COMMISSIONER OF INLAND REVENUE v CHIMAN LAL JAMNADAS and 2 Ors

COURT OF APPEAL — APPELLATE JURISDICTION

REDDY P, BARKER and DAVIES JJA

20 February, 1 March 2002

[2002] FJCA 83

Taxation and revenue — deductions — allowable deductions — "purpose" and "wholly and exclusively" to determine whether expenditure deductible — income earning activities — private expenses — Income Tax Act (Cap 201) ss 19(b), 62, 63, 70, 94, 100(2) — Income Tax Assessment Act 1936 s 51(1).

Appellant sought an appeal from a judgment allowing an appeal from the decision of the Court of Review under the Income Tax Act Cap 201 (the Act). The two issues were whether Mr Jamnadas was entitled to deductions for travel costs and whether the Court of Review and the High Court had the power, on the review of the assessments following the disallowance of objection, to review the exercise by the Commissioner of Inland Revenue of his discretion under s 100(2) of the Act to mitigate the penalties imposed by s 94 of the Act.

Held — (1) Mr Jamnadas carried on no significant income earning activities in Australia. Adelaide was the place where he lived, for the purposes of his children's education. Mr Jamnadas did not have significant investments in both Fiji and Australia and his home was not a place of business.

The expenses incurred by Mr Jamnadas were occasioned by his decision to live in Adelaide while his children were being educated. The travel expenses were the cost of getting Mr Jamnadas to and from the place where he could engage in income earning activities, not costs incurred in those activities. The expenses had the character of private expenses, being occasioned by the needs of his children's education, rather than that of business expenses. They were incurred wholly or in part for the purpose of achieving a better education for his children.

(2) The Court of Review did not review the Commissioner's exercise of discretion because the Court of Review considered that it did not have jurisdiction to do so. However, the Court of Review referred to certain facts, which appeared to have no or little relevance to the issue, which was the failure by Michelle Apartments Limited to file returns over many years, a failure which was ultimately rectified but which led to the imposition of the subject penalty. The Court of Review suggested that the penalty was excessive. By the time the matter came before Byrne J, the penalty had been reduced. Byrne J reduced the penalty further to a nominal sum having regard to the 50% penalty for which s 94 provided. Byrne J stated that, "*In all the circumstances I consider it be fair to impose a penalty of 10% or $1,160.00*". However, apart from referring to the comments made by the Court of Review on penalty, which appear to relate to an irrelevant matter, Byrne J did not identify any reason why the discretion should be interfered with and he reduced the penalty, not to 10% of the tax payable, but to a very much lesser sum.

Appeal disallowed. Orders set aside. Court of Review decision restored. Costs made.

Cases referred to

Amalgamated Zinc (De Bavay's) Ltd v Federal Commissioner of Taxation (1935) 54 CLR 295; [1936] ALR 67; *Avon Downs Proprietary Limited v Federal Commissioner of Taxation* (1949) 78 CLR 353; [1949] ALR 792; *Federal Commissioner of Taxation v Green* (1950) 81 CLR 313; [1950] ALR 531; *Federal Commissioner of Taxation v Payne* (2001) 202 CLR 93; 177 ALR 270; [2001] 46

ATR 228; *Lunney & Haley v Federal Commissioner of Taxation* (1958) 100 CLR 478; [1958] ALR 225; *Mallalieu v Drummond (Inspector of Taxes)* [1983] 2 AC 861; 2 All ER 1095; 3 WLR 409; *Newsom v Robertson (Inspector of Taxes)* [1952] Ch 7; 2 All ER 728; *Penrose v Federal Commissioner of Taxation* (1931) 45 CLR 263; 5 ALJR 174; *Richardson v Federal Commissioner of Taxation* (1932) 48 CLR 192; [1932] ALR 257; *Ronpibon Tin NL & Tong Kah Compound NL v Federal Commissioner of Taxation* (1949) 78 CLR 47; [1949] ALR 785; *Sweetman v Commissioner of Inland Revenue* [1996] FJSC 3 Civil Appeal No CBV 0005 of 1995S; *Watkis (Inspector of Taxes) v Ashford Sparkes & Harward (a firm)* [1985] 2 All ER 916, considered.

