

**THOMAS JOSEPH HOWA v ATTORNEY-GENERAL OF FIJI**

HIGH COURT — CIVIL JURISDICTION

SINGH J

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6 May 2003

[2003] FJHC 329

10 **Statutes — interpretation — application to sought declaration in favor of Plaintiff — whether Plaintiff is entitled to conditional exemption — Whether commissioner has discretion in refusing the exemption — Conditional exemption for stamp duty — requirements to be conditionally exempted from stamp duty — stamp duties — Stamp Duties Act (Cap 205) s 45(1).**

15 Thomas Joseph Howa (Plaintiff) is an American citizen. He bought a piece of land on Wakaya Island. The transfer was lodged with the commissioner of Stamp Duties for stamping together with an application for conditional exemption for stamp duty with a statutory declaration. The commissioner refused to grant conditional exemption on the basis that the Plaintiff was a non-resident and unlikely to occupy the property as his place of residence for at least 5 years out of 10. The Plaintiff sought a declaration by an originating summons that he was entitled to conditional exemption on the ground that there was no dwelling or other residential property on the land and he intended to build a dwelling for occupation by him. The issue is one of statutory interpretation.

20 **Held** — (1) The Stamp Duties Act is a taxing statute. The approach generally adopted in interpreting taxing legislation is to look at the plain meaning of the words that is adopted that is the literal interpretation.

25 (2) Stamp duty is levied on documents. The residential status of a person is immaterial to duty. The Stamp Duties Act grants exemption in respect of certain documents which meet the criteria. There is no mention in Pt III of the Act that a non-resident is not entitled to exemption or that he has to meet any additional criteria to that stipulated in Pt III.

30 (3) Exemption is not restricted to those who intend to make a place their only place of residence. A person may have more than one place of residence. The requirement under the law is the intention to build and occupy.

(4) The commissioner has no discretion to refuse exemption if the requirements under the law are met. Once the commissioner is satisfied that all the requirements have been complied with he has no discretion but to grant conditional exemption. If on the evidence before him the commissioner is of the view that a person is not likely to occupy the dwelling 5 years out of 10, then he can conclude that no conditional exemption is warranted. He need not wait for 10 years to collect stamp duty in such circumstances. Application dismissed.

**Cases referred to**

40 *Anderson v Commissioner of Taxes (Victoria)* (1937) 57 CLR 233; [1937] ALR 313, cited.

*Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1; *Lumsden v Inland Revenue Commissioners* [1914] AC 877, considered.

*Renee Lal* for the Plaintiff.

*J. Udit* and *N. Karan* for the Defendant.

45 **Singh J.****Background**

By an originating summons issued out of the court on 2 September 2002 the Plaintiff is seeking a declaration that he is entitled to conditional exemption from stamp duty in respect of a transfer lodged by him with the Commissioner of Stamp Duties on or about 20 June 2002. The following affidavits were filed:

50 (a) Affidavit of Plaintiff dated 21 August 2002 in support

(b) Affidavit of Usenia Losalini Commissioner of Stamp Duties dated 15 October 2002 in reply

(c) Affidavit of Katherine Margot Brewer dated 25 March 2003 in support.

### 5 **Facts**

5 There is no dispute as to facts. The Plaintiff is an American citizen. He bought a piece of vacant freehold land on Wakaya Island. The area of land is 3.0427 hectares. The purchase price was US\$850,000. A sale and purchase agreement and transfer were drawn. The transfer was lodged with the  
10 Commissioner of Stamp Duties for stamping together with an application for conditional exemption for stamp duty with a statutory declaration. The ground on which exemption was sought was that there was no dwelling or other residential property on the land and that the Plaintiff intended to build a dwelling for occupation by him.

15 On 26 June 2002 the Commissioner of Stamp Duties wrote to the Plaintiff's solicitors saying that the transferee was a non-resident of Fiji and sought evidence to show that the Plaintiff would be occupying the property as his *only place of residence* for at least 5 years [annexure of Plaintiff's affidavit].

20 The Plaintiff's solicitors responded by saying they were not sure of the type of evidence the commissioner required. They said the Plaintiff intended to build a house on the property and occupy it after that which really adds nothing more to what was already before the commissioner in the declaration. The commissioner by letter dated 2 July 2002 (Annex H of Plaintiff's affidavit) wrote back and asked that the Plaintiff "provide some form of evidence such as a permit of some nature  
25 from Immigration to show that your client is intending or will be occupying the above property as his place of residence for at least five years".

The Plaintiff then paid stamp duty under protest as the transaction had been held up for some time and filed this action. The stamp duty paid was \$35,335.

