

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

CIVIL APPEAL NO. ABU0017 OF 1997S
(High Court Civil Action No. HBA0009&0010/95)

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

DISSENTING JUDGMENT OF SIR MARI KAPI

The circumstances which led to these two appeals are not in dispute and they are fully set out in the majority opinion. The question of law for determination by this Court concerns the proper construction of s 102 (b) of the *Income Tax Act* (Cap. 201) ("the Act").

It is necessary to examine the whole provision and determine what it provides. The introductory words of the provision begins with the words:

“The tax chargeable in respect of income derived outside Fiji by a resident shall be abated or exempted...”

This means that where a resident is liable to pay tax in Fiji in respect of income derived in another country, that tax shall be “abated” or “exempted”.

The circumstances and the extent to which this tax shall be “abated” or “exempted” is set out in more detail in s. 102 (a) and (b). These sub-sections provide further clue to the meaning and effect to be given to the whole section.

Section 102 sets out two situations where this tax may be “abated” or “exempted”. The first is where income is derived from a country with whom arrangements have been made regarding relief from double taxation (s 102 (a)) and secondly where income is derived from a country with whom arrangements have not been made regarding relief from double taxation (s 102 (b)). The words ‘abated’ and ‘exempted’ must be interpreted within the context of s 102 (a) and (b). I will come back to this task later.

It is necessary to identify the nature of the relief in the two situations set out in s 102. In respect of s 102 (a), the nature of the relief “shall be given in accordance with that arrangement” What these arrangements are is a matter entirely within the discretion of the Government of Fiji and the other country concerned..

In respect of s 102 (b), the nature of the relief is expressed "such income shall be exempt from tax to the extent that it is chargeable with income tax in that other country". That is to say, such income "shall be exempted from tax" in Fiji. That is the plain meaning of the words used in s 102 (b). No Court can depart from the plain meaning of the words used unless such meaning may result in some injustice or absurdity (see *Ex parte Rashleigh* (1875) 2 Ch. D. 9 at page 13 per James L. J.) It has not been suggested that the relief granted in s 102 (b) may result in some injustice or absurdity. That is a relief given by the Act itself.

It is clear that the nature of relief in each situation is different. If there is an arrangement as in s 102 (a), the tax chargeable in Fiji shall be "abated". That means the tax to be paid in Fiji would be reduced or credit given in accordance with the arrangement. The word "abated" as interpreted can have no application to s 102 (b) which provides exemption from tax.

The word "exempted" is used in the introductory part of s 102 and "exempt" is used in s 102 (b). These words must be given a consistent interpretation. It has been suggested that "exempted" used in the introductory part of the provision provides that "tax is exempted" whereas "exempt" used in s 102 (b) provides "income shall be exempt". Where tax is "exempted", it means tax will not be paid. Where income is exempted from tax, no tax will be paid on that income. The practical result is the same, namely, no tax is paid in Fiji.


I do not find any conflict in the meaning to be given to "exempted" in the introductory part and "exempt" in s 102 (b). The meaning attributed to "exempted" or "exempt" cannot be applied to s 102 (a) where relief is provided for by way of deduction of tax.

The practical effect of the interpretation I have given is simply to construe the provision in a way so that the word "abated" is read with reference to s 102 (a) and the word "exempted" is read with reference to s 102 (b). The provision in its present form appears to apply the words "abated" and "exempted" to both s 102 (a) and (b). This is bad drafting. For the reasons I have given s.102 should be interpreted in the manner I have suggested. It is permissible to construe a provision in this manner to give effect to the intention of Parliament (see authorities referred to in Maxwell on *The Interpretation of Statutes* (Eleventh Ed.) at page 221).

Section 102 clearly deals with both types of relief. One allows for some reduction and the other allows for full exemption. Parliament in its wisdom is entitled to grant different relief in both situations. There is no justification for the view that the relief in s 102 (a) should have effect to the exclusion of relief given by s 102 (b) or vice versa. If the intention of the Parliament were to give effect to one type of relief only it would have said so clearly. The point is the Parliament has provided for both. To give effect to s 102 (a) to the exclusion of s 102 (b) is to render the words used in s 102 (b) to have no meaning and of no effect. That would have the practical effect of repealing s 102 (b). That is tantamount to legislating in the guise of statutory construction.

In the present case, Fiji had no arrangement with Australia regarding relief from double taxation. Therefore, the appellants' income that was taxed in Australia is exempted from tax in Fiji.

In the result I would allow the appeal with costs to the appellants.



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Sir Mari Kapi
Justice of Appeal

Solicitors:

Messrs. Mitchell Keil and Associates, Suva for the Appellants
Office of the Commissioner of Inland Revenue, Suva, for the Respondent