

IN THE COURT OF FIJI
CIVIL JURISDICTION
AT SUVA

HBT 01 of 2019

IN THE MATTER of an Application pursuant to Regulation 28(4) of Division 3 (Other Miscellaneous Matters) of the Tax Administration (Electronic Fiscal Device) Regulations 2017 for a Review of the Respondent's Infringement Notice.

BETWEEN : RAVIRAVI INVESTMENT TIMBER & HARDWARE LTD

APPLICANT

AND : FIJI REVENUE AND CUSTOMS SERVICE

RESPONDENT

CORAM : The Hon. Mr. Justice David Alfred

COUNSEL : Mr J. Vulakouraki for the Applicant

: Mr R. Singh for the Respondent

Date of Hearing : 27 March 2019

Date of Judgment : 15 April 2019

JUDGMENT

1. This the Applicant's Originating Summons (OS) seeking the following Orders:
 - (1) *That the Respondent's (Revenue) Infringement Notice be declared invalid and/or the fine of \$50,000 imposed be reviewed.*
 - (2) *A declaration that the maximum fixed penalty fine of \$50,000 by Revenue is harsh and excessive.*
2. The OS is filed pursuant to Regulation 28(3) and (4) of the Tax Administration (Electronic Fiscal Device) Regulations 2017 (EFD Regulations).
3. The affidavit in support is sworn by Ms Shushila Devi (Devi) a director of the Applicant, on 4 January 2019. She deposes as follows:
 - (1) *On 7 December 2018, Revenue served them an Infringement Notice (Notice) dated 5 December 2018 for not complying with EFD Regulations 28(3) by not installing etc an EFD. A fine of \$50,000 (penalty) was imposed by the Notice.*
 - (2) *The Notice stated that if they did not wish to contest the Notice, they should pay the penalty within 30 days from its issuance and if they wished to contest it they should dispute it in court within the same period.*
 - (3) *Devi believes Revenue's placing such hefty fines is detrimental to the Applicant.*
 - (4) *If the Court does not declare the Notice invalid, she prays the Court will review the penalty and declare it harsh and excessive.*
4. Revenue's affidavit in opposition is sworn in 11 February 2019 by Rohit Pillay (Rohit), principal auditor of taxation. He deposes as follows:
 - (1) *He had issued the notice.*
 - (2) *All groups of business as specified by the Minister of Economy (Minister) by notice in the Gazette under the EFD Regulations are required to install, implement and operate for each business in the group an EFD before the expiry of the time specified in the Gazette.*
 - (3) *On 20 December 2017, the Minister specified in Gazette No 122 that hardware companies (companies) (wholesale and retail) must, on or before 30 June 2018 have installed and be implementing and operating an EFD for the hardware company.*
 - (4) *Revenue on 16 February 2018 issued a Press Release (No 2 of 2018) stating that hardware companies (wholesale and retail) are required to install etc VMS by 30 June 2018.*

- (5) *The fine for failing to comply with the EFD Regulations is based on the gross annual turnover of the taxpayer, which for the Applicant for the year 2017 was in excess of \$1.8m.*
 - (6) *Revenue conducted a field visit to the Applicant's place of business in Suva and a receipt provided by them was not a fiscal invoice.*
 - (7) *The Applicant was issued a Notice on 5 December 2018 for failing to install, implement and operate an EFD for the business before 21 October 2018 contrary to EFD Regulation 28(2).*
 - (8) *The penalty is compliant with both the EFD and Infringement Notices Regulations.*
 - (9) *On 28 December 2018, the Applicant entered into an arrangement to pay the \$50,000 by 31 March 2019.*
5. Devi in her affidavit in response deposed as follows:
- (1) *Their accountant had advised that timber companies are not liable to the EFD Regulations and only the bigger hardware companies are bound and she relied on the accountant's advice.*
 - (2) *Prior to being served with the notice, she was unaware of the implementation of the EFD Regulations.*
 - (3) *She admits that their gross annual turnover for 2017 was more than \$1.8m but their net profit was only \$1565.*
 - (4) *The Applicant has complied with the installation of the EFD system on 10 December 2018 after the issuance of the notice on 5 December 2018.*
6. The hearing commenced with Mr Vulakouraki submitting that the Applicant admits they were a few days late in installing the EFD. Revenue can only fine if the taxpayer is convicted by a court. There was no conviction, so the CEO Revenue cannot impose a fine. The fine should be declared null and void.
7. Mr Singh then submitted. He said the fine was imposed on total sales which at 31 December 2016 was \$2,084,594. Turnover means the total sales value. The applicant could have gone to a court of law to contest the notice but they failed and it was a hardware company. (With both of these Mr Vulakouraki agreed). Mr Singh said the Applicant should have installed the EFD on or before 30 June 2018, but had not done so by 31 October 2018. Revenue was proper in issuing the notice and the fine of \$50,000 is not excessive as it is in accordance with the law.

