THE STATE

v.

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MINISTER OF FINANCE

ex parte
EVERCRISP SNACK PRODUCTS (SOUTH SEAS) LTD

[HIGH COURT, 1998, (Byrne J) 4 June]

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Revisional Jurisdiction

Income tax- tax concessions- export incentives- commencement date of concessionary periods- Income Tax Act (Cap 201) Section 16 (2) (d) and Schedules III and V.

C

Under the Income Tax Act approved enterprises were entitled to apply for tax concessions and export incentives for limited periods. The Minister of Finance refused claims for export incentive relief on the ground that they fell outside the period of approval tax concessions. Quashing the Minister's decision, the High Court HELD: that in the absence of a specific provision to the contrary the commencement date of the periods was not necessarily the same and accordingly there was nothing to prevent a claim for export incentives by a company unable to claim tax concessions.

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Cases cited:

Canadian Eagle Oil Co. Ltd. v. R. [1946] AC 119
Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 1 K.B. 64

E

Commissioner of Inland Revenue v. Alcan New Zealand Limited (1994) 16 NZTC 11. 175
IRC v. Ross Coulter (Bladnoch Distillery Co. Ltd.) [1948] 1 All ER 616
IRC v. Wolfson [1949] 1 All E.R. 865
Russell v. Scott [1948] AC 422

F

Motion for judicial review in the High Court.

F.G. Keil for the Applicant
I.W. Blakeley for the Respondent

Byrne J:

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I have found this a difficult case to decide partly because of the very helpful submissions I have received from the parties which have caused my mind to waver more than once but mainly because I have found the interpretation of the relevant parts of the Third and Fifth Schedules of the former 1978 Income Tax Act. Cap. 201 in their relationship with Section 16(2)(d) of the Act far from easy.

On the 15th of December 1995 I delivered an Interlocutory Judgment in which I gave the Applicant leave to judicially review the decision of the Minister of Finance made on or about the 26th of June 1992 in which he reconfirmed earlier decisions refusing the Applicant Export Incentive Relief for the years 1985, 1986 and 1987 in the amounts of $112,889, $131,916 and $122,688 respectively.

Earlier on the 28th of June 1976 the Permanent Secretary for Commerce, Industry and Co-Operatives had informed the Applicant by letter that the Government had granted the Company various assistance and concessions relating to Free Fiscal and Customs Duty and Income Tax Concessions initially for a period of three years but later extended to eight years from the date of commercial production.

The Applicant began commercial production of its products and snack foods on 25th October 1976 and was granted income tax concessions in accordance with Section 16(2) and the Third Schedule of the Income Tax Act.

In my Interlocutory Judgment I stated the relevant facts and some relevant law and I shall not repeat them here except where necessary for this judgment.

The question to be decided is when the time for claiming export incentives provided by Section 16(2)(d) of the Income Tax Act begins. However Section 16(2)(b) is also relevant. This empowers the Minister, where he is satisfied that it is expedient for the economic development of Fiji, to -

> "(b) specify any company engaged in an approved enterprise as being one to which the tax concessions contained in the Third Schedule shall apply and such company shall accordingly enjoy such concession."

Sub-paragraph (d) reads:

> "specify any trade and any product to be an approved trade and an approved product qualifying for an export incentive under the provisions of the Fifth Schedule and any such sum referred to in that Schedule shall be exempt from tax or chargeable at such reduced rate as may be specified."

The extent of the tax concession is stated in Section 4 of the Third Schedule and is either an exemption from tax in respect of profits of either $8,000 per annum or if greater, 15 percent of the smaller of -

> "(a) the paid up equity capital of the company relating to the enterprise; or
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> (b) the total fixed capital investment of the company relating to the enterprise."

at the commencement of each of the normal accounting years of the company

covering the period specified by the Minister.

The maximum period for entitlement to tax free concessions is eight years. A

The Fifth Schedule deals with Export Incentives.

Paragraph 3(a) reads:

> "Every company resident in Fiji for the fiscal year of any year of assessment which desires to avail itself of the deduction under this Schedule shall apply to the Minister for approval to be treated as a company eligible for a deduction or rebate for that year. B

Paragraph 5 deals with the Method of Relief.

Sub-paragraphs (i)(a) and (b) are as follows:

> "(i) In respect of an approved product the manufacture or processing of which commenced after the 1st of September, 1973; C
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> (a) A rebate of one-half of the tax chargeable on the company in respect of the export profits relating to the manufacture or processing of such approved product for the fiscal year in which approval is first given and the two subsequent fiscal years. D
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> (b) For the subsequent five fiscal years a deduction from such profits of the difference between the profits attributable to export of the approved product for the fiscal year and the mean profits attributable to export of the approved product for the three immediately preceding fiscal years." E

Paragraph 6 is as follows:

Time Limits: F

> "(i) Except in respect of an application made during the year 1974 in respect of a fiscal year ending in that year, an application for an export incentive deduction shall be submitted to the Minister not later than three months after the commencement of the fiscal year the profits of which are to be the subject of an application. G
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> (ii) Provided that satisfactory records are maintained a taxpayer may continue to claim relief for the year of claim and the seven subsequent fiscal years."

