

**SC2418**

PAPUA NEW GUINEA  
[IN THE SUPREME COURT OF JUSTICE]

**SCM NO. 02 OF 2023**

BETWEEN:  
**SOUTH SEAS TUNA CORPORATION LIMITED**  
*Appellant*

**AND:**  
**SAM KOIM in his capacity as COMMISSIONER GENERAL,**  
**INTERNAL REVENUE COMMISSION**  
*First Respondent*

**INTERNAL REVENUE COMMISSION OF PAPUA NEW GUINEA**  
*Second Respondent*

**THE INDEPENDENT STATE OF PAPUA NEW GUINEA**  
*Third Respondent*

Waigani: Yagi J, Collier J, Geita JJ  
2023: 28<sup>th</sup> June, 7<sup>th</sup> July

***TAXATION – Judicial Review – Garnishee Notice – Application to appeal the primary Judge’s Decision – s 88 Goods and Services Tax Act 2003 – whether the primary Judge failed to take into account relevant evidence – Credibility of evidence – discretion of the Commissioner General – delegation of powers - Appeal allowed.***

The Appellant appealed the primary Judge’s decision to uphold the Commissioner’s discretionary power to issue a garnishee notice claiming K460,000.00 pursuant to s 88 of the *Goods and Services Tax Act 2003*. On 5 May 2022 the Commissioner issued a garnishee notice to a third party that held the Appellant’s bank accounts, based on an alleged GST debt of K54,078, 233.74. The appellant appealed the decision on 10 grounds, including that it was owed substantial GST input credits which had not been taken into account by the decision-maker prior to the issue of the garnishee notice, and that the primary Judge had not considered the appellant’s evidence to that effect.

**HELD:** The Court found that the primary Judge failed to take into account relevant evidence of the appellant’s witnesses. The appeal was allowed, and the first and second respondent were ordered to pay the appellant’s costs of and

incidental to the appeal and of the proceedings for judicial review in the National Court.

### **Cases Cited:**

#### **Papua New Guinean Cases**

*Air Niugini Limited v Beverly Doiwa* [2000] PNGLR 347

*Bean v. Bean* [1980] PNGLR 307

*Government of Papua New Guinea v. Barker* [1977] PNGLR 386

*JV PNG Investment Constructions Ltd v Samson* [2022] SC2224

*Kakaraya v National Parliament* [2004] SC756

*Lewis v. The State* [1980] PNGLR 219

*Papua New Guinea Law Society v Cooper* [2017] PGSC 10; SC1585

*PNG Power Ltd v Gura* [2014] SC1402

*Ralai v Yama* [2008] SC1029

*South Seas Tuna Corporation Limited – v- Sam Koim as Commissioner General, Internal Revenue Commission & Ors* [2022] PGNC 570

*South Seas Tuna Corporation Ltd v Palaso* [2019] SC1761

#### **Overseas Cases**

*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

*Finance Facilities Pty Ltd v Federal Commissioner of Taxation* [1971] HCA 12; (1971) 127 CLR 106

*Julius v. Lord Bishop of Oxford* (1880) 5 App Cas 214

*Ward v Williams* [1955] HCA 4; (1955) 92 CLR 496

### **Legislation:**

*Goods and Services Tax Act* 2003

*Income Tax Act* 1959

*Internal Revenue Commission Act* 2014

*Stamp Duties Act* 1952

### **Counsel**

*Mr I Molloy and Mr J Kakaraya*, for the Appellant

*Mr S Sinen*, for the First and Second Respondents

## REASONS FOR JUDGMENT

7<sup>th</sup> July, 2023

1 Before the Court is an appeal against the whole Judgment of the National Court of Justice given on 13 December 2022 in proceedings OS (JR) No. 83 of 2022; *South Seas Tuna Corporation Limited – v- Sam Koim as Commissioner General, Internal Revenue Commission & Ors* [2022] PGNC 570 (**primary decision**). In the National Court the appellant sought judicial review of a decision of the first respondent after leave to apply for judicial review was granted on the 10 August 2022.

2 The first respondent had issued a written notice in the form of a Garnishee Notice number 132761349 addressed to the appellant, but served on BSP Financial Group Limited (**BSP**) pursuant to s 88 of the *Goods and Services Tax Act 2003 (GST Act)*, in the sum of K460, 000 for a GST based tax debt.

3 On 13 December 2022 the primary Judge made the following orders:

1. The application for Judicial Review is dismissed.
2. Cost follows the cause and is awarded to the First and Second defendants.
3. Time is abridged to the time of settlement or the Order.
- 4 The appellant claims that the decision of the first respondent to issue a garnishee notice was unlawful and invalid. By Notice of Motion filed on 20 January 2023 the appellant has appealed the primary Judge's decision.

## BACKGROUND FACTS

5 On 29 June 2016 the appellant objected in writing in respect of amended GST assessments dated 27 June 2016 totalling K64,543,072.47.

6 In July 2017, the appellant filed proceedings in OS 382/2016 seeking orders that journal entries inputted into its GST Account by the respondents in January 2016 amounted to three separate assessments of tax.

7 On 23 November 2017 the National Court held that the journal entries inputted into the GST Account of the appellant did not amount to an assessment of tax. The appellant appealed the interlocutory decision of the National Court in the SCA No. 176 of 2017.

8 On 14 February 2019 the Supreme Court affirmed the interlocutory decision of the National Court. It followed that the GST entries inputted into the GST Account of the appellant by the respondents did not amount to three different assessments of tax and that the amended GST assessments issued by the first respondent on 27 June 2016 in the sum of K 64,543,072.47 was valid: *South Seas Tuna Corporation Ltd v Palaso* [2019] SC1761. This total sum of GST assessment against the appellant was for:

- (a) Base GST of K24,646,744.95;
- (b) A penalty of K2,464,577.49; and
- (c) Interest of K37,431,720.03.

9 On 18 April 2019 the respondents informed the appellant that its objections made on 29 June 2016 were invalid. On 28 July 2021 in OS (JR) 108 of 2021 (IECMS), the appellant filed an originating summons in which it sought leave to apply for judicial review pursuant to O 16 R 3 of the National Court Rules of (inter alia) “the decisions comprised by the ongoing failure and refusal by the First Defendant to determine the Plaintiff’s objections made on 29 June 2016”. On 19 October 2022 leave was refused.

10 On 16<sup>th</sup> February 2022, the first respondent exercised its powers under s 88(2) of the *Goods and Services Tax Act 2003 (GST Act)* and issued a garnishee notice for the amount of K54,078, 233.74 for the outstanding GST tax debt for the period from January 2004 to December 2013.