8. Mr Vulakouraki in his reply said that Revenue CEO cannot convict as he is not mandated by law and without a conviction there can be no fine. Their client was never convicted.
9. At the conclusion of the arguments I said I would take time for consideration. Having done so I shall now deliver my decision.
10. I shall state straightaway that pivotal issue to be decided that will bring resolution to this matter is this. Can the CEO of Revenue convict a taxpayer and then fine it and for that matter, imprison every director where the taxpayer is a company for committing an offence against sub regulation (3) of regulation 28 of the Tax Administration (Electronic Fiscal Device) Regulations 2017 by not installing, implementing and operating an EFD? For reasons that will be obvious, I am confining the issues as above and not extending the ambit of my decision to include prejudging the question whether the Applicant has breached the regulation concerned.
11. I start by considering the first operative word in Regulation 28 sub-regulation (4) - "offence". This is defined by the Oxford Dictionary of Law, 9th edn, as "A crime. The modern tendency is to refer to crimes as offences".
12. I then consider the second operative word in sub-regulation (4)- "conviction". Black's Law Dictionary, 10th edn, defines "conviction" as 1. The act or process of judicially finding someone guilty of a crime, the state of having been proved guilty. 2. The judgment (as by a jury verdict) that a person is guilty of a crime.
13. I shall finally consider the third operative word in para (a) of sub-regulation (4) of the Regulations - "fine". According to Osborn's Concise Law Dictionary, 7th edn, a "fine" is "a sum of money ordered to be paid to the Crown by an offender, as a punishment for his offence".
14. I now turn to section 15(1) of the Constitution of Fiji, the supreme law of the land, which states "Every person charged with an offence has the right to a fair trial before a court of law.
15. It is as plain as a pikestaff that the CEO, Revenue is not a judge nor a court nor a member of the Judicial Branch of Government. He is clearly a member of the Executive Branch. My decision today will put the issue at rest in consonance with the constitutional arrangement for the separation of powers.

16. Before I pronounce my judgment, I shall first have to attend to the startling wording in the ultimate paragraph of the Infringement Notice. This reads "If you do not pay your fixed penalty and late payment fee in full or elect to dispute this Infringement Notice in court within 3 months from the date this Infringement Notice is issued to you, this Infringement Notice will take effect as a conviction from the court and the Fiji Revenue and Customs may seek the maximum penalty from the court".
17. I shall state quite categorically that this part of the Notice has no such effect nor can it ipso facto convert itself to something tantamount to a conviction by the court. A conviction of the court, I reiterate, can only emanate from the court and from nowhere else.
18. In my considered opinion, sub-regulation (4) will require a taxpayer who is alleged to have committed an offence against sub-regulation (3) to first be charged in a court of law, then convicted, and then only fined. Here these elements are clearly absent. In their absence, Revenue had no right to impose a \$50,000 fine even if that is erroneously described as a penalty.
19. In the result:
- (1) I find and I so hold that as the \$50,000 fine was imposed by the CEO Revenue when the Applicant had not been convicted and had not been fined by a court of competent jurisdiction it is wholly null and void and is hereby set aside.
 - (2) I hereby order the sum of \$50,000 paid by the Applicant to the Respondent to be refunded to the Applicant.
 - (3) There shall no order as to interest on the sum.
 - (4) There shall be no order as to the costs of this Originating Summons.
20. I trust this case points to a moral, that from an independent judiciary that asserts its bounden duty is to maintain the Rule of Law, a person can expect the equal protection of his fundamental rights but is not entitled to claim any more. This applies without exception to all quarters.
21. Before I rise from the bench, I shall make the following comments. The facts disclosed in the course of these proceedings should entitle the Revenue to escalate them for consideration by a Court of Law. This would disabuse the Applicant of the misperception created by their accountant that the EFD

Regulations do not apply to them. The law and its applicability to any person or given situation is to be decided by the court and not by one's professional advisor. Nor can any person arrogate to itself any of the powers of a court.

Delivered at Suva this 15th day of April, 2019.



David Alfred
JUDGE
High Court of Fiji