IN THE TAX COURT, HIGH COURT OF FIJI
AT SUVA
(APPELLATE JURISDICTION)

Civil Action No: HBT 4 of 2014

BETWEEN	:	**REDDYS' ENTERPRISES LIMITED** **Appellant**
AND	:	**CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND CUSTOMS AUTHORITY** **Respondent**
BEFORE	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr. R K Naidu and Mr R A Krishna for the Appellant Mr S Ravono for the Respondent
Dates of Hearing	:	31 August and 3 September 2015
Date of Judgment	:	18 April 2016

JUDGMENT

1. This is an Appeal from the decision of the Resident Magistrate in the Tax Tribunal, on the 15th July 2014, dismissing the Appellant's Application for Review against the assessments issued by the Respondent.

2. In its Notice of Appeal, the Appellant states its grounds of appeal are, inter alia, that the Tribunal erred in law and fact as follows:
   (1) In failing to consider there is no legal basis for and that it is unfair for the Respondent to demand further non-resident dividend withholding tax (NRDWT) from the Appellant after it has paid away dividends on the basis of a tax clearance issued by the Respondent.
   (2) In holding a tax clearance is not a tax assessment.

(3) In holding a tax clearance has no place in the imposition process despite evidence that a tax clearance was part of the process for assessing NRDWT.

(4) In failing to consider that when no document is issued by the Respondent the tax clearance must qualify as the assessment.

(5) In holding the assessments for 2006, 2009 and 2010 are within the statutory limitation period despite holding that some bases for the formula used in the assessment were outside the statutory limitation period.

(6) In holding the critical issue is the assessments fall within the statutory limitation period as opposed to the periods to which they relate.

(7) In failing to consider that corporate tax paid before the 2001 income tax year could be used for calculating NRDWT.

3. The Appellant also prayed for various specified declarations and orders.

4. The hearing commenced with the Appellant's Counsel submitting. He said the NRDWT story starts in 2001 and the Respondent went back too far. He referred to section 72A of the Income Tax Act (Cap 201) (ITA).

5. His co-counsel then submitted. He said the 1st issue is section 8 of the ITA. The 2001 Amendment was to avoid double taxation i.e. taxation in the hands of the shareholder. After 8 years the Respondent changed its interpretation. The question is one of interpretation of law and not computation of the tax amount payable. Section 8(2) does not distinguish when tax is paid.

6. Counsel referred to Regulation 8 of the Dividend Regulations (Regulations). He said Kotigalage J in deciding "A New Zealand Holding Company v Fiji Revenue & Customs Authority, did not refer to the most important provision and wrongly held the Appellant was intending retrospectivity. Counsel referred to Section 8(2)(a) of the ITA and also the Mara Bus Case.

7. On the next day of hearing, the Appellant's lead Counsel resumed submissions. He said he had these points to make:

(i) The Court should not fall into the trap which the Tribunal did, of assuming because one aspect of the formula occurs in the past that therefore the legislation is to be interpreted as being retrospective. The legislation is stop the shareholder from being double taxed which is a policy decision. It is not a good policy decision to say that the past tax credits cannot be used. The Respondent for 8 years allowed the previous tax credits to be used.

(ii) Section 8 of ITA- The shareholders in Fiji are burdened with payment of tax due from the Hong Kong shareholder, years later. The Respondent can and should claim from the Hong Kong shareholder.

(iii) The issue of limitation. The limitation period of 6 years is laid down in Section 11(2)(b) of the Tax Administration Decree 2009 (TAD) for the amendment of a tax assessment. Withholding tax was never the subject of a return. The 6 years runs from the date of the tax clearance issued by the Respondent. Finality is important to the taxpayer because the law only requires records to be kept for 7 years under section 34 of the TAD. Here the calculation goes back to 2001. With that Counsel concluded his submission.

8. Counsel for the Respondent now submitted. He said with regard to the imposition of NRDWT, everything began on 1 January 2001, because the law is prospective. The tax clearance is not a notice of assessment. It is a certificate given to a third party i.e. the Governor of the Reserve Bank, whereas the notice of assessment is issued in the name of the taxpayer and issued to him. The 6 years period does not apply to a tax clearance certificate and does not apply to this case. It is only applies to a notice of assessment. The tax clearance is provisional only.

9. Lead Counsel for the Appellant then replied. He said the Respondent was coming back after 6 years and the tax clearance must be read as the taxpayer's return. The clearance is given after the Respondent does a due diligence of all taxes to be paid. The consent of the Respondent is not required under section 34(2)(b) of the

TAD if the taxpayer wants to destroy documents after year 7. Finality means certainty.

