IN THE TAX COURT OF THE HIGH COURT OF FIJI
AT SUVA

Tax Court Appeal No: HBT 05 of 2012

IN THE MATTER of the Decision made by the Tax Tribunal on the 24th September 2012

AND

IN THE MATTER of section 107 of the Tax Administration Decree 2009 (Decree 50 of 2009)

BETWEEN	:	FIJI REVENUE AND CUSTOMS AUTHORITY
		Appellant
AND	:	GURDIAL SINGH BROTHERS LIMITED
		Respondent
Coram	:	The Hon. Mr Justice David Alfred
Counsel	:	Ms F. Gavidi for the Appellant Mr R. Singh for the Respondent
Date of Judgment	:	23 January, 2017

JUDGMENT

1. This appeal was heard by Kotigale J on 12 February 2014, at the conclusion of which he reserved his judgment.

2. When Counsel on both sides appeared before me on 11 September 2015, they requested that I deliver the judgment based on the Appeal Record (AR) as they did not desire to make any further submission. Accordingly I have perused the AR and now proceed to deliver my judgment.

3. This is an appeal against the judgment of the Tax Tribunal (Tribunal) (judgment) delivered on 24 September 2012.

4. In the Notice of Appeal of the Appellant (Revenue), Revenue contends that the Tribunal erred in law and in fact:

   (1) In wrongly interpreting section 14 of the Value Added Tax Decree 1991 (VAT Decree) by stating it does not apply to VAT unregistered persons when in fact it applies to the importation of goods and should be applied in accordance with the Customs Act and the Customs Tariff Act 1986 (CTA).

   (2) In wrongly interpreting Schedule 2 of the CTA, particularly Item 1212.99.10 whereby the Tribunal stated it can only be imposed on VAT registered persons and not a produce supplier, when in fact it applies to the import of yaqona or kava and does not distinguish between VAT registered and unregistered persons.

5. Revenue in its written submission avers, in essence that the section 14 VAT Decree tax is leviable on both registered and unregistered persons and that section 14 does not state that it applies only to registered persons. The section applies to the importation of any goods by both registered and unregistered persons.

6. The Respondent in its written submission contends that VAT can only be imposed on supply of goods and services carried out by a registered person in the course or furtherance of a taxable activity. A registered person should be able to claim back from Revenue input tax paid by it. Thus the Respondent should be permitted to claim input

credits for VAT on the Customs Duty even through it was not a purchase cost but a tax imposed on the import of goods.

7. The Respondent further says that if item 1212.99.10 of the Schedule shows VAT is to be imposed on yaqona or kava, then it can only be imposed on a registered person and not a produce supplier. The produce supplier should not be caught by sections 14 or 15 of the Decree. The Respondent therefore asked for the Tribunal's judgment to be upheld and it be allowed to claim its input credits for VAT on imports.

8. The Tribunal in its judgment states as follows:

(a) The language of the VAT Decree makes it clear that an input tax can only be imposed on a registered person. The purpose of the law was not to impose an input tax on an unregistered person.

(b) It is clear that section 22(1) of the VAT Decree does not seek to include produce suppliers as registered persons. Thus the produce supplier is not caught by sections 14 or 15 of the VAT Decree. Consequently Schedule 2 of the CTA is not intended to apply to produce suppliers. If, as item 1212.99.10 of the Schedule shows a value added tax is to be imposed on yaqona or kava, then it can only be imposed on a registered person and not a produce supplier, who imports that crop. Kava, unprocessed or processed, sold by a produce supplier is not subject to a section 15 output tax in respect of the supply of these goods. Thus the Respondent's (Applicant in the Tribunal) separate registered entity can claim input credits and charge VAT in relation to the import and sale of unprocessed and processed kava. However, the Grog etc Produce Division of the Respondent cannot charge input tax under section 14 of the VAT Decree nor can it charge output tax under section 15.

(c) The Respondent could at most, be accused of mistake, and consequently the penalties imposed appear harsh. The matter, in accordance with section 86(1) of the Tax Administration Decree, is remitted to the Revenue for the VAT calculations relating to

the Respondent and its Produce Supplier Division to be recalculated and confirmed based on the judgment and for the penalties imposed on the Respondent to be reviewed.

9. Accordingly the Tribunal ordered the Chief Executive Officer (Revenue) to:

(i) Review and confirm the calculations of the tax imposed in accordance with its decision; and

(ii) Review and evaluate the penalties imposed under the former sections 76 and 76 A of the VAT Decree in light of the relevant facts and circumstances.

