

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

CIVIL APPEAL NO. ABU0069 OF 2001S  
(High Court Civil Action No. 5 of 1998S)

BETWEEN:

COMMISSIONER OF INLAND REVENUE

*Applicant*

AND:

UNITED TOURING (FIJI) LIMITED

*Respondent*

Coram:

Eichelbaum, JA  
Gallen, JA  
Ellis, JA

Hearing:

Thursday, 8<sup>th</sup> May 2003, Suva

Counsel:

Mr. K. Muaror ]  
Ms. S. Tagicaki ] for the Applicant  
  
Mr R. A. Smith for the Respondent

Date of Judgment: Friday, 16<sup>th</sup> May, 2003

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JUDGMENT OF THE COURT

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This is an application for leave to appeal to the Supreme Court from a decision of this Court delivered on 29 November 2002. To succeed the applicant must show that there is a question of significant public importance which ought to be decided by the Supreme Court as required by the Constitution Section 122.

The question in issue was whether certain payments made by the taxpayer to its agent in Japan were deductible for tax purposes. The issue is governed by s.19(b) of the Income Tax Act, Cap.201 which provides:

*"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."*

The Commissioner assessed part of the payments as taxable. This decision was reversed by the Court of Review whose decision was reversed by the High Court but reinstated by this Court. The taxpayer accepted that the burden of showing the payments were deductible was on it, although there was reference to an OECD publication "Transfer Pricing for multinational enterprises and tax administrative." (Article (b)(ii) para. 4.16) which suggest a more flexible approach.

This Court stated its conclusions at pages 18,19, 20 and 21 and 22. There is no need to set them out now. This Court concluded in agreement with the Court of Review that the appellant had established as a matter of fact that the payments were wholly and exclusively laid out or expended for the purpose of the taxpayers business.

In support of the present application Mr Sudhan, the Acting Director General of the Inland Revenue Department filed an affidavit in which he claimed:

***“THAT it is imperative (sic) public importance that the Supreme Court clarifies the***

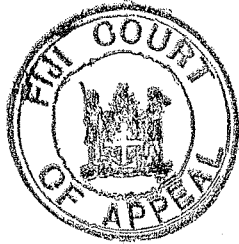
- *Treatment of representation fees paid by a company in Fiji to an associated company overseas;*
- *The construction of the arm’s length principle in relation to our domestic legislation and our Double Tax Agreements; and*
- *The applicability of the OECD Guidelines”*

This puts the applicant’s case at its most succinct. Counsel’s submissions expanded on this in considerable detail. In our view it is plain from this Court’s decision that the analysis of the representation fees was directed entirely to deciding the case in terms of s.19(b), that the “arms length principle” is one of the tests that can be applied to the facts and that the Double Tax Agreements between Fiji and Japan were never in issue. Finally the OECD Guidelines were referred to with approval in passing, but the ordinary civil burden of proof on the taxpayer was used in assessing the facts.

In our view the decision of this Court raised no disputed question of law nor indeed a disputed question of fact. Further neither this Court nor the Supreme Court will entertain applications to settle theoretical propositions let alone general questions as to how facts should be assessed. **Bruce v. Commonwealth Trade Marks Label Association** (1907) 4 CLR 1569. It follows that in our view there is no question of significant public importance raised by this Court’s November decision which should be resolved by the Supreme Court. The application is dismissed. The applicant must pay the respondent’s costs which we fix at \$500.00 plus disbursement if any to be fixed by the Registrar if they cannot be agreed.

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Eichelbaum, JA

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Gallen, JA



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Ellis, JA

Solicitors:

Legal Officer, Inland Revenue Department, Suva for the Applicant  
Munro Leys, Suva for the Respondent