

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: HBA 09 of 2012 (On Appeal from the Tax Tribunal in Civil Action No.05 of 2007).

BETWEEN : Malcolm Griffith Brain

APPELLANT

AND : **Chief Executive Officer, Fiji Revenue and Customs Authority**, Revenue & Customs Services Complex, Corner of Queen Elizabeth Drive & Ratu Sukuna Road, Nasese, Suva

RESPONDENT

COUNSEL : Ms. B Malimali for the Appellant
Ms. T Rayawa for the Respondent

Date of Judgment : 2 August 2013

JUDGMENT

1. This is an appeal from the decision of the Tax Tribunal dated 31.01.2012 by the Appellant John Stewart Hill which arises out of proceedings in the tribunal in relation to a decision made on the assessment of Income Tax Pursuant to Income Tax Act. (Cap 201) Laws of Fiji.
2. Notice of Appeal was filed on 27 February 2012 by the Appellant on following grounds:

Error of Law

Ground 1

That the Learned Tribunal erred in law when went beyond the issues that the parties had agreed upon as the issues in contention between them, thereby acting ultra vires.

Ground 2

That the Learned Tribunal erred law when he invited the parties to make submissions on the 1st and 2nd limbs of s11(a) of the Income Tax Act at the end of the witness evidence in spite of opposition from both Counsel for FIRCA and for the Taxpayer.

Ground 3

That the Learned Tribunal erred in law when he sought to re-interpret the way s11(a) has been interpreted and put in practice by reading s11(a) from the commencement of s11 of the Income Tax Act.

Ground 4

That the Learned Tribunal erred in law when he sought to re-interpret s11(a) by dividing in into 2 limbs in spite of settled principles laid down by the Superior Courts in Fiji that s11(a) has 3 Limbs. This is also in contravention of FIRCA's own position that s11(a) has 3 limbs, as per Practice Statement No. 25.

Ground 5

That the Learned Tribunal erred in law when he failed to apply the test and/or principles for what constitutes an undertaking or scheme for the purpose of s11(a) of the Income Tax Act.

Ground 6

That the Learned Tribunal erred in law when he failed to apply the test and/or principles laid down by the superior courts of Fiji on the interpretation of s11(a) of

the Income Tax Act. The Court was informed by both Counsel that neither party had any issued with the interpretation of s11(a) as laid down by the Courts. The Court of Review/Tax Tribunal is bound by the decisions of the superior courts.

Ground 7

That the Learned Tribunal erred in law when he invited the parties to make submissions on the 1st and 2nd limbs of s11(a) of the Income Tax Act at the end of the witness evidence in spite of opposition from both Counsel for FIRCA and for the Taxpayer.

Ground 8

That the Learned Tribunal erred in law when failed to take into consideration the submissions made on behalf of the taxpayer that the errors and omissions made by FIRCA were so substantial that in and of themselves were grounds for holding the Assessments to be incorrect.

Errors of Facts

Ground 9

That the Learned Tribunal erred law when he invited the parties to make submissions on the 1st and 2nd limbs of s11(a) of the Income Tax Act at the end of the witness evidence in spite of opposition from both Counsel for FIRCA and for the Taxpayer. Both Counsel informed the Court that if they had been made aware at the beginning of the witness evidence that the 1st and 2nd limbs were also being considered, then Counsel would have run their cases differently.

Ground 10

That the Learned Tribunal erred in fact when failed to take into consideration the submissions made on behalf of the Taxpayers that the errors and omissions made by FIRCA and which were admitted to by the witness from FIRCA, were so substantial that in and of themselves were grounds for holding that the burden had been discharged. In other works, the Tribunal failed to consider the question

of: Has the burden been discharged because of the manner of how the assessment was raised.

3. Chronology of event in this appeal may also be important for the determination of this matter and states as follows:

[a] Affidavits of Service was filed on 30 April 2012 which deposed that the Notice of Appeal and Notice of Motion was served on the legal department of Fiji Island Revenue & Custom Authority on 25 April 2012.

[b] The appeal was mentioned inter-partes on 1 May 2012 and both counsel for the Appellant and the Respondent were present in Court.

[c] Counsel for the Respondent drew the attention of the Court and the counsel for the Appellant that the appeal does not adhere to the Section 107(3) of the Tax Administration Decree and counsel for the Appellant sought an adjournment to take necessary steps to comply with the requirement of Section 107 (3) of the Tax Administration Decree.

[d] When this appeal was listed for mention on 24 May 2012, court was informed that negotiation are underway for a settlement and moved for eight weeks adjournment to inform the outcome of the settlement.

