IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Misc. Action No. HBM 37 of 2013

BETWEEN : **SHAHIK HASSAN** of Laucala Beach Estate, Suva

Plaintiff

AND : **FIJI REVENUE AND CUSTOMS AUTHORITY**, a body Corporate duly constituted under the provisions of the *Fiji Revenue & Customs Authority Act 1998* having its registered office at Revenue & Customs Service Complex, Corner of Queen Elizabeth Drive & Ratu Sukuna Road, Nasese, Suva.

Defendant

Counsel : **MR R SINGH** for the **Plaintiff**

MR S. RAVONO with **MR VEREBALAVU O**. for the **Defendant**

Date of Judgment: **1st November, 2013**

JUDGMENT

1. Originating summons was filed by the Applicant on 18th February 2013 and sought the following orders:

   (i) that the Departure Prohibition Order dated 26th August 2013 issued by the Commissioner of Inland Revenue against the Applicant be revoked;

(ii) that the Respondent is to pay the costs.

2. The Affidavit in Support dated 15th February 2013 filed by the Applicant stated inter-alia:

2.1 According to the assessment of Tax raised by the Respondent, a sum of $885,768.43 was due as per Statement of Tax Account marked as *Annexure "SH1"*.

2.2 Departure Prohibition Order was raised on 26th of August 2011, marked as *Annexure "SH2"*.

2.3 The Applicant by his Solicitors letter dated 6/9/2011 (Annexure *"SH3"*) informed the Respondent the sum of $885,768.43 was written off as per entry made (marked as *Annexure "SH1"*) on 29th of December 2005. The letters dated 22nd November 2011, (*Annexure "SH4"*), 25th January 2012 and 25th March 2012 (*Annexure "SH5"*) were sent by the Applicant.

2.4 On 2nd of April 2012, there was a meeting with the Respondent and by letters dated 18th April 2012 (*Annexure "SH6")* the Applicant's solicitors sought a confirmation from the Respondent the Departure Prohibition Order dated 26th August 2011 be withdrawn on the basis that there is no justification for continuance of same as per Tax Administration Decree 2009.

2.5 The Application's solicitors by their letters dated 27th April 2012 (*Annexure "SH7"*) requested the Respondent to remove the Departure Prohibition Order since there is no tax owed and in failure to remove the said Order within 7 days they were to initiate court proceedings.

2.6 The Applicant's solicitors had filed an Amended Application for Review of Reviewable Decision pursuant to Section 82(1) of the Tax Administration Decree 2009 at the High Court on 14th June 2012 under Income Tax Action No. 5 of 2012 (*Annexure "SH8"*).

2.7 Receiving Order made against Applicant was made in Bankruptcy Action No. 306 of 1996S by the Magistrate Court Suva (*Annexure "SH9"*).

2.8 Order of Adjudication was made against the applicant in the said Bankruptcy case on 15th of June 2004 and the Applicant Bankrupt (*Annexure "SH10"*).

2.9 The Amended Application for Reviewable Decision filed under Action No. 5 of 2012 was withdrawn by the applicant's counsel on 17th December 2012 and no objection was made by the counsel for the Respondent.

2.10 The Applicant also stated the Respondent withdrew the taxable sum of $885,768.43 and it was revealed in the Statement of Tax Account dated 10th December 2012 (*Annexure "SH11"*).

2.11 The Applicant's solicitor by letter dated 15th January 2013 informed the Respondent and made a request to remove the Departure Prohibition Order (*Annexure "SH12"*).

2.12 It was stated by the Applicant since there was no response for the said letter dated 15th January 2013, the Applicant's solicitors by their letter dated 29th January 2013 informed the Respondent to remove the Departure Prohibition Order within seven days on their failure the Applicant shall initiate legal proceedings.

3. In reply, the Respondent filed its Affidavit dated 21st March 2013 through Visvanath Das the National Manager of the Debt Management until and deposed.

3.1 The Applicant trading as Autoline Marketing was registered for Tax purposes on 1st January 1993.

3.2 *(a) Replying to paragraph 3 of the Applicant's Affidavit stated inter-alia audits were carried out pertaining to Tax Years 1996-2002 on i/eo 2003 and there were several businesses Applicant was carrying on and the Applicant had defaulted Tax payments and VAT payments both accordingly tax assessments were raised;*

(b) Further audit was carried out by the Defendant on 26th July 2005 for Tax years 2003 and 2004 and the Applicant was carrying on minivan business of 9 vehicles. During the audit it was found there were telegraphic transfers deposited to the Applicant's account and withdrawn. Further, Applicant had deposited $40,000.00 cash with Bhindi Brothers for land purpose. With additional tax assessment with legislative penalties, the Applicant was liable to pay $885,768.43 as at 2005. The statement of Tax Account was annexed marked as

"VD1" (same document was marked by the Applicant as *"SH1"*).

