IN THE SUPREME COURT OF FIJI

ACTION NO.9 of 1982

IN COURT

BETWEEN:

THE FIJI SUGAR CORPORATION LIMITED — Appellant

AND

COMMISSIONER OF INLAND REVENUE — Respondent

Mr. B.N. Sweetman for the Appellant
Mr. M.J. Scott for the Respondent.

JUDGMENT

In 1879 the first group of labourers from India indentured to the Colonial Sugar Refining Company Limited of Sydney in the state of New South Wales had arrived in Fiji and in 1882 that company began operations as sugar millers in Fiji. In 1961 it set up a subsidiary company called South Pacific Sugar Mills Limited in which it held 82% of the shares. In 1971 the Fiji Government purchased all the shares of the Colonial Sugar Refining Company Limited in South Pacific Sugar Mills Limited, and in October, 1972 South Pacific Sugar Mills Limited by virtue of the Fiji Sugar Corporation Limited Act Cap.209 became known as the Fiji Sugar Corporation Limited. Under that Act it was given the sole and exclusive right to manufacture sugar of merchantable quality from sugar cane. The

memorandum and articles of association of South Pacific Sugar Mills Limited by that same statute became the memorandum and articles of the appellant. The indenture system under which the Colonial Sugar Refining Company Limited recruited labour for its plantations continued until 1916 when Indian migration to Fiji ceased. The Colonial Sugar Refining Company Limited experimented with various alternatives to the old estate system and eventually the large plantations or estates were split up into small holdings of ten to fifteen acres each and leased out to farmers, and this system still operates to-day except that the land previously owned by the Colonial Sugar Refining Company Limited is now owned by the Government. But sugar cane formerly grown only on the sugar plantations or estates owned by the appellant's predecessors began to be grown on land leased from the Fijians - formerly through the Government and since 1940 through the Native Land Trust Board and that system operates to-day.
Each farmer who wants to grow sugar cane is given a contract by the appellant and he delivers his cane either to the railway owned by the appellant for transport to its mill, or by sending it by motor lorry to the mill. That contract enures for ten years. Two arbitrations have taken place in connection with new contracts. There was the Eve contract of 1960 and the Denning contract of 1970, which was followed by the retirement of the Colonial Sugar Refining Company Limited from the industry and the sale of its assets to the Fiji Government.

In 1978 some among the descendants of the original Indian indentured labourers who have been called Gurmiteers from the Hindustani word 'gurmit' - 'agreement' decided that the centenary of the arrival of the Gurmiteers should be celebrated and to that intent these people began to gather subscriptions. The appellant's auditor - or perhaps I should say, a member of the firm of accountants which audits the appellant's accounts, gave evidence. He told the court that he was a member of the committee which was

formed to make arrangements for this centenary, and he and his members considered that since the Gurmiteers and their descendants had contributed very largely by their labours to the growth of the sugar industry and the appellant had succeeded to that growth, the appellant should make a handsome contribution to the centenary funds. The figure of $250,000 was hoped for. The appellant's success or failure in the manufacture of sugar depends first upon the growers and after that upon the various categories of mill-workers and employees and finally management so the appellant's board of directors decided to contribute $100,000. The witness said that this was regarded as satisfactory for the moment, although he did not preclude the possibility of a demand for a further contribution. The appellant paid this $100,000 out of revenue and sought to deduct it from profits to 31st March 1981. The respondent demurred. He thought it should be regarded as a donation, but was willing to allow part of it. The taxpayer would not have that so the respondent added back the amount. The appellant objected and when its objection was disallowed filed this appeal.

Mr. Sweetman for the appellant submitted that this was a disbursement laid out under section 19(b) of the Income Tax Act Cap.201 wholly and exclusively for the purpose of the appellant's business. Mr. Scott for the respondent cited authority purporting to show that such a payment did not fall within section 19(b). He submitted also that it would fall under section 19(j) as an expenditure of a capital nature, and therefore not deductible.

