CHIMAN LAL JAMNADAS and 2 Ors v COMMISSIONER OF INLAND REVENUE

SUPREME COURT — CIVIL JURISDICTION

FATIAKI P, FRENCH and HANDLEY JJ

15, 24 October 2003

[2003] FJSC 4

Taxation and revenue — assessment of income — deductibility of travelling and associated expenses — penalty tax assessed for late lodgment of returns — power of courts on appeal to review assessments — Income Tax Act 1985 (Cap 201) (Rev 1985) ss 19(a), 19(b), 62, 62(6), 63(1), 66(1), 66(2), 69, 94, 100(2).

Appellants sought an appeal by leave granted by the Court of Appeal from the decision of that court. The first issue related to the travelling and associated expenses incurred by the Appellants in connection with travel by 1st Appellant from Adelaide where he lived, to Suva. The second related to penalty tax assessed on the 2nd Appellant, under ss 94 and 100(2) of the Income Tax Act 1985 (Cap 201) (Rev 1985) for late lodgment of its returns, and the powers of the Court of Review and High Court on appeal to review the assessments.

Held — (1) First Appellant did not conduct business activities in Adelaide and his trips to Fiji lacked the essential requirement of a business trip. His trips did not involve travel from one place where business activities were carried on to another place where business activities were carried on. These trips were for business purposes since 1st Appellant intended to conduct business activities in Suva after he arrived. However they were really incurred because he chose to live away from the place where his business activities were carried on.

(2) Only the 2nd Appellant succeeded on the issue of penalties since it lodged its returns. The Court of Appeal erred in limiting the appeal to the Court of Review in penalty cases to the correction of error by the commissioner and in reversing this part Byrne J's decision. The judge having held correctly that the Court of Review made a jurisdictional error and wrongly refused to re-exercise the discretion under s 100(2) of the Act was entitled and bound to re-exercise that discretion himself on the material before the High Court.

Orders made.

Cases referred to

Bentleys, Stokes & Lowless v Beeson [1952] 2 All ER 82; *Ladd v Marshall* [1954] 1 WLR 1489; *Owen v Pook* [1970] AC 244, cited.

Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616; *Horton v Young* [1972] Ch 157; *Inland Revenue Commissioners v Korner* [1969] 1 WLR 554; *Lunney & Hayley v Federal Commissioner of Taxation* (1958) 100 CLR 478; *Newsom v Robertson* [1953] Ch 7; *Sweetman v Commissioner of Inland Revenue (Fiji)* (1996) 96 ATC 5107; 34 ATR 209, considered.

Mulholland v Mitchell [1971] AC 666; *Ricketts v Colquhoun* [1926] AC 1; *Taylor v Provan* [1975] AC 194, distinguished.

J. Greenwood and *M. Arjun* for the Appellants.

S. Tagicaki and *Riti Ali* for the Respondents.

Fatiaki P, French and Handley JJ. This appeal, by leave granted by the Court of Appeal (Sheppard, Tompkins and Smellie, JJA, 31 May 2002) from the decision of that court (Reddy P, Barker and Davies, JJA, 1 March 2002) raises

two questions of importance under the Income Tax Act 1985 (Cap 201) (Rev 1985). The first relates to the travelling and associated expenses incurred by the appellants in connection with travel by Mr Jamnadas from Adelaide where he lived, to Suva. The second relates to penalty tax assessed on the 2nd Appellant, Michelle Apartments Ltd (Michelle) under ss 94 and 100(2) for late lodgment of its returns, and the powers of the Court of Review and High Court on appeal to review the assessments in this respect.

The first issue

The facts as found by the Court of Review and the High Court were that Mr Jamnadas practised as a barrister and solicitor in Suva until 1988 when he moved with his family to Adelaide for the purpose of educating his children. Thereafter he progressively wound down his legal practice until it ceased at the end of 1990. In 1982 he had acquired control of Michelle and in 1987 he acquired control of the 3rd Appellant Primetime Properties Ltd (Primetime). Both companies owned valuable real estate and carried on associated business activities in Suva. Mr Jamnadas also had an interest in a deceased estate which received income from sources in Fiji.