House v R (1936) 55 CLR 499; 10 ALJR 202, cited.

B. Malimali for the Appellant

J. Greenwood QC and *A. Prasad* for the Respondent

Judgment of the court

Reddy P, Barker and Davies JJA. This is an appeal from a judgment given on 24 August 1999 by a judge of the High Court of Fiji, Byrne J. His Lordship allowed an appeal from the decision of the Hon MJC Saunders sitting as the Court of Review under the Income Tax Act Cap 201 (the Act).

There are two issues in the appeal. One is whether the 1st Appellant, Mr Chiman Lal Jamnadas, was entitled to deductions under s 19 of the Act for the costs of travel between Adelaide, Australia, where he was living, and Suva, Fiji where his income was derived, and also his expenses for accommodation, meals and laundry while he was staying in Suva. The other is whether the Court of Review and the High Court had jurisdiction, in appeals against objection decisions, to review the exercise by the Commissioner of Inland Revenue under s 100(2) of the Act of his power to mitigate or remit a penalty imposed by the Act. Section 94 of the Act imposed a penalty on Appellant, Michelle Apartments Limited, for failure to lodge returns over eight or nine years. The Commissioner reduced the penalties to $26,313 and then to $11,621. The issue is whether Byrne J had power to and was justified in reducing the penalty assessed from $11,621 to $1,160.

An appeal to the Court of Review is a general appeal and so is the further appeal to the High Court. However, an appeal to the Court of Appeal from a judgment of the High Court in its appellate jurisdiction is limited to a question of law: see s 3(4) of the Court of Appeal Act.

On the first issue, it is to be kept in mind that it does not concern an assessment of Australian tax but an assessment of Fiji tax on income derived in Fiji. Moreover, the issue is not whether Michelle Apartments Limited and Primetime Properties Limited, companies controlled by Mr Jamnadas which derived income in Fiji, could have obtained deductions for Mr Jamnadas' travel, accommodation, meals and laundry had they incurred the expenditures for the purpose of their businesses. The fact as found by the Court of Review and by Byrne J was that Mr Jamnadas incurred the relevant expenses, and that was what Mr Jamnadas stated in his evidence and claimed in his returns.

Section 19(b) of the Act provides inter alia:

> *19 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;*

Byrne J described the basic facts as follows:

> *Mr Jamnadas, the First Appellant, practiced as a lawyer in Suva, Fiji. In 1982 he acquired control of Michelle Apartments Limited (Michelle). In 1987 he acquired control of Primetime Properties Limited (Primetime).*
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> *In 1988 Mr Jamnadas moved himself and his family to Adelaide, South Australia for the purpose of educating his children in Australia. He intends to return to the Fiji Islands upon completing the education of his children. He and his wife still retain their Fijian passports. When he left for Australia he let the family home in Suva. He had an interest in a family deceased's estate, which produces Fiji income and he retained his interests in Michelle and Primetime. He began to travel regularly and considerable periods from his Australian residence to Fiji to look after the estate and business interests. He had no business interest in Australia and ran down his practice as a solicitor in Suva until it ceased at the end of 1990.*
>
> *He derives no income in Australia other than small amounts of interest. His income is otherwise entirely sourced in this country.*
>
> *When he came to Fiji the pattern of his visits was always the same. He left Adelaide, flew to Nadi and caught a bus from Nadi to Suva where he stayed at the then called Travelodge now Centra.*
>
> *While at the Travelodge he paid for accommodation, telephone calls, faxes, laundry, dry cleaning and meals.*
>
> *When he returned to Adelaide immediately after he finished his business in Suva he left Suva, stayed overnight in Nadi and then flew across the following day to Adelaide. The reasons why he stayed at the Travelodge were that it was very central and that he could use the hotel's facilities such as the telephone and fax.*

In support of his contention that the purpose of his expenditure was solely to derive income, Mr Jamnadas gave evidence of which the following is an example:

