

IN THE TAX COURT  
AT SUVA

Tax Court Appeal No. HBT 5 of 2013

BETWEEN : CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND CUSTOMS  
AUTHORITY

*Appellant*

AND : VIJAY NARAYAN

*Respondent*

Coram : The Hon. Mr Justice David Alfred

Counsel : Ms T Rayawa for the Appellant  
Ms S Devan for the Respondent

Date of Judgment : 4 November 2016

JUDGMENT

1. This appeal was heard by Kotigalege J on 15 November 2013, when judgment was reserved.
2. The matter was called on 6 August 2015 before me when Counsel on both sides consented to my delivering judgment based on the written record and did not require any further oral submission to be made. I informed I would take time for consideration. Having done so, I now proceed to deliver judgment.

3. This is the Appellant's (Revenue's) appeal against the decision of the Tax Tribunal dated 6 March 2013 (judgment). By its Notice of Appeal, Revenue is seeking (inter alia) the following Orders:

- (i) That there was no agricultural income derived by the Respondent therefore all agricultural expenses should be disallowed.
- (ii) That the Appellant correctly assessed the Respondent income tax for the sum of \$29,685.05.
- (iii) That the disallowance of expenses by the Appellant was correct as there was no documentary evidence provided by the Respondent.

I shall refer to the Tribunal in the masculine gender wherever it is necessary to do so.

4. The Grounds of the Appeal include the following:

- (i) The Tribunal erred in law and in fact:
  - (a) When he concluded the Respondent (Narayan) was carrying out a farming business when there was no evidence adduced of agricultural income.
  - (b) When he allowed expenses of \$93,625.50 as incurred over 24 years.
  - (c) When he accepted the oral evidence of Narayan on the extensive work undertaken in preparation for the farming activities without any documentary evidence of payment.

5. Revenue appeals against those parts of the judgment where the Tribunal concluded:

- (i) The expenses allowed of \$93,625.50 (expenses) as being reasonably incurred over the 24 year period.
- (ii) He was satisfied on the balance of probabilities that the expenses would have been expended having regard to Narayan's testimony and as a result the income gained by Narayan is \$42,374.50 and Revenue must re-issue a Notice of Amended Assessment having regard to those calculations.

6. The judgment gives the agreed facts which I paraphrase as follows:

In 1982, Narayan, whilst employed by a Fiji Government department, purchased the land concerned for \$32,000.00. Narayan subdivided the land into 4 lots, each lot being about 1 hectare. He sold 3 lots at a total price of \$136,000.00. The Revenue treated this amount as income, and offset against it the purchase price of \$32,000.00 and expenses of \$4,557.89.

In the result Narayan had to pay \$29,685.05 as income tax. It is this assessment that was the subject of the review before the Tribunal.

7. At the Review, Narayan and Revenue's sole witness, Laisa Turagalada gave evidence.
8. The Tribunal then analysed the law, went through the authorities and came to a considered opinion that Narayan's intent was "to develop the foundations of a farming business that he could pursue upon his compulsory retirement from the civil service" (see para 36 of the judgment).
9. Having determined the dominant purpose for which the property was acquired, the Tribunal then went on to determine that the profit arising is income. The first issue he had to decide was that relating to allowable expenses. Narayan was unable to "validate his expenses". Counsel for Revenue had submitted Revenue had allowed items that could be verified by documentation.
10. Section 109(3) of the Income Tax Act requires retention of records by a taxpayer for 7 years after the relevant taxation year period. Narayan was not able to provide the necessary documents. He however provided as Exhibit R5 a detailed breakdown of the items and amounts claimed which came up to a total of \$127,552.50. In it he also stated there were no records kept for labour charges as these were done on a cash payment basis, and other records, receipts and documents were destroyed by floods.

