COMMISSIONER OF INLAND REVENUE v UNITED TOURING FIJI LTD (CBV0004 of 2003S)

SUPREME COURT — APPELLATE JURISDICTION

FATIAKI P, FRENCH and MASON JJ

19, 21 May 2004

Practice and procedure — applications — leave to appeal — whether or not petition for extension of time to petition for special leave should be granted — Constitution of the Republic of Fiji s 122(2) — Income Tax Act ss 19(b), 71(2), 106 — Supreme Court Act 1998 s 7.

The Respondent United Touring Fiji Ltd was a travel agency and a subsidiary of an Australian based company Tourism International (South Pacific) Pty Ltd which in turn was a subsidiary of British Electric Tradition International (BET) based in the United Kingdom. Another subsidiary of BET called UTIJ operated as the Respondent's representative in Japan. The Respondent paid UTIJ representation fees which were in essence agency fees.

In 1994, the Respondent was acquired by a Fijian company Manzoa Ltd (Manzoa). At around the same time, UTIJ was also sold, hence, the companies ceased to be related companies for purposes of taxation. However, Manzoa continued to use the same method in relation to the payment of representation fees as had been used prior to its acquisition.

Thereafter, a dispute arose between the Respondent and the Commissioner of Inland Revenue (the Commissioner) as to the deductibility of the representation fees paid to UTIJ in the years 1990 to 1993. On 3 December 1996, the Commissioner issued tax assessments in which he disallowed, in each of the 4 years, certain elements of the representation fee and in particular a 6% commission. The Respondent objected to the assessment which was rejected. Thereafter, the Respondent appealed to the Court of Review.

The Commissioner then appealed to the High Court, which allowed the appeal, set aside the decision of the Court of Review and reinstated the assessment made by the Commissioner. The Respondent then appealed to the Court of Appeal, which allowed the appeal and set aside the decision of the High Court. The Court of Appeal also refused an application for leave to appeal from its decision to the Supreme Court. The Commissioner then filed a petition for an extension of time within which to bring an application for special leave to appeal against the decision of the Court of Appeal.

The principal issues relevant to the grant of special leave were the following: (a) the failure by the Court of Appeal to have due regard to the restrictive scope of s 19(b) and in particular the preclusion by that provision of dissection or apportionment of expenditure and the impact of dual purpose; and (b) the failure by the Court of Appeal to take into account the provisions of the Fiji/Japan Double Taxation Agreement, the due consideration of which requires application of the relevant principles of transfer pricing developed by the OECD; and (c) As to the complaint that the Court of Appeal erred in refusing leave to appeal to Supreme Court.

Held — (a) The sole issue for decision before the Court of Review was whether or not the Respondent established that the representation fees were deductible as expenditure wholly or exclusively expended for the purpose of the Respondent's business. The Court of Appeal did not go into the question of the dissection of expenses for the purposes of s 19(b) as it believed that the Court of Review had enough evidence to support its conclusion that the expenses were wholly and exclusively incurred for the relevant purpose. The expenses had been tested against the "arms-length principle". There was no apparent error of law in the construction by the Court of Appeal of s 19(b) which would warrant the grant of special leave.

(b) The issue relating to the application of the Fiji/Japan Double Taxation Agreement raised some important questions about whether and how various provisions of that

agreement operate in the context of the domestic law of Fiji having in relation to s 106 of the Income Tax Act. However, under no circumstances was this issue raised in the Court of Review or in the High Court. It was not considered by them other than in reference to the OECD guidelines as a useful guide to determine if an arms-length transaction occurred and how the burden of proof should be applied. It would be unjust to allow this issue to be discussed in the Supreme Court.

(c) As to the complaint that the Court of Appeal erred in refusing leave to appeal to this court, the grant or refusal of leave is not a matter which can be appealed to the Supreme Court. Appeals to the Supreme Court lie only against final judgments of the Court of Appeal. The proper approach absent the grant of leave by the Court of Appeal, was to seek a special leave to appeal which was not properly pressed by counsel.