[e] When this matter was again listed for mention on 3 August 2012, counsel for the Appellant once again moved a further adjournment till 6 August 2012 for compliance of the Section 107 (3) of Tax Administration Decree.

[f] This matter was mentioned again on two occasions, 6 August 2012 and 22 August 2012 respectively, for consideration and settlement.

[g] On 4 September 2012, when this matter was listed for mention, counsel for the Appellant submitted to court that there is no prospect of a settlement and court directed both parties to file their Written

Submissions. The Appellant was to file Written Submissions by 16 November 2012 with response from the Respondent to be filed and served by 3 December 2012. The Appellant was given liberty to reply if wishes to the respondent's submission by 14 January 2013 and hearing was fixed for 8 February 2013.

- [h] On 14 November 2012, counsel for the Appellant had written to the respondent with copy to the court registry seeking an extension of time to file their submission by 19 November 2012.
- [i] The filing of submission by the Appellant was only made on 5 February 2012, which was only two clear days before the scheduled hearing date.
- [j] Counsel for the Respondent agreed to the late filing of submissions but wrote to the registry notifying that application would be made on the hearing date for vacation of the hearing as Respondent requires further time to file Written Submissions.
- [k] On 8 September 2012, when this appeal was listed for hearing, the counsel for the Respondent raised a preliminary objection and moved that the appeal be dismissed on premise that the Appellant has failed to comply with the Section 107 of the Tax Administration Decree which is fatal to the appeal.
- [l] Appellant's counsel submitted to court that there are practical difficulties in complying Section 107 of the Decree in consideration of the nature of the appeal and compiled as far as possible in term of the Decree.
- [m] Both counsel for the Appellant and the Respondent thereafter moved time till 25 February 2013 to file Written Submissions to support their respective position on the preliminary objection and court thereafter reserved the judgment to be delivered on notice.

4. It is to be noted that the Respondents neither filed submissions nor sought leave of the court for late filing of submissions whereas Appellant filed submission on 28 February 2013.

5. **Preliminary Objection**

The objection raised by counsel to the Respondent was that Section 107 of the Tax Administration Decree has not been strictly complied with and fatal for appellant's appeal.

Section 107 states as follows:

107.-(1) A party to proceedings before the Tribunal who is aggrieved by a decision of the Tribunal in the proceedings may appeal as of right or by leave to the Court.

(2) An appeal to the Court must be made in the prescribed manner within 28 days from the date of the decision of the Tribunal.

(3) A notice of appeal must specify-

(a) the grounds of appeal;

(b) the decision or the part of the decision appealed from; and

(c) the precise form of the order which the appellant proposes to seek from the Court.

(4) Subject to subsection (2) an appeal lies as of right to the Tax Court:

a) from any first instance decision of the Tribunal; or

b) where any ground of appeal from the Tribunal involves a question of law.

6. The objection was in relation to 107(3)(b) that the grounds of appeal do not specify the decision or part of the decision appealed from and therefore must be struck out as the Section 107 (3) specifically refers to "must" in Section 107 and thus failure to comply mandatory requirement is necessarily fatal to the appeal.

7. Counsel for the Appellant in response to the preliminary objection submits as follows:
 - a. *Section 107(2) states that appeals must be made in the Prescribed Form, yet there is no Form in the schedules for Taxpayers to use.*
 - b. *The use of the word or term “must” in the section is prescriptive and directory only.*
 - c. *Section 107 must be read as a whole and one must realize that not following strictly the terms of s107(3) does not make vitiate the appeal.*
 - d. *The appeal or the grounds of the appeal in this case, substantially comply with s107(2) in any event.*
 - e. *Reference should be made to s8 of the Interpretation Act (Cap 7), which states:*

Deviation from Forms

Save as is otherwise expressly provided, whenever any form is prescribed by any written law, in instrument or document which purports to be in such form shall not be void by reason of any deviation there from which does not affect the substance of such instrument or document, or which is not calculated to mislead.

8. It is to be noted that prescribed forms and due compliance of Sec 107 of the Tax Administration Decree are two distinct aspects as I observe and there was no practical difficulty whatsoever for the Appellant for compliance of the decree relating to the specification of the decision or the part of the decision appealed from to the notice of appeal. The court is unable to apprehend the submissions of the Appellant that the failure of due compliance was due to non availability of forms in the schedule for tax payers to use as a ground to deviate from the procedural requirement in Section 107 of the decree.
9. It is evident in paragraph two of my judgment that the Respondent’s counsel brought to notice of the Appellant’s counsel for non compliance of Section 107(3) of decree in way back in May 2012 and having agreed to rectify the irregularity in the instant appeal failed to do so until the hearing scheduled on

8 February 2013. The Appellant's counsel on numerous occasions informed court that steps will be taken to comply with the requirements in the notice of appeal pursuant to the Tax Administration Decree.

