

IN THE TAX COURT
AT SUVA

ACTION NO. 7 of 2015

IN THE MATTER of the Income
Tax Act 1974.

AND

IN THE MATTER of section 82
of the Tax Administration Decree
2009.

BETWEEN : SINOHYDRO CORPORATION LIMITED **APPLICANT**

AND : CHIEF EXECUTIVE OFFICER, FIJI ISLANDS REVENUE
AND CUSTOMS AUTHORITY **RESPONDENT**

CORAM : The Honourable Mr Justice David Alfred

Counsel : Mr B Solanki for the Applicant
Ms R Malani for the Respondent

Dates of Hearing : 25 July, 8 and 15 August 2016

Date of Judgment : 2 September 2016

JUDGMENT

1. This is the Applicant's Amended Application for Review of Respondent's decision refusing to grant the Applicant's application for an extension of time to object, pursuant to section 16(4) of the Tax Administration Decree 2009 (Decree).

2. The Applicant also seeks an order that the Applicant be granted an extension of 21 days from the date of this order within which to lodge with the Respondent any objections against its amended assessment for Pay As You Earn for 2009 to 2012 issued on 26 September 2013 (the tax decision). The tax decision stated the Applicant's total PAYE tax liability as \$6,482,929.58.
3. The Statement of Agreed Facts and Issues states the Issues are, inter-alia:
 - (1) whether there was reasonable cause for the Respondent to grant an application for extension of time to lodge an objection.
 - (2) whether the Applicant had a reasonable explanation why an objection to the assessments issued on 26 September 2013 was not lodged within the required 60 days as per Section 16(1)(a) of the Decree.
4. At the commencement of the hearing, Counsel on both sides agreed that the only issue before me is whether the Respondent (Revenue) was right or wrong not to have granted the said extension of time.
5. The Applicant's first witness was Li Xianglin (PW1) the finance manager of the Applicant. The following paras contain a summary of his evidence.
6. He said he had sworn the Affidavit and he was familiar with its contents. The Applicant was doing 2 hydro construction projects in Fiji for the Fiji Electrical Authority (FEA). The labour came from Fiji and the management and technicians from China. There were over 300 technicians from China. The Revenue wants to collect the tax for the Chinese employees. At first, Revenue wanted to impose the Non Resident Miscellaneous Withholding Tax (NRMWT), but the Applicant objected. The Revenue cancelled the NRMWT and collected PAYE.
7. At this juncture Counsel for Revenue stated she consented to all annexures in PW1's affidavit (the Affidavit) being tendered as evidence.

8. PW1 resumed by referring to Annexure 8 of his Affidavit, which was Revenue's letter showing PAYE at the non-resident rate was imposed.
9. The Applicant had objected to this by lodging a further objection (Annexure 9). In it, the Applicant had requested Revenue to charge its Chinese employees at the resident rate instead of the non-resident rate.
10. Revenue responded by reiterating its stand that the Applicant's foreign employees would be assessed with PAYE at the non-resident rate. (Annexure 11).
11. The Revenue then issued a "Garnishee Order" under section 27 of the Decree requiring the FEA to pay it the sum of \$6,482,929.58 (the sum) from any amount due to the Applicant (Annexure 12).
12. The Revenue then wrote a letter to the Applicant dated 26 September 2013, stating its PAYE Tax liability is the sum, and informing the Applicant that it could object with 60 days (see Annexure 13).
13. PW1 confirmed he had received the 4 assessments in Annexure 16. They then had a meeting with Revenue because they thought the assessments were wrong. At the meeting held on 1 October 2013 where the CEO and staff of Revenue were present, they reached an agreement that Revenue would withdraw the garnishee order within the same day and Revenue (allegedly) agreed to reconsider the PAYE tax issue and to reply within 2-3 months.
14. PW1 stated these 2 alleged agreements were not put into writing. At this juncture, Counsel for Revenue objected to this piece of evidence as she said both the CEO and Mr Moalanata were no longer with Revenue.
15. PW1 continued and said the garnishee order was withdrawn (see Annexure 15). No further meetings were held with Revenue.

