IN THE STATUTORY TRIBUNAL, FIJI ISLANDS
SITTING AS THE TAX TRIBUNAL

Application No. 16 of 2013

BETWEEN: **TAXPAYER H**

Applicant

AND: **FIJI REVENUE & CUSTOMS AUTHORITY**

Respondent

Counsel: **Mr I Ramanu for Applicant**
Mr S Ravono, FRCA Legal Unit for the Respondent

Date of Hearing: **Friday 1 November 2013**

Date of Decision: **Tuesday 5 November 2013**

DECISION

EXTENSION OF TIME APPLICATION – Section 82(3)- TAX ADMINISTRATION DECREE 2009 – Objection Decision; Relevant Considerations.

Background

1. Taxpayer H is a former Accountant whose conduct as a servant was the subject of a police investigation, relating to allegations that can best be described as the receiving of secret commissions during the period 1999 to 2003.

2. The Taxpayer's financial affairs during that period were the subject of a tax audit undertaken by the Respondent and completed in 2004.

3. The consequence of that Audit, was that on 10 March 2004, the Respondent issued amended Tax Assessments to the Taxpayer for the Income Years 1999 to 2002.

4. On 19 April 2004, the Taxpayer wrote to the Respondent, Objecting to the Amended Assessments.

5. By letter dated 20 May 2004, the Respondent wrote to the Taxpayer advising that the Amended Assessments would stand.

6. The relevant police investigation into the conduct of the Taxpayer was closed on 11 September 2013, on the basis that there was insufficient evidence to proceed on any charges by the Director of Public Prosecutions.

7. On 7 October 2013, Counsel for the Taxpayer wrote to the Senior Court Officer High Court, asking that this Tribunal extend the time for the making of an application of a reviewable decision.

8. The application made under Section 82(3) of the *Tax Administration Decree* 2009, was first brought on for mention before the Tribunal on 22 October 2013, at which time Counsel was asked to file an Application setting out the grounds the Taxpayer intended to rely upon, should the extension of time be granted.

9. When the matter was brought back on for hearing of the application on 1 November, only a skeleton application had been filed and on that basis, rather than delay consideration of the matter further,[1] the Tribunal sought to clarify with Counsel for the Taxpayer, the basis upon which the application was to be filed, including understanding the grounds in which the review of the substantive decision should be based.

10. As the matters in dispute between the parties related to Income Tax Assessments in the periods 1999 to 2002, the transitional provisions set out within Section 119 of the *Tax Administration Decree* 2009, apply.

Grounds of Application for Extension of Time

11. Within the correspondence sent to the High Court Registry on 7 October 2013, Counsel for the Taxpayer stated among other things:-

    "(The Taxpayer) has been challenging the (Respondent) for what he deems is money that was not income, therefore not taxable, since 2004.

    His case has been dealt with by many officials of the (Respondent), some of whom have retired or resigned and moved on.

    According to evidence provided by him, one particular official had informed him that they were going to withdraw any tax claim. Then another official started demanding illegal personal payments from him in return for his tax matter to be dropped.

[1] Particularly given that there was a related matter to be determined in the High Court pertaining to the debt recovery of the taxes in dispute.

Then there was the attitude by his former counsel showing very little concern about his current High Court Case[2]; she appeared only once, but failed to appear in other sittings."

12. When the application for extension of time came before the Tribunal, the first difficulty facing the Taxpayer, was the fact that it had failed to identify any grounds in which it was seeking to rely on, in the making of a review application.[3]

13. With the assistance of the Tribunal and so as to expedite proceedings, it was accepted by Mr Ramanu, that the substantive ground for making the application, should be that,

    Certain loans paid to the Taxpayer should not be considered to be "income" for the purposes of Section 11 of the Income Tax Act (Cap 201).

14. In relation to why the Taxpayer sought an extension of time to make the application, the first major argument to be advanced by Counsel was that the former lawyer responsible for the carriage of the taxpayer's legal matters, Ms L, had failed to prosecute an Appeal under Part IX of the *Income Tax Act* (Cap 201). That is, she had been derelict in her duties, to the disadvantage of the Taxpayer.