The approval granting the Applicant Fifth Schedule incentives was contained in the letter from the Permanent Secretary for Commerce, Industry and Co-

Operatives of the 28th of June 1976 and stated in paragraph 2 "Export Incentive Relief shall be provided to the Company so long as it complies with A the Fifth Schedule of the Income Tax Ordinance".

It will be noted that in the letter there is no reference as to when the period of relief up to the maximum of eight years was to commence.

In the very helpful affidavit of Michael Joseph Yen, Deputy Commissioner of Inland Revenue filed on behalf of the Respondent it is stated that the period B for Fifth Schedule Relief commenced on the 28th of June 1976 or applied from the year ended 31st October 1977 (paragraphs 5, 33 and 38).

No basis either under the provisions of the Fifth Schedule or the Act itself is given in support of this interpretation but in two annexures "I" and "J" the rationale for the concessions is set out. These two documents are respectively C a Minute or Memorandum to the Permanent Secretary for Finance dated 20th June 1983 and 6th of July 1987.

The Applicant first made a profit of $28,616.00 in respect of its fiscal year ended 31st October 1980 and claimed an exemption of this amount under the Third Schedule. There were no surplus profits against which the Fifth Schedule rebate could be applied.

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This caused the firm of Coopers & Lybrand, Chartered Accountants of Suva to write to the then Minister of Finance on the 1st of June 1983 requesting his approval under Section 16(2) of the Income Tax Act for the Applicant's trade and products to be specified as being expedient for the economic development of Fiji and qualify for export incentives under the Fifth Schedule E in respect of the income year commencing 1st November 1981. The request was prompted because as stated in the memorandum of 20th of June 1983 the Company could then derive maximum benefit of export incentive relief in view of its recently-gained profitability and the fact that by then the Third Schedule concession had expired. The memorandum continued in paragraph 2:

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> "The point to consider is whether under the provisions of the Fifth Schedule to the Income Tax Act, the Minister is provided the flexibility to defer the commencement date of the export incentive relief after it has once been approved and granted to a company. Unfortunately, in my opinion, this is not provided. It should however be noted that the Fifth Schedule specifically G states that Third Schedule concession, which the company has been granted, shall be first allowed and export incentive relief will be available on any balance of profits which have not been exempted. This clearly demonstrates the intention that whilst a company is permitted both the Third Schedule and the Fifth Schedule concessions, it is not permitted to defer the latter and thereby extend the period of its overall concessions. Concessions are designed as you are aware, to assist a new company in the

> initial stages of its operation and once it is established and is profitable, the need for concession diminishes. Concessions granted subsequent to its becoming viable could only be regarded as a handout. Therefore, once concession is approved, very much would depend on the company's effort to generate profits to take maximum advantage thereof during the period of concession. In my opinion, if investors are allowed the flexibility to defer concessions at will, then concessions will be used to maximise tax savings and this would not be in accord with the reason for granting concessions. The design of the Fifth Schedule export incentive relief which permits a company to claim relief, over a period of 8 years is intended to give the exporter sufficient time to be able to induce him to promote his product and generate profit. In practice it is not possible for an exporter to take advantage of the relief for each of the 8 years during which the concession is applicable."

In annexure "J" the Commissioner stated that the condition "so long as it complies with the Fifth Schedule of the Income Tax Act" is a condition that is imposed in respect of all approvals to ensure that the requirements of the Fifth Schedule are met each year of claim.

The requirements are then set out and I need not state them here but the memorandum continues:

> "It will be observed that export of at least 30% of local input is the real quid pro quo for the benefit of the concession granted under the Fifth Schedule and the policing of this by the Department is important, hence the need for the condition in approval letters."

On the part of the Applicant the first application under paragraph 3 of the Fifth Schedule appears to be that made by its income tax return for the year ended 31st October 1981, later repeated in subsequent returns which were lodged with the Commissioner.

The Applicant's contention is that under the Fifth Schedule the Company determines when the eight year period begins. It says that having obtained approval of the Minister under Section 16(2)(d), the Company is then entitled under the Schedule to wait as many years as it sees fit before making its first claim for relief. The Applicant says at that point the eight year period begins. Thus, if the Applicant is right, the Company could apply to the Minister to be granted export incentives under Section 16(2)(d) when it first begins operation and then wait for several years until such time as it has achieved maximum income earning potential before claiming the relief for the first time. This would obviously maximise the benefits to the Company at the expense of the Government because they would be available at a time when the Company was generating profit. The Respondent agrees with this view except that it

submits the adjective "most" should be added before the word profit.