It is first desirable to say that the sugar industry is a protected industry to the extent that section 15 of the Sugar Industry Act, Cap.206 provides that unless there

is a dispute notified by the independent chairman any person who hinders orderly planting growing or harvesting transport or crushing of cane or making or storing sugar is guilty of an offence and liable to imprisonment for up to two years. Of course that is all very well, but the appellant does not want any of its activities to reach that stage, and the appellant's Chief Executive emphasised this in his evidence. Mr. Sweetman referred to clause 50 of the appellant's memorandum of association as authorising a payment such as that under consideration but the chief executive said the directors did not look at any particular power and there are in fact three clauses which might be cited in support of such a payment. I set them out.

> " (45) To promote freedom of contract and to resist, insure against, counteract and discourage interference therewith and to subscribe to any association or fund for any such purpose, to enter into any industrial agreement with any association or associations, persons, unions, or organisations and to vary and rescind the same, to submit to or contest in or before any Industrial Court, Wages Board, Conciliation Committee, Board of Reference, Conciliation Board, Commission of Enquiry, Court of Arbitration or other industrial tribunal or body, any industrial dispute or matter or to combine with any persons or company in such submission or contest and to use the Company's funds for such purposes and to take all such steps as the Directors think fit to prevent or settle strikes or industrial disputes or matters by conciliation, arbitration or otherwise; also to insure any employee or officer of the Company against risk of accident in or in connection with or arising out of his employment by the Company and to effect insurance for the purpose of indemnifying the Company in respect of claims by reason of any such risk or accident.
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> (50) To expend money in any way which the Company may think fit with the view of improving the value of any business or property of the Company and to make donations to such persons and in such cases as the Company may think expedient.

(53) To do all such other things as the Company may think incidental or conducive to the attainment of the abovementioned objects or any of them this general statement of objects being deemed as enabling and not in any way restrictive of the foregoing objects.

It is then necessary to ascertain the purpose of this payment. I think that the critical statements by the appellant's chief executive were that he agreed that appellant had greater responsibility than others for aiding the Gurmit scheme, that appellant was at the time engaged in negotiating a new contract with growers, and that if the contribution had not been made the appellant might have lost goodwill, resulting in difficult relations with the grower's leaders and that in fact the contribution had helped the appellant's relations with the growers' leaders and generally with the growers.

The appellant's second witness told the court that the Gurmit committee had it in mind that the appellant had not long previously given $100,000 to dockworkers at Lautoka who had been made redundant by the appellant's introduction of mechanised bulk loading of sugar at that port. He said that there was pressure on the appellant to make a very substantital contribution, that his committee were aware of preparations for the new sugar contract. He said that if the appellant had not given what his committee considered a reasonable sum, they would have exerted numbers of pressures, even up to industrial action. It struck me that the appellant was being subjected to a polite form of blackmail, very polite, but blackmail none the less.

Having considered the evidence I have come to the conclusion that the purpose of the appellant's contribution was to foster goodwill not only among the growers, but also among the various grades of employees, a large majority of whom are descended from the Gurmiteers. By so doing the

appellant hoped that its activities would proceed without hinderance, and in particular that its endeavours to have a new contract signed by the growers would be conducted in an atmosphere of harmony. In so finding I have borne in mind that from the point of view of the Gurmit centenary committee, their only interest was to obtain a substantial donation, and I have borne in mind too the statements by the appellant's chief executive that the appellant had a greater responsibility than many others to support the Gurmit centenary. Nevertheless, I am satisfied that this expenditure was money laid out for the purpose of the appellant's business rather than a donation to assist the Gurmit centenary, and the question which has to be answered is whether it can be said that this expenditure was wholly and exclusively laid out for the purposes of the appellant's business.

The Fiji Income Tax Act (Cap.201) provides for tax upon net income and the scheme of it is that a very wide definition of 'total income' is followed by a section describing certain things which may be deducted. This is then followed by section 19 which specifies a number of matters which are not allowed to be taken into account in calculating total income. Among these are:-

(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.