15. Mr Ramanu argued that the former Counsel had failed to advise the Taxpayer of his rights and that Mr H in turn, assumed that the investigation of his affairs by the Fiji Police was in some way, an ongoing investigation of his tax obligations. The argument being, that until that investigation had concluded, there was no further action required of the Taxpayer, in regard to challenging the Respondent's Objection Decision under Fiji Income Tax Laws.[4]

16. The Taxpayer Mr H was called up to clarify the evidence set out within his *Affidavit in Support* dated 23 October 2013. Mr H claimed that some time in late November or mid December 2012, the former Auditor of the Respondent who had undertaken the 2004 audit of the Taxpayer's affairs, had spoken to him and indicated that the Respondent was going to alter its position and treat the matter as a loan.[5] Mr H also responded to other questions put to him by the Tribunal, where he gave evidence in relation to how some of

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[2] A case initiated by the Respondent seeking the sale of two of the Taxpayer's properties, as enforcement of the tax debt owing in the amount of $555,242.04.

[3] While I acknowledge that Counsel for the Taxpayer had advanced an argument, that the expectation was that the grounds of application for review would not need to be advanced, prior to the Tribunal actually granting leave to apply; such a situation would be unworkable given the relevant judicial criteria to be considered when determining whether or not to exercise the discretion to grant such leave.

[4] That is, under either the *Income Tax Act* (Cap 201) or the *Tax Administration Decree* 2009.

[5] As the Tribunal had indicated to the parties during the hearing of this application, even if that was so, the position of the Respondent in its submissions in 2013, was very clearly different to that..

these loans came about, what was their purpose and the nature of his relationship with the lender, Mr N. [6]

Submissions of the Respondent

17. The case of the Respondent is set out in submissions filed in the High Court Registry on 30 October 2013, including a supporting Affidavit in Response by Mr John Faktaufon[7], who is the Chief Auditor of the Respondent.

18. Mr Ravono made clear that Section 22 of the *Tax Administration Decree* 2009, makes any unpaid tax, a debt due to the State and recoverable in accordance with Division IV of Part II of the Decree.

19. Counsel for the Respondent argued, that the Taxpayer had ample opportunity to pursue a review of the Tax Assessments but had failed to do so. He stated that the Respondent was entitled to certainty in such matters and cited two recent cases of this Tribunal where the issue of enlargement of time was considered. [8]

Relevant Legal Principles to be Considered

20. In *Taxpayer K,* this Tribunal identified the principles set out by his Honour and President of the Supreme Court, Chief Justice Gates in *NLTB v Ahmed Khan and Anor* [9], when considering whether or not to exercise the discretion in allowing an extension of time. These principles require an examination of the following factors:-

    - *the reason for the delay;*
    - *the length of the delay;*
    - *any action taken by the Applicant to dispute the Objection Decision;*
    - *possible impact and prejudice to the Respondent; and*
    - *the apparent merits of the application.*

21. Moreover, his Honour the Acting President of the Court of Appeal, Calinchini AP, has clarified in the case of *Datt v Datt*[10] that

    When the length of the delay is extreme and the explanations for it are wholly unsatisfactory, it is still necessary, in exercising the discretion given to the Court, to assess the chances of the proposed appeal succeeding.

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6 It should be noted that despite the invitation from the Tribunal, that Counsel for the Taxpayer did not exploit further the opportunity to have clarified any of that evidence by way of re-examination.

7 Also sworn on that same date.

8 See *Company L v Fiji Revenue & Customs Authority* [2013] FJTT 12 and *Taxpayer K v Fiji Revenue and Customs Authority* [2013] FJTT 10

9 CBV002.2013

10 [2013] FJCA 58 at [13]

22. Let us examine these factors in turn.

Length of Delay

23. Regardless of whether or not it is accepted that the Objection to Assessment or Objection Decision were compliantly attended to for the purposes of Section 62 of the former provision of the *Income Tax Act*, the length of delay in the making of this application to the Tribunal, comes approximately 9 years and six months after the Amended Assessments were issued by the Respondent.

