IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 32 of 1985

Between:

REDDY CONSTRUCTION COMPANY Appellant

- and -

COMMISSIONER OF INLAND REVENUE Respondent

V.K. Kalyan for the Appellant
M.J. Scott for the Respondent

Date of Hearing : 11th July, 1985.
Delivery of Judgment : 20th July, 1985.

JUDGMENT OF THE COURT

Roper, J.A.

This is an appeal against the judgment of Rooney J. in which he dismissed an appeal against the decision of the Court of Review.

The basic facts are not in dispute. In 1970 two construction companies, the Appellant and an English company, Sir Lindsay Parkinson & Company Limited (Lindsay Parkinson) were interested in tendering to build the new Loutoka Hospital, and to that end entered into what was called a pre-bidding agreement. The scheme was that Lindsay Parkinson should tender for the contract and if successful the work would be carried out as a joint venture by the Appellant and Lindsay Parkinson with each contributing a maximum of $50,000 as working

capital. Lindsay Parkinson's tender was accepted, and a new company, Parkinson Reddy Limited was then incorporated although the formation of such a compony was not envisaged by the pre-bidding agreement. There were only two shareholders, the Appellant and Lindsay Parkinson, and each held one $1 share. The main contract was then subcontracted to Porkinson Reddy and the Appellant ond Lindsay Parkinson each paid $50,000 to the new company. It was a further term of the pre-bidding agreement that the Appellont would supply on hire to Parkinson Reddy the necessory plant and equipment. The new company's operation of the subcontract was not a financiol success and the Appellant's $50,000 loon was irrecoverable.

In its return of income for the year ended 31 December 1982 the Appellant sought to deduct the $50,000 from its taxable income as a "loan written off". The Commissioner disallowed the deduction and both the Court of Review and Rooney J. held that he was right in so doing.

Section 19 of the Income Tox Act (Cop.201), so for as is relevant provides :-

> "19. In determining total income, no deductions shall be allowed in respect of -
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> (b) ony disbursement or expense not being money wholly and exclusively loid out or expended for the purpose of the trode, business, profession, employment or vocation of the taxpoyer;
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> (c) any loss not connected with or arising out of the trode, profession, business, employment or vocotion of the taxpoyer;
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> (i) any expenditure or loss of a capital nature;"

In the Court below and before the Court of Review the primary enquiry was whether the loss was of a capital nature (s.19(i)), with some passing consideration being given to the question af whether the $50,000 was a disbursement "wholly and exclusively laid out" (s.19(b)). The Appellant has never claimed the $50,000 as a deduction as a disbursement laid out and in aur opinion the first step is to enquire whether "the loss" can be claimed as a deduction under s.19(c). If it cannot then no enquiry as to whether it was of a capital nature is called for.

In Strong & Co. of Ramsey Limited v. Woodifield /1906/ A.C. 448 the House af Lords considered a provision which is for all practical purposes identical with s.19(c), and at page 452 Lord Loreburn L.C. said :-

> "In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration, losses sustained by a railway company in compensating passengers for accidents in travelling might be deducted. On the other hand, if a man kept a grocer's shop, for keeping which a house is necessary, and one of the window shutters fell upon and injured a man walking in the street, the loss arising thereby to the grocer ought not to be deducted. Many cases might be put near the line, and no degree of ingenuity can frame a formula so precise and comprehensive as to

solve at sight all the cases that may arise. In the present case I think that the loss sustained by the appellants was not really incidental to their trade as innkeepers, and fell upon them in their character not of traders, but of householders."

(our emphasis).

It was central to Mr. Kalyan's argument, and indeed he described it as the most important single fact, that the Appellant was in the construction business and the loss with which we are concerned arose from construction work by a company in which the Appellant was a shareholder. In our opinion the fact that both companies were in the construction business is beside the point. The Appellant made what was in effect a loan to enable another construction company to carry out a contract. In our opinion the resulting loss was in no way connected with the Appellant's own trading. It was a loss "which fell on the Appellant in some character other than that of trader" to use Lord Loreburn's words.