(c) any loss not connected with or arising out of the trade, profession, business, employment or vocation of the taxpayer.

(j) any expenditure or loss of capital nature.

I do not think that in this instance subsection (c) need be considered apart from subsection (b). They are each different sides of the same coin, as it were. However I will at this stage dispose of subsection (j) which was mentioned by Mr. Scott, although he did not develop it.

I expect that when such a large sum as $100,000 is expended it is almost inevitable that the suggestion should be made that it is capital expenditure. The position is thus set out in British Insulated and Helsby Cables v Atherton (1926) A.C.205, 213: 95 L.J. K.B. 336, 340.

> "Now, in Vallambrosa Rubber Company v. Farmer, 1910 S.C. 519; 5 T.C. 529, Lord Dunedin, as Lord President of the Court of Session, expressed the opinion that 'in a rough way' it was 'not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all and income expenditure is a thing which is going to recur every year'; and no doubt this is often a material consideration. But the criterion suggested is not, and was obviously not intended by Lord Dunedin to be, a decisive one in every case; for it is easy to imagine many cases in which a payment, though made 'once and for all,' would be properly chargeable against the receipts for the year. Instances of such payments may be found in the gratuity of £1,500 paid to a reporter on his retirement which was the subject of the decision in Smith v. Incorporated Council of Law Reporting, (1914) 3 K.B. 674, and in the expenditure of £4,9994 in the purchase of an annuity for the benefit of an actuary who had retired which, in Hancock v. General Reversionary Interest and Investment Company, Ltd., (1919) 1 K.B. 25, was allowed, and I think rightly allowed, to be deducted from profits. But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

In Inland Revenue Commissioners v. Granite City Steamship Company (1927) 13 T.C. 1 Lord Sands said at p.14:

> "Broadly speaking outlay is deemed to be capital when it is made for the initiation of a business, or for a substantial replacement of equipment."

These principles were recently applied in Sargent v. Eayrs (1973) 1 WLR 236 where the taxpayer failed in an attempt to deduct travelling expenses to Australia to investigate farming conditions with a view to migration. He intended to extend his business to Australia.

Most of the cases following British Insulated & Helsby Cables v. Atherton appear to envisage the bringing into existence of an asset or an advantage for enduring benefit of the trade. See Strick v. Regent Inc. Company (1966) A.C. 295: Inland Revenue Commissioner v. Europa Oil (N.Z.) Limited (1971) A.C. 760: 2 W.L.R. 55: Walker v. Cater Securities (1974) 1 WLR 1363. Here I can see no asset brought into existence or enduring advantage created by this large sum of expenditure and I am accordingly of the view that this was not capital expenditure.

I pass, then, to a consideration of subsection (b) in the context of this expenditure. Both counsel relied to some extent upon Australian cases. Generally speaking, however, I doubt if the Australian cases are relevant in that the subsections (b), (c) and (j) in section 19 of the Fiji Act parallel section 130 of the Income and Corporation Tax Act 1970 which reproduces English sections which have been in existence since 1842. These sections have been discussed in cases such as Strong v. Woodifield (1906) A.C.448: 75 L.J. K.B. 864, 5 T.C. 215 and in many cases since then, and I will mention it more fully in a moment. The Australian legislation since 1936 exemplified by such cases as Ronpibon Tin. N.L. v. Federal Commissioner of Taxation (1949) 78 C.L.R.47 and F.C.T. v. Magna Alloys Research Pty. Limited (1980) A.T.R. 276, to take but two, deals with expenditure incurred in gaining or producing the assessable income and necessarily incurred in carrying on a business for the purpose of gaining or producing such income. I will begin with Strong v. Woodifield (cit supra) which was a case where a person staying in an inn was injured by the fall of a chimney which the brewers who owned the inn had neglected to keep in repair. The brewers sought to deduct the damages paid to the injured person from their revenue.

