IN THE STATUTORY TRIBUNAL, FIJI ISLANDS
SITTING AS THE TAX TRIBUNAL

Value Added Tax Appeal No 1 of 2006

BETWEEN: **Company G**

Applicant

AND: **FIJI REVENUE & CUSTOMS AUTHORITY**

Respondent

Counsel: **Ms R Lal, Lal Patel Bale Lawyers for the Applicant.**

Ms F Gavidi, FRCA Legal Unit, for the Respondent

Date of Hearing: **Monday 3 September 2012**
Tuesday 4 September 2012

Date of Judgment: **Monday 24 September 2012**

JUDGMENT

VALUED ADDED TAX – Section 14(1) Value Added Tax Decree 1991 – Imposition of Tax on Imports; Part VI Special Class; Section 27 -Treatment as Branch or DIvision

Background

1. This an application for review against the decision of the Respondent Authority dated 29 December 2005, disallowing the objection of the Taxpayer to tax assessments issued by the Authority for the period 1998 to 2004. Those tax assessments included the imposition of a 30% penalty for the understatement of taxation returns and relate to value added taxation imposed on the taxpayer in accordance with the Value Added Tax Decree 1991.

2. A short history of the factual issues in dispute is as follows:

- Company G at all relevant times is involved in the importation of raw kava.
- Upon its import, the Company is involved in the wholesale and distribution of kava in its processed and unprocessed form.
- The Applicant was issued with a Notification of Vat Registration by the Respondent Authority on 22 June 1991.[1]
- On 30 June 1992, the Applicant applied to the Respondent for its wholesale operations (the 'unprocessed arm') to be treated as a produce supplier.
- The Applicant has sought to claim input tax against the value of its unprocessed kava that it has imported for sale.
- The Respondent has disallowed the input claim on the basis that the Applicant has charged no output tax on the sales of that produce.
- The Applicant argues that it should be able to make the input claim, on the basis that the output tax is capable of being calculated on both the combined result of the processed and unprocessed kava sales of Company G and its producer supplier Division.
- Alternatively, the Applicant claims that the Respondent is estopped from objecting against the manner in which the input tax has been claimed, as a result of various representations made by the Respondent to the Authority at various times. These representations are said to have influenced the course of conduct of the Applicant.
- Finally, the Applicant seeks a review of the penalties imposed on the Respondent, by virtue of Section 76A of the Value Tax Decree 1991. The grounds for that claim are primarily on the basis that should the case of estoppel be made out, the subsequent removal of the penalties incurred, is a logical and natural outcome arising from such a determination.

3. I will now address these issues in turn.

[1] The application appears to have been made on the basis that the Division deals with "grog, taro and other local produce".

Effect of Application by Registered Person to Treat Branch or Division as Produce Supplier

4. In my mind, the first issue that warrants resolution within this analysis is the issue of the status of the Applicant Taxpayer for the purposes of the Decree.

5. Specifically Section 27(2) of the Decree provides as follows:

> *The Commissioner may upon application made pursuant to subsection (1) of this Section treat any branch or division as a separate person if each branch or division maintains an independent system of accounting, solely supplies produce in a raw and unprocessed state and can be separately identified by reference to being a produce supplier or the location of the branch or division and where any such branch or division is so separately treated, any taxable activity carried on by that branch or division shall, to that extent, be deemed not to be carried on by the registered person first mentioned in subsection (1) of this Section.*

6. The implication of a determination as to the status of the raw processing arm during the relevant period becomes therefore significant.

7. The Applicant argues that it had not been granted the status of a separate entity for the purposes of Section 27(2) until 30 September 2005 and on that basis, there should be no distinct treatment of the processed and unprocessed kava for the purposes of the Decree.

8. The Respondent argues on the other hand that the separate divisions operating in place cause the distinct entities to find their own obligations under the Decree. That is, the activity of the registered person (entity) that is involved in the process kava concern, must levy, collect and pay an input tax in accordance with Section 14 and a tax on supply of that good (Section 15).

