THE COMMISSIONER OF INLAND REVENUE

A

v

BAY FISHERIES LIMITED

[HIGH COURT 1994 (Fatiaki J), 7 October]

Civil Jurisdiction

B *Value Added Tax-disputed assessment-appeal period expiring before VAT Tribunal Rules promulgated and tribunal appointed-appropriateness of summary Judgment-VAT Decree 48/1991 Sections 46 & 50-High Court Rules 1988 Order 14.*

The Commissioner applied for summary Judgment against a taxpayer who
C had been unable to dispute his assessment owing to the absence of a dispute procedure and who had sought relief from the Court. HELD: In the circumstances of the case and in the interests of justice the application would be refused and the taxpayer be given unconditional leave to defend.

Other cases referred to:

D *CIR v Pearlberg* [1953] 1 All ER 388
Customs and Excise Commissioners v Holvey [1978] 2 W.L.R. 155
Miles v Bull [1968] 3 W.L.R. 1090
Ragg v The Queen (1954)4 FLR 109

Application for summary judgment in the High Court.

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I.W. Blakeley with *A. Naco* for the Plaintiff
D. Jamnadas for Respondent

Fatiaki J:

On the 26th of January 1994 the Commissioner of Inland Revenue ('CIR')
F issued a Writ with a Statement of Claim endorsed claiming a sum of $32,473.87 earlier demanded in a Notice of Assessment issued under Section 44 of the Value Added Tax Decree No. 48 of 1991 ('VAT Decree') which was posted to the defendant company ('taxpayer') in November 1993 and on which an objection by the taxpayer had been earlier disallowed by the CIR on the 6th of December 1993.

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On the 18th of February 1994 the taxpayer filed a Statement of Defence in which it denied owing any money in terms of Section 3(8) of the VAT Decree under which the liability allegedly arose. I say allegedly because the taxpayer undoubtedly disagrees with the CIR's interpretation of the Section. Needless to say the taxpayer also avers that the CIR "wrongfully disallowed the defendant's objection to the assessment".

On the 4th of May 1994 the CIR issued a summons for summary judgment under Or. 14 of the High Court Rules 1988 on the ground that :

> "12. BASED on the provision of Section 44(1), 45, 46, 50(5), 50(6), 50(7), 50(8) and 64 of the VAT Decree and Section 77 of the Income Tax Act it is my belief that there is no defence to the claim contained in the Statement of Claim herein and that judgment should be entered for the plaintiff in the amount of $32,473.89 as per the Statement of Claim."

The taxpayer by its managing director has responded in an affidavit dated the 26th of September 1994 asserting that it "... has a good and valid defence in this matter" and "(that) ... triable isues which relate to the interpretation of the VAT Decree" are raised in its Statement of Defence.

The taxpayer however has not denied being a registered person in terms of the VAT Decree nor has it denied receiving the CIR's assessment or his notice wholly disallowing its objection. It was also pointed out that the taxpayer had not denied the CIR's assertion that it had not given the requisite notice under Section 50(5) of the VAT Decree requiring that its disallowed objection "be heard and determined by the Tribunal"

In the light of the above and given the taxpayers failure to exhaust fully the relevant objection provisions of the VAT Decree learned counsel for the CIR forcefully submits that the taxpayer is now precluded from raising his grievance to the assessment before the Court. This is said to be the inescapable cumulative effect of Sections 46 and 50 of the VAT Decree and various authorities cited to the Court.

The relevant statutory provisions of the VAT Decree may be usefully examined at this stage. Firstly, Section 46 which provides :

> "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 ground ; 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."

Learned counsel for the CIR submits firmly that in this case the taxpayer is now seeking to dispute the CIR's assessment by going behind it which is clearly prohibited by the Section. Counsel also drew the court's attention to several authorities in support of this submission.