16. He then sought the assistance of the Chinese Embassy because they (Applicant) required the help of the Embassy. The Embassy wrote to the Prime Minister (PM) with a copy to Revenue (Annexure 18). After 14 months, Revenue required them to pay PAYE tax at the non-resident rate.
17. PW1 referred to para 22 of his Affidavit and said they had in October 2013 ended PWC dealing with the PAYE issue because they thought their service fee was too high and they, PWC, did not resolve the issues as required. The Applicant wanted to find another way to resolve the problem. They “did not object within 60 days because after the meeting we did not receive assessment from Revenue so we thought issue resolved.” (Emphasis mine)
18. After 14 months when the Applicant applied for the Certificate of Exemption, Revenue told them that Revenue was still imposing the taxes. (Annexure 22). The Applicant retained another accountant, Integrated Financials who wrote a letter dated 8 January 2015 to Revenue (Annexure 22).
19. The Applicant’s lawyers wrote to Revenue, a letter dated 4 June 2015 seeking an extension of time (Annexure 26). Revenue by their letter dated 3 August 2015 declined to grant their application for an extension of time (Annexure 27). PW1 also referred to Annexure 28, which is their lawyers’ letter dated 21 August 2015. enclosing the Notice of Objection to the decision of Revenue dated 3 August 2015.
20. Under cross-examination by Counsel for Revenue, PW1 said, with reference to their objection to assessment (Annexure 2), that in the last 2 lines he has said they have 60 days to object. He said this letter was prepared by PWC and they read it and signed. He agreed he had knowledge that he had to object within 60 days. With regard to Annexure 13 he agreed that was a tax decision and he agreed he has a right to object within 60 days. They were trying to find another way to resolve the issue.

21. During re-examination, PW1 said at that time he did not know the consequences of not objecting within 60 days. With regard to Annexure 2 he said this was drafted by PWC after they sent PWC all materials received from Revenue. After reading the letters and signing them, they sent them to Revenue. With this, the Applicant closed its case.
22. The Respondent now opened its case by calling its witness Ms Laisa Bainimarama (DW1). She said she had been with Revenue for more than 16 years. She is part of the Revenue Objection Team to consider applications by taxpayers who object to assessments or tax decisions. The objection here was the tax decision, not the tax assessment.
23. The objection decision (Annexure 30) was because of the unsatisfactory reasons given, as these are within the taxpayer's control. It is within the taxpayer's control to submit within time. The taxpayer gave as one of its reasons, its ignorance of the law. This is based on paras 11 and 12 of the Notice of Objection (the Notice)(Annexure 28). Revenue felt this is subjective, as the Applicant was retaining tax agents. Para 13 is indicative of the reason being within their control. It is the responsibility of the tax agent to inform the taxpayer that the assessments remain in spite of the meetings being held. Para 14 is again the Applicant's subjective opinion. Revenue asked the Applicant for the relevant contracts of employment but were only given unsigned templates and not even photostats.
24. Revenue acknowledges the taxpayer is contributing to the development of Fiji. However, Revenue is unable to consider para 15 of the Notice as they are conscious they have to act within the ambit of the law and not be influenced by economic purposes. They considered the Embassy letter (Annexure 18) in their review. However they considered this as advisory for political purposes for which they deal sensitively when considering any objection so that it does not infringe the laws they administer. They are concerned that a level playing field be maintained for all taxpayers. Revenue's reputation is at stake. They treated the

taxpayer with justice. They were submitted a legal advice obtained by the taxpayer but it was not in relation to the extension but related to the assessment raised in 2013.

