

IN THE COURT OF REVIEW

SUVA

APPEAL NO.10 OF 1981

BETWEEN

FRAMESH NARAIN KHANNA

Appellant

and

COMMISSIONER OF INLAND REVENUE

Respondent

Mr. M.J. Benefield for the Appellant

Mr. M.J. Scott and Miss C. Punga for the Respondent.

JUDGMENT

The appellant is an employee of Asian Paints (South Pacific) Ltd. having been lent to that company (which I will call 'the Fiji company') by its parent company in India, which I will call the 'Indian Company' to work in an executive position in the Fiji company. As an employee of the Indian company he is entitled to a gratuity after his working career is finished, and the basis upon which he was lent to the Fiji company was that the latter was to keep the gratuity on foot by sending to the Indian company 15 days' salary of the appellant at the end of every financial year for the credit of Asian Paints (India) Ltd. Employees' Gratuity Fund. I think that the intention is that an amount equal to fifteen days' salary is to be paid for there is nothing anywhere requiring an employee to make contributions to the Gratuity Fund. The

respondent claims that the amount of that payment is assessable to income tax. The appellant objects. The main ground of objection is that the amount of that payment is not part of appellant's Fiji income, but arises from a condition made by the Indian company lending the appellant for service to the Fiji company, and the appellant turns for support to the Trust Deed set up by the Indian company, dated 23rd December, 1975 to a collaboration agreement made between the Indian company and the Fiji company dated 15th November 1976 and to a contract of service made by him with the Fiji company dated 1st May, 1978. I should perhaps explain that there are actually two Trust Deeds among the agreed documents. The one relates to the Indian company's provident fund and need not be further mentioned. The other which was produced in Court after the agreed documents had been put in, and was subsequently marked as the last of the agreed documents is the Trust Deed of the gratuity fund. It is not always easy to read, but it recites that the Indian company is setting up a fund for the purpose of providing gratuity to those employees of the company employed in India who shall be eligible for membership of the fund on the terms and conditions set out. The objects of the fund are thus described in clause 3. "The sole object of the fund is to provide gratuity to employees of the company employed in India eligible in this behalf in accordance with the rates on the retirement, at or after a specified date or on their becoming incapacitated prior to such retirement or on termination by resignation or otherwise of their employment after a minimum period of service or to the widows children or dependents of such employees on their death." The company - that is the Indian company - agrees to make contributions to the trustees according to the rules

and the rules provide that the quantum of contributions is to be determined on the basis of the gratuity liability that would be ascertained through an actuarial valuation effected by an actuary or other reasonable basis having regard to the length of service of each member, provided that the aggregate of the contributions payable by the company in respect of every member shall not exceed 8 $\frac{1}{2}$ % of the aggregate salary of the member for each year of service. Then Rule 5(e) provides that if a member's services are lent by the company to any other company, the member's services are deemed to continue and the contributions payable by the company "in respect of such service" shall continue to be paid to the Trustees provided that the company recovers such contributions from the company to which the member's services are lent. This point is covered in the applicant's contract of service with the Fiji company. The amount of gratuity would appear to be covered by an Indian Act called the Payment of Gratuity Act 1972. Then it is provided that gratuity need not be paid to an employee dismissed for misconduct and the benefits are declared to be strictly personal to the employee and cannot be assigned charged or alienated. Gratuity can be paid to an employee who retires on medical grounds. Then a member is entitled to nominate a beneficiary or beneficiaries to receive the gratuity in the event of his death. The company is entitled to discontinue contributions but has no power over contributions once they get into the hands of the Trustees, and on winding-up the Trustees have to distribute the fund among the employees who are entitled. The collaboration agreement recites that the Fiji company has been promoted by the Indian company inter alia, and has asked the Indian company to provide 'know-how' and

technical advice and provides inter alia for staff of the Fiji company to go to India for training, and for not more than six employees of the Indian company to be sent to Fiji at the cost and expense of the Fiji company. Any dispute under the Trust Deed or under the collaboration agreement is to be arbitrated under Indian law. The contract of service recites that the appellant has been lent by the Indian company to the Fiji company in pursuance of the collaboration agreement, but shall always be an employee of the Indian company but subject to the regulations of the Fiji company and provides that appellant is to serve as Chief Executive and will carry out the orders of the Board of Directors of the Fiji company. In addition to his salary the appellant is to receive free accommodation and amenities,

health insurance, provident fund, resident insurance, entertainment and other amenities, and also "gratuity at the rate of 15 days' salary for each completed year of service. Accordingly the Fiji company shall remit 15 days' salary at the end of every financial year to the Indian company for the credit of Asian Paints (India) Ltd. Employees' Gratuity Fund." The final clause is a curious one, for although the agreement is deemed to be made in Fiji any difference is to be arbitrated in Bombay and subject to the Indian Arbitration Act.