Following his move to Adelaide Mr Jamnadas began to travel regularly to Suva and to remain there for considerable periods to look after his various business interests and the interests of Michelle and Primetime. He had no business interests in Australia. When he came to Fiji he travelled by air to Nadi and by bus to Suva where he stayed at the then Travelodge Hotel. While at the Travelodge he incurred expenses for accommodation, meals, laundry, dry cleaning, faxes, and telephone calls (associated expenses). He stayed at the Travelodge because of its central location and its telephone and facsimile transmission facilities. After his business in Suva had been completed he returned to Nadi by bus, stayed overnight and then flew back to Australia.

The actual travelling and associated expenses incurred in connection with these business trips to Suva were agreed during the proceedings in the Court of Review as was the apportionment of those expenses between the three appellants. In this court, although not below, the proceedings have been conducted on the basis that no separate question arises in relation to the associated expenses so that these will be deductible if the travelling expenses are deductible but not otherwise.

The first issue turns on s 19(a) and (b) of the Act which are relevantly as follows:-

> In determining total income, no deductions shall be allowed in respect of –
> (a) personal and living expenses …;
> (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;

As this court said in *Sweetman v Commissioner of Inland Revenue* (1996) 96 ATC 5107; 34 ATR 209 at 9:-

> Section 19(b) is identical to all intents and purposes with Rule 1 of Schedule D of section 100 of the Income Tax Act 1842 (UK). There is a body of English authority which throws light on the meaning of this provision and its successors.

The Court of Review (The Hon MJC Saunders) in his decision (6 October 1997) held that the travelling expenses incurred in and after 1989 should be disallowed under s 19(b) in accordance with the decision in *Newsom v Robertson*

[1953] Ch 7 (CA) on the comparable provision in Sch D. The Court of Review also followed the decision of the House of Lords in *Ricketts v Colquhoun* [1926] AC 1 which rejected a claim to deduct travelling expenses under the provisions of Sch E governing the taxation of the emoluments of an office or employment.

5 The taxpayers appealed to the High Court from the disallowance of the travelling expenses and their appeals were allowed by Byrne J (24 August 1999). His Lordship characterised the travelling expenses in issue as expenses incurred on business trips which, as such, were deductible. He distinguished *Newsom v Robertson* on the ground that that case was concerned with the cost of daily 10 commuting which he characterised as an expense of daily living. Byrne J also distinguished *Ricketts v Colquhoun* on the ground that it was decided under the stricter provisions of Sch E which were not incorporated in the Fiji Act.

The commissioner appealed to the Court of Appeal. Appeals to that court in tax 15 cases, unlike the general appeals to the Court of Review and the High Court are limited to questions of law (Court of Appeal Act s 12(1)(c)). The court allowed the Commissioner's appeals (1 March 2002). Their Lordships, (Reddy P, Barker and Davies JJA) commenced their legal analysis by considering decisions of the High Court of Australia on s 51(1) of the Income Tax Assessment Act 1936 20 (Australia) which is in different language, and does not incorporate s 19(a) and (b) although there is some overlap. After considering the leading Australian case on the deductibility of travelling expenses, *Lunney v Federal Commissioner of Taxation* (1957) 100 CLR 478 and quoting extensively from the majority judgment, the Court of Appeal said:-

25

> These views accord with approach taken in the United Kingdom where legislative provisions similar to s 19(b) of the Act apply.

They then quoted extensively from the judgment of Denning LJ in *Newsom v Robertson*. They referred to five decisions of the High Court of Australia but in 30 our judgment their focus on these decisions was, with respect, misdirected. The relevant sections of the Fiji Act were based on United Kingdom legislation and there are long standing decisions of the courts of that country dealing with the deductibility of travelling expenses which are directly relevant to the Fiji Act. The Australian cases dealt with a different section.

35 The primary task of a court construing revenue legislation is to address itself to the statutory text. The consideration of decisions on comparable but differing legislation in other countries diverts attention from the relevant text in the Fiji legislation. In some cases taxation decisions in other jurisdictions on similar facts but different legislation may be of limited assistance by way of analogy where 40 there are no authoritative decisions on the text in the Fiji legislation. Such references will seldom be helpful where authoritative decisions are available.