Case referred to

Chiman Lal Jamnadas v Commissioner of Inland Revenue [2003] FJSC 4, cited.

M. Scott and *K. Muaror* for the Petitioner

R. A. Smith for the Respondent

Fatiaki P, French and Mason JJ.

Introduction

[1] This case concerns the disallowance by the Commissioner of Inland Revenue of deductions claimed by a Fiji-based travel agency for a portion of agency payments made by it to a related company in Japan. The Commissioner having disallowed the deductions in part, the taxpayer appealed successfully to the Court of Review. The Commissioner appealed to the High Court, which allowed the appeal, set aside the decision of the Court of Review and restored the Commissioner's assessments. The taxpayer then appealed to the Court of Appeal, which allowed the appeal and set aside the decision of the High Court. The Court of Appeal also refused an application for leave to appeal from its decision to this court. The Commissioner now petitions this court for an extension of time within which to bring an application for special leave to appeal against the decision of the Court of Appeal. For the reasons that follow, we are of the view that no issue warranting the grant of special leave is disclosed and that the petition to extend time should be dismissed.

Outline of factual history

[2] United Touring Fiji Ltd (UTC) is a travel agent which arranges and conducts tours for overseas visitors coming to Fiji. Up until 1994 it was a subsidiary of a company based in Australia called Tourism International (South Pacific) Pty Ltd (Tourism International) which in turn was a subsidiary of British Electric Tradition International (BET) based in the United Kingdom. Another subsidiary of BET, called UTIJ, operated as UTC's representative in Japan. It would book clients for UTC in Japan and provide representative services including the negotiation of tour packages with other agents, the management of debtors and other administrative matters. UTC paid UTIJ representation fees which, in essence, were agency fees. Amounts remitted by UTC to UTIJ from 1984 to 1990 ranged from 1.9 million yen per month in 1984 to 3 million yen per month in 1990. On 12 November 1990, UTC's immediate holding company, Tourism International, advised that as from 1 January 1991 its contribution to the Japanese office was to increase from 3 million yen to 4 million yen per month. The following amounts were "*overseas representation fees*" for the financial years 1990–1993:

Financial Year	*Amount*
1990	$579,344
1991	$619,582
1992	$812,137
1993	$895,533

[3] UTC was acquired by a Fijian company, Manzoa Ltd (Manzoa), in 1994. UTIJ was also sold at about the same time. The companies therefore ceased to be related companies for tax purposes. The new controller of UTC, an experienced New Zealand travel businessman, continued to use the same method in relation to payment of representation fees as had been used prior to his acquisition of the company.

[4] A dispute arose between UTC and the Commissioner of Inland Revenue as to the deductibility of the representation fees paid to UTIJ in the financial years 1990–1993. On 3 December 1996, the Commissioner issued tax assessments in which he disallowed, in each of the 4 years, certain elements of the representation fee and in particular a 6% commission. The disallowance was explained in a letter dated 16 October 1996, which preceded the issue of the assessments. In that letter he said:

> The main area of concern however is with respect to representation fees claimed when UTC and UTIJ were related parties. It has been stressed by UTC that amounts remitted to Japan for the periods 1990 to 1994 represent an arm's length price because the same basis (4m yen per month) had initially been adopted for the 1995 year when parties were unrelated. This represents a reimbursement of costs plus a small profit margin consistent with a mark-up for travel agents. It is therefore agreed that the tax clearance requests granted to remit 36m yen for 1990, 39m yen in 1991, and 48m yen for 1992 to 1994 would be considered arm's length and thus allowable. Any additional claim (eg accrued marketing and/or representation fees to Japan) is deemed excessive and will be disallowed as an income tax deduction.
>
> After converting Japanese yen to Fijian currency, this will result in an overclaim of representation fees of $194,800; $196,586; $301,970 and $253,548 for the 1990 to 1993 years respectively. No adjustment is required for the 1994 year because the claim for 48m yen has been correctly converted to Fijian currency and there were no further claims (eg Accrued marketing expenses) that would be considered non-arm's length.