11 The notice was as follows:



February 16, 2022

SOUTH SEAS TUNA CORPORATION LIMITED
C/O: ALAIN NACUA
C/Sic Enterprise Limited
P.O. Box 209
Konedobu 125, National Capital District
Papua New Guinea

Internal Revenue Commission - Debt Management Division - GARNISHEE NOTICE
TIN: 500027302
TOTAL GARNISHEE VALUE: K54,078,233.74
GST ACCOUNT ONLY: BASE TAX: K14,101,936.22, PENALTY: K39,896,297.52
ACTION OFFICER: TREVOR LOVAE
DIRECT LINE: 322 6670
EMAIL: LOVAET@IRC.GOV.PG (ALL IN LOWER CASE)

Notice pursuant to Section 272 of the Income Tax Act 1959 as amended and/or Section 88 of the Goods & Services Tax Act 2003 as amended and/or Section 8 of the Stamp Duties Act Chapter 117.
Take notice that in exercise of the powers conferred to me by legislation referred to above, I HEREBY REQUIRE YOU, being a person:
a) by whom any money is due or accruing or may become due to the taxpayer named above; or
b) who holds or may subsequently hold money for or on account of the taxpayer named above; or
c) who holds or may subsequently hold money on account of some other person for payment to the taxpayer named above;
or having authority from some other person to pay money to the taxpayer named above; to pay to the Internal Revenue Commission forthwith, or at such time as an amount comes under your control, so much of the money as is sufficient to pay the amount specified above as the tax due by the taxpayer, or the whole of the money when it is equal to or less than that amount.
The specified amount and tax types are mentioned above, being an amount(s) of tax owing to the Commissioner General.
AND TAKE FURTHER NOTICE that if you fail to comply with this notice, YOU will be liable to pay
a) the amounts specified in this notice; or
b) the amount due or held on behalf of the defaulter, whichever is the lesser amount and any amount collected shall be applied against the tax owing by the taxpayer named above.
In addition to any amount you become liable to pay as a result of failing to comply with this notice, you will be guilty of an offence punishable upon conviction by a fine of not less than:
a) K500.00 and not more than K5,000.00 under Section 272 of the Income Tax Act 1959 as amended or Section 88 Goods and Services Tax 2003 as amended; and
b) K650.00 and not more than K6,500.00 under Section 8 of the Stamp Duties Act Chapter 117

Yours faithfully
[Signature]
As Delegated Authority
For Sam Koin
Commissioner General
Internal Revenue Commission

[Signature]
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13 THE FIRST NOTICE
was withdrawn on 5 May 2022 by a letter from the first respondent to BSP,
materially in the following terms:

REVOCATION OF GARNISHEE NOTICE

...
You are advised that our action taken under Section 272 of the
Income Tax Act 1959 as amended, and/or Section 88 of the Goods
and Services Tax Act 2003 as amended, and/or Section 8 of the
Stamp Duties Act Chapter 117, is now withdrawn from immediate
effect.

SOUTH SEAS TUNA CORPORATION LIMITED
TIN : 5000027302
DOC NO : 129739366 & 129738425
GARNISHEE DEBT VALUE : K54,078,233.74
GARNISHEE DATE : 16TH FEBRUARY 2022
REASON : REVOKE CURRENT GARNISHEE AND ISSUE

NEW GARNISHEE WITH THE CONFIRMED BALANCE ON THE BANK STATEMENT SUPPLIED BY BSP FOR IMMEDIATE REMITTANCE TO IRC  
ACTION OFFICER : TREVOR LOVAE

14 On or about 5 May 2022, the first respondent issued and, or about the 6 May 2022 served on BSP, a second garnishee notice addressed to the appellant, and numbered 132571349 in a debt amount of K460,000.00 for alleged GST Base Tax debt and default (**second garnishee notice**):

  
Document No. 132571349

May 05, 2022

**SOUTH SEAS TUNA CORPORATION LIMITED**  
C/O ALAN HADJA  
C/Be Enterprise Limited  
P.O. Box 209  
Konedobu - Waterfront 1125, National Capital District  
Papua New Guinea

**Internal Revenue Commission - Debt Management Division - GARNISHEE NOTICE**  
TIN: 500027302  
TOTAL GARNISHEE VALUE: K460,000.00  
GST ACCOUNT: BASE TAX ONLY: K460,000.00  
ACTION OFFICER: TREVOR LOVAE  
DIRECT LINE: 922 6670  
EMAIL: LOVAET@IRC.GOV.PG (ALL IN LOWER CASE)

Notices pursuant to Section 272 of the Income Tax Act 1959 as amended and/or Section 88 of the Goods & Services Tax Act 2003 as amended and/or Section 8 of the Stamp Duties Act Chapter 117.

Take notice that in exercise of the powers conferred to me by legislation referred to above, I HEREBY REQUIRE YOU, being a person:

- a) by whom any money is due or accruing or may become due to the taxpayer named above; or
- b) who holds or may subsequently hold money for or on account of the taxpayer named above; or
- c) who holds or may subsequently hold money on account of some other person for payment to the taxpayer named above;

or having authority from some other person to pay money to the taxpayer named above; to pay to the Internal Revenue Commission forthwith, or at such time as an amount comes under your control, so much of the money as is sufficient to pay the amount specified above as the tax due by the taxpayer, or the whole of the money when it is equal to or less than that amount.

The specified amount and tax types are mentioned above, being an amount(s) of tax owing to the Commissioner General.

AND TAKE FURTHER NOTICE that if you fail to comply with this notice, YOU will be liable to pay

- a) the amounts specified in this notice; or
- b) the amount due or held on behalf of the defaulter, whichever is the lesser amount and any amount collected shall be applied against the tax owing by the taxpayer named above.

In addition to any amount you become liable to pay as a result of failing to comply with this notice, you will be guilty of an offence punishable upon conviction by a fine of not less than:

- a) K500.00 and not more than K5,000.00 under Section 272 of the Income Tax Act 1959 as amended or Section 88 Goods and Services Tax 2003 as amended; and
- b) K650.00 and not more than K6,500.00 under Section 8 of the Stamp Duties Act Chapter 117

Yours faithfully  
  
As Delegated Authority  
For Sam Joins  
Commissioner General  
Internal Revenue Commission

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K460,000.00 held in the appellant's bank account to the second respondent, reducing the appellant's bank account balance with BSP to nil.

17 On 4 August 2022 in OS (JR) No. 83 of 2022 (IECMS) the appellant commenced proceedings against the respondents in the National Court seeking judicial review of the first respondent's decision of 5 May 2022.

18 Notwithstanding that two garnishee notices were issued it is only the second garnishee notice which is in question in this appeal. For convenience we shall now simply refer to that document as “**the garnishee notice**”.

## **REASONS FOR DECISION OF THE FIRST RESPONDENT**

19 No formal reasons for decision of the first respondent were provided at the time of the issue of the garnishee notice. Such reasons as exist appear to be in the affidavit of Mr Trevor Lovae dated 17 October 2022. Relevantly Mr Lovae deposed:

1. I am a Senio [sic] Firmer Recovery Officer attached within the Debt Lodgement & Enforcement Division of Internal Revenue Commission, and thus depose to this my affidavit.

2. Except where it is stated to be on belief or information, I have personal knowledge of the facts deposed to herein.

3. I am in carriage of the Plaintiff's tax debt recovery file. Upon my perusal and reconciliation of its outstanding GST Tax Account, I confirmed that the Plaintiff has K54,078,233.74 unpaid GST for tax periods January 2004-December 2013.

*Annexed to and marked “A” is a true copy of the Reconciliation Sheet and SOA.*

4. On 16th February, 2022, I issued Garnishee Notice Document Number 129739366 and 129738425 to BSP Financial Group Limited for South Seas Tuna Corporation Limited tax debt value of K54,078,233.74 for unpaid GST.

*Annexed to and marked “B” is a true copy of the IRC Garnishee Notice*

5. On 1<sup>st</sup> April, 2022, Asher Wafi, Senior Legal Officer of BSP Financial Group Limited advised through email that they would require a new garnishee notice for the exact amount held for it to remit such funds.

*Annexed to and marked “C” is a true copy of email threads*

6. Given BSP Financial Group Limited advice, on 5th May, 2022, I issued Revocation of Garnishee Notice Document Number 132668528 to BSP Financial Group Limited for South Seas Tuna Corporation Ltd for the garnishee tax debt value of K54,078,233.74 for unpaid GST.

*Annexed to and marked “D” is a true copy of the Revocation of Garnishee Notice*

7. On 5th May 2022, I also issued Garnishee Notice Document

Number 132672222 and 132671349 to BSP Financial Group Limited for South Seas Tuna Corporation Ltd for the garnishee tax debt value of K460,000.00 for unpaid GST.