For similar reasons *Ricketts v Colquhoun* (above) and other decisions rejecting claims to deductions for travelling expenses under Sch E are of little assistance. 45 However since the deductions allowable under Sch E are more limited than those allowable under Sch D decisions such as *Pook v Owen* [1970] AC 244 and *Taylor v Provan* [1975] AC 194 allowing deductions for travelling expenses are relevant because such deductions would have been allowable under Sch D.

In a number of respects these proceedings have been conducted by the parties 50 on a conventional basis. In *Sweetman* (above) this court said (p 17) with reference to s 19(b):-

> The word "wholly" refers to the quantum of money expended and the word "exclusively" requires that the money be expended solely for the relevant purpose, ie for the purpose of the taxpayer's profession... that being essentially a question of fact.

Mr Sweetman was a member of a partnership which carried on a legal practice in Fiji and the deduction allowed by this court in that case related to his share of payments made by the partnership to clients whose funds had been misappropriated by a former partner. Under s 51(1) of the Fiji Act a partnership must file a joint tax return but a joint assessment is not issued. Instead each partner is assessed on his or her share of the net income of the partnership.

Thus to some extent the Act treats a partnership as if it was a legal entity distinct from its members and s 19(b) must be applied accordingly. The same view has been taken in the United Kingdom. See *Bentley Stokes & Lowless v Beeson* [1952] 2 All ER 82 (CA). In the present case the expenses were incurred for the benefit of all three taxpayers but they were not partners and could not be assessed jointly. The parties dealt with the matter by agreeing to an apportionment of the expenses between the taxpayers.

The requirement in s 19(b) that a disbursement or expense be "wholly and exclusively laid out for the purpose of the trade, business, profession, employment or vocation of the taxpayer" might appear at first glance to disallow entirely payments for a single service such as air fares made for the benefit of two or more taxpayers which cannot be dissected into separate payments for the purposes of different taxpayers. The Act does not appear to authorise taxpayers or the commissioner to apportion such payments.

This problem has arisen in the United Kingdom in respect of payments made partly for business and partly for private purposes. *Inland Revenue Commissioners v Korner* [1969] 1 WLR 554 (HL) concerned a claim by a university professor, who carried on a farming business and lived in a house on the farm, to deduct under Sch D the cost of rates, repairs, maintenance and insurance on that house. Under a special provision dealing with farmers the taxpayer was held entitled to deduct the whole of those costs but the parties had agreed that if the general provisions of Sch D had been applicable, the taxpayer could deduct one tenth of those payments as being the proportion referable to his business use of the farm house. At 558 Lord Upjohn said:-

> The result of... Schedule D was that, apart altogether from s 526, the farmer occupying a house (no doubt with his wife and children) for the purpose of his farming activities would be entitled to claim a proportion of the reasonable and necessary expenditure upon the maintenance of his house as a deduction from his assessment to tax for the purposes of Schedule D. This practice is very old, works great justice between the Crown and the subject and I trust will never be disturbed. Thus speaking generally the grocer living above his shop, the doctor who has a surgery in his house and the barrister who works in his house where he keeps or brings his law books and works on his briefs in the evenings and at weekends is allowed by the Crown a reasonable sum in respect of the necessary upkeep of his dwelling as being properly attributable to his trading or professional activities.
>
> So that in the present case there is no doubt, and indeed it is not disputed, for I did not understand the Solicitor- General for Scotland to challenge this proposition in his reply, that, apart from s 526, the respondents are, in any event, entitled to a proportion of the expenses, and it is agreed between the parties that this proportion should be one tenth.

The practice of the United Kingdom revenue referred to by Lord Upjohn may be the basis for the commissioner's practice here in allowing apportionments such as those agreed upon in the present case notwithstanding the language of s 19(b). This court likewise would not wish this practice to be disturbed. In fact Ms Tagicaki, who argued this part of the case for the commissioner, said that the commissioner did not challenge the apportionment of the expenses as between the taxpayers and did not rely on the fact that those expenses were incurred for the purposes of more than one taxpayer.

