

IN THE HIGH COURT OF FIJI
AT SUVA

Appellant Jurisdiction

CIVIL APPEAL NO. 0009 OF 1995

BETWEEN :

THE COMMISSIONER OF INLAND REVENUE

APPELLANT

v.

DONALD HENRY BULL

RESPONDENT

CIVIL APPEAL NO. 0010 OF 1995

BETWEEN :

THE COMMISSIONER OF INLAND REVENUE

APPELLANT

v.

DONALD HENRY BULL

RESPONDENT

Mr I Blakeley for the Commissioner of Inland Revenue
Mr G Keil for the Respondents

JUDGMENT

This is an appeal by the Commissioner of Inland Revenue (the 'CIR') against a decision of the Court of Review delivered on the 28th of April 1995 in which the Court upheld an appeal by the taxpayers against assessments of the CIR requiring each of the taxpayers to pay income tax in respect of interest income for the years 1987 to 1990, derived by each of the taxpayers from funds invested in Australia and in respect of which Australian Withholding Tax of 10% had already been deducted at source.

The appeals to the Court of Review although separately numbered were dealt with in a single decision of the Court. The nature and source of the income in each appeal was identical and the CIR's assessments were based on the same section of the Income Tax Act (*Cap. 201*). It is therefore convenient to adopt a similar approach to the CIR's two (2) appeals and render a single judgment.

In the appeal before the Court of Review a **Statement of Agreed Facts** was filed in respect of each appeal and save for the calculation of the interest income earned in Australia and the tax paid thereon, was identical in all other respects. For the purposes of this appeal I gratefully adopt the convenient summary of the Court of Review where he states at p. 37 of the record:

“The agreed facts are that each of the Appellants earned income in Australia at a time where there was not a Double Taxation Agreement in force between Australia and Fiji.

Withholding tax was charged and deducted in Australia on the whole of each income.

The Commissioner does not dispute that this was ‘income chargeable with income tax’ within the meaning of those words in S.102(b) of the Act.”

The Court of Review then summarises the relative position taken by the CIR as follows:

“The Commissioner assessed each of the appellants on that amount of the same Australian income as remained after the tax imposed on it in Australia had been deducted on the grounds, that the words to the extent that in S(b) were meant to include no more than the amount paid in tax.”

and by the appellants as follows:

“The appellants claim exemption in each case, from Fiji tax under paragraph (b) of S on the grounds that the whole of the income in question having been chargeable with income tax in Australia, a fact not denied by the Commissioner, and having furnished the correct evidence required by proviso (I) and there being no evidence that proviso (ii) applied, the whole of it was exempt income.”

The Court of Review then sets out various submissions of both counsels for the parties and after referring to several cases states, at p.38 of the record:

“Applying the principles set out above, that is, looking fairly at the language used, without any implications, intendment, or reading in, my interpretation is that the degree, dimension or scope of the exemption in S.102(b) extends to the part of the income (that is the ‘it’ in S.102(b)) that is chargeable with income tax in that other territory. That part of the income that is chargeable with income tax is exempt from tax in Fiji. That part of the income that is not chargeable with income tax is not exempt from tax in Fiji.”

The Court’s decision was that:

“The whole of each Appellant’s income, the subject of these appeals being chargeable and taxed in Australia, the whole of each is exempt from tax in Fiji.”

The CIR now appeals against that decision of the Court of Review on the following two (2) grounds:

- “1. The learned Court of Review erred in law in holding that Section 102(b) of the Income Tax Act provided a total exemption from income tax in Fiji in respect of income earned by the respondents and taxed in Australia.*

- 2. The learned Court of Review erred in law in failing to have regard to the provisions of Section 103 of the Income Tax Act when applying the provisions of Section 102(b).”*

I am grateful to both counsels for the comprehensive written submissions and photocopy authorities furnished for the assistance of the Court.