3.3 In response to paragraph 4 of the Affidavit, it was stated:

(a) The Applicant had come for renewal of LTA permit and it was discovered the Applicant's tax debts were written off on the grounds that tax payer being bankrupt. The tax debt of the Applicant was written off on 29/12/2005 and it was reinstated at this juncture and Departure Prohibition Order was issued on 26th August 2011;

(b) The Respondent's contention was LTA permit issued to the Applicant and the Applicant needs to pay his tax liability. As such the Respondent placed the Departure Prohibition Order (DPO).

3.4 In response to paragraph 5, the Respondent stated the tax liabilities were written off as an accounting correction on uncollectable bad debts. It did not absolve the tax payer of his liability. At any time when tax payer earns income the state can recover its dues on tax.

3.5 Replying to paragraphs 6, 7, 8, and 9, Respondent had stated that due to the following reasons the Respondent did not respond to the letters of the Applicant:

(a) There was an interim verification initiated by the Respondents;

(b) Debt was reinstated and DPO was executed;

(c) As soon as the Applicant was earning income in Fiji, Applicant would become liable for payment of tax.

3.6 In response to paragraph 10, the Respondent admitted filing of amended application of reviewable decision pursuant to Section 82(1) of the Tax Administration Decree 2009 in the Tax Tribunal.

3.7 No comments were made by the Respondent with regard to paragraphs 11 and 12 *(Bankruptcy Proceedings against the Applicant).*

3.8 In response to paragraph 13, it was stated that Tax Tribunal application was withdrawn by the Applicant and the Tax Tribunal had commented the matter be reassessed and revocation of DPO to be considered by the Respondent. The Applicant in paragraph 13 of his affidavit, it was stated:

> *"Action No. 95 of 202 was heard before the Magistrate Mr Andrew See at which Mr Singh, counsel for the Applicant had stated that the matter be reassessed and that the Departure Prohibition Order be withdrawn. The counsel for the Applicant also sought Leave to withdraw the application".*

The Learned Magistrate had stated in the notes made in the proceedings of Action No. 12 of 2012 *"Order accordingly"* which means Leave was granted to withdraw the application. There is no order made by the Magistrate Departure Order to be withdrawn. If such order being made there is no necessity for the Plaintiff to initiate an action before this court and seek cancellation of the Departure Prohibition Order.

3.9 The Respondent in reply to paragraph 14 and 15 of the Applicant's Affidavit admitted that taxable sum had been written off on 10th December 2012 it did not absolve the Applicant of his tax liability. The Applicant now has the ability to derive income the Respondent had to reinstate the said tax liability. It was also stressed the Applicant's wife and children are in New Zealand and Applicant also has a permanent residence permit with New Zealand.

3.10 In response to paragraph 16, the Respondent had assessed the tax payer a flight risk and it had raised concerns on income sources for funding of his family and children's education overseas. However, he claimed his inability to pay tax obligations to the state which was written off since he is adjudged bankrupt. As such Respondent pleaded not to grant orders in the Applicant's summons.

4. The Applicant filed affidavit dated 8th of April 2013 sworn by the Applicant in response to the Respondent's Affidavit dated 21st March 2013 and stated inter-alia.

4.1 The Applicant admitted paragraph 4 of the Respondent's Affidavit that the Applicant was trading as Autoline Marketing since 1993.

4.2 In response to paragraph 5 of the Respondent's Affidavit the Applicant had stated:

4.2.1 The Applicant was in the business of exporting Yaqona to the United States of America and Dalo to New Zealand but he did not derive such huge sums of profit which would in fact accrue such large sum of tax.

4.2.2 That since there was an Official Receiver appointed he was stopped from exporting anything to overseas countries.

4.2.3 The Applicant had 9 vehicles and the purpose of purchasing 9 vehicles was to obtain permit with Land Transport Authority. The Applicant had bought the 9 vehicles through securing a loan from Credit Corporation.

4.2.4 The Applicant was unable to obtain a Permit from Land Transport Authority and sold the vehicles to discharge his loan from Credit Corporation and that out of the said 9 vehicles, the Applicant only had one existing permit being registration number MB121 and the Applicant had been the holder of the said permit since 27th March 2008. A copy of a letter dated 4th April 2013 from Land Transport Authority confirming the same was annexed and marked as *"SH1"*.