Lord Loreburn L.C. said -

> "In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader..... In the present case I think that the loss sustained by the appellants was not really incidental to their trade as innkeepers, and fell upon them in their character not of traders, but of householders."

Lord Davey said, referring to the words "for the purpose of trade,"

> "I think that the payment of these damages was not money expended 'for the purpose of the trade." These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, &c. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

It seems to me that these words can be applied to the facts of the present case and that money expended to enable the business of the appellant to be carried on without discord is money expended for the purpose of the appellant's business.

I pass on to two cases, one an English case Mitchell v. B.W. Noble Limited (1927) 11 TC.372 421: 1 K.B.719, 738, and the other an Australian, W. Nevill & Company v. Federal Commissioner of Taxation (1937) 56 CLR 290 1 AITR 67. The former was a case where money paid to a director to secure his retirement was held to be deductible and Sargant L.J. said -

> "Now, first, as to the question whether this was a disbursement wholly and exclusively laid out or expended for the purposes of the trade, it seems to me that there is nothing at all to show that it was not so exclusively laid out. The object, as disclosed by paragraph 9 of the Case, was that of preserving the status and reputation of the company, which the directors felt would be somewhat imperilled by the other director remaining in the business or by a dismissal of him against his will, involving proceedings by way of action in which the good name of the company might suffer. To avoid that and to preserve the status and dividend earning power of the company seems to me a purpose which is well within the ordinary purposes of the trade, profession or vocation of the company."

W. Nevill's was a similar case but decided prior to 1936 at a time section 25(e) of the Income Tax Assessment Act 1922-32 required money to be "wholly and exclusively laid out or expended for the production of assessable income", and it was decided in favour of the taxpayer.

Mr. Scott referred to Hutchinson v. Turner (1950) 31 T.C. 495, 2 AER 632 and pointed out that there the taxpayer was concerned for his reputation but to no avail for the deduction of the amount expended. There the taxpayer published for the benefit of a charity a certain publication without any agreement in writing or anything except an oral promise to give the proceeds to the charity. That having been done the taxpayer then sought to deduct the proceeds from his taxable income. He failed.
Vaisey J says in his judgment "The payment of the £31,469 to the charity is alleged to have been a necessary outgoing of the taxpayers' business, because had it not been made, the taxpayers would, or at least might, have been so ruined in reputation as to affect to a serious degree their financial position and standing." In the present case, however, the matter goes deeper. The court was told that had the appellant not made this payment, 'pressures of various kinds would have been put upon the appellant even up to industrial action.' I think that the object of this payment was much more than to preserve the status and reputation of the appellant, it was to preserve its very being, surely much more. The words of Jenkins L.J. in the Court of Appeal in Morgan v. Tate & Lyle (1953) 35 T.C.367, 402:3 W.L.R. 1, 23 2 AER 162 are relevant. He said -

> "It is clear on the authorities that Lord Daveys formula (in Strong v. Woodifield) includes expenditure for the purpose of preventing a person from carrying on andearning profits in the trade."

Next, Mr. Scott submits that the words 'wholly and exclusively must be very strictly construed, and refers to Bentleys Stokes and Lowless v Beeson (1952) T.C. 491 2 AER 82. This was a case dealing with solicitors' lunches, and the taxpayer succeeded. However the matter was illustrated by Romer L.J. in the course of his judgment in the Court of Appeal by two simple examples. He said -