UTC objected to the assessments. The objection was disallowed and UTC appealed to the Court of Review.

Statutory framework

[5] Before considering the way in which this case was presented in the Court of Review and the findings of that court, it is convenient to refer to the relevant provisions of the Income Tax Act Cap 201 and provisions of the Fiji/Japan Double Taxation Agreement apparently also known as the Fiji/Japan Double Taxation Relief Arrangements.

[6] Section 19(b) of the Income Tax Act provides:

> In determining total income, no deductions shall be allowed in respect of—
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> …
>
> (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;…

[7] Section 106 of the Income Tax Act authorises the minister to enter into agreements with the governments of other countries relating to the prevention or mitigation of double taxation. Section 106(4) provides that when such an agreement is made and notified in the Gazette:

> … the arrangements notified therein shall, so far as they relate to immunity, exemption or relief in respect of income tax in Fiji, have effect as if enacted in this Act …

[8] Certain of the provisions of the Fiji/Japan Double Taxation Agreement, which was made in October 1990, were also relied upon by the Commissioner. The record of the proceedings reproduced a copy of the United Kingdom/Japan Double Taxation Agreement made in 1962 but it seems to have been assumed in the course of the proceedings that the relevant provisions, whether by adoption or otherwise, reflect the terms of the arrangements presently in force between Fiji and Japan.

[9] Reference was made in argument to Arts III and IV of the Agreement. Article III relates, inter alia, to the attribution of profits to the permanent establishment of the enterprise in the contracting state in which it is situated. Deductions allowable in respect of the permanent enterprise include expenses which would be deducted if it were an independent enterprise in so far as they are reasonably allocable to the permanent establishment. Article IV authorises the contracting states to tax as profits sums accrued to one of two related enterprises as the result of non arms-length conditions made or imposed between the enterprises.

The case before the Court of Review

[10] The written closing submissions dated 25 September 1997 to the Court of Review made on behalf of UTC identified two issues to be determined:

(1) What price did UTC pay for the representation services provided to it by UTIJ?

(2) Was that price deductible under s 19 of the Income Tax Act ?

In the Commissioner's written closing submissions of the same date, the appeal was characterised as one which involved "*the deductibility of expenses incurred by [UTC] for representation fees paid to a related entity in Japan between 1990 and 1993*". It was submitted that "*to be deductible fees must not fall within the exclusion of s 19(b). In other words they must have been incurred 'wholly and exclusively for the purpose of the business of the taxpayer*'".

[11] Reference was made to the onus of proof on the taxpayer and the necessity to determine which portion of the expenses was incurred "*wholly and exclusively*" for the purpose of the business of UTC. In the determination of that question, the "*arms-length principle*" was applicable. The source of the principle was said to be Art IV of the Fiji/Japan Double Taxation Agreement. Article IV is based on Art 9 of the OECD Model Convention and its application was said to be the subject of "*very complex and detailed guidelines agreed upon at an international level*". Reference was made to the OECD commentary on Art 9. The submissions did not expand upon the application of the guidelines in Fiji but referred to the evidence of the Commissioner's only witness, Mr Norris. The guidelines, it was said, had been translated into a Draft Rule of Practice issued by the Commissioner.

[12] The Commissioner's submissions then turned to the absence of adequate documentation upon which UTC could demonstrate how the transfer prices were established and the lack of information and documentation generally. Detailed

commentary was offered upon particular aspects of the evidence. The last two paragraphs of the submissions encapsulated their central propositions thus:

> 28. In order to succeed UTC must show it has paid the fees claimed and the amounts claimed are attributable to UTC on some proper basis ie the arms length principle.
> 29. UTC has failed to establish either of the above. Further, no evidence of the nature required by the OECD Guidelines and the Fiji Ruling has been produced which could satisfy the Commissioner or this Court that the fees claimed were incurred "wholly and exclusively" for the purpose of UTC's business.

