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

CIVIL APPEAL NO. ABU 12 OF 2017
(High Court No. HBT 05 of 2012)

BETWEEN	:	**GURDIAL SINGH BROTHERS LIMTED**
		Appellant
AND	:	**FIJI REVENUE AND CUSTOMS AUTHORITY**
		Respondent
Coram	:	**Chandra, JA** **Basnayake, JA** **Almeida Guneratne, JA**
Counsel	:	**Mr. H. Nagin for the Appellant** **Ms. T. T. Rayawa for the Respondent**
Date of Hearing	:	**12 September, 2018**
Date of Judgment	:	**5 October, 2018**

J U D G M E N T

Chandra, JA

[1] I agree with the reasons and conclusion in Almeida Guneratne JA's judgment.

Basnayake, JA

[2] I agree that this appeal be allowed.

Almeida Guneratne, JA

[3] This is an appeal from the judgment of the Tax (High) Court dated 23rd January, 2017 (pages 4 to 10 of the Record of the High Court – RHC) which partially reversed the judgment of the Tax Tribunal (the tribunal) dated 24th September, 2012 (pages 1-14 of the Supplementary Record of the High Court (SRHC). The tribunal's decision was itself one given in review of the Respondent's ruling.

[4] The matter involved the liability of the Appellant as an importer of Kava but as an unregistered VAT person to be charged for VAT and whether such a person could claim input tax.

[5] A short background history in that context is recounted below.

[6] (i) The Appellant at all material times has been involved in the business of importation of kava and its wholesale and distribution in both its processed and unprocessed forms.

(ii) The unprocessed kava arm was registered as a produce supplier, sometime after June 1992 under Section 27 of the VAT Act. (as separated from the processed kava arm/division).

(iii) The Appellant when lodging its VAT returns claimed input tax against the value of its unprocessed kava that it had imported for sale (the relevant period being between 1998 and 2005).

(iv) The Respondent disallowed the input claim on the basis that the Appellant had not charged output tax on the sales of that produce.

[7] No doubt the matter had to be resolved and determined in the light of the several provisions of the tax regime namely, the VAT Decree (now Act) 1991 (as amended), the Customs Act and the Customs Tariff Act of 1986.

The Judgment of the Tribunal

[8] Interpreting the several provisions of the aforesaid legislation the tribunal concluded thus:

> *"(a) The language of the VAT Decree makes it clear that an input tax can only be imposed on a registered person. The purpose of the law was not to impose an input tax on an unregistered person.*
>
> *(b) It is clear that section 22(1) of the VAT Decree does not seek to include produce suppliers as registered persons. Thus the produce supplier is not caught by sections 14 and 15 of the VAT Decree. Consequently Schedule 2 of the CTA is not intended to apply to produce suppliers. If, as item 1212.99.10 of the Schedule shows 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, who imports that crop. Kava, unprocessed or processed, sold by a produce supplier is not subject to a section 15 output tax in respect of the supply of these goods. Thus the Respondent's (Applicant in the Tribunal) separate registered entity can claim input credits and charge VAT in relation to the import and sale of unprocessed and processed kava. However, the Grog etc Produce Division of the Respondent cannot charge input tax under section 14 of the VAT Decree nor can it charge out tax under section 15."*

The Judgment of the Tax (High) Court

[9] The learned High Court Judge reasoned as follows:

> *"15. I shall start with section 22, of the VAT Decree, which comes under Part V – Registration. Sub section (1) of this section states 'Subject to this Decree, every person (other than a produce supplier) who on or after the 1st day of July 1992, carries on any taxable activity and is not registered becomes liable to be registered.*
>
> *16. It is therefore crystal clear that the lawmaker at this juncture (22 November, 1991) did not intend 'a produce supplier' to come within the ambit of the VAT Decree. Only registered persons did.*
>
> *17. Section 2(1) – Interpretation defines the following:-*
>
> *'Input tax', in relation to a registered person means:-*
>
> *(a) Tax charged under section 15 on the supply of goods and services made to that person.*

(b) Tax levied under section 14 on goods imported by that person.

'Output tax', in relation to a registered person means the tax charged under section 15in respect of the supply of goods and services made by that person.

