IN THE TAX COURT OF THE HIGH COURT OF FIJI
AT SUVA

Tax Court Appeal No: HBT 12 of 2013

BETWEEN	:	**PUNJAS FLOUR LIMITED**
		Appellant
AND	:	**THE CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND CUSTOMS AUTHORITY**
		Respondent
Coram	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr B.C. Patel (Mr C.B Young with him) for the Appellant
		Ms S Ravono for the Respondent
Dates of Hearing	:	25 June and 3 August 2015
Date of Judgment	:	28 November 2016

JUDGMENT

1. This is an Appeal from the Decision of the Tax Tribunal dated 12 November 2013, whereby he dismissed the Appellant's Application relating to the imposition of Non-Resident Miscellaneous Withholding Tax (NRMWT).

2. The Application, for Review of the objection Decision, made to the Tax Tribunal asked for the following orders:

   (1) To set aside or vary the objection Decision of the Respondent dated 23 November 2012 disallowing substantially the Appellant's objection to the imposition of NRMWT.

(2) The Respondent refund to the Appellant such tax as the Respondent had wrongly collected.

(3) Compound Interest at 8% on all sums refunded.

3. The Appellant in its Notice and Grounds of Appeal is asking, inter-alia, for the following:

(1) That the Appellant is not liable to pay NRMWT and the Respondent do refund to it the $53, 549.05 collected in respect of such tax.

(2) That the Respondent refund to the Appellant the $5,354.91 collected for insufficient advance tax in respect of which the objection was upheld and also refund the $69,952.17 transferred to the Appellant's VAT refund account.

(3) That the Respondent pay compound interest at the rate of 7% p.a on the monies to be refunded.

4. The Grounds advanced by the Appellant are, inter-alia, the following:

(1) The Tribunal erred in law in failing to consider and determine the additional new ground challenging the Applicant's (Appellant) liability to pay NRMWT when leave to argue such new ground had been granted by the Tribunal.

(2) The Tribunal was wrong in law in holding it had no jurisdiction to order the refund of the overpaid tax collected by the Respondent for VAT refund held by it because the Applicant's grounds for review did not raise that issue, when it was raised in the reliefs claimed in the Application for Review.

(3) The Tribunal was wrong to hold that the Appellant had not discharged the onus upon it to prove the total price of services was CHF 139,000 and not CHF 194,580.

5. At the hearing, leading Counsel for the Appellant submitted there were 2 issues here. The Tribunal did not accept the letter from Buhler AG. The Appeal only concerns section 8A – (1) and (2)(d) of the Income Tax Act (ITA).

6. The Tribunal has power to order the refund, but to date none of the refunds have been made. Section 8A does not apply to a lump sum contract. It could not be extrapolated to include Buhler AG's employees. The financial provision never eventuated. Buhler AG's personnel were never employed by the Appellant and the Appellant never paid them any money. The Appellant never ever paid Buhler AG apart from the local content of the contract which required the Appellant to pay daily allowances which are not taxable. The Respondent never told the Appellant, until the hearing, that they did not accept the Buhler AG letter. The Tribunal gave leave but never considered the ground. It was wrong for the Tribunal to say the Respondent never received it.

7. Hearsay evidence was now admissible – Civil Evidence Act 2002, sections 2(1)(a) and 6. The parties agreed to the Buhler AG letter and the Appellant could not get its maker to come from Switzerland. The Tribunal never looked at the Act and never said what weight he gave to the letter.

8. Counsel referred to *Mobil Oil (Australia) Limited v Laisa Digitaki:* Supreme Court Fiji Civil Appeal No. CBV 0008 of 2008S.

9. It was speculation for the Tribunal to say the Appellant should have got more evidence and the Tribunal never put this to Counsel to respond. Counsel concluded by asking the Court to award compound interest.

10. On the next date, Mr Young of Counsel for the Appellant indicated he wanted to make a supplementary submission. This was objected to by Counsel for the Respondent because the Appellant's Counsel had completed his submission, it was not in the grounds of appeal and had not been raised before the Tribunal.

11. I ruled that the supplementary submission for the above reasons could not be made or received after the Appellant's Counsel has completed his submission.

12. Counsel for the Respondent now submitted. She referred to section 8A ITA and said the Appellant had not discharged the onus of proof. The only issue is whether the Respondent can impose tax on professional services. The Respondent concedes that the $11,048.21 should be refunded but the issue is the rate of interest.

13. Counsel for the Appellant replied the issue of interest was raised from the start. There was a mistake of law here and so the refund must be effected immediately.

14. At the conclusion of the arguments, I informed I would take time for consideration. Having done so, I now proceed to deliver my judgment. In doing so, I shall cut to the chase which would be salutary advice to all counsel.

