

IN THE RESIDENT MAGISTRATE'S COURT
AT SUVA

BETWEEN:

COMMISSIONER OF INLAND REVENUE

Plaintiff

AND:

PERMANENT SECRETARY FOR FOREIGN AFFAIRS &
EXTERNAL TRADE &
ATTORNEY GENERAL OF FIJI

Defendants

RULING

Plaintiff : Ms Buatoka
Defendant : Ms Lord

The Plaintiff as Commissioner of Inland Revenue issued a writ with a statement of claim enclosed claiming \$786,523.41 being arrears of value added Tax and penalties for taxable periods 1999 till March 2003.

On 5th January 2004 the defendants (a Department of the Government) filed a statement of defence in which the taxpayers denied liability and put the plaintiff to strict proof of his claim.

On 22nd March 2004 the plaintiff moved this court a motion to strike out the defence as it was contrary to S50(i) and 8 of the VAT Decree and to enter judgment. The defendant opposes the motion. Both parties rely on matters deposed in the affidavits filed by them.

The defendants admit that the said assessment s were forwarded to them by way of notices under S44 of the VAT Decree 991.

That the plaintiff did not receive any objections to its notices of assessment in the requisite time of 28 days under Section 50 of the VAT Decree. The plaintiff now submits that the assessment is final and under S50 of the Decree provides for no appeal objection or defence against the said assessments after the expiry of 28 days.

Learned Plaintiffs counsel also submits the court cannot be used as a Tax court to hear grievance of the tax payer when he has failed to take steps which was required of him under the TAX laws. Various authorities have been cited by the learned plaintiff's counsel.

On the other hand the learned defendants counsel argues that the matter ought not to be decided in a summary manner. She says the claim is made of penalties and the plaintiff ought to consider using his discretion of waiver. Also as a Government Ministry the Foreign Affairs Department has no budgetary allocation provision for the payment of late payment penalties. In turn this would raise constitutional problem under S177 and S182 of the Constitution. So these sums have not been appropriated and therefore should not be enforced against them as a recovery. She further argues the authority of CIR –v- Bay Fisheries Ltd (1994) 40 FLR 161, where Fatiaki J (then) in the **“interest of Justice”** allowed the defendant to intend an action unconditionally. The defendants rely heavily on the **Bay Fisheries** case.

The relevant provisions of the VAT Decree are:

S46 “Except in proceedings on objection to an assessment under Section 50 of this Decree, no assessment made by the Commissioner shall be disputed in any court; or in any proceedings, either on grounds that the person so assessed is not a registered person or any other grounds; and except as aforesaid, every such assessment and all the particulars thereof shall be conclusively deemed and taken to be correct and the liability of the person so assessed shall be determined accordingly.

S50(1) Any registered person dissatisfied with an assessment, may personally or by his agent, within 28 days Lodge with the Commissioner on objection in writing to the assessment in form 2.....”

S50(8) “Where no objections is made within the time for objecting set out in subsection (1) of this section or where that time is extended by the Commissioner, within the time as extended, the assessment shall stand and shall be valid and binding upon the registered person, notwithstanding any defect, error or omission that may have been therein or in any proceeding required by the decree or any regulation there-under.”

The defendants here admit under S4 of the VAT Decree that the term **taxable activity** includes activity of a public authority and all Government Departments are taxpayers liable to pay VAT pursuant to the Decree.

SUMMARY PROCESS]

There is no special provision in the Magistrates Court Act for striking out defence. However ***Order III Rule 8*** provides ***“In the event of there being no provision in these Rules to meet the circumstances arising in any particular cause..... the court shall be guided by any relevant provision cautioned in the High Court Rules.”***

The respondents have not objected or questioned the jurisdiction power of this court to entertain the application. In fact it has submitted itself to this Court for a decision. I am also satisfied under amendment 2000 of the Magistrates Court Act the legislature has also intended to give powers to strike out proceeding without cause.

Should the summary process be exercised in this matter?

“In the case of Hubback –v- Wilson (1899) 1 QB relied upon by the respondent counsel the court stated at p 91 “that in plain and obvious cases recourse should be had to the summary process under this rule.”

The respondent’s defence is a mere denial. It merely puts the plaintiff to strict proof of its claim. They do not deny the assessment but argue that their failure to object does not deny them the right to challenge it now.

They advance two arguments to show there are issues which has to be considered:

- (i) The sums claimed are almost wholly made up of penalties. There is no indications that the commissioner has considered the exercise of his discretion to waive or remit any additional Tax or penalty which may be assessed under S70.

S70(1) of the VAT Decree states:

(1) The Commissioner may in his discretion, mitigate or remit any additional TAX (other than additional tax imposed under pay (a) of subsection (i) of Section 60 of this Decree; penal tax or penalty which may be assessed or imposed under this Decree)

This power to waive relates to additional taxes. In any event once its established that the Tax is owed and assessed than the question of discretion to waive etc arises. This is not a triable issue prior to judgment.

The defendant cannot question the unreasonableness of the exercise of the Commissioner’s power under S70(i) before it is exercised. The learned defendant counsel submits its an issue of law as to when a tax payer can expect the waiver of penalties or can the commissioner accumulate these penalties as a practice and recover in one instance when the amount is large?

Under the Decree, there is no statutory limitation of time either to the assessment of persons income nor a limit or prohibition over time within which to inform a taxpayer of his assessment. ***Section 61 allow recovery of “TAX payable by any one as a debt due to the state.”***

- (2) Defendants second argument states” there is a provision for the Government to pay VAT in their annual budgetary allocations but there is no provision for payment of late penalties. It raises a constitutional [problem under S177 money must not be withdrawn except under an appropriation made by law. Also under S182 which provides ***“All public***

moneys must be dealt with and accounted for in accordance with law and in accordance with accounting principles generally accepted in public sector.”