The judgment of the Court of Review

[13] The Court of Review found, after hearing evidence from witnesses for UTC and from Mr Norris of the Commissioner's office:

(a) UTC and UTIJ were associated companies.
(b) Originally BET fixed the amount to be paid by its Fiji subsidiary to its Japanese subsidiary.
(c) The payments did not accord with the more usual arrangement in the worldwide travel industry by which a principal in one country, of an agent in another, deducts all the expenses and commission and then remits the balance to the principal. This would have been the easiest way to move capital to Japan.
(d) All the payments had required and received the approval of both the Reserve Bank of Fiji and the Commissioner.

[14] The court observed that the Commissioner's witness failed to press the grounds that the payments were not for exclusive expenditure but questioned whether they were at arms-length. The court referred to the OECD Transfer Pricing Guidelines, which had been received in evidence. It described them "*as an authority on how [UTC] should prove that the arrangement was at arms-length*". This was consistent with the way in which the written submissions for the Commissioner had sought to make use of those guidelines. They were said not to be an authority but to make instructive reading. The court also referred to Art 9 of the OECD Model Convention and then posed the question raised by that article:

> Were the conditions made between [UTC] and [UTIJ], that is the payment of all moneys gross to Fiji and the repayment of fee and commission to the agent, as opposed to the retention by the agent of operating costs and commission, different from those which independent enterprises would have made? The question was whether so much of the sum paid as exceeded 4 million Yen was really profit liable to tax in Fiji.

The Court of Review pointed out, correctly, that the OECD Guidelines are not the law of the land. It nevertheless made reference to their provisions relating to burden of proof.

[15] The court was obviously not impressed by the evidence of the Commissioner's witness, which it seems to have regarded as largely argumentative. The court referred to the firm view formed by the Commissioner's witness that the large quantum of the amounts transferred by UTC to UTIJ was indicative of fraud. The court held that he "*really had no definite evidence upon which to disallow the deductions*". It referred to his expressed "*last hope*" that the transaction was not arms-length.

[16] In considering UTC's evidence the court said:

> Evidence has been adduced by [UTC] before this Court that no exceptional industry profit was being made, that expenses have been detailed, that if the intention was to transfer capital, it would have been easier to have deducted it under the cover of expenses and commission at source, in Japan. There is no evidence that these conditions that had been made between [UTC] and UTIJ resulted in profits not accruing to the Appellant when, but for those conditions, they would have accrued.
>
> I do not consider the evidence, on its own and in the face of [UTC's] evidence, that [UTC] and UTIJ were associated companies at the relevant times, is sufficient to say that they were not at arms-length when the agreement for payment of fees and commission was reached.
>
> Association by itself is not enough. It is too easy to believe that international conglomerates cheat the tax system of each country in which they operate. I fully understand the frustration which Mr Norris no doubt feels on occasion while carrying out his duties to the best of his ability, but in this case, there is only suspicion.

It is to be noted that in the first of the preceding paragraphs quoted there is a clear reference by the Court of Review to the criteria for determining an arms-length transaction set out in Art IV of the Double Taxation Agreement.

[17] The Court of Review allowed the appeal with costs. The disallowed deductions were to be allowed.

The case in the High Court

[18] The Commissioner appealed against the decision of the Court of Review to the High Court. The grounds of appeal in a reference dated 25 February 1998 were as follows:

> 1. The learned Court of Review erred in law in failing to hold that amounts paid by the Respondent for representation fees in 1990, 1991, 1992 and 1993 were prohibited from deductibility by Section 19(b) of the Income Tax Act;
> 2. The learned Court of Review erred in law in failing to apply the onus of proof as required by s 71(2) of the Income Tax Act;
> 3. The learned Court of Review erred in law in applying the provisions of the Double Taxation Relief Arrangements with Japan made by order dated 7 October 1990.