*Annexed and marked "E" is a true copy of the Garnishee Notice*

8. On 30<sup>th</sup> May 2022, the garnishee amount of K460, 000.00 was paid to IRC.

*Annexed and marked "F" is a true copy of the BSP Remittance Advice and IRC Payment Receipt*

9. On 14<sup>th</sup> October 2022, I caused a search into the GST Tax Account of the Plaintiff using our tax computer system called SIGTAS and confirmed that it has outstanding GST of K31,336,222.16 that still remains unpaid.

*Annexed and marked "G" is a true copy of the Plaintiff's GST Statement of Account*

10. The above statements are true to the best of my knowledge and belief.

## **DECISION OF THE PRIMARY JUDGE**

20 The trial in the National Court was conducted by affidavit. Deponents were not subjected to cross-examination.

21 Before the primary Judge the appellant relied on five grounds of judicial review, summarised by his Honour as:

- (1) Decision maker relied on irrelevant or incorrect or assumed facts;
- (2) Decision maker failed to consider relevant facts.
- (3) Unreasonable under the Wednesbury principle of unreasonableness.
- (4) Ultra Vires/Other errors of law.
- (5) Improper Purpose.

22 In respect of the first ground, the primary Judge identified that the Commissioner's power to make an assessment was very wide. His Honour referred to s 67 of the GST Act which provides:

### ***ASSESSMENT OF TAX.***

*(1) Subject to Section 72, the Commissioner may from time to time, from returns furnished under this Act and from any other information in the Commissioner's possession, make assessments*



*of the amount that, in the Commissioner's judgment, is the tax payable under this Act by –*

- (a) a person required to furnish a return under this Act; or*
- (b) a person, not being a registered person, who supplies goods and services and represents that tax is charged on that supply; or*
- (c) a person whose registration has, under Section 44(6) been cancelled by the Commissioner, with effect from the date on which the person was registered under this Act; or*
- (d) in the case of an assessment in relation to goods deemed to be supplied by a person under Section 53 –*
  - (i) the person selling the goods; or*
  - (ii) the person whose goods are sold, where any written statement supplied by that person under Section 53(a) to the person selling the goods is in the judgement of the Commissioner incorrect, and that person shall be liable to pay the tax so assessed except in so far as the person establishes an objection that the assessment is excessive or that tax is not payable.*

*(2) Where –*

*(a) a person is not satisfied with –*

- (i) a return furnished by that person under this Act; or*
  - (ii) a return furnished under Section 54 by another person in relation to goods sold in or towards satisfaction of a debt owed by the person,*
- and requests the Commissioner, in writing, to make any addition or alteration to that return; and*
- (b) the Commissioner has not already made an assessment of the amount of tax payable in respect of the period to which the return relates,*

*the Commissioner shall make an assessment of the amount that, in the Commissioner's judgment, is the tax payable under this Act, and the person so assessed shall be liable to pay the tax so assessed except in so far as the person establishes on objection that the assessment is excessive or that tax is not payable.*

*(3) Subject to Section 72, the Commissioner may from time to time and at any time make all such alterations in or additions to an assessment made under this section as the Commissioner thinks necessary to ensure the correctness thereof, notwithstanding that tax already assessed may have been paid.*

*(4) Where an assessment or amended assessment is made under this section, the Commissioner shall –*

- (a) cause notice of the assessment or amended assessment to be given to the person liable to pay the tax; and*
- (b) in the case of an assessment amended assessment in relation*

*to goods deemed to be supplied by a person under Section 53, send a copy of such notice to whichever of –*

*(i) the person whose goods were sold; or*

*(ii) the person selling the goods,  
is not the person assessed.*

*(5) In a case in which an assessment is not made until after the due date of the tax payable, or is increased after the due date, and the Commissioner is satisfied that the person has not been guilty of neglect or default in making due and complete returns for the purposes of that tax, the Commissioner shall fix a new due date, being one month after the date of the assessment, for the payment of the tax payable or, as the case may be, of the increase in the tax payable, and the date so fixed is deemed to be the due date of the tax or increase in tax for the purposes of this Act.*

*(6) Omission to give any notice under Subsection (4) does not invalidate the assessment or in any manner affect the operation thereof.*

23 The primary Judge noted that the appellant made assertions including:

- the finding of a GST Base Tax debt owed by the appellant capable of collection by garnishee was not true;
- the decision-maker's own GST records and GST assessments of the appellant's tax affairs showed that no debt existed;
- the appellant was not indebted in the sum of K460,000.00 for GST Base Tax or in any sum;
- at the date of the first respondent's decision, by its own records, the second respondent was indebted to the appellant in a sum of K13,375,405.84 for GST Base Tax which was then immediately due to the appellant as refundable input credits; and a sum of K29,240,669.61 on all tax accounts combined which was then immediately due to the appellant.

24 The primary Judge observed that the appellant had not referred the Court to any independent *evidence* to support these assertions, and merely relied on evidence of the respondents. The primary Judge continued:

*53. ...For example, in the affidavit of one Michael McCulley, the plaintiff witness, he deposes and relies on the records of the second defendant. The evidence annexure marked as "MMC8" shows that as at 30 May 2022 the total GST owed to the defendants was K 29,642,846.16 (K31,336,222.16 incl. tax), after payment of K460,000.00 pursuant to Garnishee Notice of 5 May 2022. Also*

*in the same Michael McCulley affidavit is a copy of an affidavit by Dollarcruise Augustine filed on the 21 June 2022 (in relation to OS (JR) No.63 of 2022, deposing that “The sum of K 31,336 million in Goods and Services Tax still remains unpaid and owing by the plaintiff”.*

*54. Relying on the same defendants’ evidence the plaintiff asserts as alluded to above for example that at or about the date of the Decision, by its own records, the second defendant was indebted to the plaintiff in a sum of K13,375,405.84 for GST Base Tax which was then immediately due to the plaintiff as refundable input credits. In my view this is a misrepresentation of the content, record and information, which is the evidence of the defendants to favour the plaintiff. The evidence by the defendants is for one purpose and that is to use as facts and record to justify the decision made and is admissible, whereas the plaintiff attempt to use the same evidence must be treated with caution as it is inadmissible as a matter of discretion, see R v Georgiev (2001) 119 A Crim Rev 363 at [54].*

25 The primary Judge noted that the garnishee notice was issued to BSP pursuant to s88(2)(b) of the GST Act. His Honour observed that the intention of ss 88(2)(b) and 67 of the GST Act was clear, and that there was a presumption that the information and facts relied on by the first and second respondent for assessment of the appellants’ tax records were true and correct factual records. The primary Judge concluded in respect of ground 1:

*56. There is no independent evidence by the plaintiff to dispel the presumption that the original reconciliation to reduce assess amount of K64,543,072.47 on the 27 June 2016 to K54,078,233.74 on the 16 February 2022 was correct. What is in evidence is that the plaintiff objected to the assessment and the defendants undertook further reconciliation resulting in the issue of the subject Garnishee Notice for outstanding GST in the amount of K460,000.00 due and owing to the State on the 5 May 2022 based on facts and information kept at the Taxation Office.*

*57. In my view the Decision Maker properly exercised his statutory discretion to issue the Garnishee Notice of 5 May 2022 in respect of an existing debt by the plaintiff as a “registered person” and was in default or may become a defaulter after properly assessing all relevant information which they are empowered to do under Section 67 of the GST Act, and in the exercise of further powers pursuant to Section 272 of the Taxation*

*Act 1959 and Section 88 of Goods and Services Tax Act 2003.*

*58. In the end I find that the information on the account about the outstanding GST tax in the GST Statement of Account are not irrelevant facts to consider prior to the issue of the Garnishee Notice...*

26 In relation to ground 2 the appellant listed what it considered to be the relevant facts not considered nor attributed any or proper weight by the first and second respondents prior to the issue of the garnishee notice. His Honour continued:

*59. ...The Commissioner is empowered primarily by Section 88 of the GST Act. The GST Act makes no specific provisions on what relevant facts are to be considered prior to issuing of the Garnishee Notice or to be followed or any set criteria except as provided under the GST Act.*

27 His Honour considered evidence of Mr William Jackson, the tax agent for the appellant, who gave evidence that the respondents GST Account records for the appellant showed no GST Base Tax debt owed by the appellant, but rather that the plaintiff maintained a credit balance of K22, 152, 266.17 GST Base Tax.