The directly relevant cases on s 19(b) for present purposes are the decisions of the English Court of Appeal in *Newsom v Robertson* [1953] Ch 7 and *Horton v Young* [1972] Ch 157. The first case involved a claim by a barrister who practised at the Chancery Bar in London, but lived in the country, to deduct the cost of travelling regularly to London in term time, and intermittently in vacation. The special commissioners allowed the costs of travel to London during vacation but disallowed the costs incurred during term time. The High Court disallowed the whole of the expenditure and the taxpayer's appeal to the Court of Appeal failed. Somervell LJ said that the taxpayer's home in the country had nothing to do with his practice because if he lived anywhere else in the country nothing would really be changed (p 14). He doubted if the journeys into and out of London were for the purposes of the taxpayer's profession and said that the fact that the taxpayer intended to and did professional work in his own home did not mean that his homeward journeys were for the purpose of his profession. He added that even if the journeys had a dual purpose the expenditure would still have to be disallowed. He held also that the expenditure on the intermittent journeys during vacation should be disallowed as the taxpayer's chambers in London remained his professional base.

Denning LJ agreed, and in respect of the travelling costs incurred by the taxpayer during vacation he said that the taxpayer's professional base remained in London throughout and "did not cease to be so simply because he rarely went there during vacation." He said (p 16):-

> A distinction must be drawn between living expenses and business expenses. In order to decide into which category to put the cost of travelling, you must look to see what is the base from which the trade, profession, or occupation is carried on. In the case of a tradesman, the base of his trading operation is his shop. In the case of a barrister, it is his chambers. Once he gets to his chambers the cost of travelling to the various courts is incurred wholly and exclusively for the purposes of his profession. But it is different with the cost of travelling from his home to his chambers and back. That is incurred because he lives at a distance from his base. It is incurred for the purposes of his living there and not for the purposes of his profession, or any rate not wholly or exclusively; and this is so, whether he has a choice in the matter or not. It is a living expense as distinct from a business expense.

Romer LJ acknowledged that when the taxpayer was due to appear in court he had to travel to London to practise his profession in the sense that if he did not do so he would not earn his fee but continued (p 17):-

> … It cannot be said even of the morning journey to work that it is undertaken in order to enable the traveller to exercise his profession; it is undertaken for the purpose of neutralising the effect of his departure from his place of business, for private purposes, on the previous evening. In other words the object of the journeys, both morning and evening is not to enable a man to do his work but to live away from it.

He too agreed that no distinction could be drawn between the cost of the taxpayers regular travel during term time and the cost of his intermittent travel during vacation.

In *Newsom v Robertson* their Lordships considered that the cost of travel between places at which the taxpayer carried on business was wholly and exclusively laid out for the purposes of the business (see Somervell LJ at 13-14, Denning LJ at 16, and Romer LJ at 18).

Horton v Young [1972] Ch 157 concerned a claim by a sub-contract brick layer to deduct the cost of travelling from his home to the building sites where he did his work. The taxpayer's claim was allowed. The court held that the taxpayer's home was his base of operation and place of business where he negotiated his sub-contracts, kept his tools of trade, and wrote up his books of account. The court rejected an argument for the revenue that the taxpayer carried on his business at each building site so that his expenses of travelling from his home to each building site were covered by the decision in *Newsom v Robertson*.

In *Lunney v Federal Commissioner of Taxation* (1958) 100 CLR 478 the High Court held, by majority, that the cost of travelling between one's home and one's place of work was not deductible under the Australian Act, but the court also considered the English decisions on travelling expenses. After referring to *Newsom v Robertson* the majority (Williams, Kitto and Taylor JJ) said at 499.

> … A taxpayer's daily journeys between his home and place of work are rendered necessary as much by his choice of a locality for his residence as by his choice of employment or occupation. And indeed the purpose of such journeys is, at least, as much to enable him to reside at his home as to attend his place of work or business.

At 501 the majority referred to other English cases decided between 1887 and 1955 other than *Newsom v Robertson*, and said that those cases accept the view that the cost of travelling between home and work "is properly characterised as a personal or living expense". This of course was the view of Denning and Romer LJJ in *Newsom v Robertson*.