The errors asserted were all said to be errors of law although appeals to the High Court from the Court of Review are not so limited. It may be noted that the High Court also has power to direct further evidence be adduced.

[19] The submissions on behalf of the Commissioner in the High Court attacked the absence of evidence of any breakdown of the amounts paid by UTC to UTIJ in the relevant years. He explained the basis of the disallowance thus:

> 30. The department … via a letter dated 16/10/96 agreed that the tax clearance requests for 1990 to 1994 for 4m Yen per month would be considered arm's length (sic) and thus allowable.
> 31. However, any additional claim was deemed excessive and would be disallowed.

[20] The "*arms-length principle*" was at the forefront of the Commissioner's submissions which considered the various methods of determining whether a payment is at arms-length. Methods identified were the Comparable Uncontrolled Price (CUP) Method, the Cost Plus Method and the Resale Price Method. The Fiji/Japan Double Taxation Agreement was referred to. It was said not to deal specifically with transfer pricing. Art IV was cited however no submission was made as to its application to this case as a matter of domestic law. Rather reference was made directly to the OECD Guidelines relating to Art 9 of

the Model Convention. The guidelines were said to "*provides (sic) a useful base for determining the issue of 'arm's length*'" (sic).

[21] The submissions then turned to the second ground relating to the issue of burden of proof and the requirement that the taxpayer satisfy the court that the disputed assessment was wrong.

[22] In relation to the third ground of appeal, the Commissioner invoked the OECD Guidelines and the proposition in those guidelines that both taxpayers and administrations use restraint in relying upon burden of proof in transfer pricing cases. The assessments raised for 1990–1993 were said to be soundly based given that UTC and UTIJ were related at the relevant times and given the absence of documentation to verify the claimed deductions. The submission gave some emphasis to the inadequacy of UTC's documentation.

[23] It is plain that despite the reference to Art IV of the Double Taxation Agreement and the OECD Guidelines in relation to Art 9 of the Model Convention, the issue was from beginning to end one of the deductibility of the expenses under s 19(b) and whether the taxpayer had proved that the amounts disallowed were wholly and exclusively laid out for the purposes of its business.

The High Court judgment

[24] Pathik J in the High Court attached critical importance to the failure of UTC to provide information to the Commissioner to substantiate its claims for deduction and its failure to discharge the onus of showing that the assessments were wrong.

[25] In relation to the first ground of appeal in the High Court he contrasted the detailed breakdown of expenses raised by UTIJ on UTC's account in the years 1984–1987 with the absence of any such breakdown in the years 1990–1993. He had regard to the fact that UTIJ represented, in Japan, agents from other countries including Australia and New Zealand. His Lordship referred to the Commissioner's request for the breakdown and the failure by UTC to provide it. There was still no detailed analysis of the representation fee especially the 6% component which had been disallowed. This failure his Lordship described as "*the crux of the case*". He also referred to record-keeping obligations imposed on taxpayers by s 109 of the Income Tax Act. He found for the Commissioner on the first ground of appeal.

[26] On the second ground relating to onus of proof, he held that UTC had to show that it had paid the fees claimed on an arms-length basis which could be assessed by reference to one of the three methods mentioned earlier. He found that UTC had "*failed to show, on the balance of probabilities, the true amount of expenses reimbursed and that the whole of those expenses were incurred exclusively for the purpose of its business as opposed to the businesses of the Japan office*". He found for the Commissioner on the second ground of appeal.