It is common ground that the CIR’s appeals raises a single ‘question of law’ for determination by this Court namely, the meaning and ambit of Section (b) of the Income Tax Act. (‘the Act’). Section is to be found in **PART XIV** of the Act entitled **REBATES FORM TAX CHARGED** and reads:

“102. The tax chargeable in respect of income derived outside Fiji by a resident shall be abated or exempted as follows:

- (a) *in respect of income derived from a territory with whom arrangements have been made regarding relief from double taxation, relief shall be given in accordance with the arrangement;*
- (b) *in respect of income derived from a territory with whom arrangements have not been made regarding relief from double taxation, such income shall be exempt from tax to the extent that it is chargeable with income tax in that other territory:*

Provided that –

- (i) *the taxpayers shall furnish evidence satisfactory to the Commissioner showing the amount of tax paid and the particulars of income;*
- (ii) *such income (shall) not be exempt if, under the law of that other territory, tax is deducted therefrom at source but such person has the right thereafter of making a return of that income and being assessed to tax thereon with relief in proper circumstances for the whole or any part of the tax already deducted at source and he does not exercise that right, and a certificate purporting to be signed by an officer of the Taxation Department of that other territory shall be prima facie evidence that such a right exists and of the exercise or non-exercise thereof by the taxpayer.”*

It is convenient at this stage to set out the competing interpretations of the parties as appears in their written submissions on appeal. Counsel for the CIR submits as to ground (1) of the grounds of appeal:

“...that when constructed correctly section 102(b) operates as an abatement or exemption from tax after the income in question has been brought within the charging provisions of the Act. It does not operate so as to exclude the income referred to from those (sic) charging provisions.”

In other words:

“.... When Section 102(b) is considered in its entirety rather than construing individual words its meaning is plain and unambiguous. It provides for an exemption from tax that is otherwise payable in Fiji to the extent of the tax chargeable overseas on the same income. It does not exempt that income for Fiji tax altogether.”

As for the phrase ‘to the extent that it is chargeable with income tax’ counsel submits that its effect:

“ gave no reason for the conclusion that Section 103 did not apply to unilateral relief granted under Section 102(b).”

Thereby ignoring the express wording of Section 103 itself and the fact that:

“Section 103 appeared in Fiji Act in 1974 at the same time Section 102 appeared and the old regime under Section 44 was replaced. That is consistent with moves in other jurisdictions such as New Zealand and the United Kingdom to move away for unilateral relief which provided total exemptions.”

and the submission concludes by reasserting that:

“..... Section 103 does apply to 102(b) and the Commissioner was correct in the way he approached the taxpayers assessment i.e. he allowed them a credit against Fiji tax for the 10% tax paid in Australia. In short they were taxed as if they had received the income in Fiji.”

Counsel for the taxpayer in seeking to uphold the decision of the Court of Review writes:

“The contention of the Respondents is that S.102 deal with two separate matters and could easily be read as follows:

A. The tax chargeable in respect of income derived outside Fiji by a resident shall be abated:

(a) in respect of income derived from a territory with whom arrangements have been made regards relief from double taxation, the relief shall be in accordance with that arrangement.”

and as a separate section

B. *The tax chargeable in respect in income of income derived outside Fiji by a resident shall be exempted:*

(a) *in respect of income derived from a territory with whom arrangements have not been made regards relief from double taxation such income shall be exempt from tax to the extent that it is chargeable with income tax in that the (sic) territory: Provided – (etc)."*

In other words:

"S.102(b) deals with what is referred to as 'unilateral relief'"

and

"..... merely restates the exemption provision from Fiji tax for income derived out of Fiji by residents of Fiji if taxed in that country which has been part of the Fiji income tax law since at least 1920"

This latter year is a reference to the position obtaining under Section 21 of the Inland Revenue (Income Tax) Ordinance 1920 which plainly exempted from income tax (subject to the Commissioner's satisfaction), income derived by a person resident in the Colony but not derived from the Colony.

In essence, counsel's submission is that Section 102(b) is the present day successor to Section 21 of the 1920 Ordinance and there has been no discernible change in the legislature's intention to maintain the complete exemption of foreign income from local income tax (subject to certain conditions) despite the different wordings of the two sections.

As for the phrase 'to the extent that' the taxpayers submission is:

"(the phrase) must be read in the context in which (it) is used in particular with the word which follows, namely 'it' can only mean and refers to the income derived from a territory or such income as used earlier in S.102(b)."

and Counsel submits in an obscure paragraph:

“..... the plain meaning of S.102(b) is that part only of the income is exempt from Fiji tax, on which tax has been charged in Australia but that the part of that income is not exempt which has not been taxed or the income which has not been taxed at all or if the conditions of the provisos have been complied with when (sic) Fiji tax applies. There is no need for the detailed provisos have been complied with when (sic) Fiji tax applies. There is no need for the detailed provisions of S.103 to be applied to the circumstances existing under S.102(b).