11. The Tribunal accepted the above as reliable evidence for those purposes and found he would accept a total of \$93, 625.50 had been reasonably incurred over the 24 year period. The Tribunal was satisfied on a balance of probabilities that these would have been expended.
12. In the result, the Tribunal concluded the income gained by Narayan was \$42,374.50. As this was considerably less than that originally assessed by Revenue, the Tribunal set aside the Notice of Amended Assessment #2 issued on 28 August 2012 and ordered Revenue to reissue an Assessment Notice based on an income gained by Narayan of \$42,374.50. Against this order Revenue has filed this Appeal to the Tax Court.
13. In my considered opinion this Appeal turns on the pivotal issue of the Tribunal's acceptance of evidence at the hearing and it is to this issue that I now turn my attention. The leading authority on the question of the evaluation of the evidence of witnesses is the speech of Lord Thankerton in : *Thomas v Thomas* [1947] A.C. 487 – 8:  
*“where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;”*
14. I also refer to the speech of Lord Reid in: *Benmax v Austin Motor Co. Ld* [1955] A.C. 375. Lord Reid said the trial judge has seen and heard the witnesses whereas the appeal court is denied that advantage and only has a written transcript of their evidence. The trial judge enjoys an advantage in determining any question whether a witness is or is not trying to tell what he believes to be the truth. More than that the trial judge may be led to a conclusion about the reliability of a witness's memory by material not available to an appeal court.  
To my mind, this means the best judge of a witness's credibility is the trial judge himself.

15. I shall first consider whether the Tribunal was justified in holding it was a farming business and not one of selling property and then whether he was also justified in allowing the expenses in the sum that he did.
16. In the Record of the Court of Review (Record) it is recorded that Narayan in his examination in chief testified that he purchased the property "with farming backyard". He "thought when I would retire go back and farm" and he "would travel on weekends and work on the farm – weekend farming for me," and "then plant crops on weekends."
17. Narayan moved to Australia in 1994 for the higher education of his 2 boys. When he subdivided the "intention was not to make money but to sell at decent price to landless people. His "intention is to return to land and farming. May be 6 months in Australia and 6 months in Fiji."
18. It is significant that in cross-examination, Counsel for Revenue asked Narayan "\$32K intention to use land for farming" and he answered "Yes."
19. In re-examination, he said pesticides for crops were "part of normal farming expenses."
20. The evidence of Revenue's sole witnesses, Laisa Turagalada, did not address the issue of whether Narayan was carrying on a farming or agricultural business.
21. At the end of the day, it is clear that the Tribunal refused to be tied to the particular mode of assessment of tax chosen by Revenue. Before I can upset the decision of the Tribunal, I must find that there was no evidence on which he could find as he did. Having read the record and the written submissions of Counsel on both sides, I am satisfied that it is impossible to say there was no evidence on which he could so find.

22. I need to go no further than to quote para 37 of the judgment which reads: *"The Taxpayers own evidence of the extensive work that had been undertaken on the property in preparation for farming activities and the engagement of various labour to undertake different tasks, that included the hiring of a full time caretaker, all lead me to conclude, that this was the carrying out of a subsidiary business for the taxpayer, albeit on a small scale."*
23. I am satisfied that the Tribunal was correct when he said at para 39 of the judgment that Narayan's objective intention at the time of acquisition of the property, and the dominant reason why the property was acquired was "pursuing his goal as a farmer at Deuba."
24. In my opinion it is clear that while Revenue contends that Narayan was not carrying out a farming business, their real complaint is that the Tribunal allowed expenses of \$93,625.50 (the expenses) in the absence of documents.
25. So, I turn now to the second issue in this Appeal *viz* whether the Tribunal was wrong to allow the expenses. I accept that the oral evidence was all that the Tribunal had to go on in reaching his conclusion. I accept that Narayan's evidence was not of the best quality. But reading the Record in cold print cannot given me or any other appellate forum, the opportunity or the advantage that the Tribunal possessed in gathering from the evidence before him, material on which to base his estimation of the expenses. The Tribunal makes this crystal clear at para 50 of the judgment when he says *"given the nature of the faming business that the Taxpayer was seeking to pursue, I am satisfied based on his oral evidence, that some of these expenses would have been reasonably incurred as wholly and exclusively laid out or expended for the purpose of the business."* In my view there can then be no gainsaying that the Tribunal was right to allow the expenses as properly claimed and allowable business expenses.

26. In fine, I dismiss this Appeal, I affirm paras (i), (ii) and (iii) of the Decision, on page 12 of the judgment, and I order the Appellant to pay the Respondent costs which I summarily assess at \$2,000.00.

Delivered at Suva this 4<sup>th</sup> day of November 2016.



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David Alfred  
**JUDGE**  
High Court of Fiji