IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NOS. ABU0017 & ABU0018 OF 1997S
(High Court Civil Appeals Nos. HBA0009 and HBA0010 of 1995)

BETWEEN:

DONALD HENRY BULL
-and-
WILLIAM JOHN BULL

Appellants

AND:

COMMISSIONER OF INLAND REVENUE

Respondent

Coram: The Hon. Sir Moti Tikaram, President
The Hon. Sir Mari Kapi, Justice of Appeal
The Hon. Justice I. R. Thompson, Justice of Appeal

Hearing: 5 May 1998

Counsel: Mr. F.G. Keil for the Appellants
Mr. G. Keay and Mr. A. Bale for the Respondent

Date of Judgment: 15 May 1998

MAJORITY JUDGMENT OF SIR MOTI TIKARAM, PRESIDENT, AND JUSTICE IAN THOMPSON, JUSTICE OF APPEAL

These two appeals are against a single judgment of Fatiaki J. given in the High Court in respect of two appeals against a single decision of the Court of Review. Only one issue, common to both appeals, has to be addressed. The parties wish the appeals to be heard and determined together; in the circumstances that is proper and appropriate.

On 28 April 1995 the Court of review upheld an appeal by the taxpayers against the assessment of the Commissioner of Inland Revenue 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 tax payers from funds invested in Australia and in respect of which Australian withholding tax of 10% had been paid and deducted at source. The Court of Review's decision was as follows:

> **"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 Commissioner of Inland Revenue (the present respondent) appealed to the High Court against the Court of Review's decision.

On 18 February 1997 Fatiaki J. allowed the Commissioner's appeal and thus overturned the decision of the Court of Review. In brief Fatiaki J. held that the foreign income of a resident tax payer forms part of his chargeable income and is accordingly taxable. In short the income was not wholly exempt.

From this decision the taxpayers now appeal as follows:

> **"The learned Judge erred in law in holding that on his interpretation and application of the provisions of S102(b) of the Income Tax Act only partial relief was provided from Fiji income tax on the Appellant's interest income derived in Australia and taxed with income tax in Australia."**

The facts were never in dispute; they were formally agreed in the Court of Review. Each of the appellants derived income from investments in Australia in 1987, 1988, 1989 and 1990; they were resident in Fiji. Withholding tax at the rate of 10% of the whole amount of the income was deducted in Australia before the income was received by the

appellants. , During those years there was no double taxation agreement between Fiji and Australia.

The one issue to be determined concerns the construction of section 102 of the Income Tax Act (Cap.201) ("the Act"), which was enacted in 1974. Section 102 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 that 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 taxpayer 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."

Reliance is placed by the respondent on section 103 of the Act; it is convenient to set it out here. It reads:

"103.(1) Notwithstanding the provisions of any agreement entered into by the Government of Fiji and any other territory, the relief granted by section 102 shall be subject to the following provisions:-

(i) relief shall only be granted to persons who are resident in Fiji for the year of assessment;

(ii) credit shall not be allowed by virtue of section 102 for overseas tax on a dividend unless the overseas tax is directly charged on the dividend, whether by charge to tax, deduction of tax at source or otherwise and the whole of it represents tax which neither the company nor the recipient would have borne if the dividend had not been paid;

(iii) the amount of the credit for overseas tax which is to be allowed to a person against income tax for any year of assessment shall not exceed the difference between the amounts of income tax which would be borne by him for the year (no credit being allowed for overseas tax) -

(a) if he were charged to tax on his total income, computed in accordance with this Act; and

(b) if he were charged to tax on the same income, computed in the same way but excluding the income in respect of which the credit is to be allowed.

Where credit for overseas tax is to be allowed in respect of income from more than 1 source, this basis shall be applied successively to the income from each source but so that, on each successive application, paragraph (a) shall apply to total income exclusive of the income to which this paragraph has already been applied;

(iv) where credit is to be allowed against the Fiji tax payable in respect of the overseas tax, such overseas tax, whether payable directly or by deduction on profit or income from sources within the overseas territory (excluding, in the case of a dividend, tax payable in respect of the profits out of which the dividend

is paid), shall be computed by reference to the same profits or income by reference to which the overseas tax is computed;

(v) notwithstanding anything contained in this Act or in any agreement entered into by the Minister under section 106, "credit", for the purpose of this section, shall not exceed the lesser of the following amounts:-

(a) the amount of Fiji tax payable on the same overseas income which is appropriate to the income which has been charged to tax in the overseas territory for the same year; or

(b) the amount of overseas tax payable on the same overseas income which is appropriate to the income which has been charged to tax in Fiji for the same year;

(vi) the Commissioner may satisfy himself regarding the amount of overseas tax paid or deducted by demanding production of any relevant notices of assessment or other confirmatory evidence.