> "A London solicitor may hear that an old friend and client whom he has not seen for a long time has arrived in London. He says to himself, "I would like to see my friend again', and I know he may wish to talk business with me. I will ask him to have lunch with me and then we can discuss any business he has at the same time. I can kill two birds with one stone."
> A London solicitor may hear from the representative of a foreign firm, old clients of his own, that the representative is in London and urgently desires to see him on some matter of business, but that his time is very short - he cannot come to the solicitor's office and is only free at lunchtime. The solicitor to enable his client to get his advice, asks him to lunch at his club or a restaurant.
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> "In the first case it appears to us clear that the expenditure could not be justified under the paragraph even though it turned out that the friend spent the whole of the lunchtime seeking the solicitor's advice on his private affairs. On the other hand it would appear to us reasonably clear that in the second case (so far, at any rate, as reasonable) must be allowable. The difficulty, of course, arises in the large area between the two examples when it is a question of fact in each case to determine what was the real motive or purpose of the entertaining. But in both examples we have given there is present inevitably the motive or purpose of hospitality - that is the solicitor in inviting the friend or the foreign representative to lunch does so with the purpose of giving him lunch. That motive is unavoidably involved in the activity itself. A man to oblige a friend who is a Roman Catholic priest, may agree to participate in a church bazaar organised for the purpose of promoting the interests of the Roman Catholic church, though he has himself no desire whatever to support that church to which he may be religiously opposed. In such a case the subsidiary purpose is no part of the conscious or deliberate motive of the actor.

> "So much indeed, counsel for the Crown concedes, for otherwise it would follow that all entertaining expenses, all charitable donations would be necessarily excluded. Counsel admits, as we understand him, that in such a case as the present, there must be a deliberate and independent wish or motive, that is, independent of the business purpose to be served, to entertain the guest, and for simplicity counsel has described this independent motive as "private hospitality".
> Thus, we return to the question: In the case before us, was this element of private hospitality in some degree present? Many cases were properly cited to us, but in such a matter we cannot think, that by and large, they are of much assistance. It is not relevant to the present matter that the present purpose must be related to its profit earning capacity: Strong v. Woodfield (cit supra). Nor are we assisted by cases in which there is involved, not so much duality of purpose as duality of capacity - cases for example where the question has been, whether the activity is at least in part attributable to the doers' character not as proprietor of, or partner in a business, but to his character as an ordinary citizen - cases relating to the costs of litigation like Smith's Potato Estates v. Bolland (1948) 2 AER 367: AC 508: 30 T.C.267 or Spofforth & Prince v Golder (1945) 1 AER 363: 26 T.C.310 and cases of particular charitable donations such as Bourne & Hollingsworth v Ogden (1929) 14 T.C.349. If we have correctly analysed the problem then the present question remains one of fact to be determined in the light of its own circumstances and we agree with the Crown's contention that it is for the taxpayer to satisfy the tribunal of fact on his claim."

I should perhaps add that the Crown succeeded in all three of the cases abovementioned. Smiths Potato Estates v. Bolland was a case where the taxpayer sought to deduct the costs of defending a claim for supertax, Spofforth & Prince v. Golder was a case where a firm of accountants sought to deduct the costs of a criminal prosecution against one of the partners, and in Bourne & Hollingworth v. Ogden the taxpayer had been in the habit of contributing $100 to a charity and one year increased the contribution to $1000. The increased contribution was disallowed. It will be seen from the above citation from the judgment of the Court of Appeal that there can be a subsidiary purpose,

but it must be very definitely subordinate to the main purpose and this is exemplified in the judgment of Lord Sumner to Usher's Wiltshire Brewery v. Bruce (1915) AC. T.C. 399, 437: 84 L.J. K.B. 417, 435.

He said -

> "Where the whole and exclusive purpose of the expenditure is the purpose of the expender's trade, and the object which the expenditure serves is the same, the mere fact that to some extent the expenditure enures to a third party's benefit, say that of the publican, or that the brewer incidentally obtains some advantage, say in his character of landlord, cannot in law defeat the effect of the finding as to the whole and exclusive purpose."

In that case the taxpayers were held entitled to deduct sums which they had expended in aid of their tenants in their tied houses, and which although made voluntarily and for the benefit also of the tenants, was made for their own benefit because it promoted the sale of their beer. There is a statement to much the same effect in the judgment of Viscount Cave L.C. in the case of British Insulated & Helsby Cables v. Atherton (1926) A.C. 205: 10 T.C. 155, 191; 95 L.J.K.B. 336, 339.