That conclusion is enough to dispose of this appeal but in deference to Counsels' submissions we propose to deal briefly with the capital loss issue (s.19(i)). Before doing so it is worth repeating Lord Pearce's comments on this subject in B.P. Australia Ltd. v. F.C.T. (1965) 112 C.L.R. 386 at p. 387 :-

"The solution to the problem is not to be found by any rigid test or description. It has to be derived from many aspects of the whole set of circumstances some of which may point in one direction, some in the other. One consideration may point so clearly that it dominates other and vaguer indications in the contrary direction. It is a commonsense appreciation of all the guiding features which must provide the ultimate answer.

> Although the categories of capital ond income expenditure are distinct and easily ascertainable in obvious cases that lie far from the boundary, the line of distinction is often hard to draw in border line cases; and conflicting considerotions moy produce a situation where the answer turns on questions of emphasis and degree. That answer 'depends on what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal rights, if any, secured, employed or exhousted in the process' (per Dixon J. in Hallstrom's Case (1)). As each new case comes to be argued felicitous phrases from earlier judgments are used in orgument by one side and the other. But those phrases are not the deciding factor, nor are they of unlimited application. They merely crystallize particular factors which may incline the scale in a particular case after a balance of oll the considerations has been token."

Rooney J. based his decision on three cases which he described as being conclusive against the Appellant, and they were Odhams Press Ltd. v. Cook /1940/ 3 All E.R. 15; English Crown Spelter Coy. Ltd. v. Baker 99 L.T.R. 353; and C.I.R. v. Shipbuilders /1968/ N.Z.L.R. 885. Mr. Kolyan submitted that these cases were distinguishable on their facts and that in the Shipbuilders case the passage from the judgment of Turner J. relied on was obiter. Mr. Kalyan's argument was in essence a negative one in that he submitted that the cases relied on did not support Rooney J.'s conclusion, while being unable to refer to any convincing outhority that would support the Appellant's case. We are inclined to agree that the Odhams Press case was not particularly helpful to either side on the capital question except that it makes it clear that where there is a relotionship between two companies and the question of copital poyment

is in issue each must stand on its own feet from a tax liability point of view.

The English Crown Spelter case was one of the class of case where advances are made to another company in order to secure a fixed source of supply or other enduring benefit; and what is regarded as one of the more important tests on determining what is expenditure of a capitol nature was that proposed by Viscount Cave L.C. in Atherton v. British Insulated & Helsby Cables Ltd. /1926/ A.C. 205 at p. 213 :-

> ".... But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital. For this view there is already consideroble authority."

There is support for the view in the circumstances of the present case that an enduring benefit came into existence by a "once and for all" payment, because although the originol intention of the Appellant and Lindsay Parkinson, as gleaned from the pre-bidding agreement, was that their association would be limited to the Lautoka Hospital job, the later formation of the company may well have meant a much longer business association had the hospital contract been profitable.

The Shipbuilders case must be regarded as the most important ond relevant of those cited.

At p. 905 Turner J. said :-

"All the reparted cases in which one company has been allawed, as deductions, losses incurred in writing off advances made to another, be that other a subsidiary or not, fall without exception into two groups - those in which the original advances are shown to have been made by banker to customer in the course of an established mercantile banking or moneylending business, and those in which the transactian, though in farm a loan, has in substance been pre-payment for goods ta be delivered. A payment far the purchase price of trading goods may be a trading expenditure; and a mere laan may be a trading expenditure if the lender is a banker or moneylender. Consequently in each of these two classes of case the expenditure may be a legitimate deduction."

In the same case North P. and McGregor J. expressed similar views. It is quite inappropriote to classify Turner J.'s comments as obiter as Mr. Kalyan submitted. All the learned Judge was saying was that having examined the reported coses he could find none in which advances written off had been allowed os a deduction except in the two classes of case he referred to. If there is an exception Mr. Kalyan has not referred us to it.

The appeal is therefore dismissed with costs to the Commissioner to be taxed by the Registrar if Counsel cannot agree.

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Vice President

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Judge of Appeal

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Judge of Appeal