**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 108/2018**
**[2019] NZSC 29**

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| BETWEEN | GERARDUS PETER VAN UDEN<br>Applicant |
| AND | COMMISSIONER OF INLAND REVENUE<br>Respondent |

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| Court: | Glazebrook, O'Regan and Ellen France JJ |
| Counsel: | M S Hinde for Applicant<br>M Deligiannis and N S Delamore for Respondent |
| Judgment: | 19 March 2019 |

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**JUDGMENT OF THE COURT**

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**A The application for leave to appeal is dismissed.**

**B The applicant must pay the respondent costs of $2,500.**

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**REASONS**

## Introduction

[1] Mr van Uden is a sea captain employed by a foreign shipping company. The Commissioner of Inland Revenue (the Commissioner) contended Mr van Uden had a permanent place of abode in New Zealand in the relevant tax years and so was liable to pay tax on his worldwide income. Mr van Uden's challenge to the reassessment of his liability for income tax on this basis was unsuccessful in the Taxation Review

Authority (the TRA),[1] the High Court[2] and the Court of Appeal.[3] The TRA, the High Court and the Court of Appeal found Mr van Uden was resident in New Zealand for the relevant tax years.

[2] Mr van Uden now seeks leave to appeal to this Court on the basis the Court of Appeal did not apply the principles set out in the relevant authority, *Commissioner of Inland Revenue v Diamond*, to his case.[4] In addition, Mr van Uden challenges decisions about taxation of his employer's superannuation fund; whether the reassessment was properly made given the position of the officer who made it; and, as to the penalties imposed.

**Background**

[3] Mr van Uden has worked at sea for over 40 years. During the period in question, the TRA found that he spent the following time in New Zealand: over six weeks in the 2005 tax year; two months during the 2006 year; five months during the 2007 year; four months during the 2008 year; and four months during the 2009 year.[5]

[4] During that time, Mr van Uden filed nil tax returns for the relevant tax years apart from filing a non-resident tax return disclosing a small loss in 2007. When Mr van Uden met his future wife in early 1998 she was living at the property in issue. By that time, the property had been transferred to a family trust of which Mr van Uden became a trustee in 1999. Mr van Uden never owned the property. During the period in question, his typical pattern was to return to New Zealand twice per year during breaks from being at sea. It was accepted that he "almost always" stayed at the property when he was in New Zealand.[6]

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1 *Case 1/2017* [2017] NZTRA 1, (2017) 28 NZTC ¶4-000 (Judge Sinclair) [TRA decision].
2 *Van Uden v Commissioner of Inland Revenue* [2017] NZHC 2554, (2017) 28 NZTC ¶23-037 (Venning J).
3 *Van Uden v Commissioner of Inland Revenue* [2018] NZCA 487, (2018) 28 NZTC ¶23-081 (Winkelmann, Brown and Clifford JJ) [CA judgment].
4 *Commissioner of Inland Revenue v Diamond* [2015] NZCA 613, (2015) 27 NZTC ¶22-035.
5 TRA decision, above n 1, at [44].
6 CA judgment, above n 3, at [34].

[5] The Commissioner commenced an audit of Mr van Uden in 2009. The challenged assessments were issued in February 2014.

[6] The Commissioner assessed Mr van Uden as liable for New Zealand income tax for the 2005 to 2009 tax years. She did this on the basis Mr van Uden had a permanent place of abode in New Zealand for those tax years and so was liable to pay tax in New Zealand on his worldwide income. In addition, a 10 per cent penalty was imposed because Mr van Uden, in not returning his income on that basis, had taken an unacceptable tax position.

[7] In upholding the decisions of the High Court and the TRA on the question of Mr van Uden's permanent place of abode, the Court of Appeal concluded that Mr van Uden had made the relevant property his home.[7] The Court considered that the "individual factors listed in *Diamond* support this conclusion".[8] These included matters such as household expenditure.

[8] The Court of Appeal then dealt with whether Mr van Uden's interest in his employer's non-contributory superannuation fund (the Provident Fund) would constitute an interest in a foreign investment fund (FIF) which was accordingly taxable on the basis of the accrual rules.[9] The Court rejected the argument made on behalf of Mr van Uden that because the contributions to the Provident Fund were paid by his employer there was no "cost or expenditure incurred by or on behalf of Mr van Uden" as regards that Fund.[10] The Court of Appeal concluded the employer was acting on Mr van Uden's behalf in making the contributions.

