IN THE HIGH COURT OF FIJI
COURT OF REVIEW

No. 1 OF 1991

BETWEEN COMMONWEALTH DEVELOPMENT CORPORATION

APPELLANT

AND THE COMMISSIONER OF INLAND REVENUE

RESPONDENT

Mr I V Gzell Q.C. and Mr R A Smith for Appellant
Mr G A Keay for Respondent

JUDGMENT

In this case, the Commonwealth Development Corporation, which was referred to in Court as CDC, appeals against its assessment to income tax for 1989 upon two grounds, first that it is not liable at all, by reason of the double tax agreement made between Fiji and the United Kingdom, and secondly because the tax charged is excessive by reason of Article 24 of that agreement. The CDC called two witnesses, the first Charles Harrowby Christopher Seller who was its representative in Fiji in 1988 and the second John Francis Avery Jones who was tendered as an expert witness on foreign law similar to Article 5 of the double tax agreement. Mr Keay for the Commissioner objected to the production of Mr Avery Jones upon the ground that the double tax agreement has been made a part of Fiji's domestic law. I received Mr Avery Jones evidence *'de bene esse'*, and the first decision I have to make is whether it is admissible. The Commissioner did not call evidence.

The first point to be made is that no expert witness can tell this Court what the law is in Fiji. On the other hand this Court does not know what foreign law is, and can only learn from the sworn testimony of an expert witness. Mr Keay submits that Mr Avery Jones is trying to tell the Court what the law is in Fiji because Article 5 of the double tax agreement, with which the Court is concerned, has been made part of the domestic law of Fiji. He referred to Scruples V. Crabtree & Evelyn (1983) 1 IPR 318, a New South Wales case, in which

Powell J, in the Supreme Court of that state, was dealing with five notices of motion seeking to clear the ground preparatory to the trial of an action by Scruples Ltd against five defendants, two of them United States companies, one from Connecticut and one from Delaware. The learned Judge referred to Camille & Henry Dreyfus Foundation V. Inland Revenue Commissioner, [1954] 1 Ch 672, as authority for saying that the question of how Courts of a foreign country apply a law is a mixed question of law and fact. That case is a decision of the English Court of Appeal and Jenkins L J said [1954] 1 Ch 672,708: 3WLR 167, 196 *"In my view it is well within the competence of a witness as to the operation of a given instrument under foreign law to state the content of the relevant law and to add his opinion as to the effect attributable to that law to the instrument in question."* That, as I understand the matter, is what Mr Avery Jones has purported to do in this case. Expert evidence is, of course, principally opinion evidence, but it is opinion based upon the knowledge and experience of the witness. I consider that the evidence of Mr Avery Jones is admissible.

Mr Avery Jones is very experienced. He is an English solicitor, practising in London and specialising in taxation. He is a Deputy Special Commissioner of Income Tax, and explains that the Special Commissioners are a tax appeal tribunal in the United Kingdom. He is third Vice President of the International Fiscal Association, and a former chairman of its British branch. He is visiting professor in taxation at the London School of Economics, a member and past chairman of the Revenue Law Committee of the Law Society of England and Wales and a former specialist (in taxation) member of the Council of that Law Society. He has written extensively in the field of tax treaties and one of his treatises, **"The Interpretation of Tax Treaties with particular reference of Article 3(2) of the OECD model"** is referred to by the appellant. He said in his evidence that he was familiar with the approach of other countries (including in particular the United States, Canada, Japan, Australia, France, Belgium, the Netherlands, Germany, Switzerland and Italy) to the interpretation of tax treaties. He has perused the papers exhibited to the affidavit of Mr Seller to which I refer in the next paragraph.

I pass then to the kernel of the case which is whether CDC is liable to income tax in Fiji. Mr Seller's evidence in chief was furnished by an affidavit containing no fewer than 35 exhibits, including among them a directive from the head office of CDC to its representative in Fiji and a power of attorney to him and he then submitted himself for cross-examination. It

became clear when he had completed his evidence that although CDC in 1988 maintained an office in Suva, which they have since closed (June 1991), the appellant's Fiji representative had very little power, and all the decisions about investments were made in CDC's head office in London. I should perhaps add that CDC is a statutory corporation, incorporated in England in 1948, now organised and existing under the Commonwealth Development Act 1978 (United Kingdom) as amended in 1982 and 1986. Its purpose is to assist overseas countries in the development of their economies. CDC claims that its office in Fiji existed:

1. As representative of CDC's interests in the South Pacific.

2. For checking on the progress of projects in which CDC has invested, including projects in Vanuatu and the Solomon Islands as well as in Fiji.