4.2.5 That it was false that the Applicant had in fact ever deposited a sum of $40,000.00 cash with Bhindi Brothers for any land purposes of whatsoever kind. A letter dated 28th March 2013 written by K Bhindi Brothers Limited confirms the same was annexed and marked as *"SH2"*.

4.2.6 The Applicant had no comments for telegraphic transfers in the sum of $14,990.00, $9,000.00 and $5,000.00 being deposited into his account but if the full particulars of the Telegraphic transfers was furnished for him to comment on.

4.3 In response to paragraphs 6 and 7 of the Affidavit, the Applicant stated:

4.3.1 That the tax debts were written off on the 29th day of December 2005 on the grounds that he was declared Bankrupt.

4.3.2 That a Receiving Order was also made against him on the 20th day of September 1996 in the Bankruptcy Action No. 306 of 1996S.

4.3.3 An Order of Adjudication was also made against him on the 15th day of June 2004 whereby he was adjudged bankrupt.

4.3.4 That the Applicant had no comments in relation of the tax write off being stated as an accounting correction of the tax office records for debtors being uncollectable and would only able to comment on it if schedule of discrepancies could be furnished.

4.4 The Applicant responding to the paragraphs 8, 9 and 10 of the Affidavit it was stated Respondent had not written to him or his solicitors that Tax Office had initiated its internal verifications. It was also stated that the Respondent failed to inform the internal discussions records of 2nd April 2012 that the debt will be reinstated and Departure Prohibition Order executed.

In my view there is no basis of this argument for the reason that as admitted by the Applicant discussion was held to decide on issue of Departure Prohibition Order. I conclude there is no necessity to inform the outcome of the discussions to the Applicant until the Departure Prohibition Order was issued.

4.5 The Applicant had admitted the contents of paragraph 11 of the Affidavit.

4.6 The Applicant responding to paragraphs 12, 13, 14 and 15 of the Respondent's Affidavit stated he repeated the contents of paragraphs 11, 12, 13 and 14 of his Affidavit dated 15th February 2013 filed in this proceedings

4.7 The Applicant disagreed with paragraph 16 and 17 and stated:

4.7.1 That he was deriving income from one minivan which has a Land Transport Permit being registration number MB121.

4.7.2 That income which he derived from minivan did not exceed the sum of $12,000.00 and as such he was unable to get any tax returns from it.

4.7.3 That it was true that the Applicant's family are in overseas as they all have Permanent Residence, the education and all miscellaneous expenses were entirely borne by themselves and that I did not support them financially in any way.

4.8 The Applicant prayed for the Orders in Originating Summons dated 18th February 2013.

5. **Law and Analysis**

5.1 The preliminary question to be decided in this matter is as to whether the Tax Authorities are entitled to reinstate the tax liability which was written off in their books. This practice had been adopted not only in Tax matters even in the financial institutions. When a customer defaults on advance given to him if the Financial Institution is of the view it cannot be recovered they will make a provision in their accounts on the outstanding amount as a bad and doubtful debt and thereafter they will write-off the Debt according to guidelines issued by the monitory authority of the country. The write-off of the debt does not absolve the defaulter from liability. Write-off will go as a direct expense from the profits and subsequently the Financial Institution could take steps to recover the outstanding when if it is found that the defaulter has sufficient assets in his possession; *(subject to limitation laws of the country).*

5.2 It is also important to note with regard to statutory liability, provisions of the Limitation Act does not apply. In the circumstances, I conclude that the Respondent had the right to reinstate the tax liability which was written-off and the Applicant was not absolved from the liability, only for the reason that tax liability was written-off. I agree it is an internal accounting entry. The Applicant's argument does not carry any merits and it fails.

5.3 Having concluded the Respondent had the right to reinstate the Tax liability it is now to analyze whether the Departure Prohibition Order issued by the Respondent could be revoked by this court on the material and evidence submitted by the Applicant.

5.4 The Departure Prohibition Order is issued pursuant to Section 31 of the Tax Administration Decree No. 50 of 2009. It states:

> "31(1) where –
>
> *(a) a person is subject to a tax liability; and*
>
> *(b) the CEO believes on reasonable grounds that it is desirable to do so for the purposes of ensuring that the person does not depart from Fiji for a foreign country without:*
>
> (i) wholly discharging the tax liability; or
>
> (ii) making arrangement satisfactory to the CEO for the tax liability to be wholly discharged.
>
> The CEO may by order in accordance with the prescribed form, prohibit the tax payer departing from Fiji for a foreign country.
>
> (2) The CEO must state ……."