> *The amount went up to about $180,000 but in the meantime the bank was not pressing so it was all in an overdraft position all around and I have to negotiate quite a lot by that time I was in Adelaide so I have to commute and negotiated with the bank with Bani Druavesi, who was the second manager then and eventually in 1990 they paid us the whole of the rent in arrears for about four or five years over $180,000. Then further negotiations took place and they paid an additional sum and that's how it was all tied up. At that point and time when I was commuting I had a total debt for me and my companies of about more than one and a quarter million … and it was imperative that I travel just to hold everything together.*

However, in s 19(b) of the Act, the term "purpose" does not mean "motive", although motive is a factor to which regard may be had and, in a particular case, may be determinative. The terms "purpose" and "wholly and exclusively" require one to have regard to the nature, attributes and incidents of the activity from which income is derived and the connection which the subject expenditure has with that activity. In s 19(b) the purpose referred to is "the purpose of the trade, business, profession, employment or vocation of the taxpayer," not the purpose which the taxpayer has in his conscious mind.

In s 51(1) of the Income Tax Assessment Act 1936 (Australia), the point is made explicit by the use of the terms "incurred in gaining or producing the assessable income" and "necessarily incurred in carrying on a business for the purpose of gaining or deriving such income". In *Ronpibon Tin No Liability v Federal Commissioner of Taxation* (1949) 78 CLR 47, Latham CJ, Rich, Dixon, McTiernan and Webb JJ said at 56–7:

For expenditure to form an allowable deduction as an outgoing incurred in gaining or producing the assessable income it must be incidental and relevant to that end. The words "incurred in gaining or producing the assessable income" mean in the course of gaining or producing such income.

Although similar words are not used in s 19 of the Act, the same requirement is inherent in its operation.

Particularly when the issue is whether the expenditure is, in its nature, a business expense and deductible, or a private expense and not deductible, it is important to have regard to the part which the subject expenditure plays in the income-earning activity. In this context, judges tend to use terms such as "the character" or the "category" of the expense.

In *Lunney & Haley v Federal Commissioner of Taxation* (1958) 100 CLR 478, the High Court of Australia affirmed the basic proposition that fares paid by taxpayers in travelling day by day from their home to their places of business and back again are not deductible expenses. Williams, Kitto and Taylor JJ expressed views to the effect of those I have stated above. At 496, their Honours referred to the remarks of Dixon J in *Amalgamated Zinc (De Bavay's) Ltd v Federal Commissioner of Taxation* (1935) 54 CLR 295 at 309 that:

The expression "in gaining or producing" has the force of "in the course of gaining or producing" and looks rather to the scope of the operations or activities and the relevance thereto of the expenditure that to purpose in itself.

At 495, Williams, Kitto and Taylor JJ said, after referring to a number of cases including Ronpibon said:

In each of the cases except the last the expenditure in question was essentially expenditure of a business character but the question was whether it was expenditure "incurred in gaining or producing the assessable income" or necessarily "incurred in carrying on a business for the purpose of gaining or producing such income" whilst in the last mentioned case the occasion of the loss in question was properly regarded as an "incident" of the carrying on of the business which produced the taxpayer's assessable income.

At 498–9 their Honours said:

It is, of course, beyond question that unless an employee attends at his place of employment he will not derive assessable income and, in one sense, he makes the journey to his place of employment in order that he may earn his income. But to say that expenditure on fares is a prerequisite to the earning of a taxpayer's income is not to say that such expenditure is incurred in or in the course of gaining or producing his income. Whether or not it should be so characterized depends upon considerations which are concerned more with the essential character of the expenditure itself than with the fact that unless it is incurred an employee or a person pursuing a professional practice will not even begin to engage in those activities from which their respective incomes are derived.

At 500–1, their Honours said:

In the course of the argument we were referred to a number of cases in which, from time to time, much the same problem has been discussed. It is unnecessary to review these cases but of them we mention Cook v Knott; Friedson v Glyn-Thomas; Ricketts v Colquhoun; Nolder v Walters; Blackwell v Mills and Durbidge v Sanderson. No doubt the legislative provisions which required consideration in these cases were not identical with s 51, but the process or reasoning by which they were decided consistently rejects the notion that expenditure incurred by a taxpayer in order to travel from his home to his place of business is, in any sense, a business expenditure or an expenditure incurred in, or, in the course of, earning assessable income Indeed they go further and refuse

assent to the proposition that such expenditure is, in any relevant sense, incurred for the purpose of earning assessable income and unanimously accept the view that it is properly characterized as a personal or living expense. This view agrees with that which we, ourselves, entertain. Expenditure of this character is not by any process of reasoning a business expense; indeed, it possesses no attribute whatever capable of giving it the colour of a business expense.