(2) For the purpose of this section, "overseas tax" means tax under the law of a territory outside Fiji."

Section 106, referred to in section 103(1)(v), authorises the making of double taxation agreements.

Section 7(1) of the Act provided at all relevant times that normal tax was to be "assessed on every dollar of chargeable income" of an individual taxpayer. Section 24(1) defined the "chargeable income" of a taxpayer as his or her "total income" for the year, whether accrued in or derived from Fiji or elsewhere, "subject to the deductions" specified in sections 25, 26, 27, 29 and 30. Section 11 defined the "total income" of a resident as "the aggregate of all sources of income", including interest and discounts. Subject, therefore, to section 102, the Australian interest of each of the appellants was part of his total income and, subject to any deductions being allowed under the sections specified, normal tax was required to be assessed on every dollar of that total income.

The respondent conceded in the Court of Review and the High Court that the withholding tax deducted in Australia was a form of income tax.

The appellants' contention is that the effect of section 102 (b) was that they were not liable to pay income tax in Fiji on the income from the Australian investments. The respondent contends that, for the purpose of calculating the amount of income tax which the appellants were liable to pay, that income was to be taken into account as part of their total income in accordance with section 11 of the Act and that the amount so calculated was to be reduced by the amount of the withholding tax deducted in Australia. The appellants' contention was upheld by the Court of Review; the High Court upheld the respondent's contention.

As Fatiaki J. observed at the conclusion of his judgment in the High Court, it would have been quite simple for the draftsman to frame the provisions of section 102 (b) so that they clearly achieved one or other of the results contended for. But section 102 fails to make such clear provision. The difficulty in construing paragraph (b) of that section arises because, if all the words and phrases used in the section are given their natural meaning, there is an internal contradiction within the section.

It is necessary as a first step to examine all the provisions of the section to ascertain their possible natural meanings. The first two lines provide for the tax chargeable in respect of the income to be "abated or exempted". The rate of income tax in a foreign country may be lower than the rate of tax in Fiji; in that event the effect of section 103, at least where there is a double taxation agreement, is that the amount of tax which would otherwise have been payable in Fiji is to be offset by not more than the amount of the foreign tax paid or deducted. Clearly, therefore, as the first two lines of section 102 apply to paragraph (a) as well as paragraph (b), "abated" means reduced. On the other hand, the rate of tax in the foreign country may be higher than the rate in Fiji; in that event the effect of section 103 may be that the amount of tax which would otherwise be payable in Fiji may be offset to the point where it is extinguished. That is an unusual meaning for "exempted" to bear; but one meaning of the verb "exempt" given in the Shorter Oxford Dictionary is "to omit; to except". The usual meaning of the verb in a context such as the Act is to grant immunity or freedom from a liability; there is no liability to which the tax chargeable is subject from which can be granted immunity or freedom. In our view "exempted" in the second line of section 102 can mean extinguished. The natural meaning of the first two lines of that section is then that the amount of income tax

calculated on a taxpayer's income that is chargeable with tax is to be reduced or extinguished and that that is to be done in the manner set out in paragraphs (a) and (b).

The natural meaning of the words in paragraph (b) "such **income** shall be exempt from tax to the extent that it is chargeable with income tax in that other country" is that to that extent the income is not chargeable with tax in Fiji, that is to say, such income is not a part of the taxpayer's income taken into account in calculating the amount of tax chargeable. Paragraph (b) provides that income in respect of which foreign tax has been paid or deducted is exempt from tax "to the extent" to which it, **that is to say the income**, was chargeable with that foreign tax. In the appellants' case the whole of their income derived from Australia was chargeable with Australian tax; the tax deducted was 10% of the total income. So, it appears that, if the words of paragraph (b) are given their natural meaning, they do not state the manner in which the amount of tax chargeable on that income is to be reduced or extinguished. Instead their effect is that there is no tax chargeable, so that there is no tax to be reduced or extinguished.