Having thus set out the opposing submissions of counsels for the CIR and the taxpayers, I begin my consideration of Section 102(b) by reminding myself of the proper approach that the Court should adopt in interpreting Section 102(b) which is plainly intended to provide unilateral relief against the incidence of double taxation which Lord Russell of Killowen described in **Canadian Eagle Oil Co Ltd v The King** (1945) A C 119 at p 142:

“(as) meaning that the same person pays tax twice on his income.”

and which, in his lordships view:

“.... Would, in default of express provision, not doubt be wrong.” (p 143)

The approach I adopt is best summarised in the Judgment of Lord Herschell in **Colguhoun v Brooks** (1889) 14 AC 493 when he said at p.505 in adoption a passage from the judgment of Lord Blackburn in **Coltress Iron Co. v Black** 6 A C at p 330:

“The object of those framing a Taxing Act is to grant to Her Majesty a revenue; no doubt they would prefer if it were possible to raise that revenue equally from all, and as that cannot be done, to raise it from those on whom the tax falls with a little trouble and annoyance and as equally as can be contrived; and when any enactments for the purpose can bear two interpretations, it is reasonable to put that construction upon them which will produce these effects.”

It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to show that the particular provisions

ought not to be construed as it would be if considered alone and apart from the rest of the Act.”

In this latter regard it is also well to bear in mind the provisions of Section 13 of the Interpretation Act (*Cap 7*) which provides:

“When a written law is divided into chapters, Parts, titles or other subdivisions the fact and particulars of such division and subdivision shall, with or without express mention thereof in such written law, be taken notice of in all Courts and for all purposes whatsoever.”

In his submissions counsel for the CIR argues that the Court of Review not only ignores the placement of Section 102 in the Act but also its interpretation of the section would be more consistent with the section appearing in **Part IV Division 2** of the Act which is entitled: Items of Income Not Liable to either **Basic Tax or Normal Tax or Basic Tax and Normal Tax.**

The submission if I may say so, has a good deal of force to it when one considers more closely the changes which were effected to the predecessor of Section 102(b) namely, Section 44 of the Income Tax Ordinance (*Cap 176*) which originally contained two (2) subsections.

Subsection (1) which was the immediate predecessor to Section 102(b), and subsection (2) which dealt with the exemption from tax of what might be conveniently described as shipping profits.

In respect of this latter subsection i.e S44(2) the legislature in 1974 enacted a new Section 18 which it then placed in **Part IV Division 2** thereby clearly excluding such profits from the tax net.

Needless to say subsection (1) of Section 44 could have been similarly treated by the legislature but this was not done. Instead, it was renumbered and relocated under a newly created **PART** of the Income Tax Act entitled **REBATES FROM TAX CHARGED**. In this latter regard the **Shorter Oxford Dictionary** defines a ‘rebate’ as being ‘a reduction from a sum of money to be paid a discount; also a repayment’.

This meaning is further reinforced by the natural and primary meaning given by the Privy Council to the word ‘exempt’ in **AMP Society v CIR** (1962) NZLR 449 where in rejecting a submission that ‘exempt form taxation’ means not subject to taxation the Privy Council endorsed at p.454 the Stipendary Magistrates comment (that):

“A company cannot be exempt unless, but for the exemption, it would have been liable.”

(See also : Redbank Meat Works Pty Ltd v C of T (Q) (1944 69 bCLR 315)

In my opinion the word 'exempt' is similarly used in Section 102, that is to say in its 'natural and primary' meaning. The foreign income of a resident taxpayer forms part of his 'chargeable income' in Fiji and is accordingly taxable.

Of greater significance however are the changes that were effected by the legislature in the wording of Section 44 which, in my view, altered the primary focus and the manner in which double taxation relief would thenceforth be granted under the taxing Act.

In particular, whereas under Section 44(1) it was the '(foreign) income' that was 'exempt from tax'; under Section 102 it is the 'tax chargeable' on foreign income that is to be 'abated or exempted'.