15. According to the Appellant's written submission, the main issue is whether the Appellant is liable for NRMWT under section 8A 1 and (2)(d) ITA. The alternative ground is if NRMWT applies whether the Appellant has proved the amount liable by providing the Buhler AG letter dated 27 March 2012.

16. This letter is at page 49 of the Copy Record (CR). It states the total contract value was CHF 1,550,000.00 whereof the price for equipment is CHF 1,411,000.00 and the special lump sum price for services is a total of CHF 139,000.00 . This letter was given in response to the Respondent's request.

17. I have perused the Decision of the Tribunal dated 12 November 2013 (Decision), wherein para 20 he opined that the Appellant does not appear to be arguing it is not liable to pay NRMWT under Section 8A(2)(d) ITA, but only challenging the quantum and method of calculation.

18. I have therefore perused the Objection to Assessment (page 46 of the CR) dated 25 October 2012 lodged by the Appellant. The grounds of the Objection state that the NRMWT "has been wrongly calculated on total charges for services of CHF 194, 580 instead of on the correct amount of CHF 139,000." In my view, this is an unequivocal admission at the least that the tax is correctly imposed but incorrectly calculated.

19. I note that the Respondent's Counsel in para 15 of her Supplementary Submission states; *"Therefore, the Respondent submits that the Learned Tribunal had correctly accepted and admitted the letter dated 27 March 2012 as evidence during the proceedings before the Learned Tribunal. As such, the Learned Tribunal did not err in law as the Learned Tribunal is not bound by the strict rules of evidence."* To my mind, this is tantamount to accepting as correct what is stated in the Buhler AG letter.

20. In my considered opinion, the Appellant's Counsel cannot resile from the admission made by his client's authorised officer which is part of the Record. There is therefore no need for me to consider any further argument on this issue.

21. I do not see how the decision of the Fiji Court of Appeal in: *Vergnet SA.... Appellant and The Commissioner of Inland Revenue ... Respondent*: [2013] FJCA 51, can assist the Appellant in this appeal. There the taxpayer's position was that under the contract it did not impart any scientific ... knowledge .... to the FEA. The Revenue's position was that the payment was in relation to know how. The Court of Appeal set aside the High Court's finding that the FEA had acquired technical knowledge. However it held the Appellant was subject to NRMW Tax under management or supervision and training.

22. In view of the opinion I have formed on the issue before me, it is unnecessary to consider the other authorities cited by Counsel on both sides.

23. I therefore uphold the Tribunal's decision to accept and admit the letter as evidence. Since it is common ground between the parties that CHF 139,000, is the amount on which NRMWT is to be levied, the solution is at hand. Section 8A-(1) ITA stipulates that NRMWT shall be paid at the rate of 15% of the gross amount payable (i.e CHF 139,000). This would work out to the FJ equivalent of CHF 20,850.00 at the then prevailing exchange rate, which would be FJ $39,461.23. The Revenue would be required to refund the excess NRMWT it has collected from the Appellant.

24. With regard to the sum of $69,952.17 transferred to the Appellant's Income Tax ledgers (see para 23 of the Respondent's Supplementary submission, and the sum of $5,354.91 for insufficient advance payment these were not included in the Application, for Review of Objection Decision, made to the Tribunal. Therefore the Tribunal was correct in holding it was not within his ambit to make any orders with regard to their refund. Any issue regarding the latter sum is now rendered redundant by the effect of my judgment.

25. I shall therefore order the Respondent to forthwith refund to the Appellant the excess NRMWT collected, which would be the sum of FJ$14,087.09 ($53,549.05 - $39,461.96) together with simple interest at the rate of 7% per annum from the date of payment (deduction) to the date of actual payment to the Appellant.

26. I also order the Respondent to forthwith refund the Appellant the penalty wrongly imposed in the sum of $11.048.21 together with simple interest thereon at the rate of 7% per annum from the date of payment (collection) to the date of actual payment to the Appellant.

27. I finally order the Respondent to pay the Appellant costs throughout these proceedings which I summarily assess at $1,000.

28. In fine, the Appeal is partially allowed to the extent above and the Decision of the Tribunal varied as above.

29. Before I conclude I may be permitted to say it would be better for the Tribunal in making its decision to bring finality to the issues before him by deciding the nature and the rate of the interest he is ordering thus obviating difficulties that stem from the inability of Counsel on both sides to decide that issue. This will preclude this being an additional issue to be remitted to the High Court for its decision.

Delivered at Suva this 28th day of November, 2016.

David Alfred
JUDGE
High Court of Fiji