9. In the case of the *'Grog Taro Other Local Produce'* Division of Company G, the Respondent argues that by virtue of its status as a "produce supplier", it is not a

"registered person" for the purposes of Section 22 of the Decree, nor is it entitled to levy, collect pay or be charged an "input tax" for the purposes of either Sections 14 and 15 of the Decree.

10. I support the proposition adopted by the Respondent in this regard.

11. The definition of "input tax" at Section 2 of the Decree seems to crystallise that point.

12. In its original form when the Decree was first made law in 1991,[2] it was defined in these terms:

> *"Input tax", in relation to a registered person, means -*
>
> *(a) tax charged under Section 15 of this Decree on the supply of goods and services made to that person:*
>
> *(b) tax levied under Section 14 of this Decree on goods imported under the Customs Act 1986 by that person;*

13. In its present form the definition is as follows[3]:

> *"Input tax", in relation to a registered person, means -*
>
> *(a) tax charged under Section 15 of this Decree on the supply of goods and services made to that person:being in any case goods and services acquired or imported for the principal purpose of carrying on that persons taxable activity.*
>
> *(b) tax levied under Section 14 of this Decree on goods imported under the Customs Act 1986 by that person:being in any case goods and services acquired or imported for the principal purpose of carrying on that persons taxable activity.*

14. While I note the submissions of Counsel for the Applicant, that the purpose of the tax levied by Section 14 of the Value Added Tax Decree 1991, is a levy generated by virtue of the Customs Tariff Act 1986, there is nothing beyond that statement that goes to show why or how Company G as a separate entity arrangement, could

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2 25 November 1991 (See Decree No 45 of 1991)

3 The amendment to this definition appears to have come into effect on 1 January 1995.

claim input tax credits supposedly in support of the custom tariff's regime, in cases where it was the produce supplier Division, rather than Company G, that imported the kava.

15. An analysis of the combined customs laws reveals the shortcomings in the Applicant's contentions in this regard.

Customs Duties and Taxes

16. The Customs Act 1986 is the starting point in which the relevant custom laws can be assessed.

17. Section 92 of that Act sets out the liability to pay custom duties. The definitions at Section 2 of the Act, give the term "duty" the meaning:

> *Any duty leviable under any customs law, Dumping and Countervailing Duties Act and includes Value Added Tax leviable under section 14 of the Value Added Tax Decree 1991*

18. Section 92 states:

> *..that the import duty is payable on all goods imported into Fiji at the rates and in the circumstances specified in the Customs Tariff Act 1986.*

19. Section 3 of the Customs Tariff Act 1996, sets out the three distinct classes of duties that are imposed by virtue of the customs regime as follows:

> *Except as otherwise provided by this Act, there shall be raised, levied and collected—*
>
> *(a) on imported good:-*
> *(i)fiscal duty;*
> *(ii) import excise duty; and*
> *(iii) value added tax; and*
>
> *(b) on exported goods produced or manufactured in Fiji—export duty, at the rates specified in Schedule 2.*

20. Part 2 of the Customs Tariff Act 1986, sets out the basis in which the valuation of the imported goods for value added tax purposes is determined.

21. Schedule 2 of the Act[4] sets out at Item 1212.99.10, the following duties to be imposed on Yaqona or Kava. These rates are currently set at:-

Import Duty

Fiscal	Excise	VAT
5%[5]	Free	15%[6]

Export Duty

Free

22. But it is the Value Added Tax Decree 1991, that provides the context for how such value added tax is to be determined.

Value Added Tax Decree 1991

23. The language of that Decree makes it clear that an input or output tax, can only be imposed on a registered person.

24. So much can be ascertained by the way in which the terms input tax and output tax are defined at Section 2 of the Decree, where the meaning given is predicated by the fact that it relates to a registered person.