These views accord with the approach taken in the United Kingdom where legislative provisions similar to s 19(b) of the Act apply. In *Newsom v Robertson (Inspector of Taxes)* [1952] 2 All ER 728, the Court of Appeal held that the costs of travel by a barrister from his home outside London to this chambers in London and return to home were not deductible. At 731, Denning LJ said:

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 at 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 expenses.

In *Mallalieu v Drummond (Inspector of Taxes)* [1983] 3 WLR 409 the House of Lords rejected a claim by a female barrister for the cost of articles of clothing, which were ordinary articles of apparel which could be worn in everyday life. Their Lordships rejected the view that the case was to be determined by the taxpayer's evidence that her motive in purchasing the clothing was solely a business motive. At 418–99, Lord Brightman, with whom Lord Diplock, Lord Keith and Lord Roskill agreed, Lord Elwyn-Jones dissenting, said:

Of course Miss Mallalieu thought only of the requirements of her profession when she first bought (as a capital expense) her wardrobe of subdued clothing and, no doubt, as and when she replaced items or sent them to the launderers or the cleaners she would, if asked, have repeated that she was maintain her wardrobe because of those requirements. It is the natural way that anyone incurring such expenditure would think and speak. But she needed clothes to travel to work and clothes to wear at work, and I think it is inescapable that one object, though not a conscious motive, was the provision of the clothing that she needed as a human being. I reject the notion that the object of a taxpayer is inevitably limited to the particular conscious motive in mind at the moment of expenditure. Of course the motive of which the taxpayer is conscious is of a vital significance, but it is not inevitably the only object which the Commissioners are entitled to find to exist. In my opinion the Commissioners were not only entitled to reach the conclusion that the taxpayers' object was both to serve the purposes of her profession and also to serve her personal purposes, but I myself would have found it impossible to reach any other conclusion.

Another case in which the nature and incidents of the income earning activities and the connection therewith of the subject expenditure was considered was*Watkis (Inspector of Taxes) v Ashford Sparkes & Harward (a firm)* [1985] 2 All ER 916 in which Nourse J upheld a ruling that the provision of accommodation, food and drinks at an annual conference of a partnership of solicitors was deductible, the business purpose being the exclusive purpose and the private benefit to the taxpayer being purely incidental. Yet his Lordship

disallowed other claims for accommodation, food and drinks on the footing that it was not open to find that the business purpose thereof was the exclusive purpose.

Byrne J did not agree with the approach taken in these cases. Speaking of Lord Brightman's judgment in *Mallalieu v Drummond*, Byrne J said that he preferred the opposite opinion of Sir John Donaldson M R in the Court of Appeal. However, the decisions in *Mallelieu v Drummond* and *Watkis (Inspector of Taxes) v Ashford Sparkes & Harward (a firm)* apply the traditional approach to deductions. A decision that Miss Mallalieu was entitled to a deduction for the cost of ordinary clothes would have surprised taxation lawyers throughout the world.

The emphasis which the above-mentioned cases place upon the scope and incidents of the income earning activity was also given effect in the Supreme Court of Fiji by Lord Cooke, Sir Anthony Mason and Sir Maurice Casey in *Sweetman v Commissioner of Inland Revenue* Civil Appeal No CBV 0005 of 1995S where their Lordships said:

> *It may be said that an expenditure which serves the purpose of the taxpayer's business or profession also serves the taxpayer's personal purposes on the basis that what is good for his business or profession will be good for him personally. However, it is scarcely to be supposed that the legislature intends to disqualify an expenditure for that reason. In other words, the non-business or non-professional purpose to be excluded by s 19(b) is a purpose distinct from the business or professional purpose which justifies the deduction of the expenditure. And this supports the view that motive, though it may be a relevant factor, is by no means a decisive factor. If the purpose of the expenditure is truly for the purpose of the taxpayer's business or profession, it matters not that the taxpayer has in mind some personal advantage which is a consequence of that purpose.*