10. In this Appeal, I am called upon to judicially construe:

(a) Whether section 14 of the VAT Decree applies to persons who are not VAT registered.

(b) Whether schedule 2 of the CTA, in particular item 1212.99.10 applies to a person who is a produce supplier and not registered for VAT.

11. In embarking on this exercise I have as the lodestar what was said by the learned judges in the following three cases.

12. "The only safe and correct way of construing statutes is to apply the plain meaning of the words".

"As the meaning of words ... is clear, and no ambiguity, whether patent or latent, lurks within them, under our rules for the construction of Acts of Parliament the statutory intention must be found within those words." (per Lawton LJ in Macarthys Ltd v Smith [1979] 3 All ER at 332.

I would pause here to state that I am not advised that a Decree is ipso facto to be construed in some other way than an Act. Therefore I would substitute "lawmaker's intention" for "statutory intention".

13. Lord Simonds in Russell (Inspector of Taxes) v Scott [1948] AC 433, said "There is a maxim of income tax law which, though it may sometimes be overstressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him".

14. Finally, Rowlatt J in Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 K.B at page 71 said "It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

15. I shall start with section 22, of the VAT Decree, which comes under Part V – Registration. Sub section (1) of this section states "Subject to this Decree, every person (other than a produce supplier) who on or after the 1st day of July 1992, carries on any taxable activity and is not registered becomes liable to be registered – ".

16. It is therefore crystal clear that the lawmaker at this juncture (22 November 1991) did not intend "a produce supplier" to come within the ambit of the VAT Decree. Only registered persons did.

17. Section 2 (1) – Interpretation defines the following:

"Input tax", in relation to a registered person means:
(a) tax charged under section 15 on the supply of goods and services made to that person.
(b) tax levied under section 14 on goods imported by that person.

"Output tax" in relation to a registered person means the tax charged under section 15 in respect of the supply of goods and services made by that person.

18. There is no mention anywhere of an unregistered person. If the lawmaker intended unregistered persons to come within the ambit of the VAT Decree, he would either have included another definition for input tax in relation to an unregistered person or he would not have used the words "a registered" but instead used the word "any".

19. To my mind, the tax on imports and the tax on supply are only imposed on a registered person and not on an unregistered person and certainly not on a produce supplier.

20. The taxation regime changed the following year, by section 2 of the Customs Tariff (Amendment) Decree 1992 (CT (A)) whereby section 3 of the CTA was amended to raise, levy and collect VAT on imported goods.

21. I am of opinion, the intention of the lawmaker now, expressed in the plainest terms is that imported goods, without exception, would come within the ambit of VAT. At the same time this also removed any grey area as to whether an unregistered person, a produce supplier or a person who imported yaqona or kava was or was not caught by VAT. It was now made as clear as daylight that all the above did and would indeed come within the ambit of VAT. No longer could any person assert, relying on section 2 (1) of the VAT Decree that he did not have to pay VAT because he was not a registered person, or for any other reason.

22. Any lingering doubt that the Tribunal might have had that VAT only applies to a VAT registered person should have been put to rest by section 2 of the CT (A) Decree.

23. I am fortified in my decision by the judgment of the Supreme Court, Fiji in Jamnadas & Ors and Commissioner of Inland Revenue [2003] FJSC 4 that "The primary task of a Court construing revenue legislation is to address itself to the statutory text".

24. In the event, Order (i) of the Tribunal's judgment cannot stand. I find and I so hold that:

(1) Section 14 of the VAT Decree applies to persons who import goods even if these persons are not registered under the VAT Decree.

(2) Schedule 2 of the Customs Tariff Act and in particular item 1212.99.10 imposes VAT on the import of yaqona or kava, without regard to whether it is a produce supplier, a VAT registered or a non VAT registered person who is importing these goods.

25. The Appellant (Revenue) only appealed by its grounds of appeal against that part of the judgment as resulted in Order (i) of the Decision. Therefore Order (ii) of the Decision stands undisturbed.

26. In the result, I shall allow the Appeal and only set aside Order (i) of the Decision of the Tribunal. Each party shall bear their own costs here and in the Tribunal.

Delivered at Suva this 23rd day of January, 2017.

David Alfred
JUDGE of the High Court of Fiji.