In Lunney both the majority (at 498) and Dixon CJ (at 485-6) referred with approval to dicta of the majority judges in *Re Income Tax Acts* (1903) 29 VLR 298. A 'Beckett J (at 305-6) and Hodges J (306-7), while allowing the cost of travel between places where the taxpayer carried on business, said that if the taxpayer had not carried on business from his home on his grazing property, the cost of travelling from his home to Melbourne to attend board meetings would not have been allowable. The relevant legislation contained a provision in much the same terms as s 19(b), and the dicta support the case for the commissioner here.

Mr Greenwood QC for the taxpayers sought to distinguish *Newsom v Robertson* on the ground that that case concerned the cost of daily commuting to London so that the travelling expenses were part of the taxpayer's daily living expenses. This submission must be rejected because the case also rejected the taxpayer's claim to deduct the cost of his intermittent travel to London during vacation which could not be characterised as a daily expense. Such expenses were still living or personal expenses which were not deductible under the equivalent of s 19(b).

His other submission which must be noted was that Mr Jamnadas' trips were business trips and the expenses were deductible in the usual way like the cost of any other business trip. This submission must also be rejected. A typical business trip is one which involves travelling for business purposes from one place where

a taxpayer or his employer carries on business (even if his trip actually starts from his home) to another place where business activities are carried on. Thus in *Re Income Tax Acts* (1903) 29 VLR 298 the cost incurred by the taxpayer in travelling from his grazing property to Melbourne to attend board meetings and 5 earn directors' fees was allowed and in *Taylor v Provan* [1975] AC 194 the expenses incurred by the taxpayer in travelling from Canada to the United Kingdom were deductible under the stringent provisions of Sch E because he carried on business activities in both countries.

Mr Jamnadas did not conduct business activities in Adelaide and his trips to 10 Fiji lacked the essential requirement of a business trip. His trips did not involve travel from one place where business activities were carried on to another place where business activities were carried on. These trips were for business purposes in the sense that Mr Jamnadas intended to conduct business activities in Suva after he arrived. However they were really incurred, like the travelling expenses 15 of the barrister in *Newsom v Robertson*, because he chose to live away from the place where his business activities were carried on.

The fact was that Mr Jamnadas had a home in Adelaide and a place of business in Suva. When in Suva he made the Travelodge Hotel the base of his business operations. It follows therefore the travelling expenses incurred by Mr Jamnadas 20 and the companies were not deductible, and the appeal in this respect must fail.

We should however draw attention to the artificial basis on which the appeals by the taxpayer companies have been conducted. Their case focussed on the position of Mr Jamnadas and his need to travel to Suva for business purposes. Companies on the other hand do not have personal or living expenses, and do not 25 live in homes. The taxpayer companies have not conducted these proceedings on the basis that they paid the travelling expenses of Mr Jamnadas because they wanted him to come to Suva. There may be good reasons why the proceedings have been conducted as they have been, and it may be that under the Act the companies could not have deducted the cost of bringing Mr Jamnadas to Suva or 30 if they could do so the cost may have been taxable in the hands of Mr Jamnadas. See s 19(a) and compare *Taylor v Provan* [1975] AC 194. These matters were not argued before us, and we express no opinion about them.

The second issue: Penalties

35 As the result of the proceedings in the Court of Review and High Court this issue is now limited to the penalty of $11,621 for which the commissioner has assessed Michelle for the late lodgment of its returns, under his amended assessments, made following the decision of the Court of Review. Byrne J reduced the penalty to $1160 but the Court of Appeal reinstated the amended 40 assessments. In this court Michelle has sought the reinstatement of the penalty fixed by Byrne J.

Section 94 provides that a person who fails to make a return within the time limited shall be subject to a penalty of 50% of the amount of tax payable, and the section further provides that "all such penalties shall be assessed and collected 45 from the person liable to make a return in the same manner in which taxes are assessed and collected".