More recently, in *Federal Commissioner of Taxation v Payne* [2001] 46 ATR 228 Gleeson CJ, Kirby and Hayne JJ, (Gaudron and Gummow JJ dissenting), applied the traditional approach to travel expenses. The taxpayer had had two sources of income, one from being a pilot and the other from a deer farm. He sought to deduct the cost of travel between Sydney Airport and the deer farm and of accommodation close to Sydney Airport. At 233, Gleeson CJ, Kirby and Hayne JJ said:

> *The taxpayer's travel occurred in the intervals between the 2 income-producing activities. The travel did not occur while the taxpayer was engaged in either activity. To adopt and adapt the language used in Ronpibon, neither the taxpayer's employment as a pilot nor the conduct of his business farming deer occasioned the outgoings for travel expenses. These outgoings were occasioned by the need to be in a position where the taxpayer could set about the tasks by which assessable income would be derived. In this respect they were no different from expenses incurred in travelling from home to work.*

In the present case, the Court of Review disallowed Mr Jamnadas' claims. Byrne J, however, considered that they were allowable. His Lordship considered that Mr Jamnadas' travel was analogous to that of a barrister on circuit. Yet, the very nature of circuit work is that it involves travel away from the base at which the barrister carries on practice. Like the employment of a commercial traveler, the nature of the income-earning activity is such that the taxpayer must travel. That was not the situation with Mr Jamnadas who carried on no significant income earning activities in Australia. Apart from earning some back interest on moneys deposited in an Australian bank, he derived no income from Australia. Adelaide was the place where he lived, for the purposes of his children's education.

Mr Jamnadas did not have significant investments in both Fiji and Australia and his home was not a place of business. In *Federal Commissioner of Taxation v Green* (1950) 81 CLR 313, the taxpayer was permitted to deduct a part of the costs of travel from his home in Brisbane to Cairns and Townsville where he had rental properties. In that case, however, the taxpayer had a multitude of income earning activities in Brisbane, being an investor, a director of seven companies and a supervisor of a druggist's business. The diverse nature of his income earning activities required him to travel. For the purpose of deriving his income, Mr Jamnadas could and should have lived in Suva and, indeed, he intended t return there when the children's education had been completed.

In the present case, the expenses incurred by Mr Jamnadas were occasioned by his decision to live in Adelaide while his children were being educated. The travel expenses were the cost of getting Mr Jamnadas to and from the place where he could engage in income earning activities, not costs incurred in those activities. The expenses had the character of private expenses, being occasioned by the needs of his children's education, rather than that of business expenses. They were incurred wholly or in part for the purpose of achieving a better education for his children. The ruling given by the Court of Review on this point was correct and that given by Byrne J was wrong in law. It was not open to his Lordship to hold that the expenses were incurred wholly and exclusively for the purpose of Mr Jamnadas' income earning activities.

It is unnecessary to discuss the costs of accommodation, meals and laundry in Suva. They fall with the costs of travel and under the principles enunciated in *Mallalieu v Drummond* and *Watkis (Inspector of Taxes) v Ashford Sparkes & Harward (a firm)*.

On the second issue, the final question is whether the Court of Review and the High Court had the power, on the review of the assessments following the disallowance of objection, to review the exercise by the Commissioner of Inland Revenue of his discretion under s 100(2) of the Act to mitigate the penalties imposed by s 94 of the Act.

The Court of Review held that it had no jurisdiction to review the Commissioner's exercise of discretion. The Court considered that, if the Legislature had intended the exercise of discretion to be reviewed, it would have added the discretion to s 70 of the Act and conferred jurisdiction to review upon the Discretions Review Board.

However, s 94 provides that penalties are to be assessed in the same manner as tax is assessed and s 62 provides for the lodgment of objections against assessments and for appeals to the Court of Review and the High Court against the Commissioner's decision on an objection. Although the provisions of s 62 appear in Pt IX immediately following of Pt XIII, which the provisions provide for assessments of tax, they do not limit their operation to assessments of tax, thereby excluding assessments of penalty. Nor does s 63, which confers jurisdiction upon the Court of Review to hear "appeals from the assessment of the Commissioner".