18. *There is no mention anywhere of an unregistered person. If the lawmaker intended unregistered persons to come within the ambit of the VAT Decree, he would either have included another definition for input tax in relation to an unregistered person or he would not have used the words 'a registered' but instead used the word 'any'.*

19. *To my mind, the tax on imports and the tax on supply are only imposed on a registered person and not on an unregistered person and certainly not on a produce supplier.*

20. *The taxation regime changed the following year, by section 2 of the Customs Tariff (Amendment) Decree 1992 (CT (A)) whereby section 3 of the CTA was amended to raise, levy and collect VAT on imported goods.*

21. *I am of opinion, the intention of the lawmaker now, expressed in the plainest terms is that imported goods, without exception, would come within the ambit of VAT. At the same time this also removed any grey area as to whether an unregistered person, a produce supplier or a person who imported yaqona or kava was or was not caught by VAT. It was now made as clear as daylight that all the above did and would indeed come within the ambit if VAT. No longer could any person assert, relying on section 2 (1) of the VAT Decree that he did not have to pay VAT because he was not a registered person, or for any other reason.*

22. *Any lingering doubt that the Tribunal might have had that VAT only applies to a VAT registered person should have been put to rest by section 2 of the CT(A) Decree.*

[10] From the said reasoning the gist of the judge's conclusion may be construed thus:

"(1) Section 14 of the VAT Decree applies to persons who import goods even if these persons are not registered under the VAT Decree.

(2) *Schedule 2 of the Customs Tariff Act and in particular item 1212.99.10 imposes VAT on the import of yaqona or kava, without regard to whether it is a produce supplier, a VAT registered or a non VAT registered person who is importing these goods."*

Grounds of Appeal

[11] The said grounds are at pages 1 – 2 of the RHC:-

"1. The learned judge erred in law not properly considering, interpreting and applying the relevant provisions of the Value Added Tax Decree and the Customs Tariff Act.

2. The learned judge erred in law in not dismissing the appeal of the Respondent and in not fully adopting the judgment of the Tax Tribunal dated 24th September, 2012 in this matter."

[12] Consequently, I thought it was necessary to hark back to the tribunal's judgment when it put in perspective the essence of the Appellant's contention.

The Appellant's contention

[13] The Appellant's contention was 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 its produce supplier arm/division.

[14] Alternatively, the Appellant had claimed that the Respondent was estopped from objecting (and/or declining) to the manner in which the output tax had been claimed resulting from representations in regard to which contention I could not find supporting evidence on Record and therefore I shall not make any reference thereto hereinafter.

[15] Finally, the Appellant sought review of the penalty imposed if by virtue of Section 76A of the Act. The basis for that, was that, should the case of estoppel be made out, the penalties imposed had to be removed.

[16] In view of what I have stated at paragraph [14] above, that contention did not arise for consideration.

[17] At this point I thought it necessary to refer back to the judgment of the High Court. I begin at paragraphs 15 to 19 thereof (reproduced by me at paragraph [9] of this judgment].

[18] If I were to pause at that point, it is clear that the High Court in its reasoning fell into step with the reasoning of the tribunal (recapped by me at paragraph [8] of this judgment). In fact, I see that Sections 22, 33 and 44 of the VAT Act also contemplate 'registered persons' which is further exemplified by the definitions contained in Section 2 of 'the Act' as regards 'produce' and 'produce supplier' and the meaning given to 'taxable activity' in Section 4 of the Act.

The area of divergence between 'the tribunal's' thinking and the High Court's interpretation

[19] 'The tribunal' reasoned as it did which I have already recapped at paragraph [8] page 3 of this judgment. As opposed to that, the High Court distanced itself for 'the tribunal's' thinking on the basis of paragraph 20 to 22 of its judgment which I have reproduced at paragraph [9] pages 4 to 5 of this judgment.

Determination of this Court

[20] I preface my determination in holding that I was inclined to hold with the reasoning of the 'the tribunal' to that of 'the High Court' and I state below the reasons for saying so.

The balancing factors

[21] In that regard, taken together with the short background history I have recounted at paragraph 6 [6] in this judgment. I took into consideration the following factors as well as being the balancing factors.

Assessment of the rival contentions *vis a vis* the tribunal's and the High Court's response thereto

(a) Section 22(1) of the Act does not include produce suppliers as registered VAT persons.