25. Counsel for the Applicant now cross examined DW1. She said Revenue asked for the contracts because they were looking at the merits of the matter. There was no other avenue to challenge a tax assessment outside of the Decree. She had considered the prejudice to the taxpayer if not allowed an extension, although that is not stated in the letter.
26. The taxpayer did not provide sufficient information for the purpose of her function. The legal opinion did not provide the source documents. The taxpayer did not have reasonable cause for extension of time. It did not provide sufficient reasons why it failed to object in time. The taxpayer has no arguable case for any proposed objection. The taxpayer will not be more prejudiced than the Revenue. It is not correct that the Revenue did not consider the interests of justice.
27. There was no re-examination of DW1 and the Respondent closed its case.
28. I fixed 15 August 2016 for oral submissions. On that date Counsel for the Applicant submitted that section 16(4) of the Decree is the key issue – reasonable cause. He said the Government gives the taxpayer a right to make an objection. He then cited 3 decided cases. He contended that genuine cases like this require justice. Concerns about opening the floodgates are not to be considered. The Court has to see if there is a legal case. The Revenue made a mistake in the computation of tax. The Court should look at all the circumstances of the 14 months delay after the period to appeal.
29. There was no communication from Revenue that the amounts were still outstanding. There were merits for the delay. It was an oppressive system for payment of tax. Public interest requires an extension be given. There would be no harm and no prejudice if an extension were to be granted. Counsel concluded by stating they did not deny the Applicant made a mistake but it should be granted an extension of time in the interests of justice.

30. Counsel for Revenue then submitted. She said the only issue is whether the Revenue is correct in not granting an extension. The Applicant applied 14 months late. The letter could be read by laymen and did not require legal advice. The Applicant had knowledge and had the advice of PWC. It was intentional that the Applicant did not object within 60 days. Although the objection letter was issued to them, the Applicant hoped for a quicker resolution. It was political leverage on their part to obtain the assistance of the Chinese Embassy. PW1 said they assumed the tax assessment had been withdrawn. He said he had a misunderstanding, but Revenue says PW1 does know the consequences. Counsel said the Court should shy away and close its eyes to the case of *Sharma* which is a workmen's compensation matter.
31. The CEO's hands are tied as the Revenue will act according to law inspite of foreign intervention. Revenue will depend on *Logan's and Company L's* cases and asked for the Application to be dismissed.
32. Counsel for the Applicant replied. He said Revenue did not call Mr Nata or the CEO. The Applicant decided to get the assistance of the Chinese Embassy to seek the assistance of the P.M. to review the assessment. Revenue knew the Applicant was objecting. He said the Court should look at all the 4 criteria. The cases cited by Revenue should be distinguished because here is an application to object.
33. At the conclusion of the hearing, I informed I would take time for consideration.
34. In reaching my decision I have perused:
 - (1) The Amended Application for Review.
 - (2) The Affidavit of Li Xianglin.
 - (3) The Respondent's Affidavit in Reply.
 - (4) The Statement of Agreed Facts and Issues.
 - (5) The Respondent's Documents.
 - (6) The Application's Opening submission.

- (7) The Applicant's Closing submission.
- (8) The Respondent's Closing submission.
- (9) The photocopies of Authorities cited by Counsel on both sides.

35. I now proceed to deliver my Judgment. The sole issue that falls to me to decide is this:

Is the Applicant entitled to have the Court revise or set aside the decision of the Respondent declining the Applicant's application for extension of time to object? This is the crux of the matter. So I shall start by construing section 16(4) of the Decree which reads as follows:

"A person may apply, in writing, to the CEO for an extension of time to lodge an objection and the CEO may, if satisfied there is reasonable cause, grant an application under this section and must serve notice of the decision on the applicant."

36. I take the words therein which are pivotal and thus require my interpretation to be the following:

- (i) "may".
- (ii) "if satisfied".
- (iii) "reasonable cause."

(i) "May" is defined in the Oxford Advanced Dictionary of Current English (Oxford) as being used to indicate "possibility" or "probability".

To my mind this clearly indicates that "may" is not mandatory because mandatory is defined in Oxford as "compulsory, obligatory." So it is as plain as a pikestaff, that the CEO may grant a request or may refuse to grant a request.

(ii) "Satisfied" is defined in Oxford as "convince, make free from doubt." Therefore the CEO must be convinced or free from doubt that there is a reasonable cause.

(iii) Stroud's Judicial Dictionary 5th Edition, states "reasonable cause" is synonymous with "just cause". "Synonymous" means "with the same meaning." Oxford defines "just" as "in accordance with what is right."

