1991. Rajendra Prasad and Sahay Family decided to set up a trust for charitable purpose. A Deed of Trust was set up and three members of each family were to be the trustees. The Trust Deed was duly registered pursuant to Charitable Trust Act Cap 6 and the 22nd of November 1991, certificate of Incorporation was issued. The Trust Deed duly set out the objects of the trust. Price Waterhouse (PW) accountants acting for the trust by letter dated 3rd April notified the Commissioner of Inland Revenue (CIR) of the registration of the Charitable Trust and forwarded copies of Certificate of Incorporation and the Deed of Trust. And on behalf of the trustees applied for

registration of "Rajendra and Sahay Trust", as Charitable Trust under section 17(5) of the Income Tax Act.

By letter dated 10th November 1992, the CIR informed PW "provided the trust complies with the provisions of the Income Tax Act it's income will be exempt from normal tax". The letter further stated that to show compliance, the trust must lodge annual returns of income and disclose how the trust income has been disbursed.

The Trust to carry out its objects had purchased a commercial property in Lautoka which was mortgaged to Bank of Baroda for an overdraft of \$150.00. There was also a registered Bill of Sale over the entire assets of the Company and personal guarantees by Mr Rajendra Prasad and Mr Arjun Sahay. There are also unsecured loan in the sum of \$250,000 to the Trust contributed to Rajendra Prasad Brothers Ltd, Mr Ram Sahay, Mr Arjun Sahay, Mr Hari Sahay, to acquire the said commercial property to operate a supermarket.

The Trust filed returns from 1992 onwards. There was a trading loss in 1992, but from 1993 small profit was shown and the loss brought forward and therefore there was no taxable income.

From 1993 small percentage of the income accumulated was distributed to charities and the balance was put aside for a more substantial charitable organization. The Trust filed returns of Income from 1992 – 2001. Each year showed small percentage of Income being disbursed to various charities. And the balance income accumulated.

CIR on 7th May 1998 issued notices of assessment of income tax and penalties for the years 1994 to 1996 inclusive and provisional tax for the years 1997 and 1998 amounting to \$330,928.30.

PW, accountants for the appellant by a letter dated 14/5/98 protested at the assessment of income tax by the CIR.

By letter dated 5th June 1998 the CIR advised PW that "the income of the trust is not qualified under section 17(5) of the Income Tax Act" and that any further reason for that matter is an internal one and the department is not legally obliged to provide you with any reason(s). Objection to notice of assessment was filed by PW and thereafter few more correspondence followed without any response from CIR.

By a letter of 19/8/02 CIR disallowed the Appellants objections.

The Respondent in it's affidavit sworn on 21/5/03 and filed on the same day, in paragraph 2 alleged that the appellant does not satisfy the specific requirements of section 17(5) of the Income Tax Act. **Section 17(5) of the Income Tax Act** reads:

17. ...The following classes of income shall not be chargeable to ...normal tax:- [5] The Income of any institution, body of person of irrevocable trust of a public character established solely for the relief of the poverty or distress of the public, or for the advancement of religion or education, in so far as the Commissioner is satisfied that such income is to be expended either in Fiji or for purposes which result in benefit of the residents of Fiji.

Provided that any such income which consists of profits or gains from a business shall not be exempt from [basic tax] and normal tax unless such profits or gains are applied solely for any of such purposes.

The respondent further alleges that the Trust is not a Charitable but a Discretionary Trust because the appellant had failed to convince the respondent that the operations were in compliance with the intentions of the Trust Deed. The Respondent also stated that the "manifestation of the charitable intentions" is a pertinent consideration that should be proven by the Appellant.

The Respondent also alleges that the Appellant's business arrangement was not for the purposes of charity but rather for avoiding tax and therefore void under **Section 108 of the Income Tax Act** which provides:-

108. *Every contract, agreement or arrangement made or entered into, orally or in writing, shall, so far as it has or purports to have the purpose or effect of in any way, directly or indirectly –*

[a] altering the incidence of any tax;

[b] relieving any person from liability to pay any tax or make any return;

[c] defeating, evading or avoiding any duty or liability imposed on any person by this Act; or

[d] preventing the operation of this Act in any respect,

be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose.

The questions that arise here are that – Did the Appellant apply the income for the purposes for which the Trust was set up? Does the Trust fall within Section 17(5) of the Income Tax Act, or is it a Discretionary Trust or a business arrangement to avoid tax and therefore void under Section 108 of Income Tax Act?