24. This is an extraordinary period of time, keeping in mind that Sections 11 and 12 of the *Tax Administration Decree* 2009, allow for a 6 year time frame for the amendment to tax returns and assessments. More importantly, the present time period in which a Taxpayer is given to make an application to the Tax Tribunal for a review of a reviewable decision is 30 days.

Action Taken By the Taxpayer To Dispute The Decision

25. On 20 May 2004, the Respondent wrote to the Taxpayer advising that "the Amended Assessments for the years 1999 to 2002 inclusive, shall now be valid and binding".

26. The only documentary evidence relating to the ongoing disputation of this matter,[11] appears within the Taxpayer's *Affidavit in Support*, when on 15 August 2012, Mr H appears to have written to the Respondent seeking an urgent determination of his Objection and a reassessment being raised of his taxation obligation.[12]

27. According to the Affidavit of Mr Faktaufon dated 30 October 2013, the Respondent did undertake a further review of those Assessments and confirmed its stance on the issues by letter to the Taxpayer dated 20 September 2013.[13]

28. In the worst possible case scenario, this date could be argued to be the date in which a compliant Objection Decision was issued.[14] The implications of this being, that the Taxpayer would thereafter have 30 days in which to make application to the Tribunal to have the matter reviewed.[15] For reasons that I am later going to articulate, I am not prepared to support such a conclusion.

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[11] It is noted that within the letter dated 15 August 2012, various references are made to earlier correspondence referred to as Annexures AH 17 to AH 19.

[12] See Annexure AH 11.

[13] See Paragraphs 13 to 15 of that Affidavit.

[14] I say this on the basis that there appears to be no formal Objection Decision issued by the Respondent to the Taxpayer in accordance with Section 62(5) of the Income Tax Act., that was otherwise due to the Taxpayer in accordance with this Objection to Assessment dated 19 April 2004.

[15] See Section 16(1)(a) of the *Tax Administration Decree* 2009.

Possible Impact and Prejudice to the Respondent

29. The Respondent has sought to rely on the previous views of this Tribunal in relation to relevant issues pertaining to impact and prejudice.

30. Particularly in the case of *Company L,* the Tribunal has previously stated:

> *The impact to the Respondent needs to be considered in the context of the scheme that it administers. It would be easy to envisage the number of taxation officers within the Respondent to double or triple should there be an open ended approach as to when a Taxpayer could have its assessment reviewed. The entire taxation system could run to a stop, if there were simply no parameters to the rights and entitlements of all parties, within financial or taxation year cycles.*

31. But in some respects, there is a deal of confusion as to the position of the parties on this occasion. The Respondent appears to have entertained the ongoing dialogue with the Taxpayer. More importantly, the Respondent has failed to identify what document it purports to hold out as the Objection Decision.[16]

The Apparent Merits of the Case

32. The submissions of the Respondent do not really canvas the merits of the case. That is, whether what the Taxpayer has referred to as personal 'loans' that it has received, should be considered to be "income" for the purposes of Section 11 of the *Income Tax Act* (Cap 201).

33. In the case of the Taxpayer, his position similarly has not been that well articulated.

34. Annexure AH 7 to the Taxpayer's Affidavit does suggest that between 1999 and 17 April 2004, the Taxpayer's family had been loaned an amount of approximately $580,000 FJ, with an expected repayment amount calculated in the sum of $700,000FJ.

35. The Taxpayer also relies on Annexure AH17 to his Affidavit that purports to be a letter from Mr N, the person who has loaned him these monies, forgiving him from the debt.

36. According to the Taxpayer he had met Mr N, an American businessman some time around 1988 or 1989 while in Los Angeles, California.

37. Mr H claims to have initially borrowed an amount of $60,000 from Mr N in 1999, for the purposes of commencing a tuna fishing business. Thereafter he borrowed various sums from Mr N, for various purposes including the purchase of a boat and for the expenses associated with the holding of his daughter's wedding.

