

IN THE SUPREME COURT OF FIJI

Review No. 7 of 1981

BETWEEN:

FLEISCHMAN'S LIMITED

Appellant

AND

THE COMMISSIONER OF INLAND REVENUE

Respondent

Mr. P.I. Knight counsel for the Appellant  
Mr. M.J. Scott counsel for the Respondent.

JUDGMENT

The appellant in this case is a private company incorporated in Fiji, and is agreed to be a resident company within the definition of that term in section 2 of the Income Tax Act, Cap. 201. The Court was not told what its business was, but whatever it was, the company has two sources of income, one from its trading business and one from its dividend income. The latter is wholly derived from companies incorporated in Fiji and pursuant to section 17(1) (37) is exempt from basic and normal tax. However although exempt from basic and normal tax, that dividend income still falls under section 11 to be included as total income. Indeed to put the matter beyond doubt the proviso to section 11 says:-

"Provided however that without in any way affecting the generality of this section total income shall include:-

(f) a dividend paid or credited in the year.

Under section 32 the chargeable income of a company is its total income.

The appellant made trading losses in 1977 and 1978, amounting in all to \$6772 but made a trading profit in 1979 of \$6336 so that for three years it still shows a trading loss of \$436. Its accounts show that in 1978 its dividend income amounted to \$17,186 and in 1979 to \$16,832.

The appellant claims to be able by virtue of section 22 to set off its trading losses for 1977 and 1978 against its trading profit of \$6336 for 1979. The respondent demurs. I set out section 22(1) so far as it is material to this appeal -

(1) Any loss incurred in the year in any trade business, profession or vocation carried on by any person either solely or in partnership, shall -

(a) be set off against his income from other sources for the same year:

Provided that no relief shall be allowed under the provisions of this paragraph in respect of any loss suffered from any transaction of trade, business, profession or vocation if a profit derived from such transaction would not have been included in chargeable income; and

(b) to the extent to which it is not allowed under sub-paragraph (a) be carried forward and, subject as is hereinafter provided be set off against what would otherwise have been his total income for the next six years in succession.

There were four arguments before the Court. The

first was put forward for the appellant by Mr. K.R. Fleischman, its governing director. He contends that because his dividends are not chargeable income they do not constitute income against which his trading losses can be set off. But the section says that he is to set off his loss against his income - not his chargeable income - from any other source. His dividends are his income from another source.

The respondent replied setting out the Commissioner's views refuting the appellant's argument and stating that dividends although do fall to be included in chargeable income, they are included in the definition of total income.

Then there is Mr. Knight's argument for appellant. He complains that the terms 'chargeable income' and 'total income' in section 22 are loosely used. He says that business losses should not be set off against non-chargeable income and he wants to read the first line of the proviso as if the word chargeable were inserted before the word 'income'. But to do so, would be to completely alter the meaning of the section. Then he says that if appellant is not allowed to carry forward its losses, it is in effect paying tax on its dividends. This may be partly true, but I have no doubt that the legislature intended that trading losses should, if necessary, be set off against dividends accrued in the same year.

Mr. Scott wants me to do violence to the wording of section 17 by reading it as if it were "the following shall be excluded in arriving at 'total income'". As I have said, the section appears to be quite clear, and there is no reason to read it as Mr. Scott suggests.

In my view section 22(1) is perfectly clear. Where a taxpayer has income from several sources he can set off a loss from one source against a profit in another, provided that profits from all sources are taxable. Where there is a loss from a non-taxable source the taxpayer cannot set that against a profit from a taxable source, nor can he carry that sort of loss forward but he does have to set off a loss from a taxable source against a profit from a non-taxable source in the same year. In this case the loss from trading for 1977 and 1978 had already been set off against dividend income for those years and there was no loss to carry forward. The appeal must be dismissed and the appellant will have to pay the respondent's costs to be agreed or taxed in default of agreement.



(A.A. Stuart)  
Court of Review

6TH SEPTEMBER  
August, 1982.

Solicitors: Mr. P.I. Knight counsel for the Appellant  
Mr. M.J. Scott counsel for the Respondent.