[27] The third ground related to the applicability of the Double Taxation Agreement in Japan. His Lordship also found that the Commissioner succeeded on this ground. His reasons, with respect, did not reflect any consideration of the application of the agreement or any parts of it as a matter of domestic law. Rather, he had regard to the OECD Guidelines. That consideration seems to have reduced to a consideration of the inadequacy of the information supplied by UTC to the Commissioner. In the event, the appeal was allowed.

The Court of Appeal judgment

[28] UTC then appealed to the Court of Appeal. It is not necessary to set out the grounds of appeal in detail. It suffices to say that they raised the following issues:

(1) The correctness of the finding that UTC was obliged to provide more detailed information about representation payments.

(2) The relevance of the obligation to keep records.

(3) The unreasonableness of the High Court's findings having regard to the unchallenged evidence in the Court of Review.

(4) The absence of any application by the Fiji Court of Review of the Fiji/Japan Double Taxation Agreement.

[29] The Court of Appeal held that the learned judge in the High Court had misdirected himself and that the appeal against his decision must be allowed. The court observed that the amounts paid in representation fees in the years under review were not in dispute. The sole issue before the Court of Review had been whether UTC had proved on the balance of probabilities that the representation fees were deductible as expenses wholly and exclusively incurred for the purposes of UTC's business. The issue was not whether UTC had complied with the Commissioner's demands or requests for information.

[30] The Court of Appeal accepted that requests for information had been made and were answered, although not to the satisfaction of the Commissioner. That evidence was before the Court of Review and was able to be considered along with other evidence. UTC had contended in the Court of Review that the fees fell within normal market criteria because they were within universally accepted parameters relevant to sales volume. UTC had called evidence in the Court of Appeal in support of its broad-based approach. There was unequivocal evidence to the effect that it could not have obtained the services of UTIJ any more cheaply than Japan. It was accepted that for tax purposes, UTC and UTIJ were related companies. The Court of Appeal said:

> We have summarised the evidence earlier in this judgment. It was to the clear effect that the arrangement between UTIJ and the appellant could have not been bettered at that time in Japan. (sic)
>
> Significantly as we have already noted the evidence for the appellant on this point was not the subject of cross-examination or challenging evidence on the behalf of the Commissioner, and the Judge did not deal with it or the submissions made thereon.

[31] Their Lordships said:

> As the appellant had not supplied the Commissioner with sufficient information, which was sufficient in the view of the Commissioner; in response to justify the whole of the representation fees the Judge concluded that the appellant could not succeed. Here we think that the learned Judge fell into error. In our view the satisfaction of the onus incumbent on the appellant did not stand or fall on the Commissioner's view of the sufficiency of the information supplied to the Commissioner.

[32] The Court of Appeal referred to the advantage that the Court of Review had in seeing and hearing witnesses from both sides. Counsel for the Commissioner acknowledged in the Court of Appeal that it had been open to the Court of Review to accept the critical unchallenged evidence, adduced by UTC, that the services of UTIJ could not have been obtained more cheaply and that being accepted the Court of Review could find in UTC's favour.

[33] The Court of Appeal found that this was clearly what the Court of Review did. Other matters referred to in the judgment of the Court of Appeal, and which were pointed to by counsel for UTC, were as follows:

(a) The new owner chose to continue on the same basis.

(b) The overall costs of UTIJ's services was extremely moderate.

(c) The appellant could have conducted its business in such a way as to make the whole question redundant — that is, by arranging for UTIJ to deduct its costs before remitting the proceeds of sales in Japan to UTC.

(d) The accounts were properly audited and had made a full disclosure of UTC's expenses.

[34] The Court of Appeal said in conclusion:

> We do not consider that the learned Judge in the High Court had regard to the way the case was run in the Court of Review in that the final position of the Commissioner was that deductibility had to be tested against the arms-length principle. That is exactly what the appellant did. It advanced its case on a basis that did not commend itself to the Commissioner, but the latter did not challenge the critical evidence led by the appellant. The Court of Review however clearly accepted the approach put forward by the appellant. Had the learned Judge in the High Court considered the appeal in relation to the correct issue, the evidence adduced and the findings of the Court of Review he would have found no basis for allowing the appeal against the finding that the appellant had established the deductibility of the representation fees.