28 His Honour said:

*62. ...The date of that GST Account entry was clearly the 1 April 2020 which is 24 months earlier. It is not an accurate and reliable evidence and goes to the credibility of the plaintiff witness.*

29 His Honour continued:

*63. The affidavit of Trevor Lovai filed on the 17 October 2022, for the defendants in which he annexed a copy of the GST Statement of Account, Annexure "G" showing that as of 30 May 2022 the amount owed by the plaintiff in GST was K29,642, 846.16 (K31,336,222.16 incl. tax) after payment of Garnishee Payment (GST Base Tax) of K460,000.00 must be accepted as the accurate position of GST owed by the plaintiff. Moreover, the entry as at the 30 May 2022 shows outstanding GST owing to the State in the amount of K31, 333, 222.16. This compares favorably with the evidence annexed to Michael McCulley's affidavit referred to earlier, the copy of an affidavit by Dollarcruise Augustine filed on the 21 June 2022 deposing that "The sum of K 31,336 million in Goods and Services Tax still remains unpaid*

*and owing by the plaintiff.”*

*64. In the absence of other credible evidence, I must accept the GST Statement of Account as the accurate information, statistics, and the facts were the relevant facts considered by the defendants prior to the issuing of the Garnishee Notice. The remaining GST debt of the plaintiff would be at least K 31,336 million.*

*65. The defendants have not failed to consider relevant issues and facts. What is a relevant fact is subjective to the decision maker at the time of the decision. In my view, the first and second defendants considered all relevant facts, information and the record of the plaintiff kept at the tax office before issuing its garnishee notice of 16 February 2022 and of 5 May 2022. There are no other relevant information and facts and since the plaintiff had failed to furnish to the defendants when they requested source documents of suppliers listing to verify input tax credits claimed in its GST Returns.*

30 In respect of ground 3 his Honour noted the principles arising from the English case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. His Honour referred to the decision in *Air Niugini Limited v Beverly Doiwa* (supra) where the Court described Wednesbury unreasonableness as:

*...the determination arrived at by the tribunal cannot be said to be so unreasonable or outrages that it defies logic or accepted moral standards that no sensible person who applied his mind to the same issues could not have arrived at.*

31 His Honour found that the first and second respondents acted fairly and reasonably at all material times in exercising the powers under s74 and s 107 (3) of the GST Act.

32 In respect of ground 4 his Honour noted that there was no dispute that the first respondent issued the garnishee notice through delegated authority under s 88 (2) of the GST Act. His Honour continued:

*74. To be able to sustain the Ultra Vires test it must be established that a public authority purports to assume jurisdiction and makes a decision when in fact he lacks it. In simple terms the public body acts beyond the limits of or has no power.*

33 His Honour found that the first respondent had acted within the ambit of his power, continuing:

77. *In my view the decision maker did not have to exercise any discretion to issue a Garnishee Notice to the defaulting taxpayer under Section 88(2) (a). He was compelled by the provision of the GST Act and the Income Tax act to issue the garnishee notice. It would have been a dereliction of duty given under the GST Act and the Income Tax Act otherwise. The garnishee notice was properly given to the BSP Financial Group Limited (BSP) as permitted by Section 88 (2) as being the party holding or may subsequently hold money for or on account of a defaulter.*

78. *I have noted that the defendants did not serve a copy of the Garnishee Notice on the plaintiff as required by Section 88 and/or 73(2) of the GST Act. The plaintiff became aware of it in early July 2022 when they were informed of the revocation of the Garnishee Notice of 18 February 2022 for K 54, 078, 233.74 and replaced by Garnishee Notice 132671349 for K 460,000.00. It is in evidence that the actual transfer of funds from BSP was made on the 30 May 2022.*

79. *In my view, the plaintiff is not materially disadvantaged and prejudiced. The new assessed amount is less for which the Garnishee Notice was issued, and amount of GST actually settled as a result thereof. The plaintiff still has about K8 million kina as unverified GST tax credits, meaning not genuine tax credits and existing a GST tax debt due and owing to the State.*

80. *The 1-month delay had not affected access to the statutory scheme of review and/or appeal prescribed by the GST Act. In my view no further, legal consequence can flow from the lack of service of the notice to the plaintiff and the fact that the plaintiff is able to file this proceeding is a testimony that the legal options available to the plaintiff have not lapsed.*

34 In respect of ground 5 the primary Judge found that there was no basis for finding improper purpose motivating the issue of the garnishee notice by the first respondent.

## **APPEAL**

35 The grounds of appeal on which the appellant rely are as follows:

1. The National Court erred in law or mixed fact and law in that it failed to find that the First and/or Second Respondents in making the decision under review on or about 5th May 2022 to issue a Garnishee Notice failed to take into account relevant facts

or circumstances, namely that no debt existed as cited in the Garnishee Notice and no default could or did exist as required under s 88 of the Goods and Services Act 2003 (as amended) ("GST Act").

2. The National Court erred in law or mixed fact and law in that by reason of the matters stated in the preceding ground there was no factual or legal basis for the decision to issue the Garnishee Notice and consequently the said decision was *ultra vires* the GST Act.

3. The National Court erred in law or mixed fact and law in that the First and/or Second Respondents in making the decision to issue the Garnishee Notice relied upon or were influenced by irrelevant considerations namely a false understanding that the Appellant was indebted as contained in the Garnishee Notice.

4. The National Court erred in law or mixed fact and law in so far as it found that there was an evidentiary or other onus on the Appellant to refer the Court to independent affidavit evidence to establish that the Appellant was not indebted as alleged in the Garnishee Notice (or at all) when such evidence appeared sufficiently from the First and Second Respondents' own records.

5. The National Court erred in law or mixed fact and law in so far as it found that the records of the First and Second Respondents was admissible evidence for the purpose of justifying the Respondents' decision, whereas the Appellant's "attempt to use the same evidence must be treated with caution as it is inadmissible as a matter of discretion, see *R v Georgiev* (2001) 119 A Crim Rev 363 at [54]".

6. The National Court erred in law or mixed fact and law in so as it found there was a presumption, whether contained in the GST Act or at all, that the information within the First and Second Respondents' records relied on for an assessment was true and correct, and furthermore in making that finding the Court mistook the issue which was not whether an assessment was based on accurate information, but whether according to the evidence the Appellant was indebted as alleged so as to justify the Garnishee Notice.

7. The National Court erred in law or mixed fact and law in finding that the relevant facts for the purpose of the decision under review "are those the decision maker considers as relevant in so far as sufficient to enable him to make the decision", and elsewhere "what [is] a relevant fact is subjective to the decision maker at the time of the decision", and thereby the National Court ignored or did not appreciate the judicial review function of the

Court includes reviewing decisions of public officers or entities on the grounds that they took into account irrelevant considerations or failed to take into account relevant considerations as referred to in Order 16 Rule 13 of the National Court Rules.

8. The National Court erred in law or mixed fact and law in that by reason of the matters referred to above, in particular, the failure of the First and/or Second Respondent to give effect to the evidence that the Appellant was not indebted as alleged in the Garnishee Notice or at all, the decision under review was *Wednesbury* unreasonable.

9. The National Court erred in law or mixed fact and law in so far as it held that the First and/or Second Respondents were compelled under the GST Act and/or the Income Tax Act to issue the Garnishee Notice, instead of recognising that the power is discretionary, and must be exercised intra vires the legislation and on proper principles having regard to relevant facts and circumstances.

10. The National Court erred in law or mixed fact and law in that on one or more of the above ground the First and/or Second Defendant's decision under review was ultra vires and consequently is null and void and of no effect.

36 The appellant is seeking the following orders:

1. The appeal be allowed.
2. The orders of the National Court made in proceedings OS (JR) No 83 of 2022 on 13 December 2022 be quashed.
3. In lieu of the said orders the Appellant's application for judicial review including the orders sought in the Appellant's Notice of Motion in the National Court filed on 22nd August 2022 under Order 16 Rule 5(1) of the National Court Rules be granted.
4. The First and Second Respondent pay the Appellant's costs of and incidental to the appeal and of the proceedings for judicial review in the National Court including any reserved costs.
5. Such further or other orders as the Court considers appropriate

## **SUBMISSIONS OF THE PARTIES**



37 Submissions were filed in the appeal by the appellant and by the first and second respondents.

38 In summary, the appellant submitted as follows:

- The apparent rejection of the appellant's evidence because there was no totally independent witness was misconceived.
- There was no obligation on the appellant to call an independent witness to provide this evidence, and Mr Jackson who provided evidence was a registered tax agent.
- A misrepresentation of the evidence of the respondents to favour the appellant should have been explained. The witnesses were not cross-examined to answer the accusations of misrepresentation.
- The evidence used by the appellant was not inadmissible merely because the witnesses used the same facts information from the respondent's evidence. Additionally, there was no objection to the evidence.
- It is not apparent how the *Air Niugini* case was relevant.
- The primary Judge should have upheld the application for judicial review on the basis that the decision-maker was mistaken concerning whether the appellant was a "defaulter".
- The primary Judge was plainly wrong to find that whether a fact was relevant was to be determined subjectively by the decision-maker at the time of the decision.
- Judicial review is available where the decision-maker has reached a decision which is wrong as to an objective question of fact.
- The primary Judge's reference to the decision of the National Court in proceeding OS(JR) No. 108/2021 was misconceived, as that was an application for leave to review the decision of the garnishee notice in February.
- There was no evidence to show how annexure G in the affidavit of Mr Lovae was prepared, or who prepared it and whether anyone checked its accuracy, such that the Court should accept the credibility of the GST Statement of account.
- The point is not whether issuing a garnishee notice is a normal function under tax legislation. It was arbitrary and unwarranted in this case.
- There must be an existence of a fact to trigger a public authority's proper function. The absence of such a fact means that authority was acting without power.

- It is not necessary to characterise an absence of relevant facts as going to the jurisdiction in order to succeed in judicial review.
- The primary Judge was wrong to decide that the Commissioner was compelled to issue a garnishee notice, as s 88(2) of the GST Act states “the Commissioner may at any time...”. Accordingly, s 88 (2) contemplates the exercise of a discretionary power when relevant criteria exist.

39 In summary, the first and second respondent submitted as follows:

- Mr Lovae deposed that at all material times, there was an outstanding GST tax liability in excess of K54 million prior to the issuing of the garnishee notice.
- This existence of the tax liability enlivened the power of the first respondent under s 88 of the GST Act to issue the garnishee notice.
- There was no requirement anywhere in the law for a garnishee notice to show the amount of the tax liability.
- Where the appellant alleges unreasonableness or harsh and oppressive conduct by the first and second respondent, the onus is on the appellant to substantiate its claim with appropriate evidence.
- The evidence in the National Court identified that the first and second respondent conducted themselves within the ambit of the law.
- The respondents have only remitted K 460,000.00 from the appellant, significantly less than the outstanding debt.
- The appellant did not advance any clear evidence to show harsh and oppressive conduct or unreasonableness on the part of the first respondent.
- All the grounds of appeal in this proceeding are misconceived and without merit

40 The orders sought by the first and second respondent are as follows:

- 1.1 The appeal be dismissed in entirety;
- 1.2 The orders of the Primary Judge in proceeding OS (Comm) No. 83 of 2022 dated 13 December 2022 be upheld;
- 1.3 The Appellant to pay the First and Second Respondents’ costs of and incidental to this appeal;
- 1.4 Any other orders this Honourable Court deems appropriate.

## CONSIDERATION

41 Section 88 of the GST Act provides:

*(1) For the purposes of this section –*

*“defaulter” means a registered person who has made default in the payment to the Commissioner of any tax payable by the registered person under this Act;*

*“person” includes a bank, a company, a partnership, the Government of the Independent State of Papua New Guinea and any public authority constituted by or under a law of Papua New Guinea;*

*“tax” means any tax or additional tax or further additional tax payable by a registered person under this Act and includes any fines and costs imposed upon any person under any provision of this Act.*

*(2) The Commissioner may at any time, or from time to time, by notice in writing (a copy of which shall be forwarded to the defaulter at his last place of address known to the Commissioner), require –*

*(a) a person by whom any money is due or accruing or may become due to a defaulter; or*

*(b) a person who holds or may subsequently hold money for or on account of a defaulter; or*

*(c) a person who holds or may subsequently hold money on account of some other person for payment to a defaulter; or*

*(d) a person having authority from some other person to pay money to a defaulter,*

*to pay to the Commissioner, either forthwith upon the money becoming due or being held or at or within a time specified in the notice (not being a time before the money becomes due or is held)*

*–*

*(e) so much of the money as is sufficient to pay the amount of tax due by the default, or the whole of the money when it is equal to or less than that amount; or*

*(f) such amount as is specified in the notice out of each of any payments that the person so notified becomes liable from time to time to make to the defaulter until the amount due by the defaulter in respect of any tax is satisfied,*

*and may at any time, or from time to time, amend or revoke any such notice, or extend the time for making any payment under the*

*notice.*

*(3) A person who fails to comply with a notice under this section is liable to pay –*

*(a) the amounts specified in the notice; or*

*(b) the amount due or held on behalf of the defaulter,*

*whichever is the lesser amount and any amount collected under this subsection shall be applied against the tax owing by the defaulter.*

*(4) In addition to any amount he is liable to pay under Subsection (3), a person who fails to comply with a notice under this section is guilty of an offence.*

*Penalty: A fine not less than K500.00 and not exceeding K5,000.00.*

*(5) A person making a payment under this section is deemed to have been acting under the authority of the defaulter and of all other persons concerned and is, by force of this subsection, indemnified in respect of that payment.*

*(6) Where the Commissioner receives a payment in respect of the amount due by the defaulter before payment is made by the person so notified, the Commissioner shall forthwith give notice of receipt of that payment to the person.*

*(7) A notice to be given under this section to the Government may be served upon such person as is prescribed and a notice so served is deemed to have been served upon the Government.*

42 We note as a threshold issue that s 88 of the GST Act specifically states that it is ***the Commissioner***, and no other, who may send a notice in writing in terms contemplated by s 88 to a third party. There was no evidence whatsoever of the involvement of the Commissioner himself in the decision to send the notice to BSP – rather the unequivocal evidence of Mr Lovae was that ***he*** had carriage of the appellant's tax debt recovery file in the Internal Revenue Commission, and that ***he*** issued both garnishee notices.

43 When the Bench raised this issue with Counsel during the hearing it was clear that neither party had taken issue with the existence, or regularity, of a delegation being made for this purpose before the primary Judge. Certainly it was not a ground of appeal. Importantly, s 22 (1) of the *Internal Revenue Commission Act 2014* specifically provides that the Commissioner General may, ***by written instrument***, delegate to the Commissioners ***or any other staff of the Internal Revenue Commission*** any of his powers or functions under this Act, except this power of delegation. Mr Sinen for the first and second respondents submitted that Mr Lovae had a delegation from the first respondent supporting the issue of the notices. However this submission was not supported by evidence of any kind.

44 We are not called on at this stage to make any determination concerning the existence, or regularity of a delegation to Mr Lovae by the Commissioner, however we note that this could quite easily have been an issue in dispute in this case.

45 Turning to the grounds of appeal, we note that a number of grounds can be considered together, in accordance with the categories identified by the primary Judge in his consideration at first instance. In particular:

- Grounds of appeal 1 and 4 concern whether the primary Judge erred in determining whether the first respondent failed to take into consideration relevant facts.
- Grounds of appeal 2, 3 and 5 concern whether the primary Judge erred in determining whether the first respondent took into consideration incorrect or irrelevant facts.
- Ground of appeal 8 concerns whether the primary Judge erred in finding that the decision of the first respondent was not unreasonable in the *Wednesbury* sense.
- Grounds of appeal 6, 7, 9 and 10 concern whether the primary Judge erred in his application of relevant statutory provisions and legal principles.

46 At the hearing however it became plain that a key issue in dispute between the parties concerned whether the primary Judge had had regard to specific evidence of witnesses for the appellant concerning the appellant's GST liability after 1 April 2020, and whether the first respondent had taken that evidence into consideration in making the decision to send the second garnishee notice. This issue falls under grounds 1 and 4 of the notice of appeal, to which we will first turn.

#### **Grounds of appeal 1 and 4**

47 The particular issue arising in respect of these grounds of appeal is whether the primary Judge had regard to evidence of witnesses for the appellant – in particular, Mr Michael McCulley and Mr William Jackson – concerning the GST position of the appellant between 1 April 2020 and the issuing of the second garnishee notice.

48 First, Mr McCulley at all material times was a director of the appellant. In his affidavit filed on 4 August 2022 in the National Court proceedings, Mr McCulley materially deposed as follows:

1. I am a director of the Plaintiff and I have knowledge of the operations, books and records of the plaintiff and the circumstances deposed to in this my affidavit.

...

23. I refer to the Second Garnishee Notice (“MMC4”) and note that it purports to be a single notice issued under three pieces of legislation. The Notice then recites an assertion that the Plaintiff owes the First Defendant :

“TOTAL GARNISHEE VALUE PGK 460,000.00

GST ACCOUNT ONLY: BASE TAX K 460,000.00”

24. I say that these numbers are false and that even if the Plaintiff was wholly wrong in its GST litigation against the actions of the First and Second Defendants that on 5<sup>th</sup> May 2022 the Plaintiff owes the Plaintiff [sic] Nil Base Tax on its GST Account and that the Plaintiff would in that situation still be owed a refund by the Plaintiff on the Base Tax after setting off the amounts in the accounts of the Plaintiff.

25. Now produced and shown to me and marked “MMC 6” is a true copy of a Consolidated Accounts Statement dated 1<sup>st</sup> April 2022 which covers all areas of tax liability of the Plaintiff administered by the First Defendant. I draw the Court’s attention to the final page which shows a credit balance (“-” in computer accounting means credit) of PGK 22,142,217.73.

26. Now produced and shown to me and marked “MMC 7” is a true copy of a GST Account Statement which covers only the GST liability of the Plaintiff administered by the defendants. I draw the Court’s attention to the final page which shows a credit balance (“-” in computer accounting means credit) of PGK 6,276,953.95 for Base Tax.

27. Now produced and shown to me and marked “MMC 8” is a true copy of the affidavit of Dollarcruise Augustine dated the 21<sup>st</sup> June and filed in proceeding (OS(JR) 63 of 2022 (IECMS). I refer to Annexure “A” thereof which is an Account Statement of the Plaintiff for Goods and Services Tax current at the 21<sup>st</sup> June 2022. That Statement is a document of the First and Second Defendants and shows a credit amount of PGK 8,560,075,35 owed to the Plaintiff for GST Base Tax.

28. Those documents are the Defendants’ own documents which are completely contrary to the amounts stated in the Second Garnishee Notice, not marginally but fundamentally. The amounts shown in the Combined Accounts Statements and the GST Account Statements are completely inconsistent and irreconcilable, both

against each other and with the First and Second Garnishee Notices.

29. In addition to this I also draw the Court's attention to the GST Account Statement which is exhibit "MMC 6". The Court will note that entries are missing for the periods of 07-2019, 12-2019, 01-2020 and every month from 04-2020 to the end of the statement on 09-2021 which means that the First Defendant's officers have not keyed into the Second Defendant's records systems the Plaintiff's returns for those periods. I can definitively say that the Plaintiff has lodged GST Returns for those months including the further months from 09-2021 until the date of the Garnishee Notices in February 2022 and further to the month of 04-2022.

30. I further say that the GST Returns which the Defendants have not entered into the records are comprised wholly of credit amounts for GST Tax paid out on supplies and this adds further to the amount of credit the Plaintiff is owed by the First Defendant. Specifically, I say that the Plaintiffs unkeyed GST Returns lodged at the First Defendant total a further PGK 7,098,451.88 in credits as follows :

<b>Period GST Return Not Keyed into IRC Records</b>	<b>Plaintiff's Input Credit Entitlement (PGK)</b>
07-2019	159,140.47
12-2019	191,760.93
01-2020	156,355.10
04-2020	176,888.26
05-2020	195,147.70
06-2020	318,567.65
07-2020	614,927.60
08-2020	205,103.47
09-2020	220,478.23
10-2020	234,830.71
11-2020	275,087.74
12-2020	162,076.00
01-2021	344,511.96
02-2021	280,682.46
03-2021	189,241.73
04-2021	194,642.26
05-2021	309,973.50
06-2021	255,625.28
07-2021	147,411.01

08-2021	324,367.01
09-2021	222,995.63
10-2021	327,662.10
11-2021	225,753.07
12-2021	231,703.26
01-2022	293,768.99
02-2022	220,778.60
03-2022	372,505.43
04-2022	246,465.73
<b>TOTAL ADDITIONAL CREDIT DUE TO PLAINTIFF BY IRC</b>	<b>7,098,451.88</b>

If these further GST Returns were keyed into the system, the Defendants' records would show a balance of at least PGK 29,240,669.61 refundable to the Plaintiff on all tax accounts and at least PGK 13,375,405.84 refundable for GST Base Tax putting aside the applicability of the Penalty.

49 Second, Mr William Jackson deposed in his affidavit of 2 September 2022 filed in the National Court proceedings:

1. I am the registered tax agent for the Plaintiff (South Seas Tuna Corporation Limited (SSTC) In the course of my duties I make, keep and maintain all company taxation records – particularly GST records – of the Plaintiff and conduct dealings with the Internal Revenue Commission on behalf of the Plaintiff.
2. I make this affidavit from matters within my personal knowledge and records of the Plaintiff pertaining to its financial and tax affairs.
3. I am familiar with the history of dealings between the Plaintiff and the Internal Revenue Commission concerning alleged GST debts owed by the Plaintiff.
4. I am aware that the First and/or the Second Defendant, on or about the 6<sup>th</sup> May 2022, issued and served Garnishee Notice numbered 132671349 on the BSP bank in respect of the Plaintiff and received a payment of K460,000 from that bank in compliance with the terms of that Garnishee Notice...
5. The Garnishee Notice numbered 132671349 is dated the 5<sup>th</sup> May 2022 and recites that the Plaintiff is indebted to the Second Defendant for GST Base Tax in a sum of K460,000 and has defaulted in payment of that debt.
6. For the purposes of this litigation, I have checked the GST tax



records of SSTC maintained and provided by the Second Defendant. I say that the Second Defendant's own records show that SSTC maintained a GST Base Tax credit on 5<sup>th</sup> May 2022 in a sum of K22,152,266.17 and shows no GST Base Tax debt existed at that date. Annexed hereto and marked "WJ2" is a true copy of the Plaintiffs GST tax records maintained by the Second Defendant for the period 2014 to the 22<sup>nd</sup> August 2022.

7. From perusal of the Second Defendant's own records it is apparent that there was no GST Base Tax debt owed by the Plaintiff on the 5<sup>th</sup> May 2022 in an amount of K460,000, or at all, and no default as Garnishee Notice Number 132671349 recites.

8. For the purposes of this litigation, I have perused the GST records of the Plaintiff maintained by the Second Defendant to ascertain if those records were current and include all GST statutory returns made by the Plaintiff to the 5<sup>th</sup> May 2022.

50 Annexed to Mr Jackson's affidavit were Goods and Services Tax Returns by the appellant from July 2021 through to May 2022, as well as the same list of unkeyed GST Returns at the IRC as were annexed to Mr McCulley's affidavit.

51 The primary Judge dismissed evidence of the appellants as reliant on that of the first and second respondents, and otherwise unreliable. In particular, his Honour said:

*53. The plaintiff has not referred me to any independent affidavit evidence except to use the evidence of the defendants. For example, in the affidavit of one Michael McCulley, the plaintiff witness, he deposes and relies on the records of the second defendant. The evidence annexure marked as "MMC8" shows that as at 30 May 2022 the total GST owed to the defendants was K 29,642,846.16 (K31,336,222.16 incl. tax), after payment of K 460,000.00 pursuant to Garnishee Notice of 5 May 2022. Also in the same Michael McCulley affidavit is a copy of an affidavit by Dollarcruise Augustine filed on the 21 June 2022 (in relation to OS (JR) No.63 of 2022, deposing that "The sum of K 31,336 million in Goods and Services Tax still remains unpaid and owing by the plaintiff".*

...

*56. There is no independent evidence by the plaintiff to dispel the presumption that the original reconciliation to reduce assess amount of K64, 543, 072.47 on the 27 June 2016 to K54, 078,233.74 on the 16 February 2022 was correct. What is in evidence is that the plaintiff objected to the assessment and the*

*defendants undertook further reconciliation resulting in the issue of the subject Garnishee Notice for outstanding GST in the amount of K460, 000.00 due and owing to the State on the 5 May 2022 based on facts and information kept at the Taxation Office.*

...

*62. The affidavit of William Jackson, tax agent for the plaintiff deposes that the first and second defendant's own GST Account records for the plaintiff show no GST Base Tax debt owed by the plaintiff but rather that the plaintiff maintained a credit balance of K22, 152, 266.17 GST Base Tax. The date of that GST Account entry was clearly the 1 April 2020 which is 24 months earlier. **It is not an accurate and reliable evidence and goes to the credibility of the plaintiff witness.***

(emphasis added)

52 The primary Judge plainly accepted the evidence of the first and second respondents' witness, Mr Lovae. To his affidavit filed 17 October 2022 in the National Court proceedings, Mr Lovae annexed records of the second respondent, being the Reconciliation Sheet and the Account Statement for Goods and Services Tax of the appellant. In particular, we note that the first Tax Period in the Account Statement commenced 1 February 2015, at which date the appellant had a GST credit in the amount of K209,349.00. The last Tax Period in the Account Statement commenced 1 April 2020, at which date the appellant had a GST credit in the amount of K22,152,266.17.

53 Following this entry in the second respondent's Account Statement were several pages of entries representing tax charges and penalty charges, the first of which was for the tax period of 1 August 2014 (being a credit of K21,698,118.72), concluding with the tax period of 13 June 2019 (being a tax debit of the appellant of K31,925,967.57).

54 We note that there is an unexplained gap in the Account Statement record of the respondents, between 1 July 2016 and 30 May 2019.

55 His Honour found:

*63. The affidavit of Trevor Lovai [sic] filed on the 17 October 2022, for the defendants in which he annexed a copy of the GST Statement of Account, Annexure "G" showing that as of 30 May 2022 the amount owed by the plaintiff in GST was K29,642, 846.16 (K31,336,222.16 incl. tax) after payment of Garnishee Payment (GST Base Tax) of K460,000.00 must be accepted as the accurate position of GST owed by the plaintiff. Moreover, the*

*entry as at the 30 May 2022 shows outstanding GST owing to the State in the amount of K31, 333, 222.16. This compares favorably with the evidence annexed to Michael McCulley's affidavit referred to earlier, the copy of an affidavit by Dollarcruise Augustine filed on the 21 June 2022 deposing that "The sum of K 31,336 million in Goods and Services Tax still remains unpaid and owing by the plaintiff."*

*64. In the absence of other credible evidence, I must accept the GST Statement of Account as the accurate information, statistics, and the facts were the relevant facts considered by the defendants prior to the issuing of the Garnishee Notice. The remaining GST debt of the plaintiff would be at least K 31,336 million.*

*65. The defendants have not failed to consider relevant issues and facts. What is a relevant fact is subjective to the decision maker at the time of the decision. In my view, the first and second defendants considered all relevant facts, information and the record of the plaintiff kept at the tax office before issuing its garnishee notice of 16 February 2022 and of 5 May 2022. There are no other relevant information and facts and since the plaintiff had failed to furnish to the defendants when they requested source documents of suppliers listing to verify input tax credits claimed in its GST Returns.*

56 In our view, it is clear that, in making these findings, the primary Judge failed to take into account relevant evidence adduced by the appellant before the National Court.

57 First, his Honour simply did not have regard to the sworn evidence of both Mr McCulley and Mr Jackson that for several years between 2020 and 2022 the second respondent had not recorded GST returns of the appellant that were tax credits. This evidence was critical to the appellant's case, as it went to the question not only of whether the first and second respondents perceived for the purposes of the decision of the first respondent that the appellant was a defaulter within the meaning of s 88 of the GST Act, but whether the appellant was **actually** a defaulter within the meaning of that section.

58 We note the observation of his Honour at [53] that the appellant had not referred him to "any independent affidavit evidence except to use the evidence of the defendants". There was no clear reason why evidence of Mr William Jackson, the tax agent for the appellants, to whose evidence his Honour was referred, was considered by his Honour as not being "independent", and accordingly unreliable.

59 Mr Jackson was not sought to be cross-examined by the respondents in the National Court proceedings, and it is unclear why his credibility as a witness was impugned by his Honour. Indeed, none of the witnesses of either party were subject to cross-examination. To that extent the evidence of Mr Jackson ought to have been given equal credence by his Honour as that given to other witnesses in the proceedings.

60 Review of the transcript of proceedings before the primary Judge demonstrates that the appellant read and relied on affidavits of Mr Jackson sworn 8 August 2022 and 2 September 2022.

