STATE v COMMISSIONER OF INLAND REVENUE, Ex parte ROSLYN ALI

HIGH COURT — CIVIL JURISDICTION

FATIAKI J

1 February 2002

[2002] FJHC 269

Taxation and revenue — assessment of income — petition for extension of time — failure to object within 60 days — High Court Rules O 53 r 4(2) — Income Tax Act (Cap 201) ss 62(1), 62(2), 62(8) — Interpretation Act (Cap 8) s 53.

Roslyn Ali sought extension of time to object to a tax assessment by the CIR on the alleged profit made by her as joint shareholder with four others in the sale of her shares in a property-owning company. The CIR held that Roslyn delayed in her petition.

Held — The CIR had the necessary power to extend the time limited for objections to be made against a tax assessment and has refused to do so in this instance. The assessment, by operation of s 62(8) of the Income Tax Act, becomes "valid and binding" and no extension application may be entertained thereafter in the absence of an application for an extension lodged within the 60-day period.

Application allowed.

Cases referred to

Padfield and Ors v Minister of Agriculture Fisheries and Food [1968] AC 997; *Practical Shooting Institute (New Zealand) Inc v Commissioner of Police* [1992] 1 NZLR 709, considered.

R. Smith for the Applicant

B. Malimali and *T. Waqanika* for the Respondent

Judgment

Fatiaki J. On 6 May 1999 in the absence of any opposition this court granted the applicant leave to apply for judicial review of a decision of the Commissioner of Inland Revenue (CIR) refusing to extend the time limit within which notice of objection to a tax assessment might be given.

The solitary ground upon which the application is based is "that the decision is wholly unreasonable in all the circumstances". There are before the court the primary affidavit of the applicant and an affidavit of the CIR in reply. I am also grateful for the helpful submissions and authorities provided to me.

In this latter regard however, I remain unconvinced that the blame worthiness of a taxpayer's advisors in an application seeking an extension of time to object to a tax assessment is comparable with the situation where a court is considering the appropriate penalty to impose on a taxpayer who has been convicted of a tax offence and where there can be no dispute as to his liability or guilt and where the Courts have consistently maintained that the responsibility is "personal" to the taxpayer and cannot be "transferred to legal and accounting advisors".

The brief facts of the case are that applicant who was a joint share-holder with four others, in a property-owning company sold her shares in the company and was assessed for tax by the CIR on the alleged profit made by her in the sale of her shares.

Upon receipt of the tax assessment, instructions were issued to the applicant's accountant to object to it, but, owing to an error on the accountant's part, the objection was not delivered to the CIR until, in the applicant's words, "one day late". By registered letter dated 2 June 1998 the CIR rejected the applicant's objection "... as it was received outside the 60 days' time frame". The applicant was further invited within 14 days to attend a "mitigation meeting with the Commissioner of Inland Revenue".

The applicant then instructed her solicitors who by letter to the CIR dated 31 July 1998, sought "an extension of time to file an objection". No explanation was given for the delay in applying for the extension but in any event the request was subsequently refused by the CIR in a letter dated 6th January 1999 "... after a careful consideration of the facts submitted".

Four months later the present application was filed on 29 April 1999 also outside the time limit provided for in terms of O 53 r 4(2) of the High Court Rules, but on this occasion the delay is said to be due to an error on the part of the applicant's solicitor occasioned by "pressure of work".

It is common ground first, that the applicant's original objection to the tax assessment was lodged 3 days after the statutory time limited for such an objection had expired; and second, counsel accepts that the application for judicial review is brought "23 days late" but leave having been granted this latter delay is less significant at this juncture.