The first is a 1954 decision of the Fiji Court of Appeal reported in 4 F.L.R. at p.109 namely, Ragg v. The Queen in which the court said of a similar ouster provision in the Income Tax Ordinance at p.110 :

> "In our opinion this language is clear and unmistakeable ... objection not having been received in time, the appellant's right of appeal ceased, and the assessment stands and becomes valid and binding."

The Court of Appeal also examined the decision of the English Court of Appeal in CIR v. Pearlberg [1953] 1 All ER 388 and followed it saying at p.111 :

> "... provision is made whereby a taxpayer can dispute his assessment. If he fails to do so within the time stipulated, his further remedy by way of appeal against assessment is barred."

The second authority referred to is a decision of Peter Pain J. in Customs and Excise Commissioners v. Holvey [1978] 2 W.L.R. 155 in which the taxpayer sought to challenge in Order 14 proceedings, an assessment under the U.K. VAT legislation and in which counsel had advanced an argument not dissimilar to the above submission by counsel for the CIR (See : at top of p.157 ibid).

Peter Pain J. after briefly examining the relevant statutory provisions upheld counsel's argument when he said at p.158:

> "It seems to me that, on the wording of the Statute, there is really no answer that can be put forward as a matter of construction to rebut the plaintiff's case. The Statute quite clearly provides that subject to an appeal to the VAT Tribunal the amount assessed shall be deemed to be the amount due. It is deemed to be, whether in fact it is the amount due or not, and therefore it is not open to a person in this Court to take the defence which this defendant takes."

In somewhat similar vein Section 46 of our VAT Decree (op.cit) states that "... the assessment and all particulars thereof shall be conclusively deemed and taken to be correct ...".

I note however his lordship's observations at p.158 when he said :

> "This is a decision that I arrive at, I must say, without any enthusiasm."

and later :

> "... I think I can take judicial notice of the fact that many

> people, particularly small traders, find the paper work associated with this tax extremely difficult and that experience shows that it is by no means impossible for an assessment to be made ... which is quite wrong. It is also, in the light of ordinary human experience, quite likely that a person, particularly a small trader, who receives an incorrect assessment, may be sufficiently confused by it not to avail himself or herself of the right of appeal within the very short period of 30 days which is laid down ..."

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Finally in the penultimate paragraph of his judgment he said at p.159 :

> "The statutory provisions in this case are very severe. They can to my mind, work both hardship and injustice unless they are applied with a proper understanding of the difficulties which the taxable person, particularly the small trader, faces, and in the spirit that only that tax ought ultimately to be collected which is genuinely due."

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The particular matters raised by counsel for the taxpayer in this case however did not fall to be considered in either of the above decisions and bears a closer examination.

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It is a matter of public record that the Value Added Tax Tribunal Rules were first promulgated by the rule-making authority under the VAT Decree on the 5th of April 1994 (See : Legal Notice No. 39 of the 1994 Gazette Supplement) and the VAT Tribunal was itself not actually appointed until the 3rd of August 1994 (See : Legal Notice No. 1612 of F.R.G. 1994). Both these dates are well outside the time limitation provided under Section 50(5) of the VAT Decree for an appeal to the VAT Tribunal.

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In this latter regard I note the CIR's letter of December 6, 1993 notifying his decision disallowing the taxpayer's objection contains the following cryptic paragraph :

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> "In accordance with the provisions of Section 50(7) of the VAT Decree 1991 you may exercise the right of appeal to the Tribunal within 2 months of your receipt."

I say cryptic because in so far as the paragraph makes reference to Section 50(7) of the VAT Decree 1991, it appears that the CIR had either over-looked or ignored the relevant provisions of the VAT Decree 1991 (Amendment) (No.1) Decree 1992 ('the 1992 Amendment Decree') which for present purposes effected two very important changes in the 1991 Decree.

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The first, was that it deprived the CIR of the discretion he earlier had in fixing the period within which a taxpayer could appeal to the VAT Tribunal against a

disallowed objection and secondly, the CIR was deprived of the power he earlier possessed of extending the appeal period he had earlier fixed in disallowing the taxpayer's objection.