10. At the conclusion of the hearing I said I would take time for consideration.

11. In the course of reaching my decision, I have perused:
    (1) The Appeal Record (AR).
    (2) The Statement of Agreed Facts and Issues.
    (3) The Decision of 15 July 2014 of the Tax Tribunal (Decision).
    (4) The Appellant's Written submission.
    (5) The Respondent's Submission.
    (6) The Appellant's Case Book.
    (7) The Income Tax Act.
    (8) The Tax Administration Decree 2009.
    (9) The Dividend Regulations.
    (10) The Income Tax (Budget) Amendment Decree 2001.

12. I now proceed to deliver my judgment. At the outset I say the lodestar here for me is the decision of Rowlatt J in: The *Cape Brandy Syndicate v The Commissioners of Inland Revenue* (12 T.C. 1917 – 1926) at page 366, where he said: *"Now of course it is said and urged by Sir William Finlay that in a taxing Act clear words are necessary to tax the subject. But it is often endeavoured to give to that maxim a wide and fanciful construction. It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts. It means this, I think; it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment; there is no equity about a tax: there is no presumption as to a tax; you read nothing in; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax."*

13. I shall start by framing the issues as follows:
    A. Whether the tax clearance certificate is a notice of assessment of tax.

B. Whether the Respondent can amend a demand for NRDWT on a dividend already paid to a non-resident shareholder on the basis of a tax clearance received from the Respondent.

C. Whether an amendment of an assessment more than 6 years from the tax clearance to remit the dividend is time-barred under section 11 of TAD.

D. Whether the Appellant is entitled to have past corporate tax credits taken into account in the calculation of NRDWT.

14. I will start with **A.**

The First Schedule of TAD gives the full list of what are defined as tax assessments for the purposes of this Decree.

A careful perusal of the same does not disclose that an Income Tax Clearance Certificate is included as a tax assessment.

15. The clearance is given by the Respondent to the Governor of the Reserve Bank of Fiji (Bank) under the provisions of section 72A of ITA, purely and simply to enable the Bank to give exchange control approvals for the remittance of monies to a non-resident shareholder (in Hong Kong).

Applying Rowlatt J.'s words, I do not read into the words of section 72A any intendment or implication that the tax clearance means the taxpayer has paid the NRDWT, if it has not, nor that it is to be considered as an assessment of the NRDWT.

16. There is a further reason why I cannot do so. There is a vast difference between the two terms as I will illustrate. A clearance is an official authorisation for something to proceed. In other words it is an official permission for someone to do something. In the instant case this is the Respondent authorizing or permitting the Bank to give the requisite exchange control approval. This is a far cry from an assessment which is the amount of a tax which the Respondent has decided or fixed for a taxpayer to pay (see the Oxford Advanced Dictionary of Current English). Also Stroud's Judicial Dictionary defines assessment as the actual sum of tax which the taxpayer is liable to pay on his profits.

17. Finally, I accept Isaacs J's decision in *R. v DCT* (SA) ex parte Hooper, that an assessment "is the Commissioner's ascertainment, on consideration of all relevant circumstance, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer."

18. Thus, I am of opinion that the clearance is not a notice of assessment.

19. **B**. The dictionary definition of demand is this. It is to ask for something as if ordering or as if one has a right to. This is certainly the case with the Respondent viz a viz the Appellant. The Respondent is not merely asking the Appellant to pay the tax decided or fixed but, more, is ordering the Appellant to pay because the Respondent has a right to.

20. Because I have held the clearance is not an assessment, it would follow that issue B can be easily answered.

21. That the NRDWT has to be paid is laid down in Sections 8(1) and 8(2) of ITA. Subsection 8(2)(a) provides that such a tax is payable on a dividend declared, paid or credited by a company where dividend means any amount distributed by a company to its shareholders.

22. Regulation 9(1)(j) of the Income Tax (Dividend) Regulations 2001 (Regulations) requires a resident company to provide to each shareholder to whom it pays a dividend a shareholder certificate informing of "the amount of withholding tax paid (if any).

23. That the NRDWT has not been paid can be seen clearly from the Shareholder Dividend Certificates of the Appellant in the AR (where the shareholder is the non-resident Finegrand Limited) which states $0.00 in the box labeled "Withholding Tax Deducted".

24. The Respondent's demand, in informing the Appellant of the NRDWT assessed and demanding payment is, in my opinion, to be considered as tantamount to a notice of assessment of the NRDWT, for the first time, to the Appellant.