[16] Note specifically the requirements for the issue of an Objection Decision, that it be sent by registered post and that it notifies the Taxpayer to the fact that he has 35 days in which to lodge an appeal.

38. It is also noted within the Police Records of Interview contained within Annexure AH9, that other reasons attributed to why such loans were provided to Mr H's family, include for the conduct of a real estate business and the financing of a motor vehicle loan.

39. When questioned by the Tribunal, the Taxpayer advised that he was in receipt of an annual salary of approximately $34,000 FJ at the time of his termination of employment. When asked by the Tribunal why the Taxpayer was terminated in his employment, he initially advised that "he was not provided with any reason".[17] Although, when questioned further, the Taxpayer did concede that his termination related to allegations that included, he was receiving secret commissions as an employee.

40. The Respondent has maintained the position that the Taxpayer has never been able to provide any instruments or binding arrangements to "form the framework for a loan transaction".

41. The Tribunal has not been assisted by the lack of clear detail as to the source of funds that make up the income adjustments for the various Amended Assessments 1999 to 2002. While one would have thought that the Respondent would have a duty to explain why it says that the relevant funds were "income" for the purposes of Section 11 of the Act[18], an Applicant who seeks to make an application for the enlargement of time, certainly would have an obligation to clarify why it says otherwise, that the statutory definition does not apply.

42. Keep in mind that Section 21, places a burden of proof on the Taxpayer as to why a decision should not have been made in the manner that it was, or why a different decision should be put in its place.

Conclusions

43. Neither the Applicant nor the Respondent has identified the decision that is the Objection Decision for the purposes of Section 16(5) of the *Tax Administration Decree* 2009.[19]

44. It remains the case that when the Amended Assessments were issued, the former provision that was Section 62 of the Income Tax Act applied. An Objection Decision under that regime, was required to have stated to the Taxpayer the time period in which an appeal could lie. The requirement was also imposed, that service of such Decision needed to take place by registered post, presumably as some form of proof of service.

45. Section 68 of the *Interpretation Act,* headed Deviation from Forms, provides:

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[17] I note that such an account of events is not consistent with the Record of Interview set out as an Annexure within the Taxpayer's Affidavit.

[18] Certainly this would be a requirement under Section 83 of the Decree.

[19] Whether that decision was made under Section 62 of the Income Tax Act or not, with the assistance of the Transitional Provisions, that decision would be now captured by Section 16(5) of the Decree.

Save as is otherwise expressly provided, whenever any form is prescribed by any written law, an 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.

46. Even though the requirements of the former Section 62 provision may not be a prescribed form in the strict sense of the word, the manner in which compliance or otherwise should be assessed, is nonetheless instructive.

47. The Objection to Assessment was made on 19 April 2004.[20] The Respondent wrote to the Taxpayer on 20 May 2004, wishing to inform "that the objection period has expired and the Amended Assessments for the years 1999 to 2002 inclusive, shall now be valid and binding". Yet under the old regime, the Taxpayer had 60 days in which to make an Objection. As the Amended Assessments were issued on 10 March 2004, the objections would appear to have been well within time. It is only after the Objection Decision has been issued by the Commissioner, that is, whether it allows or disallows the objection, does the timing for an appeal to the then Court of Review run.

48. Again, to clarify what was the Objection Decision in these circumstances is rather difficult. The Respondent simply has not provided the Tribunal with any document purporting to be the Objection Decision for the purposes of the former provision that was Section 62(5) of the *Income Tax Act* (Cap 201).

49. In *The Perpetual Executors and Trustees Association of Australia Limited v Hosken (Registrar of Titles)*[21], Griffiths CJ stated as follows:

> *I should like upon that point to adopt the language of a distinguished predecessor of mine in the presidency of the Supreme Court of Queensland in a case decided in 1868 in which substantially the same point was raised as in this case: R v Registrar-General; ex parte Roxburgh . Cockle CJ said: "It is more reasonable to suppose that the operations of the Registrar-General's office should be adapted to the transaction of business than the transaction of business should be adapted to suit the Registrar-General's Office.*
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> *The object of the Act was to facilitate and not to hamper the dealings with land. That is an important consideration, because since an instrument dealing with land under the Act is inoperative until registered, the effect of refusing registration would be that the instrument would be void as a mortgage. That is a very serious consequence. When the legislature intend that an instrument must be in a certain form, and that, if it is not, it shall be void, they say so…*

50. I am prepared to err on the side of commonsense and indicate that the Taxpayer was under no misapprehension that the Respondent was not going to entertain its Objection, at

[20] See Annexure AH5 to the Taxpayer's Affidavit.