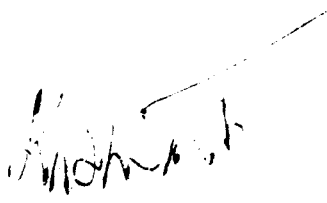
However the difference in this appeal is between the appellant and the Fiji Revenue Authorities and is subject to Fiji Law. Mr. Benefield for the appellant reminded me that the money went not to the appellant but to the Indian company, but he did not cite any authority for the money not being part of the appellant's income. The Income Tax Act, Cap.201 would appear to be against him. The definition of 'total income' in section 11 includes "any other allowance or benefit provided by his employer or

granted in respect of employment whether money or otherwise." Mr. Benefield submits that in view of the documents produced and the arrangements made for this Indian national to work in Fiji, and in particular the fact that the amount of the gratuity is forwarded to India without passing into or through the appellant's hands, it does not form part of the appellant's Fiji income. I would have thought it almost too plain for argument that the gratuity is a benefit provided by the appellant's employer or granted in respect of his employment. His contract of service is with the Fiji Company, he is subject to the control of the Board of Directors of the Fiji company, his salary is paid by the Fiji company. The gratuity is either deducted from his salary or paid in addition to his salary by the Fiji company. Then Mr. Benefield refers me to proviso (c) to section 11 which provides that total income shall include "remuneration becoming due and payable in respect of or in relation to services rendered by any person during any year in any office or employment, and such remuneration shall be the total income of that person for that year but shall not include the amount of inducement allowance, education allowance or the proportion of the gratuity payable to any designated officer by the Government of the United Kingdom"..... I understand Mr. Benefield's contention to be that his gratuity is not "in respect of or in relation to services rendered." What is "in respect of or in relation to services rendered" has been discussed in a number of cases. Mr. Benefield cited *Hochstrasser v Mayes* (1958) 2 WLR 982; 1 AER 369; 3 WLR 215; 3 AER 369; (1959) 3 AER 817; (1960) 2 WLR 63. The facts in that case are not at all like the present case. There the employer operated a housing scheme whereby it helped the employee to buy a house, and if he were moved in the course of his employment, the employer

had first option to buy the house and if the employee had to sell it elsewhere the employer would make good any loss. The taxpayer was in due course shifted and after he had offered his house to the employer he had to sell it in the open market and sustained a loss of £350 which his employer duly paid to him. The revenue claimed that this £350 was income. The claim was rejected at first instance, by a majority in the Court of Appeal and unanimously in the House of Lords. Viscount Simonds L.C. in the House of Lords said "Upjohn J. before whom the matter first came, after a review of the relevant case law, expressed himself thus, in a passage which appears to me to sum up the law in a manner which cannot be improved upon. "In my judgment," he said "the authorities shew this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money's worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment the authorities shew that to be a profit arising from the employment the payment must be made with reference to the services the employee renders by virtue of his office and it must be something in the nature of a reward for services past present or future." I would with respect to Mr. Benefield's argument say that I find not the slightest doubt in concluding that the gratuity in this case is a reward for services and nothing else. It seems to me that the Trust Deed is redolent with the idea that the gratuity is given for services rendered, whether in the past, the present or the future.

I do not know what the position is in India as to income tax, but the Trust Deed appears to envisage income tax being paid on the amount of the gratuity. Whatever the position in India however, I have no doubt that the payments made by the Fiji company to the Indian company form part of the reward paid for services rendered by the appellant. Mr. Scott referred to several cases which deal with the liability either of non-residents or of residents serving out of the jurisdiction of the Courts in which action was being taken. But here, although the appellant is an Indian national, the employment is in Fiji and the payment is made from Fiji. The appeal will be dismissed with the result that costs will be paid by the appellant to be agreed or taxed in default of agreement.

There is also a second appeal which relates to appellant's 1979 assessment and in conformity with counsel's agreement that also will be dismissed.


(K.A. Stuart)
Court of Review

6th March, 1982