FIJI TAX TRIBUNAL

Decision

Section 82 *Tax Administration Decree* 2009

Title of Matter:	**COMPANY N**	**(Applicant)**
	V	
	FIJI REVENUE AND CUSTOMS AUTHORITY	**(Respondent)**
Section:	**Section 82 *Tax Administration Decree* 2009**	
Subject:	**Application for Review of Reviewable Decision**	
Matter Number(s):	**VAT Action No 6 of 2015**	
Appearances:	**Mr J Savou, for the Applicant** **Mr. O. Verebalavu, FRCA Legal Unit for the Respondent**	
Date of Hearing:	**Monday 4 July 2016**	
Before:	**Mr Andrew J See, Resident Magistrate**	
Date of Decision:	**Tuesday 5 July 2016**	

Background

1. The Applicant Taxpayer has been engaged in the taxable activity of land development since 2007. It was not until 14 October 2013, that the taxpayer was issued with a Certificate of Registration for the purposes of Part V of the *Value Added Tax Decree* 1991.[1] On 16 July 2015, a firm of consultant tax experts, on behalf of the Applicant, made application to the Respondent to have the Chief Executive Officer exercise his powers under Section 22(5) (b) of the Decree, so as to allow for the backdating of the registration of the taxable activity to 20 September 2007, "when the actual development/taxable activity had commenced".[2]

2. By letter dated 10 August 2015, the Respondent advised the Taxpayer that it would backdate the registration as of 1 July 2007 and that "the other provisions of the VAT Decree shall apply as normal Returns are assessed under normal processing rules".

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1 That registration took effect from 5 July 2013 and presumably the application for registration was made about that time.

2 See Page 7 of that correspondence at Folio 11 of the Respondent's Bundle of Documents.

3. In addition, within that communication, the Respondent provided the Taxpayer with a conditional income tax exemption under Section 17 of the *Income Tax Act* (Cap 201).[3] On 4 March 2014, the Applicant lodged various Value Added Tax Returns for the periods 2007 to 2009.[4] The result of those returns was that the Respondent issued Notices of Assessment and then Amended Notices of Assessment for four returns, the assessments of which are now the subject of this dispute.

The Application for Review

4. The essential thrust of the Application for Review dated 29 October 2015, is that the Respondent cannot impose a forfeiture of an assessment where it was determined that a refund should otherwise be forthcoming. The objection is directed toward the words contained within the *Amended Notices of Assessment* where they calculate in the relevant periods the total tax refundable and thereafter flag that those monies are forfeited by virtue of Section 65 of the Decree.[5] The Applicant relies on these computer generated assessments as the basis for contesting the power of the Chief Executive Officer to withhold refunds otherwise due and payable. The premise that the Applicant appears to adopt to get to this point, is that first and foremost the refunds were due and payable. But that is the major defect in the argument that is presented.

5. By way of a starting point, it is quite clear within the language of the Applicant's letter to the Respondent when making its request for the backdating of registration,[6] that it was well,

> *"aware of the latest ruling in the Tax Tribunal which agrees with FRCA's current policy of limiting the input claims to three (years)"*[7]

6. It appears that it was for that reason, that the author of that correspondence sought further to provide the Respondent with a "comparative analysis" of other tax jurisdictions such as Malaysia and New Zealand, so as to secure from the Chief Executive a window for gaining the use of retrospective tax credits for a period beyond three years. The fact remains, that the Chief Executive has no power to grant any benefit so as to defeat the express language of the statute. Specifically, Section 39(6) of the Decree relevantly states inter alia:

> *no input claim shall be allowed .. after the expiration of the period of three years after the end of the taxable period.*

The Applicant's Legal Argument

7. The Applicant's submissions filed on 1 February 2016, extend beyond those otherwise envisaged within the words of its own Application for Review that deal with the legality of any forfeiture of refund. The submissions firstly rely and accept the role that Section 39(8) of the Decree plays in the formula for calculating the tax payable for a given period. Thereafter though, while recognising that the language of Section 39 refers to the refunding of excess tax pursuant to Section 65 of the Decree, the Applicant seeks to adopt an approach to statutory interpretation

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3 See Folio 6 of the Respondent's Bundle of Documents.

4 See Folios 1-4 of the Respondent's Bundle of Documents.

5 While it doesn't make clear, the forfeiture would be on the basis that the returns were lodged well out of time and therefore outside of the three year window for claiming inputs.

6 See letter dated 16 June 2015 at Folio 11 of the Respondent's Bundle of Documents.

7 See the decision in *Taxpayer V v Fiji Revenue and Customs Authority* Action No 2 of 2014 (18 May 2015).

that is fundamentally flawed. What the Applicant says is that Section 65(6) of the Decree provides a capacity for offsetting any excess tax in subsequent years, despite the effect of the language of Section 65(1). The argument goes that there were excess credits identified in each of the relevant periods at issue during 2007 to 2009 and therefore such credits should have been capable of being relied upon as claimed offsets against tax otherwise due and payable. The proposition put by Counsel, was that Section 65(1) of the Decree is not the starting point for considering how the excess needs to be considered, but that it should be Section 65(6). But that does not make sense.