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4 See Customs Tariff Act (Amendment) Law 2007 and as thereafter amended.

5 The fiscal duty rate was previously set at 3%.

6 Was 10% up to 1/1/2003; (See Value Added Tax Decree 1991; Decree No 45 of 1991) 12.5% up to 1 January 2011 See Value Added Tax Decree (Budget Amendment) Act No 34 of 2002; and 15% thereafter. [See Customs Tariff (Budget Amendment)(No3) Decree 2010; Decree No 67 of 2010]

25. For example,

"input tax" in relation to a registered person means.....

26. Put simply, there is no definition of what is an input tax for an unregistered person.

27. The only logical assumption drawn from such drafting is that the purpose of the law was not to impose an input tax on unregistered persons.

What Was the Status of the Division of Company G at the Relevant Time?

28. As mentioned earlier, Section 27 of the Value Added Tax Decree 1991 sets out the basis by which a registered person can make application to have a Branch or Division treated as a separate person (a produce supplier) for the purposes of the Decree.

29. The effect of that separation is that the taxable activities of those two entities thereafter are to be treated separately.[7]

30. So much can be derived from the language of Section 27(2) of the Decree.

31. So at what point does an entity that applies to be a branch or division, ultimately become one?

32. The language of the legislation and the absence of any regulation that sets out the procedural requirements, means that an intention consistent with the purpose of the legislation needs to be found.

33. Section 27(1) only stipulates that a registered person may apply in writing to the Commissioner for that Branch or Division to be treated as a separate person.

[7] See Section 27(2) of the Decree.

34. Section 27(2) implies, that upon receipt (and presumably should the details of the form be sufficiently filled out) that the Commissioner may treat that Branch or Division as a separate person.

35. It ordinary circumstances, it would be fair to assume that the making of an application would necessitate some written confirmation that it had been accepted.[8]

36. Though acceptance is also well known to be formed in cases, by the conduct of the parties. The treatment of the Division of Company G as a produce supplier and the preparedness of the Authority to accept it as such, would be sufficient. This would not be an ideal administrative practice, but it would be perfectly lawful.

37. It is an agreed fact between the parties that:

> *the Applicant has always maintained separate divisions within its operations, one being the processed kava and the second being the unprocessed kava. In doing so the applicant maintained separate recordings of sales, invoices purchases and separate bank accounts for the two divisions.*[9]

38. It is noted that the Authority has unfortunately changed its position in relation to the status of the unprocessed kava Division. In its Objection Decision letter dated 2 July 2005, it is clear that the Authority had regarded Company G as one homogenous registered entity, on the basis that Commissioner had not approved the producer supplier application. Now in its submissions and for whatever reason, it says that this Division should be treated as a produce supplier.

39. In *Punjas Ltd v Commissioner of Inland Revenue*[10] , the Court of Appeal confirmed the general authority that the doctrine of estoppel does not operate to preclude

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8 Though the legislation is clearly silent in this regard.

9 See Outline of the Applicants Submissions at paragraph 5.

10 [2006]FJCA 66

the Commissioner from pursuing his (or her) statutory duty to assess tax in accordance with law.

40. So if it is the case that the unprocessed arm of Company G was a produce supplier, what is the significance of that status to whether or not, it is amendable to taxation in accordance with either Sections 14 or 15 of the Decree.

Is the Intention of the Decree that Produce Suppliers Are Charged Input or Output Tax ?

41. To determine that question, one really needs to look at the manner in which the Decree is set out.

42. Part VII – Returns and Payment of Tax, provides sufficient insight in this regard. Here the scheme of how tax is to be paid and calculated is made clear. (See specifically Section 39 of the Decree).

43. The formulas that are relied on, have as their focus the input taxes imposed and the subsequent output taxes that are charged by the registered person.

44. Nowhere within Part VII is there any direct or indirect expression that would suggest that taxation of the produce supplier should occur.