A The Respondent submits that on a plain ordinary construction of Section 16 and the Fifth Schedule, the eight year concessionary period begins, by operation of law, in respect ofthe fiscal year in which approval is first given under Section 16(2)(d).

But which is the fiscal year "in which approval is first given"? The Respondent says this must be the year of commencement of the concessionary B period. The word "approval" can refer only to the approval specified by the Minister pursuant to the exercise of his power under Section 16(2)(d). That, says the Respondent, is the approval which follows an application by the Company under paragraph 3, upon the Minister being satisfied it is expedient for the economic development of Fiji. It is the only approval provided for by the Act and to uphold the Applicant's construction would result in an absurdity C according to the Respondent because the whole purpose of export incentives set out in paragraphs 6 and 7 of Michael Joseph Yen's affidavit is, negated.

In these paragraphs Mr. Yen states that the economic rationale behind the granting of export incentives is to encourage the establishment in Fiji of new export industries by assisting them in the early stages of their operations. He D continues:

> "Assistance is often required in the first few years to help a business establish itself because it is usually a time of considerable financial commitment. Once the new business becomes established and profitable there is no need for Government assistance which is why a fixed period is imposed E during which the incentives may be claimed."

Nobody would join issue with those views but the Respondent submits that if the Applicant were allowed to wait until 1982 or even longer if it chooses before starting the eight year concessionary period, what further purpose would the incentives serve in terms of Fiji's economic development? The F answer according to the Respondent is none.

The essential difference between the Applicant's construction and that of the Respondent is that the Applicant says at least two applications are required to the Minister whereas the Respondent says only one application is required. The Applicant argues it is the second approval of the Minister which G commences the concessionary period and the Respondent says it is the year in which approval is first given which commences that period.

The Applicant's case has not been helped by correspondence passing between Messrs Coopers & Lybrand and the Minister between 1976 and 1986 because in my judgment this shows a clear understanding on the part of the Applicant and its Accountants that the period of the export incentive concession began in the fiscal year ended 31st October 1977. It was only in 1986 that the Accountants for the Applicant, after having been refused an application to

defer the eight year period, decided to adopt the argument now put by the Applicant's counsel to the Court .

Here it is important to note what took place in 1981. A

The Company lodged an Income Tax Return for the year ended 31st October 1980. I have said earlier that this was the first time it had recorded a profit with chargeable income of $28,616. It claimed an exemption under the Third Schedule of this amount which meant there were no surplus profits against which the Fifth Schedule rebate could be applied. B

According to the Respondent what happened next is most important. Extracts from the Company's Income Tax Return for the year ended 31st October 1981 are attached as exhibit "E" to the affidavit of M.J. Yen. This was the first year in respect of which the Company availed itself of export incentives. The Respondent says this is very significant because the claim for export C incentives in this particular return occurred *before* the letter from Coopers & Lybrand of 6th July 1982 which the Applicant says is its first claim for export incentive relief. In their letter Coopers & Lybrand purport to apply under Section 16(2) for approval that the trade and products be specified for export incentive under the Fifth Schedule in respect of the income year commencing 1st November 1981 and ending 31st October 1982, i.e. one year later. D

I consider there is much force in this submission which indicates at its most generous a misunderstanding or misapprehension as to how the relief under the Fifth Schedule was to be claimed. I have no doubt that it never occurred to any one, least of all the Applicant, until 1986, that there was any other possible construction available to the Applicant. However, I must then ask myself would it be fair to deny the Applicant relief because of the mistake or E mistakes of its Accountants? I think not.

As I have said, according to the Respondent the only date of approval relevant for the beginning of the eight year concessionary period must be 28th June 1976 but despite the powerful arguments addressed to me by Mr. Blakeley for the Respondent, as a matter of logic and indeed law, I fail to see why the date F of approval should not be that contended for by the Applicant. I referred in my Interlocutory Judgment to the submissions of the Applicant on the application for leave, now repeated on the substantive motion, that whereas the Third Schedule makes provision for an appointed date and commencement of period for relief, the Fifth Schedule in contrast does not stipulate a commencement date. It does however provide for applications for approval G for the relief in paragraph 3 of the Schedule that "Every company resident in Fiji for the fiscal year of any year of assessment which desires to avail itself of the deduction under this Schedule shall apply to the Minister for approval to be treated as a Company eligible for a deduction or rebate for that year." Also by paragraph 6(i) an application for export incentive deduction shall be submitted to the Minister no later than three months after the commencement of the fiscal year the profits of which are to be the subject of an application.