Michelle lodged its returns for the years 1981 to 1994 inclusive on 3 August 1995, and was thus automatically liable under s 94 to a 50% penalty. However, s 100(2) provides that "the Commissioner may, in his discretion, mitigate or remit 50 any penalty which may be assessed, recovered or imposed under this Act". The taxpayers appealed to the Court of Review from the commissioner's assessments

of primary tax and penalties. It seems that the commissioner initially assessed Michelle for the full statutory penalties, but when the case was before the Court of Review he stated through his counsel that he was prepared to remit 80% of the penalties and only sought to support penalties on Michelle totalling $26,313.

The Court of Review held that it had no jurisdiction to review the exercise of the commissioner's discretion to remit the penalties but said that the commissioner was bound to exercise his discretion in respect of penalties to a greater extent than the 80% remission he had indicated through his counsel.

The Court of Review held that it had no jurisdiction to review the exercise of the commissioner's discretion to remit the penalties but said that the commissioner was bound to exercise his discretion in respect of penalties to a greater extent than the 80% remission he had indicated through his counsel.

Byrne J held, with respect correctly, that s 94 which provides for penalties to be assessed and collected in the same manner as the primary tax, brought assessments of penalty within the jurisdiction of the Court of Review. In our judgment this conclusion flowed inexorably from the provisions of s 94, the provisions of s 62 dealing with objections to assessments and appeals to the Court of Review from the decisions of the commissioner on such objections, and the powers of that court under ss 62(6), 63(1), 66(1) and (2). Byrne J exercised the discretion under s 100(2) and reduced the penalty on Michelle to $1162.

The Court of Appeal upheld the decision of Byrne J that there was no sound basis for limiting, as the Court of Review had done, the right to object to and appeal from an assessment of penalty, but it held that the jurisdiction of the Court of Review and the High Court was confined to reviewing the commissioner's decision under s 100(2) for error. We are unable to accept this limitation on the jurisdiction of those courts.

Section 62(6) gives the Court of Review power to hear and determine appeals from the commissioner. Section 63(1) provides that the Court of Review has powers and authority similar to those vested in the High Court as if the appeal were an action between the taxpayer and the commissioner. Finally s 66(1) provides that the Court of Review "shall determine the matter and confirm or amend the assessment accordingly" and s 66(2) provides that it has power to increase an assessment.

Although the Act does not explicitly identify the nature of the appeal to the Court of Review, the effect of the provisions we have referred to is reasonably clear. The problem of identifying the nature of an appeal from an administrative authority to a court, where this has not been clearly spelled out in the statute, is a familiar one. The relevant principles were conveniently summarised by Sir Anthony Mason in *Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd* (1976) 135 CLR 616 at 621; 14 ALR 174 at 184:

> Where a right of appeal is given to a court from a decision of an administrative authority, a provision that the appeal is to be by way of rehearing generally means that the court will undertake a hearing de novo, although there is no absolute rule to this effect... There are, of course, sound reasons for thinking that in many cases an appeal to a court from an administrative authority will necessarily entail a hearing de novo … The nature of the proceeding before the administrative authority may be of such a character as to lead to the conclusion that it was not intended that the court was to be confined to the materials before the authority. There may be no provision for a hearing at first instance or for a record to be made of what takes place there. The authority may not be bound to apply the rules of evidence … Again the authority may not be required to furnish reasons for its decision. In all these cases there may be ground for saying that an appeal calls for an exercise of original jurisdiction or for a hearing de novo.

Each of the matters identified by Sir Anthony Mason in this passage was applicable to the proceedings before the commissioner and to the appeal to the Court of Review. The Act does not state, in terms, that the appeal shall be a complete rehearing on the evidence in the Court of Review but that is the necessary result of its provisions.

Moreover the reference in s 63(1) to the Court of Review having the powers and authority of the High Court, as if the appeal were an action, strongly suggests that this class of appeal involves the exercise of original jurisdiction since an action in the High Court involves an exercise of such jurisdiction. In the normal case the Court of Review is likely to have before it, as it did in this case, a substantial body of oral and documentary evidence which was not before the commissioner. The duty of the court, in accordance with s 66(1) "after hearing any evidence adduced and upon such other enquiry as it considers advisable" is "to determine the matter and confirm or amend the assessment accordingly".