45. Part VII deals only with registered persons. It is clear that Section 22(1) does not seek to include produce suppliers as registered persons. On that basis, the produce supplier is not in my view caught by either Section 14 or 15 of the Decree.

Implications Arising

46. The consequences of all of this, is that Schedule 2 of the Customs Tariff Act 1986 is not intended to apply to produce suppliers.

47. If as Item 1212.99.10 of the Schedule shows, that 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.

48. To summarise, kava is according to Schedule 2, subject to value added taxation. There is no tax imposed on a producer supplier, who imports that crop. Nor is unprocessed or processed kava that is sold by a producer supplier subject to Section 15 output tax, in respect of the supply of those goods.

49. A registered person on the other hand, would be required to pay tax levied under Section 14 of the Decree for imported unprocessed and processed kava and would charge an output tax in accordance with Section 15 of the Decree, in respect of the supply of goods and services made by that person.

50. The implication for Company G out of all of this, is as follows. Company G's separate registered entity could claim input credits and charge value added tax, in relation to the importation and sale of unprocessed and processed kava.

51. On the other hand, the *Grog Taro Other Local Produce* Division of Company G is not eligible to charge input tax in accordance with Section 14 of the Decree, nor is it able to charge an output tax in accordance with Section 15.

Other Issues

52. The Applicant in it submissions is seeking to present alternative arguments in relation to the state of the produce supplier Division. Essentially, what is being submitted is that if the Respondent did not concede that there had been a separate operating entity until 2005, then up and until that time, Company G should be regarded as a homogenous entity capable of claiming and charging value added tax.

53. I do not accept that proposition. Up until 2005, the Applicant's agents consistently argued that the registered person and the produce supplier, were two discrete activities with two discrete books of records.

54. According to the Applicant, the Respondent now wishes to change its position in relation to this point and concede that the produce supplier was acting separately from the time of its application in 1992.

55. The Applicant claims that the Respondent should be estopped from changing its position. For the reasons already alluded to in *Punjas* case, no such authority exists.

56. The Respondent is free to re-assess its legal conclusion of the application of the relevant provisions and their application to Company G.

57. It must nonetheless do so within the timeframe set out within Section 11 of the Tax Administration Decree 2009.

Amendment of Tax Assessment

58. Section 11 of the Decree provides for the following:

> *(1) Subject to this section, the CEO may amend a tax assessment by making such alterations or additions to the assessment as the CEO considers necessary to ensure that a taxpayer is liable for the correct amount of tax payable in respect of the tax period to which the assessment relates.*
>
> *(2) The amendment of a tax assessment under subsection (1) may be made –*
>
> *(a) in the case of fraud, wilful neglect, or serious omission by or on behalf of the taxpayer, at any time; or*
>
> *(b) in any other case, within 6 years of the date the CEO served the notice of assessment on the taxpayer.*
>
> *(3) As soon as practicable after making an amended assessment under this section, the CEO must serve the taxpayer with notice of the amended assessment.*
>
> *(4) Subject to subsection 2(b) if a notice of assessment (referred to as the "original assessment") has been amended under subsection(1),the CEO may further amend the original assessment or an amended assessment within 6 years or as the CEO deems fit after serving the notice of the original or amended assessment on the taxpayer..*
>
> *(5) An amended assessment is treated in all respects as a tax assessment for the purposes of this Decree (other than subsection (1) or (2)) and the tax law under which the original assessment has been made.*
>
> *(6) The making of an amended assessment does not preclude the liability for penalty from arising from the date that tax was due under the original assessment.*

59. The time stipulations for the making of an assessment, are set out within Section 11 (2).

60. In ordinary circumstances, the Chief Executive Officer may amend the Notice of Assessment within six years of the date she or he served the Notice on the taxpayer.

61. Section 11(1) of the Decree provides that in the case of fraud, wilful neglect or serious omission by or on behalf of the taxpayer, the amendment may take place at any time.