25. Therefore to my mind, the Respondent can make and then amend a demand for NRDWT, unfettered by a clearance he had earlier given to the Bank to approve the payment out to the non-resident shareholder of the dividend for the simple reason that the clearance was not any confirmation that the NRDWT had been paid nor was it even the demand in the first place. It was a misperception on the part of the Appellant to consider that it was relieved of its obligation to pay the NRDWT, when it paid the dividend to Fingrand Ltd after the Bank received the clearance, because that obligation would only be met after it received the demand/notice of assessment and paid the NRDWT, which would be a later event.

26. Having disposed of **B,** I now proceed to **C**. By Section 11 of TAD, the Respondent may amend a tax assessment by making alterations and additions to ensure the taxpayer is liable for the correct amount of tax payable and by subsection 2(b) this may be made within 6 years of the date of service of the notice of assessment on the taxpayer. I reiterate here the clearance is not the assessment.

27. So the starting date for the amended assessment is when the original demand/ assessment was served. No evidence nor contention has been raised by the Appellant that any of the amended assessment notices were served on the Appellant on a date later than 6 years of the service of the original demands/notices. I therefore find and hold that the amended notices of assessment are not time-barred.

28. **D.** I now have to consider whether the Respondent is still bound by its ruling to allow tax credits or if it is entitled to consider that that has been superseded by its later decision. The Respondent relies on the decision in *Commissioner of Inland Revenue v Lemmington Holdings Ltd* [1982] 1NZLR 517, which was adopted by the Fiji Court of Appeal in the case of *Punjas Ltd v Commissioner of*

Inland Revenue [2006] FJCA para [88] where it held the Commissioner "cannot be encumbered by any previous position which he had taken up. He must be free to exercise his judgment and discharge his statutory functions as and when he thinks proper. In short, he is entitled to change his mind and take up a new position and disavow one that he has taken up previously." In my opinion the Respondent is entitled to change his previous position and adopt a new one as he has done and the Appellant cannot validly object to it.

29. I turn now to consider whether the Appellant is entitled to tax credits for the periods before 1 January 2001, as contended by the Counsel for the Appellant. At the outset, I shall state that the question whether the Regulations are retrospective or prospective is a red herring. The meaning of the words in the Regulations can be found within the 4 corners of the Regulations. Regulation 1(3) states "These Regulations are deemed to have come into force on 1st January 2001." Subsection (4) states that no penalty may be imposed unless the act or omission occurred on or after the date these Regulations were published in the Gazette. These clearly show the maker of the Regulations intended them only to apply to acts or events after 31 December 2000, and not to those before 1 January 2001. Therefore in truth the corporate taxes paid or tax credits to be considered could not have come from any period prior to 1 January 2001, but only from any period after 31 December 2000.

30. Therefore the Appellant's contention will not stand and have to be rejected for it relates to credits for corporate tax as paid by the Appellant before 1 January 2001.

31. Before I deliver my judgment there are 2 other arguments to be dealt with. First I shall refer to the plaintive argument of the Appellant that the dividend having been paid to the shareholder who may have sold the shares, the burden of the NRDWT falls on the shoulders of the other shareholders.

32. The quick answer to this is that while section 8(3) of the ITA lays down that it is the person who receives the dividend who is liable to pay the NRDWT, subsection

(4)(a) states that notwithstanding subsection (3)'s provisions, the NRDWT shall be payable and recoverable, in the case of a non-resident or any person outside Fiji, from the company paying the dividend. Thus it is the Appellant who is enjoined to pay the NRDWT for the shareholder in Hong Kong. Thus this argument also falls to the ground because I have no intention of going against the legal maxim that hard cases make bad law.

33. Second, I refer to the retention of records. Section 109(3) of the ITA and section 34(1)(b) of TAD requires the taxpayer to preserve every document etc relating to its business for not less than 7 years after the end of the income year that such document etc relates to. Since the Respondent has made amendments within the 6 years, in each case, of the demand/notice of assessment, this means the Appellant's argument that there is prejudice thereby caused to the Appellant i.e to keep its documents indefinitely, is, if I may say so, clearly untenable. Amendments are made during the period of retention of relevant documents.

34. In fine, I hereby uphold the Decision, dismiss the Appeal, refuse the Orders prayed for, and order the Appellant to pay the Respondent the costs of this Appeal which I summarily assess at $1,000.00.

Delivered at Suva this 18th day of April 2016.

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DAVID ALFRED
Judge of the High Court of Fiji