A According to Mr. Yen in paragraph 9 of his affidavit, it is not unusual for businesses to be granted concessions under the Third Schedule and incentives under the Fifth Schedule at the same time. In practice where this occurs the business applies the concessions from the Third Schedule to its profits and then applies the export incentive rebate under the Fifth Schedule to any balance of profits which has not been exempted. This practice arises out of paragraph 5(ii) of the Fifth Schedule.

B Therefore, where both are approved a lot first depends on the Company's efforts to generate profits so that it can take maximum advantage of both the exemption and the export incentives during the relevant periods.

The Applicant does not dispute this but argues that if it is open to it to claim the export incentive rebate later, then it may lawfully do so. I agree.

C The Respondent submits that according to the Applicant's argument, after being specified as an approved trade or product under Section 16(2)(d), a Company must then make a fresh application for approval in the first year it wishes to avail itself of the claim and satisfy the Minister again that allowing a deduction is for economic benefit of Fiji. The Respondent says that that D could not be the effect of the legislation because it would be inconsistent with paragraph 6(ii) which allows the tax-payer to continue to claim relief for the year of the claim and the seven subsequent years.

That would appear to me to be a reasonable construction of paragraphs 3 and 5(i) but I do not consider it to present any greater difficulties. Once the Minister gives his approval under paragraph 3 for a particular fiscal year if E an Applicant wished to obtain the concession for the following seven years it would be perfectly simple to write a short letter to the Minister requesting the continuation and equally simple for the Minister to reply granting it.

For my part I do not see anything either in the policy of the Act or the Third and Fifth Schedules which prevents a person who is unable to claim relief F under the Third Schedule from claiming such relief under the Fifth Schedule. If a practice has grown up by which the Minister has disallowed all claims under the Fifth Schedule made beyond the five year period provided by the Third Schedule when as a matter of law he could have allowed claims for export incentives under the Fifth Schedule in the manner claimed by the Applicant then of course the Applicant is entitled to relief.

G In my Interlocutory Judgment I stated at p.11 that I considered the Applicant's construction of the Fifth Schedule is to be preferred to that of the Respondent. I referred to some of the cases bearing on the construction of tax statutes and said:

> "It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties; the subject is not to be taxed unless the language of the statute clearly imposes the

obligation - Russell v. Scott [1948] AC 422 at p.433 per Lord Simonds and language must not be strained in order to tax a transaction which, had the legislature thought of it, would have been covered by appropriate words - IRC v. Wolfson [1949] 1 All E.R. 865, again per Lord Simonds.

In Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 1 K.B. 64 at 71 Rowlatt J. who was regarded as having an outstanding knowledge of income tax law said:

> "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."
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> This was approved by Viscount Simon L.C. in Canadian Eagle Oil Co. Ltd. v. R. [1946] AC 119."

Counsel for the Respondent cited in addition the New Zealand Court of Appeal decision in Commissioner of Inland Revenue v. Alcan New Zealand Limited (1994) 16 NZTC 11, 175 where at 178 the Court approved the remarks of Rowlatt J. in Cape Brandy Syndicate v. Inland Revenue Commissioners which was later approved by Viscount Simon L.C. in Canadian Eagle Oil Co. Ltd. v. R. Put simply the first two principles are that the words are to be given their ordinary meaning and that one has to look merely at what is clearly said.

In my judgment the words in paragraphs 3, 5 and 6 of the Fifth Schedule allow the construction contended for by the Applicant.

If this was not the intention of the legislature it would have been simple for the draftsman to have put it in clear words that the period of eight years applied only from the date on which the first approval was given to an Applicant under Section 16(2)(d).

It was said by Lord Thankerton in IRC v. Ross Coulter (Bladnoch Distillery Co. Ltd.) [1948] 1 All ER 616 at 625 that in cases of ambiguity the courts will prefer the construction more favourable to the subject. In my opinion there is ambiguity in the Third and Fifth Schedules as to when time begins to run for claiming export incentives under the Act and therefore the Applicant is entitled to have that ambiguity resolved in its favour. Accordingly I order:

(a) that certiorari go to remove the decision of the Minister made on about the 26th of June 1992 reconfirming earlier decisions to this Court and that the same be quashed;

(b) an order of mandamus directed to the Minister of Finance that the Applicant in all other respects having complied with the provisions of the Fifth Schedule, he by order or

written direction to the Commissioner of Inland Revenue approve the Applicant as a Company in an approved trade or with an approved product eligible for export incentive relief for the years 1985, 1986 and 1987;

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(c) that the Respondent to pay the Applicant its costs to be taxed in default of agreement.

(Judgment for the Applicant, prerogative orders issued.)

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[Editor's note: an appeal against this Judgment was partly allowed on 26 February 1999 - ABU 36/98]