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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0056 OF 2001S
(High Court Civil Action No. HBC0403 of 1998s)

BETWEEN:

GHIM LI FASHION (FIJI) PTE LIMITED

Applicant

AND:

COMMISSIONER OF INLAND REVENUE

Respondent

Coram: Reddy, P
Smellie, JA
Penlington, JA

Hearing: Wednesday, 20th November 2002, Suva

Counsel: Mr. I. Fa for the Applicant
Mr. A. Bale for the Respondent

Date of Judgment: Friday, 29th November 2002

JUDGMENT OF THE COURT

This is an application pursuant to Article 122(2)(a) of the Constitution for leave to appeal to the Supreme Court. As is well known that provision enables this Court to grant leave "on a question certified by it to be of significant public importance."

At first instance the applicant for leave was successful. On appeal, however, this Court, (Civil Appeal No. ABU0056) in a judgment delivered on 16th August 2002 reversed the High Court Judge.

The case concerns the correct interpretation of s.3(8) of the Value Added Tax Decree of 1991.

The brief facts are that applicant is a manufacturer of clothing for export which has the status of zero rated supplies under the Second Schedule of the Decree. In 1994 the applicants factory, plant and equipment, stock and vehicles were all destroyed by fire. Subsequently the applicant was assessed by the Commissioner of Inland Revenue for Value Added Tax for 10% of the proceeds of a contract of insurance taken out on an indemnity bases. The payment out under the policy was in the region of $4 million and the tax assessed was in the sum of $350,125.59. This Court in the judgment referred to above concluded that the Commissioner was entitled to make that assessment and recover that amount of tax.

At the hearing of the above appeal in August of this year the applicant (than appellant) sought to argue that the Decree itself was invalid and a fraud on the Constitution. That had not been raised in High Court and nor did the appellant on the appeal file a notice pursuant to Rule 19(2) of the Court of Appeal Rules specifying the unconstitutionality of the Decree as a further ground upon which the first instance decision should be up held. We return to that matter shortly.

The Commissioner's assessment was made pursuant to s.3(8) as recorded above. That provision is based upon a comparable section in the New Zealand Goods and

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Services Act of 1985. The New Zealand provision has not been the subject of any reported decision so far. And this case concerning s.3(8) of the Decree is the first to come before the Courts of this jurisdiction.

The Court takes judicial notice of the fact that Value Added Tax of 12.5% (10% of the time of the assessment) provides a very large and important percentage of the total tax take year by year in the Republic.

Furthermore the manufacture of clothing for export is a significant industry in Fiji and there are no doubt a number of businesses such as the applicants carrying indemnity insurance which could be similarly affected in the event of their premises stock, plant or vehicles being destroyed. As Mr Fa pointed out to the Court it is not just in relation to destruction by fire that s.3(8) comes into play. Indemnity insurance is taken out to cover a number of other contingencies such as hurricane, cyclone and civil disturbance.

For the reasons set out above we are pursuaded that the requirements of the Constitution are satisfied and that we should certify that the question of the correct interpretaion of s.3(8) of the Decree is one of significant public importance.

Having reached that conclusion this judgment need go no further. Nonetheless it is appropriate to comment on the issue that Mr Fa again raised on this application, regarding the Constitutionality of the Decree. The Counsel argued that that

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issue also provides a ground for leave to be granted pursuant to Article 122(2) (a) of the Constitution.

We adhere to the view expressed to the foot of page 12 of this Court's judgment on the appeal. As the Constitutional issue was not raised on the appeal we take the view that it is therefore not before us on this application.

We observe nonetheless, that if we are wrong in the view we take on that matter then whether or not the Decree is lawful and binding is of course a question which clearly would qualify for leave.

The question of costs on this application is best left for resolution by the Supreme Court along with the outcome the appeal.

FIJI COURT OF APPEAL

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Reddy, P

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Smellie, JA

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Penlington, JA

Solicitors:

Messrs. Fa and Company, Suva for the Applicant
The Legal Officer, Inland Revenue Department, Suva for the Respondent

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