[21] [1912] 14 CLR 286

least as and from 20 May 2004.[22] There is no evidence that this situation had altered up to and including the date of hearing, despite the evidence of the Taxpayer, that he had been advised by a former employee that it would.

51. Further, in a case such as this, given the passing of in excess of nine years from the date of issuing Amended Notices of Assessment, the Tribunal would be right in expecting that some clarity in the case that is being brought by the Taxpayer should be available. That is how is the application for review to be set up and what are the challenges to the decision it seeks to overturn.

52. For example, the following adjustments to income arose out of the Amended Assessments:

Financial Year Period	Income Amount Adjusted
1999	$35,935.33
2000 `	$83,883.83
2001	$180,155.18
2002	$458,316.84

53. This was the case that the Taxpayer needed to meet. A challenge to the income adjustment and any related imposition of penalties, requires just that; a challenge. In the case of an extension of time application, insofar as the Taxpayer needs to make submissions regarding the legal merits of the substantive case, again the same challenge remains. The legal merits of the case need to be identified. These were never set out in the original request to the High Court Registry seeking the Tribunal's consideration of the application, nor the subsequent application made, following the issuing of Directions on 22 October 2013.

54. Despite the degree of latitude provided to Counsel, I am not satisfied that the Taxpayer has sufficiently made out an arguable case in relation to the merits of the Application.[23]

55. Finally, I want to make some comments pertaining to the conduct of the Taxpayer's legal team, who Mr Ramanu advises had attended to this matter from around 2003, until relatively recently.

56. The statutory obligations of the Respondent and the rights of the Taxpayer are clearly set out within the income tax laws. If it was the case that there was a lack of clarity in relation to the Respondent's position, a competent lawyer could have easily identified such a state

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[22] Annexure to the Taxpayer's Affidavit "AH8".

[23] Here it needs to be kept in mind, that the initial position of the Respondent was that the matter should be dismissed, for the Applicant's failure to comply with the original Directions of the Tribunal. The majority of the Applicant's case, otherwise sought to rely on the negligence of its former Counsel and the lack of understanding by the Taxpayer, as to the distinction between the criminal and civil law.

of affairs and sought to have the relative rights of the parties determined in an appropriate court or Tribunal.[24]

57. There is no evidence that any steps in this regard were taken. If the actions or inactions of any legal practitioner have prejudiced the rights of the Taxpayer, then that issue should be explored both from a contractual and professional ethics point of view. The role of the Tribunal cannot be shaped by the vagaries of the lawyers and the legal advice that is given to those who come before it. The legislation requires more and the principles set out within *NLTB v Ahmed Khan and Anor* and *Datt v Datt* dictate that this be so.

58. Having regard to the length of time in which the Amended Assessments were issued, the lack of merits identified within any of the material and the reasons otherwise provided as to why such a lengthy period of time has passed, I am not prepared to grant the application.

59. The Taxpayer should have acted much earlier than what he had done. His challenge after such a lengthy period of time should have been far more precise and substantial. If there are legitimate financial losses that arise out of the conduct of parties, then the Applicant is free to pursue those elsewhere. The Application is dismissed.

DECISION

It is the decision of this Tribunal that:

(i) The Application of the Taxpayer is dismissed; and

(ii) The Respondent is free to make an application for costs within 28 days hereof.

Mr Andrew J See
Resident Magistrate

5 /11/2013

[24] Consider for example, the powers of the Tax Court for the purposes of Section 91(1)(k) of the *Tax Administration Decree* 2009.