In our judgment this makes it clear that the duty of the Court of Review is to determine the taxpayer's taxable income on the evidence before it. The court was therefore entitled and bound to re-exercise the discretion conferred by s 100(2) and to fix the appropriate penalty in the light of the evidence and argument before it.

The Court of Appeal therefore erred in limiting the appeal to the Court of Review in penalty cases to the correction of error by the commissioner and in reversing this part of the decision of Byrne J. Byrne J having held correctly that the Court of Review made a jurisdictional error and wrongly refused to re-exercise the discretion under s 100(2) was entitled and bound to re-exercise that discretion himself on the material before the High Court. This included additional materials which had not been before the Court of Review.

The appeal from the Court of Review to the High Court is governed by s 69 which provides that the High Court shall hear and consider the appeal "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".

Although the section does not spell out the principles which the High Court should follow in giving directions for the reception of further evidence, these are governed by the structure of the Act. The appeal to the Court of Review is to be conducted as if it were an action in the High Court and both parties therefore will be entitled to adduce relevant and admissible evidence as of right. On appeal to the High Court further evidence is only admissible under the direction of that court. This necessarily involves a power to refuse to admit further evidence.

The Act thus contemplates that both parties will adduce all their evidence during the hearing in the Court of Review and that some good reason will have to be shown before further evidence will be admitted in the High Court. It can be expected that the High Court will readily admit fresh evidence discovered since the hearing in the Court of Review which meets the common law requirements for the reception of such evidence. See *Ladd v Marshall* [1954] 1 WLR 1489 CA. It can also be expected that evidence of events which have occurred since the hearing in the Court of Review will also be admitted in a proper case. Compare *Mulholland v Mitchell* [1971] AC 666. However the High Court should bear in mind the statement of Lord Pearson in the latter case at 681:–

> … An appeal normally involves only a review of a judge's decision on the evidence given on the trial. A partial retrial with further evidence added is not a normal function of the Court of Appeal.

Michelle therefore succeeds on the issue of penalties and to that extent its appeal must be allowed and the judgment of Byrne J restored.

It was not suggested by counsel for the commissioner that the reexercise of the discretion by Byrne J miscarried because he failed to take into account, as a relevant consideration, the substantial deferment obtained by Michelle for the payment of its taxes. It was not suggested and it does not appear to us that the Act contains any other provision which would entitle the commissioner to recover interest on taxes which could not be assessed because the taxpayer failed to file his returns on time.

The case has been conducted on the basis that the purpose of the penalty imposed by s 94 for failure to file returns is to punish the dilatory taxpayer and the power to mitigate or remit that penalty must be exercised with this purpose in mind. It is common ground that counsel for the commissioner did not submit to Byrne J that the power in s 100(2) could be exercised to recover interest at a non-penal rate for the period of delay caused by the default.

The proper scope of this discretion was not the subject of argument in this court, and we express no opinion on that matter.

Costs

The commissioner has succeeded on the issue of the travelling expenses, and in this respect the appeal by the taxpayers fails. However Michelle has succeeded on the issue of penalties, and to that extent its appeal has succeeded. The amounts in dispute in respect of travelling expenses were substantially greater than the amount in dispute on the penalties, and the argument on the former issue took up the greater part of the hearing time in this court. In those circumstances the appellants should be ordered to pay one half of the commissioner's costs of and incident to the appeal.

The following orders should be made:

1. Appeals by Chimanlal Jamnadas and Primetime Properties Ltd dismissed.
2. Appeal by Michelle Apartments Ltd allowed in part.
3. Set aside so much of the orders of the Court of Appeal of 1 March 2002 as set aside the order of Byrne J of 24 August 1999 imposing a penalty of $1160 on Michelle Apartments Ltd under s 94 and s 100(2) of the Income Tax Act.
4. Order of Byrne J imposing a penalty of $1160 restored with effect from 24 August 1999.
5. Orders of the Court of Appeal of 1 March 2002 otherwise confirmed.
6. The appellants jointly and severally are to pay one half of the Commissioner's costs of and incident to the appeal to in the Supreme Court.

Orders made.