The provisions of paragraph (b), if accorded their natural meaning and effect, contradict those of the first two lines of the section. Generally courts are reluctant to hold that a statutory provision cannot be construed as having some effect. Neither party has suggested that section 102 should be held to be without effect. It would be unfortunate if we were obliged to so hold, as that would result in taxpayers paying both the full amount of the foreign tax and the full amount of Fiji tax; whatever effect the Parliament intended section 102 to have, it was clearly not that. However, it can have effect only if the internal contradiction can be resolved. That can be achieved only if some of the words of the section can be and are construed in

a manner which does not accord them their natural meaning or if they can be and are in some way read down. As always the purpose of undertaking the construction of the section is to ascertain the legislature's intention. In the present case that requires identification of which of the two contradictory provisions the Parliament intended to be the principal operative provision.

If we come to the conclusion that the first of the two contradictory provisions prevails, paragraph (b) must be construed as though it provided that the income is exempt **to the extent of the income tax** chargeable in the other territory. If we come to the conclusion that the second of the contradictory provisions prevails, the first two lines of section 102 must be construed as providing that, where paragraph (a) is applicable, the tax chargeable on the income is to be abated and that, where paragraph (b) is applicable, the income is exempt. Both constructions, in our view, do equal violence to the natural meaning of two provisions. However, we are satisfied that, in order to give section 102 some meaning and effect where paragraph (b) is applicable, it is permissible to adopt either of these two alternative constructions.

In favour of treating the provision in paragraph (b) as the principal operative provision is the fact that to a considerable extent it is similar to the provision made by section 44(1) of the Income Tax Act (Cap.176, 1967 edition of the Laws of Fiji) ("the previous Act"), the legislation in force immediately preceding the commencement of the Act. The Act is a taxing Act; generally such statutes must be strictly construed; that is to say for a tax be imposed the words used must demonstrate a clear intention to impose it (Cape Brandy Syndicate v. The Commissioners of Inland Revenue [1921] 1 KB 64,71). However, section 102 does not impose

a tax; depending on how it is construed, it either exempts income from tax or it reduces or extinguishes the amount of tax otherwise payable.

In favour of treating the first two lines of the section as the principal operative provision the respondent relies on dissimilarities between section 102 and section 44(1) of the previous Act, on the context of the Act generally - and particularly the position of section 102 in it - and on the effect of section 103.

Section 44 of the previous Act was contained in Part VI of that Act. The headnote of that Part was "Exemptions and Double Taxation Agreements". All the provisions of that Act exempting any income from tax were contained in that Part. Provision for the exemption of shipping profits was contained in section 44 (2). Section 45 authorised the making of double taxation agreements with other countries and provided that the arrangements made in such agreements were to have effect in relation to tax "notwithstanding anything contained in any enactment."

In the present Act all the provisions for exemption of income from income tax, other than section 102 if it is such a provision, are contained in Division 2 of Part IV. There is no headnote to that Part but there are headnotes to each of its two Divisions. Division 1 is headed "Amounts to be Included in Arriving at Total Income". It contains the provisions which govern what receipts constitute the taxpayer's income for the purposes of the Act. Division 2 is headed "Items of Income Not Liable either to Basic Tax or Normal Tax or Basic Tax and Normal Tax". Some of the sections in that Division specify, or authorise the Minister to specify, income of

particular persons or bodies or derived from carrying on particular businessess or from particular pensions and funds and provide that they are exempt from tax; others provide for certain expenditure and losses to be deducted from total income for the purpose of ascertaining the amount of chargeable income. Section 102 is in Part XIV of the Act. The headnote of that Part is "Rebates from Tax Charged". Most of the provisions of the Part provide for setting off amounts against the amount of tax which, but for those provisions, would be payable; the amounts so set off may reduce that amount or totally extinguish it. But, whatever the result of the set-off, it is generally made **after** the amount of tax appropriate to the chargeable income of the taxpayer has been ascertained; the **income** is not exempt from tax.

Both parties base arguments on section 44(1) of the previous Act. The appellants point to the similarity between it and paragraph (b); they refer to the fact that, as was section 44(1), paragraph (b) is worded "[that] income shall be exempt from tax". Under the previous Act it was exempt "so far as" it was chargeable with income tax in the other country. The appellants submit that "to the extent" in paragraph (b) has the same meaning as "so far as". The respondent points to the dissimilarity between section 44(1) and section 102 as a whole.

The provisos in paragraph (b) are essentially the same as provisos in section 44(1) of the previous Act. The first proviso was included in the section from 1945, the second was added in 1960. In his written submission Mr Keay suggested that the first proviso would not have been included in section 102(b) if the amount of the foreign tax paid was not to be set off against the tax otherwise payable; but in 1945 the section in which it was contained clearly provided that income derived from a foreign country where it had been chargeable to tax was

exempt from tax in Fiji. At the hearing, therefore, he conceded that the suggestion could not be maintained. The second proviso was not relied on by either party and, we are satisfied, does not assist in determining the Parliament's intention in respect of the contradictory provisions with which we are concerned.

Although in Fiji there is no statutory authority for referring to any sources external to the legislation itself in order to construe it, we consider it proper to refer to the reports of the Parliamentary debates on Bills for Acts to the extent, and for the purpose, approved for the courts in England by the House of Lords in Pepper v. Hart [1993] AC 593. That is to say we consider it a proper development of the common law that, where the legislation is ambiguous or obscure or where to give it its natural meaning will lead to absurdity, the courts in Fiji should be able to take into account for the purpose of construing that legislation statements by the Minister or other promoter of the Bill, provided that those statements are clear. Accordingly, we have examined the reports of the Parliamentary debates in 1994 in respect of the Bill for the present Act.

Unfortunately they afford little worthwhile assistance. In his second reading speech in the House of Representatives the Hon. C.A. Stinson, the Minister of Finance, said simply:

> "Sections 101,102 and 105 deal generally with double taxation agreements............................ Section 101 replaces subsection (1) of section 44 whilst section 102 sets out limitations to the relief which can be authorised by an agreement."

The sections 101 and 102 referred by the Minister are now sections 102 and 103 of the Act. In respect of section 18, which contains the provision in respect of shipping profits which had been made by section 44(2) of the previous Act, the Minister said that reference to exemption of U.K. residents (in respect of shipping profits) had been deleted. Nothing more was said about section 18, section 101 or section 102 during the debate; they were all agreed to without being debated. Nothing was said about any of those sections during the debate on the Bill in the Senate.

The only significance of what the Minister said in respect of section 101 (now section 102) is that he used the word "replaced" and not "reenacted". If he had used the latter word, that would have indicated that section 101 was intended to have the same effect as section 44(1) of the previous Act. The use of "replaced" does not necessarily mean that the new section was not intended to have that effect but it leaves open the question whether it does so or not. The Minister's reference to section 102 (now 103) confirms that it is intended to apply only where there is a double taxation agreement, a conclusion which we had reached from consideration of its provisions.

In our view, there are two matters which indicate fairly strongly that the Parliament intended not to reenact the provisions of section 44(1) of the previous Act but to make new provision which provided not for exemption of the foreign income from tax but for the amount of the foreign tax paid to be offset against the amount of Fiji income tax which would otherwise be payable. The first of those matters is the fact that, if the Parliament had wished to make the same provision as section 44(1) of the previous Act had made, there was no need for it to redraft that provision. Although paragraph (b) of section 102 contains provision which, if it stood alone, would have the same effect as section 44(1) of the previous Act, unlike in section 44(1) that provision does not stand alone. The legislature has placed it in a section which commences by providing that the tax chargeable is to be abated or exempted. It can be presumed that it did so for a purpose; the only purpose discernible is that it was intended to be subordinate to that provision.

The second matter indicative of how section 102(b) is to be construed is the fact that it is not included in the Part of the Act where the provisions for exemption of income from tax are located and is included in the Part where most of the provisions relate to the offsetting of amounts against the amount of tax which would otherwise be payable.

We have come to the conclusion, therefore, that paragraph (b) of section 102 is to be read down to mean that tax chargeable in the foreign country is to be offset against the tax which would otherwise be payable in Fiji and that the judgment of Fatiaki J. should be upheld.

Accordingly the appeals of both the appellants are dismissed. The appellants are liable jointly and severally to pay the respondent his costs of the appeals; those costs, however, are to be assessed on the basis of there having effectively been only one appeal.

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Sir Moti Tikaram
President

....
Mr. Justice I.R. Thompson
Justice of Appeal

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