In "**Royal Australian College of Surgeons vs FC of T**" [1943] (68) CLR 436 the question of the manifestation of trust intention was elaborated –

"In determining whether a particular trust is a charitable trust or whether the funds of an association are being disbursed for charitable purposes, it is relevant to enquire not only as to the stated objects of the trust or society but also the manner in which the relevant purposes are being carried out."

The Respondent's belief that this is a discretionary trust is unsupported by any evidence or material facts. In the case of **AG (NSW) vs Perpetual Trustees Co Ltd**, [1940] (63) CLR 209 Dixon and Evatt JJ at pages 222/223 stated the distinction between charitable trust and other trusts and a Discretionary Trust is described in **Jacob's Law of Trusts in Australia** (6th ed, 1997) at para 317. The Trust Deed has charitable objects duly registered under the Charitable Trusts Act. Inc the case of **Re Shaw** [1957] 1 ALLER 745 at 758 © his Lordship Harman J said *"One cannot have a trust other than a charitable trust, for the benefit not of person but of objects."* Here neither the trustees, nor their families or anyone else have in anyway benefited from the trust. So far the beneficiaries have been various objects such as schools and other organizations.

From the returns filed a small percentage of the income has been disbursed for charitable purposes for each year. The balance the appellant stated in his affidavit has been accumulated for something substantial. The trustees it appears had intention of building a school but at the point in time they were advised by the Ministry of Education that there was no need for another school in that area. There is nothing wrong in accumulating income for a bigger charitable purpose. The test under Section 17(5) is that the Trust's income is ultimately applied for charitable purposes. It does not require the income to be applied for the charitable purpose immediately as long as at the end of the day, the income is applied for charitable purposes. (**Calder Construction Co Ltd & CIR** [1963] NZLR 921 at 926).

As to the question of tax avoidance, the Respondents allegation is as stated in it's compliance report annexure "f" in the affidavit of Joseva Namisi Leano. The crus of the matter being that the respondent believes that the appellant set a discretionary trust and therefore the income is taxable either in the hands of the trustee or in the hands of the beneficiaries. The Respondent alleges that Sahay Brothers Supermarket Ltd which was incorporated as a supermarket in retailing and wholesaling at Bila Street, Lautoka was accruing losses to have the benefit of section 22, but had exhausted all the loss in 1992 and ceased operation. That business the respondent alleges was taken over as a going concern by the Rajendra and Sahay Trust Inc. The Respondent believes that the trust is an extension of Sahay Trust Inc. The Respondent believes that the trust is an extension of Sahay Brothers Supermarket Ltd. The Respondent's allegation is that the trust is really a tax-planning scheme to avoid tax.

From the Appellant's affidavit that has been filed and the oral submission from the counsel, the trust property, it appears, is quite a separate entity from the Sahay Brothers Supermarket Ltd. It is apparent that the appellant bought a commercial property in Lautoka for \$250,000 to carry out its intention under the trust formed. There is also a Bank of Baroda loan in the sum of \$150,000 and the contribution that has been made and mentioned earlier to make up the \$250,000. There is no evidence to show that the property purchased belonged to Sahay Brothers Supermarket Ltd or that any of SBSL losses have been taken over by the Trust. In fact, the evidence shows that the property bought belonged to one C P Kant. Further the Trust business was supervised Rajendra Prasad and not by SBSL.

I agree with Respondent's submission that the onus of proof is on the Appellant, however, that onus is one on balance of probabilities. I find that this onus has been discharged by the Appellant and the trust qualifies for exemption under Section 17(5) of the Income Tax Act. The Appellant succeeds on grounds 1 and 2.

As to the 3rd ground of appeal, the appellant relying on Respondent's letter dated 10th November 1992 claim that the CIR is now estopped from denying the Appellant a charitable status for income tax purposes and from taxing the income earned by the Appellant for charitable purposes because the Appellant has acted on CIR's advice. I cannot accept the Appellant's argument on this ground. The CIR after receiving the returns and if not satisfied can demand from the taxpayer additional information pursuant to section 50 of the Income Tax Act, which he did in the present case. However, since the appeal is allowed on grounds one and two, I don't see any need to indulge further on this ground.

The Appellant also succeeds on Ground 4 by virtue of the fact that it has succeeded on grounds 1 and 2 of the appeal and therefore I do not wish to expand any further on this ground.

The Appeal is allowed on grounds 1, 2 and 4, ground 3 is dismissed. Pursuant to Section 66(1) of the Income Tax Act, I find the trust is entitled to tax exemption under Section 17(5) of the Act. The tax assessment to be cancelled and VAT refunds to be transferred to the trust's income.

I do not make any order as to costs.

Court of Review