3. To identify possible investment opportunities which could be of both commercial and development benefit. Once a potential project has been identified CDC London takes over responsibility for its investigation, approval and documentation.

CDC claims that the functions of the Fiji office are restricted to the collection and relaying of relevant information relating to possible investments to its Head Office. It has no role in negotiation and decision making relating to CDC's investments. Although it is manned by CDC's employees, they have no authority to conclude contracts in CDC's name, or in their own names, for that matter.

CDC has no share capital and is wholly funded by the United Kingdom Government and is one instrument of the United Kingdom aid policy. It has not so far qualified as earning sufficient income to pay tax in the United Kingdom. Its liability to tax whether in Fiji or in the United Kingdom is governed by the United Kingdom-Fiji double taxation agreement which was concluded on 21st November 1975 and has been in force in Fiji since 1st January 1975. That double taxation agreement was brought into force in Fiji by notice published in the Gazette as Legal Notice No. 12 of 1976. It has its origin in Section 106 of the Income Tax Act Cap 201 which empowers the Minister of Finance to enter into agreements with the Government of any other country whereby arrangements are made with such Government with a view, inter alia, to the prevention, mitigation or discontinuance of the levying under the laws

of Fiji and of such other country of income tax in respect of the same income. Subsection (4) provides that when notified in the Gazette, the arrangement so notified shall have effect *"as if enacted in this Act"*.

The critical portion of the double tax agrement, which is called throughout "the Convention", is Article 5 so far as liability to tax is concerned, and Article 24 so far as excess taxation is concerned. Where I have to refer to the double tax agreement hereafter I shall refer to is as 'the Convention". Article 5 of the Convention, then, so far as it is relevant, is as follows:

1. *For the purposes of this Convention the term 'permanent establishment' means a fixed place of business in which the business of the enterprise is wholly or partly carried on.*

2. *The term 'permanent establishment' shall include especially:*
   a) *a place of management*
   b) *a branch*
   c) *an office.*

The definition then goes on to refer to a factory, a workshop, a mine, oil well, or quarry, a building site and an agricultural, pastoral or forestry property, but it is agreed that none of these is relevant.

3. *The term 'permanent establishment' shall not be deemed to include:*

   a) *the use of facilities solely for the purpose of storage, display in delivery of goods or merchandise belonging to the enterprise.*
   b) *the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery.*
   c) *the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise.*
   d) *the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information for the enterprise.*

e) *the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character for the enterprise.*

4. *An enterprise of one of the Contracting States shall be deemed to have a permanent establishment in the other Contracting State if:*

a) *it carries on the activity of providing the services within that other Contracting State of public entertainers or athletes referred to in Article 17; or*

b) *it carries on supervisory activities in that other Contracting State for more than six months in connection with a building site, or a construction, installation or assembly project which is being undertaken in that other Contracting State.*

5. *A person acting in a Contracting State on behalf of an enterprise of the other Contracting State - other than an agent of an independent status to whom the provisions of paragraph (6) of this Article apply - shall be deemed to be a permanent establishment in the first mentioned Contracting State if he has, and habitually exercises in that Contracting State an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise.*

6. *An enterprise of a Contracting State shall not be deemed to have a permanent establishment in other Contract State merely because it carries on business in that other Contracting State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business.*

7. *The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State of which carries on business in that other Contracting State (whether through a permanent establishment or otherwise) shall not of itself constitute either company a permanent establishment of the other.*

Under the first paragraph of Article 8 of the Convention, the profits of an enterprise in a Contracting State are taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. So the question which has to be resolved in this appeal - at all events in this part of it is, did CDC have a permanent establishment in Fiji?