As to the former time limit, s 62(1) of the Income Tax Act (Cap 201) provides (so far as relevant):

> *Any taxpayer dissatisfied with an assessment may personally or by his agent, within 60 days of the date upon which the notice of assessment has been served upon him or his agent, or where such notice has been posted, the date of posting, lodge with the Commissioner an objection in writing to the assessment … stating the grounds on which he relies …*

And s 62(2) simply provides that:

> *The Commissioner may, in his discretion, extend the time for giving notice of objection under subsection (1).*

Finally and for the sake of completeness, s 62(8) directs:

> *Where no objection is made within the time for objecting set out in subsection (1) or where that time is extended by the Commissioner, within the time extended... the assessment shall stand and shall be valid and binding upon the taxpayer...*

It is clear from the above that the CIR had the necessary power to extend the time limited for objections to be made against a tax assessment and has refused to do so in this instance.

In his affidavit the CIR has deposed inter alia to a mitigation meeting held with the applicant's accountant on 17 June 1998 wherein a mode of repayment agreement of the applicant's tax arrears was entered into and payments were subsequently made on the applicant's behalf.

Such payments however, were made "pending resolution of the Court of Review appeals" in respect of similar assessments made by the CIR against the four other joint shareholders arising out of the same transaction involving the applicant and which they had objected to within time. Be that as it may the CIR baldly asserts that the solicitor's delay (which must be vicariously ascribed to the applicant) "... is detrimental to good administration". Nowhere is it suggested that there is no merit in the applicant's grounds of objection nor is it deposed or advanced by counsel that the applicant is estopped from challenging

the assessment as a result of having approbated the tax debt both before and after seeking an extension under s 62(2) above.

The CIR has deposed however that the delay of almost 60 days in seeking an extension was "inordinate" and "... the reasons espoused by (the applicant) discloses no reasonable grounds for granting of her application". Furthermore counsel for the CIR in her skeleton submissions writes (confirmed orally):

> *It has been departmental practice to consider a request for an extension of time only where this is lodged within the 60 days allowed for the lodging of the application* (so objection?).

This so-called "practice" and the CIR's rigid adherence to it in the particular circumstances of this case, counsel for the applicant submits is "wholly unreasonable" in so far as it represents an unwarranted fetter on the otherwise unlimited discretion of the CIR under s 62(2) to extend the time within which objections may be made.

Additionally, counsel submits, such a practice is plainly contrary to the law as set out in s 53 of the Interpretation Act (Cap 8) which reads:

> *Where in any written law a time is prescribed for doing any act … and power is given … to extend such time, then, unless a contrary intention appears, such power may be exercised … although the application for the same is not made until after the expiration of the time prescribed.*

Counsel for the CIR without necessarily accepting the relevance of the above provision insists that "(the) application (for an extension) must be made within time", and further, "(that) s 62(8) should be read in conjunction with subs (2) as it contains the basis of the departments premise (practice?) that any request for an extension of time must be made within the 60-day period for the lodging of an objection". Accordingly counsel writes "the assumption therefore is that once it (the tax assessment) becomes valid and binding [under s 62(8)], any request for extension of time to lodge an objection can no longer be entertained".

In other words, in the absence of an application for an extension lodged within the 60-day period, the assessment, by operation of s 62(8), becomes "valid and binding" and no extension application may be entertained thereafter.

There is a superficial attraction to counsel's submissions concerning the limiting effect of s 62(8) on the CIR's unfettered discretion to extend time under s 62(2). I say superficial because s 62(8) expressly excludes from its operation, any period of extension granted by the CIR in the exercise of his discretion under s 62(2).

If I may say so, counsel's submission ignores the very real possibility where an application for extension is lodged within the 60-day period but no decision is made until after the 60 day has elapsed. What then? Does the mere lodgment of the application within the 60 days have the effect of suspending the operation of s 62(8) pending the CIR's decision? or is the CIR's decision to be considered statutorily barred by the operation of s 62(8)?

As drafted s 62(8) clearly recognises two separate and disjunctive time limits — (i) that which is "set out in subs (i) and (ii) where that time is extended..." under subs (2). Nowhere in the subsection is there any mention of an application for an extension and the same may not be read into the Section so as to impose an imaginary time limit within which the application must be made nor, in my view, does it justify the "departmental practice" that has been adopted thus far.