The Court of Appeal allowed the appeal against the judgment of the High Court and restored the decision of the Court of Review.

[35] The decision of the Court of Appeal was given on 29 November 2002. On 16 May 2003, the Court of Appeal, differently constituted, refused an application by the Commissioner for leave to appeal to this court. The Commissioner now applies, out of time, for an extension of time to file a petition for special leave to appeal against the decision of the Court of Appeal.

Constitutional and statutory framework for the grant of special leave

[36] Section 122(2) of the Constitution provides:

> An appeal may not be brought from a final judgment of the Court of Appeal unless:
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> (a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance; or
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> (b) the Supreme Court gives special leave to appeal.

[37] Section 7 of the Supreme Court Act 1998 provides:

> (1) In exercising its jurisdiction under section 122 of the Constitution with respect to special leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstances of the case—
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> (a) refuse to grant special leave to appeal;
>
> (b) grant special leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or
>
> (c) grant special leave and allow the appeal and make such other orders as the circumstances of the case require.
>
> …
>
> (3) In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises—
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> (a) a far-reaching question of law;
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> (b) a matter of great general or public importance;

(c) a matter that is otherwise of substantial general interest to the administration of civil justice.

The grounds of the petition

[38] The petition does not in terms identify the far-reaching questions of law or matters of great general or public importance or otherwise of substantial general interest to the administration of civil justice that might warrant the grant of special leave. Rather, it asserts that the Court of Appeal erred in law in various respects which it is convenient to quote:

(a) The Fiji Court of Appeal erred in law in holding that expenditure the subject of the Petitioner's assessment to tax was wholly and exclusively incurred by the Respondent in terms of section 19(b) of the Income Tax Act, proved and admitted evidence showing same to have been incurred for a multiplicity of purposes for the benefit not only of the Respondent but also that of other related overseas entities;

(b) The Fiji Court of Appeal erred in law in holding that expenditure under consideration by it was correctly allocated by the Respondent in terms of relevant articles of the Fiji/Japan Double Tax Treaty whose application ought properly to have involved consideration of OECD model articles whereon such were founded, same comprising at all times part of the laws of Fiji.

(c) The Fiji Court of Appeal erred in law in holding that, as to any Ground of Appeal brought before it, the Respondent had discharged the burden of proof imposed by section 71(2) of the Income Tax Act, not only by reason of the Respondent's failure to comply with information demands made pursuant to section 50(1) of said Act, but by reason of the very nature of the case presented by the Respondent to the Court of Review.

(d) The Fiji Court of Appeal erred in law in erroneously considering the submissions presented to it by the Petitioner to be limited to the issue of failure to comply with information requests.

The petition also asserts error in law by the Court of Appeal "*in declining the application of your Petitioner for Special Leave to appeal*". The grounds were not felicitously worded. As counsel for the Commissioner made clear at the hearing of the petition, grounds (a)–(c) were intended to refer to the restoration by the Court of Appeal of the decision of the Court of Review and thereby of the findings that underpinned that decision.

Whether the time limited for applying for special leave should be extended and whether special leave should be granted

[39] Counsel for the Commissioner identified as the two principal issues relevant to the grant of special leave the following:

(a) The failure by the Court of Appeal to have due regard to the restrictive scope of s 19(b) and in particular the preclusion by that provision of dissection or apportionment of expenditure and the impact of dual purpose.

(b) The failure by the Court of Appeal to take into account the provisions of the Fiji/Japan Double Taxation Agreement, the due consideration of which requires application of the relevant principles of transfer pricing developed by the OECD.