> "It was made clear in the cases of Usher's Wiltshire Brewery v. Bruce and Smith v. Incorporated Council of Law Reporting for England and Wales (1915) 6 T.C. 477 (1914) 3 K.B. 614: 83 L.J.K.B. 1724 that a sum of money expended, not of necessity and with a view to a direct and immediately benefit to the trade, but voluntarily and on the grounds of commercial expediency and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade."

Mr. Sweetman emphasises that the payment in this case was made voluntarily. With all respect to Mr. Sweetman it seems to me that the payment was made under pressure, that if it were not made "there would have been all sorts of pressures even up to industrial action." Indeed the fact that it was made - not under pressure, but under threat of pressure, makes it all the more likely that it was wholly and exclusively laid out for the purpose of the trade for pressure or no pressure

it was made so that the appellants business would not be subject to any sort of stoppage. Mr. Scott also referred to a South African tax case No.621 in South African Tax cases. That involved an advertising expenditure of £500 which the taxpayer paid, allegedly for advertising, but which the taxpayer's managing director did not give evidence to support. I regard that as a claim which the taxpayer could not adequately prove, and that, together with the fact that it was in 1946, leads me to regard it of little value in the present circumstances. Mr. Scott also referred to the case of the Kenya Meat Commission v. Commissioner of Income Tax (1966) E.A. L.R.281 in which the Commission was allowed to deduct a donation of £200,000 to the Kenya National Fund on condition that the money should be used for research and other work which would be of benefit to the Kenya beef and mutton industry. I do not find that case helpful. The only other case which I consider of relevance is Morgan v. Tate & Lyle (1954) 3 All E.R. 89: 2 All E.R. 413: A.C. : 39 T.C. 367. I have already referred to the judgment of Jenkins L.J. in this case in the Court of Appeal. It then went to the House of Lords. In that case Tate & Lyle Limited who are the largest sugar refiners in the United Kingdom considered that they faced a threat of nationalisation by a Labour Government and spent a considerable amount of money - about £30,000 - on a campaign to resist prospective nationalisation which in fact never eventuated. They claimed to deduct this amount from their taxable profits - a claim which was resisted by the Revenue on the ground that the expenditure was not wholly and exclusively laid out for the purposes of the taxpayers business. It must be remembered in this case that the Commissioners at first instance had found the taxpayers' claims admissible, and the Courts were all concerned to consider whether there was any reason in law which prevented them from so finding. The Revenue appealed

from the Commissioners to the High Court, and then to the Court of Appeal and finally to the House of Lords, in each case unsuccessfully. Towards the end of his judgment Lord Reid puts the same question as was put earlier by the Court of Appeal in Bentleys' case. He said -

> "A general test is whether the money was spent by the person assessed in his capacity of trader or in some other capacity: whether on the one hand the expenditure was really incidental to the trade itself or on the other hand it was mainly incidental to some other vocation or was made by the trader in some other capacity than that of trader."

For this I must go back to the evidence, and I have to be satisfied, remembering that the burden of proof is on the appellant, that the purpose of the expenditure was to protect the appellants trade. I have to weigh the chief executive's admission that the appellant had some responsibility to support the Gurmit appeal, against his concern to get ahead with the signing of a new contract and the accountant's statement that if his committee did not receive a satisfactory donation, they would put pressures on the appellant, even up to industrial action. Bearing in mind the appellant's negotiations leading up to a new contract I have come to the conclusion that the evidence has satisfied the court that this expenditure was laid out wholly and exclusively for the purpose of the appellant's trade and business.

The appeal will be allowed, and the appellant will be entitled to its costs to be taxed in default of agreement.

(K.A. Stuart)

16 May, 1983.

Solicitors: Mr. B.N. Sweetman for the Appellant
Mr. M.J. Scott for the Respondent.