Although the Convention under consideration here is not an international treaty, there are a sufficient number of these tax conventions about to warrant this Court construing the Convention like an international treaty in the broad way advocated by Lord Macmillan when he said in Stag Line v. Foscolo Mango [1932] AC 328, 350:101 LJKB 165, 175 *"It is important to remember that the Act of 1924 (the Carriage of Goods by Sea Act) was the outcome of an International Conference and that the rules in the schedule have an international currency. As these rules must come under the consideration of foreign courts, it is desirable in the interest of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date but rather that the language of the rules should be construed on broad principles of general acceptation."* In Buchanan v. Babco [1978] AC 141, 152: [1977] 3 WLR 907, 911 Lord Wilberforce in delivering the leading judgment in the House of Lords said *"I think the correct approach is to interpret the English test, which after all is likely to be used by many others than British businessmen, in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation."* He then referred to Lord Macmillan's comments in the Stag Line case. In Fothergill v. Monarch Airlines [1980] 3 WLR 209: 2 All ER 696: [1981] AC 251, in the House of Lords, Lord Wilberforce and Lord Diplock both gave a broad construction to the Carriage by Air Act 1961 and Lord Scarman said (A.C. 290: 3 WLR 231) *"Faced with an international treaty which has been incorporated into our law, British courts should now follow broadly the guidelines declared by the Vienna Convention in the Law of Treaties."* Those guidelines had earlier been cited by Lord Diplock in the course of his judgment in the same case (A.C. 282: 3 WLR 224). They are: Article 31(1) of the Vienna Convention.

> *"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

Article 32

"Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31(a) leaves the meaning ambiguous or obscure or (b) leads to a result which is manifestly absurd or unreasonable."

It would appear that the English Bar has largely accepted these dicta for Vinelott J, in Sun Life Assurance Co of Canada v. Pearson (1984) T.C. 250, 310 said *"It is common ground that in the light of the decision of the House of Lords in Fothergill V. Monarch Airlines the Commentaries (that is to say, the Commentaries attached to the report of the Fiscal Committee of the Organisation for Economic Co-operation and Development) can, and indeed must be referred to as a guide to the interpretation of the Treaty."* He was referring to the 1980 treaty between Canada and the United Kingdom. The Court of Appeal echoed this comment at p. 331 of the Report.

Although there is no doubt that CDC had an office or place of management in Fiji during the year of assessment, Mr Gzell argued that it maintained a fixed place of business within Article 5(3)(d) or 5(3)(e) of the Convention solely for the purpose of activities of a character auxiliary or preparatory to the enterprise in which it is engaged, namely the provision of aid to developing countries, and it is certainly clear from the evidence that the CDC representative in Fiji had no power to make any decision on its behalf. Mr Avery Jones referred in his evidence to decisions of foreign, that is European and United States, Courts. None of them is akin to the present case, and there is no English decision on a tax treaty except that of Commerzbank (1990) STC 285 in which Mummery J. found the words of the article he was asked to interpret sufficiently clear to enable him to do without purposive aids. I accept Mr Keay's argument that the double taxation treaty, having been incorporated into Fiji law by statute, has become part of Fiji's municipal or domestic law.

However, it must be construed in the same way as an international treaty is construed, and so construing it, I am satisfied that CDC had no permanent establishment here in 1989, although it maintained a fixed place of business solely for the purpose of advertising, for the supply of information and for similar activities of a preparatory or auxiliary character to its enterprise.

I do not accept Mr Keay's submission that the word 'solely' means in effect 'one only' and although I agree that 'shall be deemed not to include' has a different meaning from ' shall not be deemed to include', I cannot see any difference in meaning in the present context. CDC accordingly succeeds on its first ground of appeal.

The appellant also contends that it was discriminated against in that it was taxed at a higher rate than resident companies in that it paid tax at 47.5 percent while resident companies paid 37 percent. It says that, even it if had a permanent establishment in Fiji it should pay tax only at 43.5 percent made up as follows:

35 + 2.5 + (15 x 2/3(100 = 37.5)

= 37.5 + (0.1 x 62.5)

= 37.5 + 6.25

= 43.75.

Mr Keay, on the other hand, submits that there is no discrimination at all, because Article 24(1) refers to *'the same circumstances'*. Mr Keay construes *'the same circumstances'* as meaning a similar business, and because there is none, contends that there can be no discrimination. But I prefer Mr Avery Jones' evidence here, and *'the same circumstances'* should be equated with what a resident company would pay. In my view the appellant would be entitled to succeed on this ground if it had a permanent establishment in Fiji.

Accordingly the appeal must succeed and the Commissioner must pay costs to be taxed in default of agreement.

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K A Stuart
Court of Review

23 October 1992

Solicitors: Munro, Leys & Co:
The Solicitor for the Inland Revenue