Needless to say to require an application to extend a time limit to be lodged within the time limit itself is somewhat paradoxical even unreasonable especially when one considers that the particular discretion is primarily intended for the benefit of the taxpayer and is only exercisable where no objection has in fact been lodged within the time allowed.

What's more such a requirement would impose an unduly onerous burden on the taxpayer in having to independantly assess whether or not his objection, which is usually formulated and handled by his professional advisors, will be lodged within time however early he may have instructed his advisors to act and however innocent he may be of any default in the lodgment of the objection within time. Such an interpretation does not commend itself to this court and is accordingly rejected.

That being the construction of s 62(2) and (8) there is, in my view, no valid basis for the above assumption which is in the nature of a "non-sequitur". Nor in my considered opinion can s 62(8) be construed as indicating a "contrary intention" to the applicability of the clear provisions of s 53 of the Interpretation Act (Cap 8) to the power granted to the CIR to extend the time within which an objection to a tax assessment may be lodged.

In the leading case of *Padfield and Ors v Minister of Agriculture Fisheries and Food* [1968] AC 997 Lord Reid said in an off-quoted passage, of the nature of a statutory discretion:

> *In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act, or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then the law would be very defective if persons aggrieved were not entitled to the protection of the Court.*

More relevantly in *Practical Shooting Institute (New Zealand) Inc v Commissioner of Police* [1992] 1 NZLR 709, Tipping J, in rejecting a policy decision imposing a complete ban on the importation into New Zealand of certain types of fire arms, where the Commissioner of Police had an unfettered discretion to approve the same, said at 718:

> *… Rigid policy is really the antithesis of the exercise of discretion and I for one would need to see the power to adopt such a rigid policy for a discretionary assessment appear by clear and necessary implication from the enabling legislation …*

Before his honour would uphold the policy.

In the present context there can be no doubting the mitigatory intention of s 62(2) when one considers the consequence of a failure to object to the CIR's assessment within time, and likewise, the adoption of a rigid "departmental practice" of requiring an application for an extension to be lodged within the time limited for actual objections to be made before it can be entertained, is, in my considered opinion, a "practice" which "thwarts or runs counter to the policy and object of … [s 62(2)]".

I accept however, that in neither his rejection letter or affidavit in opposition has the CIR expressly referred to this so-called "departmental practice" as a reason for refusing the application to extend the time nor equally, has he identified the "facts" that he says he considered in arriving at his decision other than the delay in applying which the CIR claims was "inordinate" and the reasons espoused by the applicant in her affidavit which "discloses no reasonable grounds".

As to the former it may be observed that it took the CIR almost 6 months to reject the application for an extension, and, as to the latter, nothing is deposed, as to the actual "grounds" advanced by the applicant's solicitors in their letter seeking the extension which are different from those deposed in the applicant's affidavit.

Be that as it may, after careful consideration, I am constrained to conclude that in the exercise of his discretion the CIR misdirected himself and unreasonably failed to properly consider the following relevant matters:

(1) That the original delay in the lodgment of the applicant's objection was a mere 3 days and was entirely due to an innocent oversight on the part of the applicant's accountant;

(2) That the subsequent delay in applying for an extension was partly taken up by the applicant's accountant attending to a "mitigation meeting" instigated by the CIR;

(3) That by his own deposed admissions the CIR accepts that the applicant has an arguable objection to the assessment and, in any event, substantially identical assessments were being timeously challenged by the applicant's co-shareholders;

(4) In the event of the co-shareholder's (and by necessary implication the applicant) succeeding in their objections to the CIR's assessments, "due adjustments shall be made (with) amounts paid in excess being refunded..." [see: s 62(7)];

(5) The grant of the applicant's application for an extension is incapable of creating a "precedent" undesirable or otherwise; and

(6) The existence of the "departmental practice" and the reliance on it in counsel's written submissions cannot be ignored.

The application is accordingly granted. The decision of the CIR rejecting the application for an extension is quashed and the matter is remitted to the CIR to consider and determine afresh. There will be no order as to costs.

Application allowed.