[40] The Court of Appeal in its judgment referred to the evidence given by a number of witnesses called by UTC which were relevant to the character of the payments made by it to UTIJ. It reviewed the submissions and the judgments in the Court of Review and the High Court. It was accepted by the Court of Appeal

that the sole issue for decision before the Court of Review was whether UTC had established that the representation fees were deductible as expenditure wholly or exclusively expended for the purpose of UTC's business.

[41] The Court of Appeal did not enter upon the question of the dissection of expenses for the purposes of s 19(b) as it was of the opinion that the Court of Review had enough evidence to support its conclusion that the expenses were wholly and exclusively incurred for the relevant purpose. The expenses had been tested against the "*arms-length principle*". Counsel for the Commissioner suggested that the "*arms-length principle*" did not address the question whether the expenses were wholly and exclusively for the requisite purpose.

[42] In our opinion, however, while the judgment of the Court of Review may be open to criticism in respect of its conclusions about the character of the payments as a factual matter, those criticisms do not raise any point going to the interpretation of s 19(b). There is no apparent error of law in the construction of that provision which, in the circumstances of this case, would warrant the grant of special leave. The construction of s 19(b) was considered recently by this court in *Chiman Lal Jamnadas v Commissioner of Inland Revenue* [2003] FJSC 4, judgment in which was delivered on 24 October 2003.

[43] The second issue, relating to the application of the Fiji/Japan Double Taxation Agreement, as attractively presented by counsel for the commission, may well raise some important questions about whether and how various provisions of that agreement operate in the context of the domestic law of Fiji having regard to s 106 of the Income Tax Act. The issue was however never raised in the Court of Review, nor indeed in the High Court, nor considered by them other than by reference to the OECD Guidelines as a helpful guide to determine whether an arms-length transaction has occurred and how onus of proof should be applied.

[44] Article IV, embodying the "*arms-length principle*", was cited in the Court of Review in support of the Commissioner's contention that s 19(b) was not satisfied because the expense was not wholly and exclusively for UTC's business purposes. Reference to s 106 seems to have been in the context of justifying the reference to Art IV for these purposes. Section 106 does not give domestic effect to Art IV which authorises taxing action by the contracting state but does not mandate it nor in terms impose any liability, immunity, relief, or exemption.

[45] In its appeal to the High Court the Commissioner focused upon s 19(b). Interestingly, he contended that the Court of Review had erred in law in applying the Double Taxation Agreement with Japan. Presumably, this was intended to be read as a complaint about the method by which the arrangements were applied. But although there was reference in submissions before this court to Art III, there was no reference to Art III in the courts below.

[46] Article III deals with an entirely different subject matter. It concerns the profits of enterprises where a Japanese enterprise carries on business in Fiji through a "*permanent establishment*" situated in this country. The concept of "*permanent establishment*" is defined in great detail. It does not appear, however, that any issue was raised in the litigation about whether UTC was part of the UTIJ enterprise during the time they were related through a common holding company. Whatever Art III means, such operation as it has in Fiji is by virtue of s 106 of the Income Tax Act. It would be quite unjust to allow the question of the independent application of Arts III and IV to be ventilated at this

stage in the Supreme Court. A fortiori, to allow the Commissioner to attempt to reconstruct a novel basis for the original assessment would also be unjust.

The refusal of leave by the Court of Appeal

[47] As to the complaint that the Court of Appeal erred in refusing leave to appeal to this court, the grant or refusal of leave is not a matter which can be appealed to the Supreme Court. Appeals to this court lie only against final judgments of the Court of Appeal. The appropriate mode of approaching this court, absent the grant of leave by the Court of Appeal, is by seeking special leave to appeal. This aspect of the petition was, quite properly, not pressed by counsel.

Conclusion

[48] For the preceding reasons the petition does not disclose a case fit for the grant of special leave. There is no point in extending time. The petition is dismissed with costs.

Order

(1) The petition for an extension of time to petition for special leave is dismissed.
(2) The petitioner pay the respondent's costs.

Petition dismissed.