30 After this action was filed, the Plaintiff's solicitors provided the Attorney-General's Chambers photocopies of pages of Plaintiff's passport showing his visits to Fiji since 1996 and his hotel bills. He appears to have visited Fiji every year since 1996 spending substantial amounts on hotel bills.

35 The Plaintiff's solicitors filed helpful written submissions with relevant case authority. The Defendant failed to file written submissions despite being given the opportunity to do so.

### ***Relevant statutory provisions***

40 Even though the originating summons does not say so, the application to the court I believe is made under s 45(1) of the Stamp Duties Act (Cap 205) which reads:

45 If the Commissioner is in any doubt as to whether an instrument is liable to duty or as to the amount of duty or fine with which it is chargeable or if the person presenting the instrument is dissatisfied with the assessment of the Commissioner thereon, the matter, upon payment of the duty so assessed, shall be summarily referred to the High Court and its decision thereon shall be final, and the Supreme Court may, for that purpose, require the Commissioner to state and sign a case setting forth the question upon which  
50 his opinion was required and the assessment made by him.

The Plaintiff applied for conditional exemption under para 2(c)(ii) of Pt [1] of the Schedule to the Stamp Duties Act. Paragraph 2(c)(ii) reads as follows:

5 The conditions of entitlement to the conditional exemption from stamp duty under paragraph 1 of this Part of the instruments described in sub-paragraph (1) of that paragraph shall be as follows, that is to say:

(c) the case of a transfer on sale relating to any land

10 (ii) that there is no dwelling or other residential property on the land at the time of the transfer, and that a dwelling (but no other residential property) is intended to be built thereon for occupation by the applicant in whole or in part.

The commissioner refused to grant conditional exemption on the basis that the Plaintiff was non-resident and unlikely to occupy the property as his place of residence for at least 5 years out of ten.

### 15 **The law**

The issue is one of statutory interpretation. The Stamp Duties Act is a taxing statute. The approach generally adopted in interpreting taxing legislation is to look at the plain meaning of the words that is adopted that is the literal interpretation.

20 Viscount Haldane in *Lumsden v Commissioners of Inland Revenue* [1914] AC 877 — at 896–897 said:

25 the duty of judges in construing statutes is to adhere to the literal construction unless the context renders it plain that such a construction cannot be put on the words. This rule is especially important in cases of statutes which impose taxation.

A person can only be subjected to a tax if the words of the statute make it clear that he/she comes within the ambit of the words in the section. If the statute leaves any doubt as to its meaning, then the taxpayer is to get the benefit of that doubt and not be subjected to tax.

30 The position was summarised by Lord Russell of Killowen in *Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1 at 24–25 as follows:

35 I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed, if in accordance with a Court's views of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case. As Lord Cairns said many years ago in *Partington v Attorney-General* [1869] L R 4 H L 100 at 122 As I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

The above proposition was cited with approval by the High Court of Australia in *Anderson v Commissioner of Taxes (Vic)* 57 CLR 233 at 239; [1937] ALR 313.

45 Justice Pathik in *Manoj Datt v Attorney-General of Fiji* — Civil Action 470 of 1998 (unreported judgment) in considering conditional exemption in case of transfer under para 2(c)(i) of Pt III concluded that the conditional exemption provisions ought to be given the literal statutory interpretation. He was of the view that once a person had fulfilled the requirement pertaining to conditional exemption from payment of stamp duty as required by Pt III of the Schedule, a person is entitled to the exemption.

Stamp duty is levied on documents. The nature of the document determines the amount and rate of duty on it. Pt I of the Schedule to the Act quantifies duty according to documents. There are no separate duties for residents of Fiji and non-residents. The residential status of a person is immaterial to duty. Part III too  
5 again grants exemption in respect of certain documents which meet the criteria as laid in Pt III. There is no mention in Pt III that a non-resident is not entitled to exemption or that he has to meet any additional criteria to that stipulated in Pt III. The Commissioner of Stamp Duties reached her decision on the basis that the “transferee in this case is a non-resident” and also wanted to know if the  
10 property was his “only place of residence”.

Exemption is not restricted to those who intend to make a place their “only place of residence”. A person may have more than one place of residence. The requirement under para 2(c)(ii) is the intention to build and occupy.

15 **Does the commissioner have discretion in granting or refusing exemption**

In this respect the mandatory words of para 1(1) are important.

The instruments in respect of which conditional exemption from stamp duty shall be granted under and in accordance with this paragraph are ...

20 The word “shall” is mandatory. The commissioner has no discretion to refuse exemption if the requirements of para 1 subpara 2 are met. In the present case the transferee has lodged the transfer with a declaration. The issue is whether once a person has lodged the documents specified in subpara (2) of para 1, namely the application form, the transfer document and the statutory declaration, does it  
25 automatically qualify a person to an exemption and the commissioner has no discretion to refuse an exemption.

Subparagraph (2) reads as follows:

30 Subject to the following provisions of this Part and without prejudice to the provisions as to exemptions contained in Parts I and II, an instrument of any of the descriptions set out in sub-paragraph (1) shall be conditionally exempted from stamp duty by the Commissioner under this paragraph, if —

- (a) an application is made to the Commissioner, in such form as he determine, for the instrument to be so exempted and the application is made —  
35 (a) in the case where there is only one lessee, mortgagor or transferee, as the case may be, by him;  
(b) in any other case, by one of the lessees, mortgagors or transferees, as the case may be;
- (b) such application is accompanied by a declaration —  
40 (i) made by the applicant, in such form as the Commissioner shall determine, before a commissioner for oaths or, at any place outside Fiji, before a person duly authorized to administer oaths at that place; and  
(ii) stating that the appropriate conditions of entitlement specified in paragraph 2 of this Part are satisfied in relation to him;
- (c) such application and declaration, together with the instrument in respect of which the application is made, are produced to the Commissioner within the  
45 six months commencing on the date on which the instrument was executed or within such longer period as the Minister may, in any particular case, allow by reason of any special circumstances; and
- (d) the Commissioner is satisfied, having regard to such application and declaration and the instrument to which they relate, *and having regard to such other evidence as he may think proper to take into account*, that the  
50 appropriate conditions of entitlement specified as aforesaid are satisfied in relation to the applicant.

The four requirements a, b, (c) and (d) are conjunctive under para (d) and the commissioner has to be satisfied. The underlined words cannot be ignored. Some meaning has to be given to them.

5 The para 2 envisages a two step approach. As I see it, what is contemplated by the section is as follows:

Once the commissioner is satisfied that all the requirements of para 2 have been complied with he has no discretion but to grant conditional exemption.

10 However, he has discretion in deciding whether the requirements have in fact been met. The commissioner is not expected to be a mere rubber stamp. He has to act judiciously and use a commonsense approach in deciding whether the requirements have in fact been met. The words “having regard to such other evidence as he may think proper to take into account” in subpara 2(d) gives him the power to consider evidence other than on the transfer and the declaration. He is entitled to call for more information if necessary under s 32 of the Act. The  
15 commissioner is entitled to critically examine the documents before him and not to unquestioningly accept the contents of the declaration.

The commissioner must have noted that the Plaintiff executed the sale and purchase agreement in the USA. His address is given as Salt Lake City, Utah, USA. His occupation is businessman. Given the nature of his occupation, and his  
20 address, it would be quite appropriate for the commissioner to make further enquiries before he came to the conclusion that all the requirements for entitlement were met. The commissioner asked for certain information, as he/she is entitled to do under s 32 of the Stamp Duties Act.

25 The Plaintiff submits that para 3(1)(a) is relevant. It states:

Subject to sub-paragraph (2), where any instrument has been conditionally exempted from stamp duty under paragraph 1 of this Part and —

(a) the applicant has not, for any reason, occupied any part of the dwelling which he had stated in the declaration accompanying his application for such  
30 exemption to be occupying or intending to occupy, for at least five years in the aggregate during the period of ten years commencing on the date of the execution of such instrument.

Paragraph (i)(a) requires a person to occupy a dwelling for at least 5 years during a period of 10 years. If he does not then, he is liable to pay stamp duty together with compound interest at 5% per annum.

35 The existence of this provision is neither a licence for the commissioner to abandon caution nor is it an open doorway for a person to get exemption. If on the evidence before him the commissioner is of the view that a person is not likely to occupy the dwelling 5 years out of ten, then he can conclude that no conditional exemption is warranted. He ought not to wait for 10 years to collect  
40 stamp duty in such circumstances.

If I may add the type of evidence which may have assisted the commissioner would be like the availability to applicant of additional funds to build the house, arrangements which have been made by the applicant for someone else to run his business while the applicant spends lengthy stays in Fiji and his previous visits  
45 to Fiji. This is not an exhaustive list of factors.

### Conclusion:

For reason given above, I conclude that the commissioner is not obliged to unquestioningly accept an application for conditional exemption. He is entitled to  
50 critically evaluate on the evidence before him/her whether the requirements for conditional exemption have been met. On the evidence available in this case the

commissioner was entitled to reach the conclusion she did. Accordingly I refuse to make the declarations and orders sought.

The application is therefore dismissed with costs to be taxed if not agreed.

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*Application dismissed.*

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