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 enabled the relevant authorities to regularise the situation before the taxpayer's appeal period expired.

Furthermore I note that the appeal period contrary to the clear terms of Section 50(5) of the unamended 1991 Decree is said to begin 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 within the 2 months granted to the taxpayer).

It need hardly be said that a taxpayer who receives a notice allowing it 2 months within which to appeal against a disallowed objection and then subsequently receives a writ before the appeal period has expired, is likely to be confused and even perplexed. In such a situation it would not be surprising if the taxpayer assumed that the CIR himself had decided not to abide by the relevant objection provisions of the VAT Decree and that the only avenue available to it to challenge the CIR's assessment would be to contest the matter in Court.

True there may be nothing illegal in the issuance of the writ but the inconsistency in the CIR's letter and the institution of the present proceedings is plainly obvious.

Given the rather confusing circumstances of the CIR's letter of December 6, 1993 counsel appeared to indicate that the CIR might be willing to consider extending the appeal period if an application was made in that regard by the taxpayer. However in the light of the above-mentioned second amendment effected by the 1992 Amendment Decree, it is unclear under what provisions the CIR would be empowered to grant such an application. Nor might I add is there a clear power in the VAT Tribunal to grant such an extension.

I must confess that on first blush the submission of learned counsel for the CIR appeared to be somewhat extraordinary even unfair. Here was a taxpayer being brought before the High Court to answer a claim of the CIR based on a disputed VAT assessment in which the taxpayer was precluded from raising a

defence on a question of law ostensibly because it had failed to give notice of appeal under non-existent rules to a yet to be appointed Tribunal.

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Needless to say given the above lacunae even if the taxpayer had sought to appeal to the VAT Tribunal within the time limited by the CIR in his letter, it was, for all intents and purposes, a practical impossibility. In learned defence counsel's words : "The defendant had no choice but to file a defence because the legislation was incomplete at the time of the commissioner's writ."

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Undaunted, learned counsel for the CIR submits that notwithstanding the above, the taxpayer ought nevertheless to have given the CIR written notice that it required its objection to be heard and determined by the Tribunal and in failing to do so, the taxpayer was now precluded from challenging the CIR's assessment which is "... conclusively deemed and taken to be correct".

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In essence counsel's submission is not that the defendant has no defence to the CIR's claim based on an untenable and unsustainable interpretation of Section 3(8) of the VAT Decree 1991, rather, the position so far as I can discern appears to be that the relevant statutory provisions of the VAT Decree wholly prevents the taxpayer from putting forward any defence to the claim and what is more, the Court itself from considering the same however meritorious and whatever the circumstances or the blameworthiness of the taxpayer's failure to exhaust the statutory objection procedures.

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The submission however ignores the indisputable fact that 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.

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That the Court has a wide discretion to exercise in an application under Or. 14 is sufficiently plain from the wording of rule 3 which provide inter alia :

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> "Unless on the hearing of an application under rule 1, either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, ... to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial... The Court may give judgment for the plaintiff against that defendant ... as may be just having regard to the nature of the remedy or relief claimed."

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The words underlined above were applied by Megarry J. in Miles v. Bull [1968] 3 W.L.R. 1090 at 1096 in which his lordship although deciding that the defendant had no arguable defence to the claim nevertheless refused summary judgment because in his "... judgment there ought for some other reason to be a trial, and the reason is that of justice".

Earlier in his judgment Megarry J. described the terms of Order 14 as being very wide and said:

> "If the defendant cannot point to a specific issue which ought to be tried but nevertheless satisfies the Court that there are circumstances that ought to be investigated, then I think those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial, and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff."

Similarly in this case having regard to the relative novelty of the legislation in question and the rather unusual circumstances I am satisfied that justice demands that the taxpayer be allowed to defend the action.

The application is accordingly dismissed with the taxpayer's costs to be in the cause.

(Application dismissed.)