10. Furthermore, in my view the objection of the Section 107(3) of the decree is for the court to peruse the decision or the part of the decision appealed from to ascertain as to the manner in which the Learned Tribunal has interpreted in Section 11(a) of the Income Tax Act to come to the correct findings in the Appeal. The absence or failure on the part of the appellant to highlight the relevant decision or part thereof, in my view is a non compliance of a mandatory provisions of the decree which is fatal to the appeal.
11. The view of the court is that enactment laying down the procedure to be followed in commencing or prosecuting an action or an appeal in a court must be followed.
12. In the case of **Venkatamma v Ferber -Watson [1995] FJSC7**; [1995] 41FLR 258 [24 November 1995] Fiji Supreme Court highlighted the importance of due compliance of the rules as follows:

“On the part of the appellants the irregularities have been failures to comply with the Supreme Court Rules 1992. Rule 24(b) requires the appellant to lodge his case in the appeal within one month of being notified that the record is ready. Rule 37(1) requires the appellant to file a statement of written submissions within 30 days after the lodging of his case. Despite reminders by the Registrar and the President of the importance of complying with these Rules, the appellants by their solicitors omitted to do so. The Chief Justice declined to grant any extension of time, but he left the question of the future of the appeal to be determined by this Court. At our hearing Mr. Sahu Khan submitted that the appellants should not be allowed to prosecute the appeal. He indicated that if this submission did not succeed he would prefer in the interest of his clients to proceed with the argument of the appeal forthwith; Mr. Naidu for the appellants tendered their case and written submissions.

After hearing counsel on the question the Court intimidated that in the special circumstances the appeal would be allowed to proceed. We took into account that, surprisingly, counsel for the appellants had evidently not been fully alive to the importance of compliance with the Rules, but that this is an early case under the Rules; that questions arise of some general significance between landlords and tenants of agricultural holdings; and that there have been mistakes on both sides, as already explained. We now stress, however, that the Rules are there to be obeyed. In future practitioners must understand that they are on notice that non-compliance may well be fatal to an appeal in cases not having the special combination of features present there, it is unlikely to be excused.”

13. In the case of **Ponsami v Reddy [1996]** FJSC 2; [1996] 42 FLR 160 (12 September 1996] re-iterated the importance of compliance of rules and compliance of procedural requirement in an appeal arising from the Agricultural Tribunal relying on the judgment **Vekatamma v Ferrier-Watson** case, states as follows:

“We now stress, however, that the rules are there to be obeyed. In future practitioners must understand that they are no notice that non-compliance may well be fatal to an appeal; in cases not having the special combination of feature present here, it is unlikely to be excused.

No such combination of features is present here. Indeed, the warning in Venkatamma should have alerted the profession to the dangers of non-compliance. Had it been necessary to do so, we would have been disposed to dismiss the appeal on the ground of non-compliance with the Rules, more particularly in the light of the very considerable delays that have occurred in the course of this litigation for some of which the respondent has been responsible.”

14. In consideration of the above authorities, this court is unable to come to conclusion that the non compliance of the requirement in the appeal is merely a

slight deviation which does not vitiate the notice of appeal as submitted by the Appellants. Further, in my view the word “must” in Section 107(3) cannot be interpreted as merely a directory in nature and not imperative or mandatory.

15. Counsel to the appellant also relied on Section 8 of the Interpretation Act which states that whenever any form prescribed by any law, an instrument or document which purports to be in such form shall not be void by reason of any decision which does not affect the substance of such instrument or document or which is not calculated to mislead. It is to be noted that procedural statutory requirement in the Tax Administration Decree cannot be considered in relation to the Section 8 of the Interpretation Act especially in view of the two supreme court judgments cited above.
16. On the other hand where the whole aim of the decree would be defeated if the provision were not complied with strictly, this court will not hesitate to rule that the compliance is obligatory.
17. Furthermore, this court is unable to excuse the appellant for non compliance for the reason is that this court, after the counsel for the Respondent brought to the notice of the court about non compliance, has given ample time to remedy the defect. It is not possible for this court to go into the correctness of the decision appealed or part thereof, until and unless the decision or part thereof is specified in the notice of appeal.
18. For all of the above reasons the appeal is dismissed. The Appellant is ordered to pay the Respondent’s costs which are summarily in the sum of \$750.00 within 28 days.

Susantha N. Balapatabendi
JUDGE