[9] The Court also rejected the challenge made to the process followed by the Commissioner in removing the time bar that applied to the assessment for the 2005 to 2008 tax years. The issue was whether the relevant officer acting under delegated power had made the necessary factual reassessment. The Court of Appeal upheld the

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7 At [43].
8 At [44].
9 Income Tax Act 1994, s CG 15.
10 At [56].

finding of the High Court that the delegate had expressly exercised the delegated power.[11]

[10] Finally, the Court rejected Mr van Uden's submission he should not have been liable for shortfall penalties under s 141B of the Tax Administration Act 1994 (TAA). Under that section a taxpayer "takes an unacceptable tax position if, viewed objectively, the tax position fails to meet the standard of being about as likely not to be correct". The Court noted in this respect Mr van Uden had been aware there was an issue about whether he was a resident for tax purposes since 1995. Mr van Uden had received advice from his accountants that it appeared he would be treated as having a permanent place of abode in New Zealand and, so, as a resident.

**The proposed appeal**

[11] On the proposed appeal Mr van Uden wishes to raise the four issues dealt with in the courts below.

[12] On the first issue relating to Mr van Uden's tax residence status, Mr van Uden wishes to argue, amongst other matters, that the courts below have misapplied the test for a permanent place of abode set out in *Diamond*, for example, by adopting a quantitative approach and by treating the various factors identified in *Diamond* as a standalone checklist.

[13] It may be at some point that the Court may wish to revisit the *Diamond* test, but the present case, where no issues as to that test arise, does not provide an appropriate opportunity for that. The proposed ground of appeal accordingly raises no point of general or public importance, nor any matter of general commercial significance.[12] Nor is there an appearance of a miscarriage of justice.[13] Rather, Mr van Uden in this respect would seek to revisit concurrent findings in the TRA, the

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11 At [67]–[68]. The Court of Appeal also considered that the de novo hearing process having been followed in the TRA, and the TRA having confirmed the assessments, there was "no room for any further challenge pursuant to s 108 of the [Tax Administration Act 1994]": at [69].

12 Supreme Court Act 2003, s 13; and Senior Courts Act 2016, s 74. The applicant was given leave to file further submissions on the respective criteria for leave in the two Acts but the submissions filed did not address that point. Accordingly, we need not say anything on that matter.

13 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].

High Court and the Court of Appeal. Further, the *Diamond* factors were seen as simply supporting the Court of Appeal's conclusion, not determining it.

[14] The other three proposed grounds raise no questions of general or public importance or of general commercial importance. The outcome on these matters rested on the particular factual circumstances.

[15] Taking first the proposed ground relating to the foreign investment fund rules, the applicant wishes to argue that the focus of those rules is on investment behaviour. But the applicant's concern arises from the Court's assessment of the particular facts in light of the direction in s CG 15(2)(d) of the Income Tax Act 1994 that the cost be incurred "by *or on behalf of* the person". The second question, whether the person with the delegated powers undertook the reassessment so that the time bar was lifted, is similarly fact-specific. Finally, the Court of Appeal in concluding shortfall penalties were payable applied the relevant principles from this Court's decision in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*.[14]

[16] Nor is there an appearance of a miscarriage of justice arising from the Court's approach to these matters. In terms of the first proposed ground of appeal, s CG 15(2)(d) provides that expenditure incurred by "or on behalf of" the person is covered. Nothing raised by the applicant in relation to the proposed second ground calls into question the approach taken in the Courts below. On the last of the proposed grounds, nothing raised by Mr van Uden indicates there is a risk of a miscarriage of justice arising from the application of the principles in *Ben Nevis*.

[17] Finally, Mr van Uden also wishes to pursue the submission that he has not had access to justice. However, the matters he wishes to raise have all been considered by the Courts below.

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[14] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 at [181]–[203].

[18] For the reasons given, it is not necessary in the interests of justice for the Court to hear and determine the proposed appeal. The application for leave to appeal is dismissed. The applicant must pay the respondent costs of $2,500.

Solicitors:
Vlatkovich & McGowan, Auckland for Applicant
Crown Law Office, Wellington for Respondent