37. It is admitted that the Applicant did not lodge an objection, within the time frame laid down by section 16(1)(a) of the Decree which is 60 consecutive days of the service of the tax decision.
38. The lawmaker has ameliorated the strict time line by granting to the Applicant, not an absolute right, but at best a discretion to the CEO to consider if it is right to grant an extension. So the burden, in my opinion, shifts to the Applicant to show that the CEO ought to have granted it an extension. What has the Applicant done to secure such an extension? This requires me to consider the following.
39. The Applicant did not proceed with its objection in the right and proper way. Because the accountants, PWC, did not appear to be achieving the desired result through the proper channels, the Applicant decided to drop them.
40. The fact that the Applicant then resorted to obtaining the aid of a foreign mission, albeit its own Embassy, speaks clearly of a realisation that it did not possess any legal merits in its objection and would therefore not seek an extension of time within which to object. Instead it would seek the assistance of the diplomatic representative of a foreign Government to get it out of the wood. The letter from the Chinese Embassy in Suva to the P.M. (Annexure 18) was alluded to in the robust submission of Counsel for the Revenue.
41. I therefore consider it inadvisable to repeat the salient contents of that letter in my judgment. Suffice it to say here, the letter does not assist the Applicant in either its objection to the tax rate imposed by Revenue nor in its seeking an extension of time within which to object, which is really what this proceedings is all about.

42. I note the Applicant's new accountants, Integrated Financials wrote to Revenue a letter dated 8 January 2015 (Annexure 22) which seeks to challenge the basis of the Revenue's assessment rate but does not provide any request for any extension of time, nor any explanation why the Applicant did not file its objection within the requisite time frame which the Applicant's PW1 was fully aware of.
43. I also note, the Applicant's solicitors by their letter to Revenue dated 4 June 2015 (5 months after the accountants' letter) (Annexure 26) state that that is their application for an extension of time to lodge an objection pursuant to section 16(4) of the Decree. Para 19 of the letter says that the Applicant was under the impression that the matter had been resolved as there was no further correspondence from FRCA for some 14 months until January 2015.
44. If I may say so, it is not plausible that either an international corporate entity or an experienced tax counsel could presume that the mere absence of communication from Revenue is tantamount to a withdrawal of a tax assessment.
45. It is significant to note that in para 3 of the solicitors' letter, it is stated "it appears that Sinohydro are out of time to object to the assessments" and in para 26 thereof it is stated "Whilst from a purely technical point of view, it is accepted that Sinohydro were required to file and (sic) objection by 25 November 2013, FRCA fails to appreciate the reasons why Sinohydro did not do so." However, the reasons afforded in this letter, in my view, do not pass muster.
46. The Applicant has to show why an extension of time should be granted before any consideration can be given to whether it has an arguable case for objecting to the imposition of the tax, if such an extension were to be granted.
47. At the end of the day, the Applicant has failed to satisfy me that I should upset the decision of the Revenue CEO not to grant an extension. The entire

application and any subsequent proceedings hinges on this. The reasons proffered on behalf of the Applicant are political or international in nature and transcend the boundary of revenue law. Those which are purely legal do not, to my mind, hold water in so far as an application for extension is concerned.

48. In conclusion, it needs stating that justice is a two way road. If it goes only in one direction, that will not meet the ends of justice. Revenue is prejudiced if there is no finality and certainty with regard to the tax it has gathered for the country.
49. I have therefore ultimately concluded, based on the law and the weight of the evidence, that the Revenue CEO was correct in not being satisfied there was reasonable cause for granting an extension of time.
50. In the light of the decision I have arrived at, it would not be expedient to refer to the cases cited.
51. In fine:
 - (i) I hereby dismiss the Amended Application for Review.
 - (ii) I decline to grant the Orders sought therein.
 - (iii) I hereby Order the Applicant to pay the Respondent costs which I summarily assess at \$2,000.00.

Delivered at Suva this 2nd day of September 2016.



DAVID ALFRED
JUDGE
High Court of Fiji