5.5 As I stated there is a tax liability determined by the Respondent and this court has to find as to whether DPO was issued on reasonable grounds if not as to whether it to be revoked?

5.6 Mr Singh R. counsel for the Applicant submitted that:

(a) There was no tax liability as at December 2005. However, I have concluded in the preceding paragraph (5.2) that the write-off was an internal accounting adjustment and that does not absolve the Applicant from his tax liability. As such the submissions of the counsel that there was no tax liability, to issue a DPO fails. Further, the Applicant failed to give any material to show that his family and children living in New

Zealand are not dependent upon him. It is my contention that there is an imminent danger that the Applicant's departure from Fiji and joining his family to avoid the tax liability;

(b) The learned counsel relied on the principles adopted in the case of ***Herbert v. Fiji Islands Revenue & Customs Authority*** *Misc Action No. 5 of 2010 L* (unreported) *decided on 26th July 2010;*

(c) To arrive at a decision in the said case Inoke J. had vetted the facts which are totally different to this case:

(i) The DPO being issued against a Director on the tax liability of a company and the amount of the liability was not decided;

(ii) Whether the Directors are liable was not decided at the time of issuing the DPO.

(d) In the said judgment, Inoke J. had arrived at the decision considering the above 2 issues. In the present case, tax liability being established and the issue is restricted to whether there are grounds to revoke the Departure Prohibition Order. Accordingly, principle adopted by Inoke J. in the said case of ***Herbert v. FIRCA*** *cannot be applied and the Applicant's counsel failed to establish why the Departure Prohibition Order should be revoked;*

(e) Further, I find that the Applicant had failed to satisfy the requirements under 31(1) (a) and (b) of the Tax Administration Decree and the CEO had issued the DPO accordingly.

5.7 On the other hand, the Respondent had made submissions referring to Section 31(8) of Tax Administration Decree:

"31(8) The CEO must revoke a departure prohibition order if–

(a) the tax payer makes payment in full of the tax, payable or that will become payable by the tax payer;

OR

(b) the tax payer makes an arrangement satisfactory to the CEO for payment of the tax that is or will become payable by the tax payer.

The Applicant failed to satisfy any of the above requirements to get the DPO withdrawn by the Respondent. The Applicant's contention that he never deposited monies with Bhindi Brothers and remittances made are not issues to be taken into consideration in the present application for the reason that Applicant had defaulted the tax liability.

5.8 As stated in paragraphs 5.6 and 5.7, the issuance of the DPO by the CEO and not acceding to the request of the Applicant to withdraw the DPO are justified. The only instance the Court can intervene to revoke the Departure Prohibition Order is, if the CEO had acted unlawfully. In this case, the Applicant failed to establish there was an unlawful act by the CEO of the Respondent. The declaration of the Applicant as a bankrupt does not give him a right to evade tax liability; the taxes are to be paid when he derives an income. The Applicant's tax liability was reinstated when he came for the registration of the vehicle to LTA. The CEO had acted on that instance with reasonable grounds by issuing the Departure Prohibition Order. Tax Laws are introduced in a country to collect the taxes for welfare of the people. It is bounded duty of the Tax authorities to take measures to prevent defaulting of taxes or if defaulted, to take measures to recover such taxes. One such step is to issue Departure Prohibition Order persuading the defaulter to pay his tax liability. The legislature had provided adequate protection in law to the officers who lawfully act to prevent such situations. Section 31(10) of the Tax Administration Decree 2009 provides:

> **"Section 31(10)**
> *No Proceedings, Criminal, or Civil, may be instituted or maintained against the state, the CEO, a tax officer authorized to act under this section, or a Customs, Immigration, Police, or other officers for anything lawfully done under this section."*

In the present case, Applicant had failed to establish the CEO acted unlawfully, he had exercised his powers under Section 31(1) lawfully. As such, I conclude there is no cause of action arisen to the Applicant to seek relief from this court to revoke the DPO.

5.9 Having made the conclusion in the preceding paragraphs, I make the following **Orders**:

1. ***The originating summons filed on 18th February 2013 to revoke the Departure Prohibition Order dated 26th August 2011 is dismissed;***

2. ***The Applicant is ordered to pay FJ$1,500.00 to the Respondent within 14 days of this Judgment.***

Delivered at Suva this 1st Day of November, 2013.

…….
C. Kotigalage
JUDGE