61 We further note that Mr Jackson annexed to his own affidavit Goods and Services Tax Returns lodged by the appellant with the second respondent, and which appear on the face of each of the returns to have been *stamped as received* by the second respondent. This evidence was also annexed to the affidavit of Mr McCulley, which was specifically drawn to his Honour's attention during the hearing as "IRC records" (at transcript 24 October 2022 page 11 lines 10-21). To that extent there was objective evidence before the primary Judge, in the form of returns created by the tax agent subsequently received by the second respondent, which pointed to the existence of a tax position of the appellant contrary to that claimed by the respondents in the second garnishee notice.

62 None of this evidence was however considered by his Honour.

63 Second, at the hearing before the Supreme Court, Counsel for the first and second respondents submitted that the unkeyed GST Returns at the IRC from July 2019-2022 were not considered by the respondents because the appellant had not provided clarifying information as sought by the respondents. In particular, the respondents relied on the affidavit of Jacqueline Doria, a Senior Auditor in the employ of the second respondent, filed 17 October 2022.

64 Relevantly Ms Doria deposed:

*1. I am a Senior Auditor in the employ of the Internal Revenue Commission and I have personal knowledge of the matters deposed to in this affidavit.*

*2. The Plaintiff taxpayer regularly lodges monthly Goods and Services tax (GST) returns wherein it claims input tax credits on its purchases.*

*3. In all audit cases, the Second Defendant does not issue a Notice of Assessment immediately until the credits are fully verified to ensure that the taxpayer is lawfully entitled to all the tax credits*

*which it claims.*

*4. In the case of the Plaintiff, we began conducting a verification of all GST credits in its name from 2019 to 2021 after we were given clearance by our lawyers following the conclusion of court proceedings in the National Court in 2021 involving the Plaintiff.*

*5. Between September 2021 and October 2021, we requested numerous documents from the Plaintiff to enable us to verify all the GST credits which it was claiming. Annexed and marked "A" is a true copy of all the email threads between the Plaintiff and the Second Defendant.*

*6. On 13 October 2021 the Plaintiff's Financial Controller, namely Franklin Lao advised us that the Plaintiff was still working to furnish to information requested from the Second Defendant.*

*7. Since 13 October 2021 we didn't get any feedback from the Plaintiff regarding the documents, we requested from it.*

*8. On 5th September 2022 I sent another follow - up letter to the Plaintiff requesting for the documents to verify the GST credits it had claimed for the periods January 2015-June 2021.*

*Annexed and marked "B" is a true copy of this letter.*

*9. Between 6th September 2022 and 12th September 2022, the Plaintiff's Financial Controller, namely Franklin Lao sent a series of emails where he attached a number of documents to enable us to complete the verification exercise on the GST credits claimed by the Plaintiff for the periods 2015-2022. Annexed and marked "C" is a true copy of all the email threads between the Plaintiff and the Second Defendant,*

*10. The Plaintiff has provided all relevant documents to the Second Defendant to complete this GST credits verification exercise.*

*11. The Second Defendant is currently carrying out the verification exercise on the 96 taxable periods for 2015-2022. Once completed, the Plaintiff's GST Statement of Account will be updated.*

*12. I make the above statements true to the best of my knowledge.*

65 In the primary decision his Honour noted that the respondents relied on the affidavit of Ms Doria. Submissions were made to the primary Judge by the respondents to the effect that Ms Doria's evidence confirmed that the credits claimed by the appellant were not verified and accordingly they could not claim for those credits.

66 In our view, the evidence of Mr McCulley and Mr Jackson, combined with that of Ms Doria, was such that, had the primary Judge considered it, a question

would have arisen as to whether the appellant was a defaulter within the meaning of s 88 of the GST Act. As is evident from the email chain annexed to Ms Doria's affidavit, there was plainly ongoing dialogue between the appellant and the second respondent concerning the production of material supporting the appellant's tax returns, at the time when the garnishee notices were sent. There does not appear however to be any evidence that this dialogue was communicated to Mr Lovae. That there was that ongoing dialogue, was relevant to the discretionary decision of the first respondent to issue the garnishee notice, and was a factor relevant to his Honour's review of that decision.

67 Third, we note the comment of the primary Judge at [65] that the respondents had not failed to consider relevant issues and facts, because "what is a relevant fact is subjective to the decision maker at the time of the decision." Plainly, in administrative decision-making, whether facts are relevant for consideration in making a decision is not a question to be decided at the subjective whim of the decision-maker. Considerations are relevant depending on the circumstances of the particular case. As the Supreme Court recently noted in *JV PNG Investment Constructions Ltd v Samson* [2022] SC2224 at [71]:

*[I]t is settled law that the appellate Court will not interfere in a discretionary judgment of the National Court, unless it is shown that the discretion was exercised upon a wrong principle, or that extraneous or irrelevant matters were allowed to guide or affect the judgement, or that the facts were mistaken or that some relevant consideration were not taken into account, or that the decision is unreasonable or plainly unjust: Government of Papua New Guinea v. Barker [1977] PNGLR 386; Lewis v. The State [1980] PNGLR 219; Bean v. Bean [1980] PNGLR 307.*

68 It may be that the terminology used by his Honour at [65] was simply unfortunate. However, to the extent that his Honour seemed to consider that the relevance of facts was a question subjective to the decision-maker, this was an error of law.

## **CONCLUSION**

69 In our view the appellant has substantiated grounds 1 and 4 of its notice of appeal.

70 It is not necessary for us to consider the other grounds of appeal on which the appellant relies, other than to observe that, to the extent to which the primary

Judge found at [77] that the first respondent was “compelled” to issue a notice under s 88 of the GST Act, this finding constituted an error of law. Section 88 is plainly drafted in terms of the exercise of discretion by the first respondent. As the Supreme Court observed in *Papua New Guinea Law Society v Cooper* [2017] PGSC 10; SC1585:

*70. The proper interpretation of the word “may” in legislation depends on its context. As a general proposition, “may” in its natural meaning is permissive or enabling, and it lies on those who assert that there is an obligation to exercise a power conferred to show, as a matter of construction of the legislation as a whole, that this is so: Julius v. Lord Bishop of Oxford (1880) 5 App Cas 214, Ward v. Williams [1955] HCA 4; (1955) 92 CLR 496, Finance Facilities Pty Ltd v Federal Commissioner of Taxation [1971] HCA 12; (1971) 127 CLR 106 at [22]. Further, the use of the word “may” in legislation generally contemplates that the exercise of the power conferred is accompanied by a discretion on the part of the wielder: PNG Power Ltd v Gura [2014] SC1402 at [30], Ralai v Yama [2008] SC1029 at [11], Kakaraya v National Parliament [2004] SC756.*

71 “Compulsion” plays no part in the exercise of the discretion in s 88 of the GST Act.

72 Finally, we note the truism that with great power comes great responsibility. The respondents have great power over individuals as well as corporate citizens who are subject to the GST Act. The discretion conferred by s 88 of the GST Act is far-reaching, and, in our considered view, should be exercised carefully, diligently and with clear authority.

73 The appellant is entitled to the orders it seeks.

74. The Court orders that:

- (1) The appeal be allowed.
- (2) The orders of the National Court made in proceedings OS (JR) No 83 of 2022 on 13 December 2022 be quashed.
- (3) In lieu of the said orders the Appellant’s application for judicial review including the orders sought in the Appellant’s Notice of Motion in the National Court filed on 22nd August 2022 under Order 16 Rule 5(1) of the National Court Rules be granted.

(4) The First and Second Respondent pay the Appellant's costs of and incidental to the appeal and of the proceedings for judicial review in the National Court including any reserved costs.

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O'Briens: *Lawyers for the Appellant*

IRC In-House Legal Lawyers: *Lawyers for the Respondents*