Furthermore under Section 44(1) the CIR had to be satisfied of only two (2) things namely, the foreign derivation of the income and that it is chargeable with income tax; whereas under Section 102(b) the CIR must be satisfied not only as to the foreign derivation of the income and the absence of a double taxation agreement, but also, the extent (not just the fact) to which such income '..... is chargeable with income tax

In other words whilst Section 44 did not require the CIR to make a 'quantitative' analysis of the tax chargeable, Section 102(b) does by virtue of the phrase, to the extent that and the over-riding effect of the machinery provisions of Section 103 which in terms subjected the relief granted by Section 102 to its provisions.

Both submissions also sought to rely on various legislative changes and practices that occurred in New Zealand (pre and post 31 March 1963): in Australia (pre and post 1987) and in the UK (pre and post 1950) which each claimed was supportive of the particular interpretation advanced. I am content however to confine my deliberations to the structure and wordings of Section 102 of the Income Tax Act (Cap 201) and the legislative changes that were effected in 1974 by the Income Tax Act No.6 of 1974 as providing the clearest and most reliable indicators of the legislature's intentions.

Much was also made in the submissions as to the effect and meaning of the change from: '..... if (and so far as the Commissioner is satisfied) it is chargeable with income tax in that country'. [Viz: Section 102(b)]. Counsel for the taxpayers submits that the position remains unaltered, whereas Counsel for the CIR submits that the position or 'regime') has changed from a 'complete exemption' from tax of the foreign income to one of allowing a tax credit or exemption for any foreign tax paid.

In seeking to resolve this difference in wording and interpretation, I observe at the outset that both 'provisos' to Section 44(1) have been retained. I am also firmly of the view that the words 'to the extent that' in their natural and ordinary meaning, are words of limitation having a broader ambit than the word 'if' which serves to introduce in Section 44(1) at least, a single condition or qualification, namely, whether the foreign income is

chargeable with income tax? If it is, then (subject to the Commissioner's satisfaction) the income is 'exempt from tax' irrespective of the amount of foreign tax paid, and if not, then it is liable to be taxed in Fiji.

Perhaps I can best illustrate my view of the 'change' effected by the legislature's adopt of the formula: '..... to the extent that' by referring to the judgment of the High Court of Australia in **Ronpibon Tin N L v FC of T** (1949) 78 CLR 47 where the relevant Australia tax provision for the deduction of business losses and outgoings was changed by the removal of the words 'not wholly and exclusively laid out' and the substitution therefore, of the words 'to the extent to which'.

In a joint judgment, the High Court said at p 55 (ibid):

“....there are very important differences between the operation which the present S.51(1) is framed to produce and the manner in which the former S.23(1)(a) and S.25 worked. Some of these differences it is desirable to mention. In the first place the principle expressed by the former S.25(e) has been abandoned. The principle was in the words of that provision, that a deduction should not in any case be made in respect of money ‘not wholly or exclusively laid out or expended for the production of assessable income’. Instead of imposing a condition that the expenditure shall wholly and exclusively be for the production of assessable income the present S.51(1) adopts a principle that will allow of the dissection and even apportionment of losses and outgoings. It does this by providing for the deduction of losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income.”

(my underlining)

Needless to say, I do not accept the submission that despite the change in its structure and wordings, the meaning and effect of Section 102(b) remains substantially the same as that which prevailed under Section 44(1) of the Income Tax Ordinance (*Cap.176*).

In conclusion I wish to say that the interpretation of Section 102(b) has not been an easy exercise, for had the legislature intended to maintain the former position in Section 102(b) as the taxpayers argue, it would have been a simple matter to have adopted the wording of Section 44(1), or employed words to the effect the foreign income: “... ***shall be wholly exempt from tax if it is chargeable to tax in that other country.***” Equally, the interpretation propounded by the CIR would have been greatly assisted by the adoption of wordings similar to that in the post –1963- Section 170(2) of the New Zealand Land and Income Tax Act 1954 (as amended), or words to the effect that foreign tax paid in

respect of foreign income shall be allowed as a credit against any Fiji tax payable in respect of the same income. Unfortunately neither was done.

The appeal is accordingly allowed with costs to the CIR.

D V FATIAKI
JUDGE

At Suva,
18th February, 1997.

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