(b) The Appellant fell into the category of a produce supplier as well as into the category of an importer of goods (Kava) in both its processed and unprocessed forms.

(c) Only unprocessed arm of the Appellant company was registered as a produce supplier.

(d) The Appellant when lodging its VAT returns had claimed input tax against the value of its unprocessed Kava which it had imported.

(e) The Respondent had disallowed the said claim on the basis that the Appellant had not charged output tax on the sales of that produce.

[22] Given the diametrically opposite views 'the tribunal' expressed on the one hand and the High Court on the other, at that point, the matter stood to be determined on the impacting principles of statutory interpretation.

Impacting principle of Statutory Interpretation

[23] I shall make reference to only one authority in the context of what I have articulated above and that is to Rowlett, J's statement. He said:

> *"In a taxing statute one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax; nothing is to be read in; nothing is to be implied. One can fairly look at the language used ..."*
> (**Cape Brandy Syndicate v. IRC** [1921] 1 K Bat. 71.

[24] Applying and adapting that statement in the context of the instant case I came to the conclusion that, the reasoning of 'the tribunal' was consonant with that judicial exposition.

Construction (*ut res Magis valeat quam pereat*)

[25] *"If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."*

(**Nokes v. Don Caster Amalgamated Collieries Ltd**. [1940] AC 1014 per Viscount Simon L.C. at p.1022)

[26] *"Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."*

(**Shannon Realities Ltd v. Ville de St. Michael** [1924] A.C. 185 per Lord Shaw at pp. 192-193).

See also: **Engineering Industry Training Board v. Samuel Talbot Engineers Ltd**. [1969] 2 W.L.R. 464

[27] Other than the application of the principle, as far as VAT is concerned, being of a regulatory nature – distinction being drawn between 'VAT registered persons' and 'VAT Not Registered Persons', one inveterate principle – necessarily needed to be brought upon to bear thereon.

Expressio unius personae vel rei esto exclusion alterius

[28] That is: "the express mention of one or thing is the exclusion of the other."

[29] Consequently, I express agreement with the tribunal's conclusion which I have recapped at paragraph [8] of this judgment.

The VAT (Amending) Act of 1995

[30] While I could rest my determination there, I felt obliged to deal with Mr. Nagin's submissions on the VAT (Amending) Act No. 16 of 1995 as well.

[31] Mr. Nagin submitted that, although Section 2 of the recent Act contemplated any person liable to be registered (*for argument sake*) if that was to be read with Schedule 2 of the Customs Tariff Act to rope in the Appellant (being in the shoes of an importer of processed kava) for purposes of input tax (as argued by the Respondent and which was accepted by the High Court), if there was to be any doubt in that regard, that was removed by the Amending Act of 1995. Mr. Nagin adverted to the definition of input tax as presently contained in the Amending Act – *viz*:

[32] "Input tax in relation to a registered person, means -

(a) Tax charged under Section 15 of the Act on the supply of goods and services made to the person:

(b) Tax levied under Section 14 of this Act 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 person's taxable activity."

[33] Consequently, Mr Nagin (Appellant's Counsel) submitted that, had the learned High Court Judge paid regard to the said Amendment, he would not have reached the conclusion he did in his judgment.

[34] I agree. Through the passage of the changes which the tax regime had undergone over the years, the said 1995 amendment has thought fit to retain the reference to only a 'registered (VAT) person' in so far as an importer of processed kava is concerned in the context of input tax.

[35] In the absence of Hansard Material being placed before this Court to discover the legislative intent in drawing a distinction between 'VAT registered' and 'VAT unregistered' persons for the matter to have been considered within the **Pepper v. Hart** rule [1993] AC 593 (HL), this Court was obliged to determine the matter on the basis of the language contained in the present legislation exemplified by the provisions of the Amending Act of 1995.

Conclusion

[36] For the aforesaid reasons, I am inclined to allow the Appeal and proceed to propose the following orders.

Orders of Court

1. *The appeal is allowed and the judgment of the High (Tax) Court dated 23rd January, 2017 is set aside.*
2. *The judgment of the tax tribunal dated 24th September, 2012 shall stand restored.*
3. *There shall be no costs.*

Hon. Justice S. Chandra
JUSTICE OF APPEAL

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL