IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0051 OF 1999S
(High Court Civil Action No.HBA0012,13,14 of1998))

BETWEEN:

COMMISSIONER OF INLAND REVENUE

Appellant

AND:

CHIMAN LAL JAMNADAS
MICHELLE APARTMENTS LIMITED
PRIMETIME PROPERTIES LIMITED

Respondents

Coram: Sheppard JA, Presiding Judge
Tompkins JA
Smellie JA

Hearing: Friday, 24 May 2002, Suva

Counsel: Ms Barbara Malimali for the Appellant
Mr. John Greenwood Q.C. and Ms A. Prasad for the Respondent

Date of Judgment: Friday 31 May 2002

JUDGMENT OF THE COURT

The application for leave

The respondents have applied to this court for leave to appeal to the Supreme Court against the decision of the Court of Appeal delivered on 1 March 2002.

There were two issues before the Court of Appeal. One was whether the first appellant, Mr Chiman Lal Jamnadas, was entitled to deductions under section 19 of the

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Income Tax Act Cap. 201 ("The Act") for the costs of travel between Adelaide, Australia, where he was living, and Suva, Fiji, where his income was derived, and also his expenses for accommodation, meals and laundry whilst he was staying in Suva. The other was whether the Court of Review and the High Court had jurisdiction, in appeals against objection decisions, to review the exercise by the Commissioner of Inland Revenue under s.100(2) of the Act of his power to mitigate or remit a penalty imposed by the Act. Section 94 of the Act imposed a penalty on appellant, Michelle Apartments Limited, for failure to lodge returns over eight or nine years. The Commissioner reduced the penalties to $26,313 and then to $11,621. The issue is whether Byrne J had power to and was justified in reducing the penalty assessed from $11,621 to $1,160.

The Hon M.J.C.Saunders sitting as a Court of Review disallowed the deductions. On appeal to the High Court, Byrne J held that the expenses were deductible. On the appellants' appeal to the Court of Appeal, that court held that they were not deductible. It also held that Byrne J's decision on penalty should be set aside and the decision of the Court of Review re-instated.

Pursuant to s 122 (1) of the Constitution, leave is to be granted if this court certifies that there are questions of significant public importance.

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The factual background

The following factual background was adopted by the Court of Appeal from the judgment of Byrne J

> "Mr Jamnadas, the First Appellant, practised as a lawyer in Suva, Fiji. In 1982 he acquired control of Michelle Apartments Limited (Michelle). In 1987 he acquired control of Primetime Properties Limited (Primetime).

In 1988 Mr Jamnadas moved himself and his family to Adelaide, South Australia for the purpose of educating his children in Australia. He intends to return to the Fiji Islands upon completing the education of his children. He and his wife still retain their Fijian passports. When he left for Australia he let the family home in Suva. He had an interest in a family deceased's estate, which produces Fiji income and he retained his interests in Michelle and Primetime. He began to travel regularly and for considerable periods from his Australian residence to Fiji to look after the estate and business interests. He had no business interests in Australia and ran down his practice as a solicitor in Suva until it ceased at the end of 1990.

He derives no income in Australia other than small amounts of interest. His income is otherwise entirely sourced in this country.

When he came to Fiji the pattern of his visits was always the same. He left Adelaide, flew to Nadi and caught a bus from Nadi to Suva where he stayed at the then-called Travelodge now Centra.

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While at the Travelodge he paid for accommodation, telephone calls, faxes, laundry, dry cleaning and meals.

When he returned to Adelaide immediately after he finished his business in Suva he left Suva, stayed overnight in Nadi and then flew across the following day to Adelaide. The reasons why he stayed at the Travelodge were that it was very central and that he could use the hotel's facilities such as the telephone and fax."

The first question

The right to deductions from assessable income of the kind sought here is derived from s 19 (b) of the Act which provides *inter alia*:

> 19. In determining total income, no deductions shall be allowed in respect of -
> .....
>
> (b) Any disbursement or expense not being money wholly and exclusively laid out or expended for the purpose of the trade, business, profession, employment or vocation of the taxpayer;

When discussing this section, the Court of Appeal said at page 5:

"In section 51(1) of the Income Tax Assessment Act 1936 (Australia), the point is made explicit by the use of the terms "incurred in gaining or producing the assessable income and "necessarily incurred in carrying on a business for the purpose of gaining or deriving such income." In *Ronpibon Tin No. Liability v. Federal Commissioner of Taxation* (1949) 78 CLR 47, Latham CJ, Rich, Dixon, McTiernan and Webb JJ. said at 56-7:

> "For expenditure to form an allowable deduction as an outgoing incurred in gaining or producing the assessable income it must be incidental and relevant to that end. The words 'incurred in gaining or producing the assessable income' mean in the course of gaining or producing such income."

Although similar words are not used in section 19 of the Act, the same requirement is inherent in its operation."

The judgment went on to cite a number of Australian judgments, apparently on the basis that there was no practical distinction between the Australian s 51 (1) and the Fijian s 19 (b). It is submitted on behalf of the appellant that this was a fundamental error of considerable significance. In support, reference was made to the following passage in the judgment of the majority, Gleeson CJ, Kirby and Hayne JJ, in *Commissioner of Taxation v Payne* (2001) 75 ALJR 442 at 446, paragraph 16:

> "The principle ... is one which limits the amounts of a deduction for outgoings to those outgoings that are incurred in the course of deriving an assessable income. It is a principle which excludes outgoings which, although incurred *for the purpose* of deriving an assessable income, are not incurred *in the course of* doing so. Distinguishing between these two kinds of outgoing may well invite some criticism, but if it does, the criticism is directed at the legislation, not at the way in which the legislation has been interpreted." (The emphasis is in the original)

The significance of this passage is that the phrase "for the purpose of" appears in the Fijian s.19(b), the phrase "in the course of" is how the Australian Courts have interpreted the Australian s.51(1).

We are satisfied that the issue of the proper test to be applied in this difficult area of taxation law raises a question of significant public importance. The Commissioner and taxpayers need to know whether, as the passage in the Court of Appeal judgment seems to suggest, the Fijian test is the same as the Australian test, or whether, as the *Payne* decision indicates, the two tests are significantly distinct.

The second question

The Court of Appeal held that the Court of Review and the High Court had power to review the exercise by the Commissioner of Inland Revenue of his decision under s 100 (2) of the Act to mitigate the penalties imposed by s 94 of the Act.

On the nature of that review, the court held:

> "Even though an appeal be a general appeal, a court, as distinct from an administrative tribunal such as the Discretions Review Board, will not interfere with primary decision - maker's exercise of discretion unless the court considers that the decision - maker erred in the interpretation of the law, or mistook the facts or took into account an irrelevant consideration or made a decision that no reasonable decision-maker should have come to or that the discretion otherwise miscarried in law."

The court went on to hold that as no reviewable error in the exercise of the Commissioner's discretion was identified by the Court of Review, in the High Court, or in the Court of Appeal, the order made by Byrne J in respect of penalty, should be set aside.

The appellant submits that to be an erroneous approach. He relies on s 63 of the Act, which provides that the Court of Review has the ". . . powers and authority similar to those vested in the High Court as if the appeal were an action between the taxpayer and the Commissioner."

He also relies on subs 66 (1) which provides:

> (1) "The Court of Review, after hearing any evidence adduced and upon such other enquiry as it consider advisable, shall determine the matter and confirm or amend the assessment accordingly."

Finally, on the role of the High Court on appeal, he relies on s 29. It provides for the right to appeal from the decision of the Court of Review. The concluding sentence of the section provides:

> "On any such reference, the High Court shall hear and consider such matter upon the papers and evidence referred, and upon any further evidence which the appellant or the Commissioner produces under the direction of the said court"

In reliance on these provisions, the appellant submits that the Court of Appeal erred in holding that the appeal was to be treated as an appeal against the exercise of a discretion by the Commissioner. Rather, the appellant contends, both the appeal to the Court of Review and to the High Court are to be appeals *de novo,* in which either court hears evidence and makes its own decision.

This is an issue of significance. An appeal to the Supreme Court will provide guidance as to the approach to be adopted by these courts when hearing challenges to penalty assessments made by the Commissioner.

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The result

This court certifies that both the first and the second question give rise to questions of significant public importance. Accordingly, leave to appeal to the Supreme Court is granted.

Sheppard JA, Presiding Judge

Tompkins JA

Smellie JA

FIJI COURT OF APPEAL

Solicitors:

Office of the Commissioner of Inland Revenue, Suva for the Appellant
Messrs. Wm Scott Graham and Company, Suva for the Respondents

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