8. The first problem for the Applicant's case is that it needs to work out how it is that it can claim input credits outside of the time period prescribed within Section 39(6), where that subsection provides:-

> *Where a registered person is entitled, pursuant to the provisions of this Section, to deduct input tax in respect of any taxable period from the amount of output tax attributable to the taxable period, the registered person may deduct that amount from the amount attributable to any later taxable period to the extent that it has not previously deducted from the output tax of that registered person.*
>
> *Provided that no input claim shall be allowed under this subsection after the expiration of the period of three years after the end of the table period.*

9. Secondly, Section 65(1) of the Decree states:

> *Subject to this Section, in any case where the Commissioner is satisfied that tax has been paid by a registered person in excess of the amount properly calculated* in accordance within *this Decree in respect of any taxable period, he shall refund the amount paid in excess.*
>
> *Provided that no refund shall be made under this subsection after the expiration of the period of three years immediately after the end of the taxable period, unless written application for the refund is made by or on behalf of the registered person before the expiration of the period.*

10. This is a statutory block preventing any refund of entitlement after three years, unless where written application is made before that time. What the Applicant argues, is that the expression contained within Section 65(1), "tax has been paid", does not apply in this relevant case, on the basis that all the Tax Returns show are input credits; that the Taxpayer had paid no tax. Mr Savou for the Applicant says this is why the Tribunal should look at the purpose of Section 65(6) that provides the Chief Executive Officer the right to allow for future offsets against tax payable as an alternative to refunding any amount otherwise due.

11. For the sake of completeness, Section 65(6) provides:

> *Notwithstanding anything in subsection (2) of this Section, where the Commissioner is required to refund any amount to a registered person pursuant to subsection (4) of Section 38 or subsection (8) of Section 39 or any interest payable under Section 67, and the Commissioner is of the opinion that the amount should not be refunded, the Commissioner may withhold that amount and set off that amount against any future tax payable by that registered person in respect of any subsequent taxable period or otherwise set off that*

amount in terms of paragraph (b) of subsection (4) of this Section, and treat any amount so set off as a payment received from that registered person.

12. But here again the argument must fail.

13. The discretion of the Chief Executive Officer must be exercised after achieving the precondition where *the Commissioner is required to refund any amount to a registered person*. In this case there is no refund. There was no entitlement to claim for the input credits after a period of three years. The argument makes no sense. The claim for refund would have been perfectly acceptable had it been made within the three year statutory window provided. The Applicant was well aware of that in its correspondence to the Respondent when seeking the backdating of its registration. The Chief Executive Officer has no powers to usurp the language of the law.

The Case of the Respondent

14. The Respondent's Submissions deal with the obvious way in which the Decree should be interpreted. It is correctly submitted that before the Chief Executive Officer exercises his discretion in offsetting the refund payable to a registered person under Section 65(6), he must firstly determine whether the amount is refundable under Section 39(8) of the *VAT Decree* 1991. The submissions identify Section 39(6) of the Decree of making it more than clear that "no input claim shall be allowed under this subsection after the expiration of the period of three years after the end of the taxable period".

Conclusions of the Tribunal

15. Toward the end of the proceedings it became increasingly clear to this Tribunal that in the absence of something more, the Application was destined to fail. The Tribunal remained somewhat intrigued as to why neither party had sought to call any witnesses to give evidence, particularly if it was the case that the Applicant had believed it was now well entitled to have refunded or offset the input credits paid during the relevant period. Neither side sought to adduce any evidence in relation to what transpired after the Respondent approved the backdating of registration, suffice to say that while the Applicant had not achieved what it had sought in its correspondence in relation to the 'extension of the three year window'[8] it did nonetheless gain conditional Income Tax Exemption under Section 17 of the *Income Tax Act* (Cap 201). When being granted the 'backdating of registration' to 1 July 2007, the Applicant was advised that "the other provisions of the VAT Decree shall apply as normal returns are assessed under normal processing rules". There should have been no doubt.

16. Had there been any uncertainty as to what was meant by the Respondent's words[9], the Applicant and its advisors could have readily sought clarification from the Respondent as to what was now the state of play. The Tribunal would be highly surprised if no further communications took place between the parties following the receipt of the Respondent's approval dated 10 August 2015.[10]

17. There was simply no legal foundation to make the Application for Review. There was never any refund due and payable to the Applicant, as it was not entitled to claim for any input credits outside of the three years provided for within Section 39(6) of the Decree. Section 65 (1) further reinforces the inability of the Commissioner to make any refund after the expiration of three

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8 See correspondence at Folio 11 of the Respondent's Bundle of Documents.

9 It is accepted that these words could have been clearer than what they were.

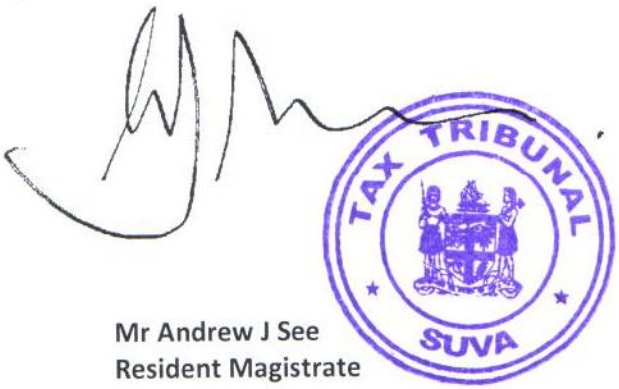
10 See Folio 6.

years from the taxable period. The processing of the 2007 to 2009 returns was simply an activity undertaken for administrative purposes. There was never any intention of the Respondent to allow the Taxpayer to secure something that the law does not allow. On that basis, the Application is without merit and must fail.

Decision

The Tribunal orders:-

(i) That the Application for Review is dismissed;
(ii) The Respondent is free to apply for costs within 28 days.



Mr Andrew J See
Resident Magistrate