Accordingly there is no sound basis for limiting the right to object to and the right to appeal against assessments to those assessments which are assessments of tax as distinct from assessments of penalty.

A similar issue was considered in *Penrose v Federal Commissioner of Taxation* (1931) 45 CLR 263 and in *Richardson v Federal Commissioner of Taxation* (1982) 48 CLR 192 where it was held, in relation to the Income Tax Assessment Act 1922 (Australia), a statute which had many similarities with the Fiji Act, that

a taxpayer's entitlement to appeal to a Board of Review or to the High Court against a Commissioner's decision on an objection included an entitlement to appeal on the issue of the Commissioner's decision to remit penalty tax in whole or in part. In Richardson, Dixon J said at 204–5:

> *Finally, the very description "additional tax" gives rise to a presumption that it will be levied and collected in the same way as the principal tax to which it is a accessory. Unless some contrary intention appears, the inclusion of additional tax in the assessment is a natural consequence of the view that the ascertainment of the tax, as well as of taxable income, is part of the process of assessing … I think that the better interpretation of the statute is that the procedure of assessment, objection, review and appeal does apply to additional tax under s 67.*

The ordinary and natural meaning of the words in s 62 encompasses objections and appeals against penalty tax. The provisions should be given their ordinary meaning for the indications in the Act of a contrary contention are not persuasive. Accordingly, objections may be taken to and review may have in the ordinary way of assessments of penalty tax. Byrne J was correct to hold that the Court of Review had jurisdiction and that the High Court, on appeal from the decision of the Court of Review, also had jurisdiction to review that aspect of the assessments.

Counsel for the Commissioner submitted, however, that the jurisdiction of the Court of Review and of the High Court was only to review for error and to remit the matter back to the Commissioner if error be found.

Even though an appeal be a general appeal, a court, as distinct from an administrative tribunal such as the Discretions Review Board, will not interfere with primary decision-maker's exercise of discretion unless the court considers that the decision-maker erred in the interpretation of the law, or mistook the facts or took into account an irrelevant consideration or made a decision that no reasonable decision-maker should have come to or that the discretion otherwise miscarried in law.

Thus, in *Avon Downs Proprietary Limited v Federal Commissioner of Taxation* (1949) 78 CLR 353, Dixon J said at 360, in relation to the review of taxation discretion:

> *But it is for the Commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexamable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure f the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.*

However, if such an error in the primary decision is identified, the court may exercise the discretion for itself or may remit the matter back to the Commissioner for reconsideration. The jurisdiction of the High Court in an

appeal is not limited to that which it would have in judicial review proceedings *House v R* (1936) 55 CLR 499 at 504–5.

In the present case, the Court of Review did not review the Commissioner's exercise of discretion because the Court of Review considered that it did not have jurisdiction to do so. However, the Court of Review referred to certain facts, which appear to have no or little relevance to the issue, which was the failure by Michelle Apartments Limited to file returns over many years, a failure which was ultimately rectified but which led to the imposition of the subject penalty. The Court of Review suggested that the penalty was excessive. By the time the matter came before Byrne J the penalty had been reduced to $11,621. Byrne J reduced the penalty further to $1,160, a nominal sum having regard to the 50% penalty for which s 94 provided. Byrne J stated that, "*In all the circumstances I consider it be fair to impose a penalty of 10% or $1,160.00*". However, apart from referring to the comments made by the Court of Review on penalty, which appear to relate to an irrelevant matter, Byrne J did not identify any reason why the discretion should be interfered with and he reduced the penalty, not to 10% of the tax payable, but to a very much lesser sum.

As no reviewable error in the exercise of the Commissioner's discretion was identified by Byrne J or by the Court of Review or in this appeal, the order made by Byrne J in respect of penalty should be set aside.

Accordingly, the orders made by Byrne J should be set aside and the decision of the Court of Review should be restored. The respondents should pay the costs of the appeal in this Court which are fixed at $1,500 and the costs in the High Court, to be taxed in default of agreement.

Appeal disallowed.