62. The case before me does not deal with the case of fraud; there has been no deception at play. Neither in my mind has there been an act of wilful neglect. There is no suggestion here that the taxpayer has deliberately failed to lodge its taxation returns.

Is the action of the taxpayer a serious omission?

63. The word omission can be defined to mean, the act of neglecting to perform an action one has an obligation to do.

64. The inclusion of the word "serious" as part of that expression appears to cast some level of gravity of consequence to that omission.[11] That is, that it is in a category of case that is more than just a simple error or mistake. The term is suggestive of a more substantial and fundamental error that needs to be corrected.

65. The failure to properly account for input and output tax, in the case of a produce supplier or a registered person for the purposes of the Value Added Tax Decree 2009, would fall within that definition.

[11] See syntactical presumption found in latin maxim, noscitur sociis. (The birds of a feather rule).

66. The consequence of that being, that the Chief Executive Officer would be able to disturb the six year limitation period, that would otherwise exist in the case where an assessment may be opened and amended following further review.

Penalties imposed by The Respondent as a Result of Serious Omission

67. The penalties that have been imposed by the Respondent on the taxpayer do appear somewhat harsh.

68. In the Notices of Assessment contained within the Respondents 'Section 83 Documents', it is clear that the tax payer has been charged penalties under the former Sections 76 and 76A of the Value Added Tax Decree 1991.

69. Those provisions have now been repealed with the introduction of the Tax Administration Decree 2009, with Section 53 of the Decree, now appearing to do the work of those former provisions.

70. The former provisions related to notions of "evasion" and "understatement or over claims" in returns.

71. The current provision at Section 53, concerns itself with "false or misleading statement(s)".

72. I am of the impression that both parties have played their part in the events that have transpired and while there is evidence of discussions regarding the way in which obligations and entitlements should be interpreted, there is no evidence before me of any deliberate evasive conduct, nor understatement or overstatement of claim.

73. If anything, given the change of position of the Respondent, the taxpayer could be accused of mistake.

74. For that reason, the penalties imposed appear harsh in the circumstances.

75. Having regard to the above and for the reasons earlier set out, in accordance with Section 86(1) of the Tax Administration Decree 2009, I hereby remit this matter to the Chief Executive Officer and ask that the value added tax calculations relating to both Company G and its Produce Supplier Division, be recalculated and confirmed on that basis.

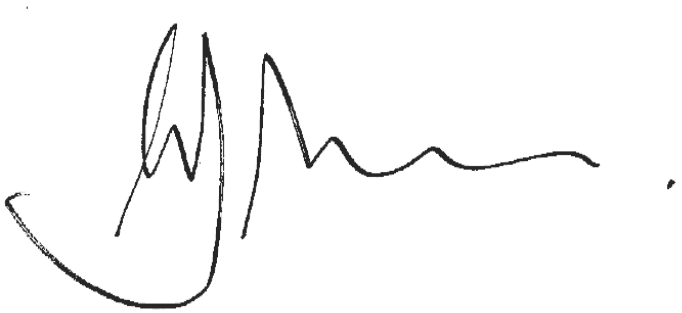
76. As part of the reconsideration by the Chief Executive Officer, I would ask that he also review, whether or not the penalties imposed on Company G, having regard to the relevant facts and circumstances, were consistent with the spirit and intention of the former Sections 76 and 76A of the Value Added Tax Decree 1991.

DECISION OF THE TRIBUNAL

The Tribunal Orders that the Chief Executive Officer:

(i) Review and confirm the calculations of the tax imposed on the taxpayer, in accordance with the terms of this decision; and

(ii) Review and evaluate the penalties imposed under the former Sections 76 and 76A of the Value Added Tax Decree 1991, in light of the relevant facts and circumstances that gave rise to the conduct of the taxpayers.



Mr Andrew J See
Resident Magistrate