The defendants argue as an issue that there is no allocation currently in the annual budget of the Department to cover late payment penalties. This in turn would raise the constitutional issues whether the Government Department should pay the penalties.

This issue also does not arise before the debt becomes due and payable by the department. A circular attached by defence to its submissions ***circular no. 10/92*** sent to all permanent secretaries by the finance Permanent Secretary clearly recognizes they are taxable under the VAT Decree as they carry out taxable activities. It is also the duty of the department to have funds appropriated and then used for lawful purposes according to procedure. The purpose of the policy is to ensure there is proper accountability of public funds. It would be upon the defendants to make provisions and to have the budgetary allocations in order to satisfy payment of all dues. It does not follow as the defendant argues, that if there is no budgetary provision for payment of TAX penalties, the department therefore cannot properly account for its payment under the above constitutional provisions. This is same as saying because funds are not appropriated and budgeted for, so the department is not liable to pay its debts.

Both issues above discussed cannot be said to raise serious arguments or issues to be decided for the purposes of deciding the claim. They are matters to be considered after the debt becomes due and payable in form of a judgment against the defendant. They are not a defence in this action. The case is “plain and obvious.” I find the plaintiff is entitled to make this application under the summary procedure.

The defendants admit in this case the assessments were issued and there were no objections made in the permitted period.

The question is whether their failure to object in the required statutory time, now precludes the defendant from challenging the assessments?

Section 50 makes the assessment as

“valid and binding on the registered person if objection is not made in time.” In similar provision under the TAX ordinance the Fiji Court of Appeal in case of Ragg -v- The Queen 4FLR 109 says “In our opinion this language is clear and unmistakable objection not having been received in time; the appellants right of appeal ceased, and the assessments stands and becomes valid and binding.”

In Gunac Ltd -v- CIR 153 of 88 and CIR -v- Mohd Ismail 459/89 High Court Justice Jayaratne in upholding the objections being out of time said – ***“in certain circumstances the interest of justice requires that the plaintiff’s application be refused and the defendant be given unconditional leave to defend.”***

I consider the relevant passages of that decision.

1. “In the circumstances given the non existence of any relevant appeal rules and the absence of an appointee as the VAT Tribunal and given that the CIR purported to exercise his powers under the unamended 1991 Decree in which he is only constrained by a minimum time limit, one might have expected the CIR to have erred on the side of caution and given the taxpayer a somewhat longer period within which to exercise its right of appeal. This might also have enable the relevant authorities to regularize the situation before the taxpayer’s appeal period expired.”
2. “Furthermore I note that the appeal period contrary to the clear terms of Section 50(5) of the unamended 1991 Decree is said to being from the date of the taxpayer’s receipt of the letter as opposed to the date of posting of the notice. In the absence of any evidence as to the date of receipt of the aforementioned letter this court cannot assume that the appeal period in terms of the letter had expired at the date of the issuance of the CIR’s Writ namely 26th January 1994 (which is clearly with the 2 months granted to the taxpayer.”
3. “The Writ in these proceedings was issued before the statutory time limit for proceedings on objection to an assessment under Section 50 of the VAT Decree had expired. In the circumstances given that the taxpayer had properly albeit only partially invoked the provisions of Section 50 and given that there is no prescribed form of notice to the CIR required by Section 50(5) and given the absence at the relevant time of any VAT appeal rules or an appointee as Tribunal and mindful of the absence of any provision for the extension of the appeal period, I cannot agree with the submission.”

The assessment in that case was for 1993. These were the early days for the VAT Decree when it was at the teething stage. There has since been amendments, appointment of Tribunal and procedures and practice followed by VAT payers. The reasons advanced for the **Bay Fisheries** decision is not applicable in this case.

Does justice demand the taxpayer be allowed to defend? The defendant does not deny notice of assessments issued and no objections were made in time. The additional tax was also assessed and not objected to by the taxpayer is admitted. The writ was issued in ample time. The VAT tribunal is appointed and in existence. There has been amendments since 1991 and no confusion as to the appeal periods under the Decree.

The facts of **Bay Fisheries** case and the reasons given for the invoking the justice principle does not apply on the facts here. The defendant here advanced issues for the trial and various reasons to permit them to defend, in the interest of justice applied. Here, the assessments issued were not objected to within the time limit. There is no justifiable reasons in this case where justice demands the defendants ought to be given time to defend this action. It would only be prolonging and delaying a case which has no reasonable arguments

to proceed with. This case squarely falls within the ambit of CIR –v- Pearlberg (1953) 1 ALLER 388 under similar English provisions heard justice Denning in the Court of Appeal decision said:- **“Once there is an assessment duly made and not appealed from then, under S169 of the Income Tax Act, the tax charged may be sued for and recovered from the person charged therewith in the High Court as a debt due to the crown. In my opinion; therefore all issues on the merits of these cases; as to fact or law, should have been determined on appeal to the commissioner’s the debts become absolute and conclusive; and their legal effect cannot be denied.”**

The above S169 in U.K. was similar to our S62 of the Income Tax Act and S50 of the VAT Decree.

Upon the present facts as above shown and in affidavits admitted by defendants which was not denied nor objected to. Also no reasons exist as a matter of justice to permit the defendants to defend the actions. The assessed taxes penalties and additional taxes become valid and binding on the defendants.

To permit other wise, would amount to delay and abuse or court process. Under S77 this court has unlimited jurisdiction as to amount claimed.

The plaintiff’s motion is therefore granted. The defence is struck out. Judgment is entered in favour of the plaintiff for the sum claimed and costs summarily assessed at \$400.00.

Dated this 1st day of November 2004.

Ajmal Gulab Khan
RESIDENT MAGISTRATE