Commissioner of Inland Revenue v To'ofohe

Supreme Court, Vava'u
Webster J.
Civil appeal No. 8/1990

8, 12, 17 October 1990

Civil procedure – statement of claim – particulars which must be included in claim for unpaid tax

Income tax – particulars which must be included in statement of claim or summons in respect of unpaid tax

Appeal – Magistrate's Court – power of Supreme Court to decide case on merits and not technicalities under section 76 (now section 81) Magistrates' Court Act (Cap. 11) should not be applied in cases relating to tax claims.

Evidence – income tax claims – officer who prepared assessment should give evidence if possible, but not necessary for Commissioner of Inland Revenue to do so

Appeal – remission of case to Magistrates' Court should not be ordered since the appellant failed to produce adequate evidence to Magistrates' Court and had access to legal advice at high level and advantageous provisions in Income Tax Act (Cap 68).

The civil claim by the Commissioner of Inland Revenue against the defendant for arrears of income tax was dismissed by the Magistrates' Court because the Commissioner of Inland Revenue did not give evidence, nor did the officer of the department who prepared the assessment. The Commissioner appealed to the Supreme Court.

HELD

Dismissing the appeal:

1. It is not necessary for the Commissioner of Inland Revenue to give evidence, but if possible the officer who prepared the assessment should do so;
2. The statement of claim or summons should state the date of assessment, the date on which it was sent to the taxpayer and by what means it was sent, details of the assessment showing calculations and how the figures are made up, whether any objection was made by the taxpayer and if so what action was taken about it, and whether the amount of tax is still unpaid or payments have been made and the balance outstanding;
3. The power of the Supreme Court to hear appeals from the Magistrates' Court on merits and without regard to technicalities under section 76 (now section 81) Magistrates' Court Act (Cap 11) should not be exercised with regard to cases involving tax claims;

4. The power of Supreme Court to remit case for further hearing before the Magistrates' Court should not be exercised where the Inland Revenue has had an adequate opportunity of preparing its case, has legal advice at a high level, and has the advantage of statutory provisions as to finality of assessment.

Statutes considered : Magistrates' Court Act (Cap 11), section 76 (now section 81)

Counsel for appellant : *Mr K. Whitcombe*
Counsel for respondent : *Mr M. Faleola*

Judgement

The Appellant the Commissioner of Inland Revenue appeals against the dismissal by the Magistrates' Court at Neiafu on 13th June 1990 of a claim for $117.37, being income tax allegedly due from the Respondent for 1987/88.

The case had had a chequered and unfortunate history as the origional claim was brought in 1989 but was heard (by a different magistrate) on the same day as the summons was served. The present Respondent appealed and this Court earlier this year allowed the appeal (Civil appeal 8/1989) and remitted the case back for re-hearing.

At the re-hearing the only witness for the Plaintiff was the local Inland Revenue officer, who did not produce the income tax assessment in question and had not prepared it himself, though in evidence he did explain the calculations to reach the alleged tax liability. The learned Magistrate dismissed the claim on the grounds that the Commissioner of Inland Revenue himself was not in court, nor the officer at Nuku'alofa who prepared the income tax assessment.

The Appellant appeals on the grounds that the calculations of the liability were correct according to section 38 of the Income Tax Act 1976 ("the Act"); that the officer at Vava'u had power to deal with the case under section 94 and the Commissioner did not require to be present; and that if an assessment was not objected to under the provisions of the Act it could not be challenged. The Respondent opposed the appeal and submitted that the decision of the learned Magistrate was correct and should be upheld.

The Court believes that the learned Magistrate was right in his decision but does not fully accept his reasons. The Inland Revenue were very slack in the presentation of their case and they were not entitled to get judgment when they did not produce sufficient information before the learned Magistrate and the Defendant/Respondent.

Counsel for the Appellant, Mr Whitcombe, also submitted that the learned Magistrate should have adjourned the hearing to allow the Plaintiff/Appellant to produce the assessment to the Court or that this court should remit the case back again for that purpose, but in the circumstances I see no reason why that should have been done. The Plaintiff, who has easy access to legal advice at a high level, had closed his case and was not entitled to a third chance, especially where there are already the very advantageous provisions in the Act on the finality of assessments.

Mr Whitcombe also sumbitted that under section 76 of the Magistrates' Courts Act this Court should decide the appeal on the merits and not the technicalities. But that principle cannot apply to tax cases where the law must be construed strictly against the Inland Revenue and in favour of the taxpayer. Also, as stated above, it must keep its own house in order and come to court with meticulously prepared cases.

I shall therefore dismiss the appeal but I believe it will be helpful for magistrates, taxpayers and the Inland Revenue if I set out how I consider unpaid tax should be claimed before the courts (either the Magistrates' Courts or this Court).

Firstly, it is not satisfactory for a summons or statement of claim to state simply, as was done here -

"Failure to pay Income Tax 87/88	-	$117.37
Court fee		$ 6.50
TOTAL	=	**$123.87**

Contrary to section 85(2), Law of Tonga Act 17 of 1976"

No defendant should be expected to answer such a brief and unexplicit claim. It is not right that a Government department with ready access to legal advice should attempt to raise a court action in this way. This is not the first time this has happened and this Court has already made the position clear to the Inland Revenue.

Even the reference "Contrary to section 85(2)" is misleading. That subsection gives the Crown the right to recover tax in the courts but does not lay any duty on the taxpayers so he cannot be in contravention of it. Indeed the only sanction for non-payment of tax is a monetary penalty under section 34(4) of the Act. So the claim is *under*, not contrary to, section 85(2).

Secondly, if the Inland Revenue is going to rely on the finality of a tax assessment to which the taxpayer has not objected and to rely on sections 38 and 84 of the Act, then it is only right that the Inland Revenue should satisfy the court that the assessment has been made, sent to the taxpayer and not objected to, within the appropriate time.

This means that the circumstances of the assessment must be fully narrated in the summons or statement of claim and the actual assessment produced to the Court (by virtue of sections 62, 63 and 70 of the Evidence Act) or a copy of the assessment (under section 67 (d) of the Evidence Act). In fairness a copy of the assessment should be attached to the summons or statement of claim.

If the assessment or a copy is produced, the local Inland Revenue officer is normally competent to do this as he can give evidence emanating from the Department's file. It is not necessary or sensible to require the Commissioner of Inland Revenue himself (the Minister of Finance) to attend every court proceeding but under the normal rules of evidence the officer who actually signed and sent out the assessment is clearly the best witness to those events.

The following particulars ought to be given in a summons or statement of claims: -

(a) the date of the assessment and the date on which it was sent to the taxpayer and by what means;

(b) a copy of the assessment showing the calculations and how the figures are made up. If any penalty has been added under section 34(4) of the Act that should be shown separately;

(c) whether or not any objection was made to the assessment under section 78(1) within the specified time. If an objection was made, what action has been taken about it;

(d) a statement that the amount of tax claimed still remains unpaid, or if any payments have been made these should be specified and the amount remaining due set out.

If a summons or statement of claim does not conform to these requirements then the court will be justified in not giving judgment. If the evidence does not satisfy the court that the assessment was duly made, sent to the taxpayer and no objection received, again the court will be justified in rejecting the claim.