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WESTPAC -v- APPLICATION UNDER INCOME TAX ACT (S.72(4))

High Court of Solomon Islands

(Palmer J.)

Civil Case No. 307 of 1992

Hearing: 10 December 1992

Judgment: 11 December 1992 (Honiara)

J. C. Corrin for Appellant

C. K. Ashley for the Respondent

PALMER J: This is an appeal by National Bank of Solomon Islands Limited in Civil case numbers 2/92 to 24/92 and 243/92 to 255/92 and Westpac Banking Corporation in civil case No.307/92, which cases have been consolidated for purposes of this appeal, the grounds and issues raised being similar.

The appeal is made pursuant to subsection 72(4) of the Income Tax Act (Cap.61).

The list of the National Bank of Solomon Islands Limited Tax appeals is as set out in "Annexure 1" attached at the end of this judgment. The list of tax payers in the Westpac Banking Corporation tax appeal is as set out in the schedule of the originating summons and a copy is attached marked "annexure 2".

The circumstances surrounding the appeals in essence are as follows.

The Commissioner of Income tax pursuant to his statutory powers in section 72 of the Income Tax Act issued written notices to the National Bank of Solomon Islands Limited and Westpac Banking Corporation and declared them to be agents of certain taxpayers that had outstanding tax bills for the purposes of collection and recovery of the tax due.

The notices were then duly served on the Banks.

The notices to National Bank of Solomon Islands Limited took 3 forms.

The first form consisted of -

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- (a) a declaration of the Bank as an agency and
- (b) a requirement that the Bank "to pay any monies which may at anytime within 12 months from the date of this notice be held by you or be due and payable by you to the Tax payer."

The second form consisted of -

- (a) a declaration of agency as in (1)(a) above and
- (b) as in 1(b) above
- (c) a requirement "to furnish a return showing monies held by you or to be held by you within 12 months of this notice. The return may be furnished within 30 days".

The 3rd form consisted of -

- (a) as in 1(a)
- (b) a requirement "to freeze all their accounts and to pay to the Commissioner of Inland Revenue any money which may at anytime within 12 months from the date of this notice be held by you or be due and payable by you to the Company".

The forms the notices took in respect of Westpac Banking Corporation were as for the 2nd and 3rd forms above.

The grounds of appeal as for the National Bank of Solomon Islands Limited appeals are as set out in the notice of appeal beginning at item 3.

The grounds of appeal as set out in the Westpac Banking Corporation appeals are as set out in the originating summons beginning at item 3 as well.

It is important to set out sub section 72(1) of the Income Tax Act.

"The Commissioner may in his discretion by notice in writing to any person declare him to be the agent of any other person for the purposes of the collection and recovery of tax due by such other person; and the person so declared agent shall pay any tax so due and specified in such notice from any moneys, including rent, pension, salary, wages or any other remuneration, which may, at any time within twelve months from the date of such notice, be held by him for, or be due and payable by him to, such other person."

It would be helpful in my view first of all to consider the circumstances under which the Commissioner of Income Tax may exercise his discretion as provided in subsection 72(1) to issue written notices and declare a person to be an agent.

The Commissioner of Income Tax's discretion to declare a person to be an agent is based on either of the following conditions being fulfilled:

- (i) that money is being held, or
- (ii) that money is due and payable

The above two conditions in my view are crucial to the exercise of the Commissioner of Income Tax's discretion. They are factual issues, and one of them must be present before the discretion can be exercised.

There must be money held or that money is expected, and there are instances given in Subsection 72 (1) where such payment of money is expected. These include payments of rent, pension, salary, wages or other remuneration. Such expectation of payment is based primarily on some existing legal relationship between the two persons.

The word "due" means owing or payable as debt; merited; what one owes. (see *The Australian Little Oxford Dictionary*, edited by George Turner).

The factual requirements of subsection 72 (1) in my view are very clear. If there is no moneys held or, if there is no expectation of any payment of money, in other words no money due, then the Commissioner of Income Tax has no right, neither a discretion to issue any notice of declaration of agency.

Also, the same position applies where the Commissioner of Income Tax does not know whether money is being held or money is due. He has no right nor discretion to issue a blanket notice of declaration for the purposes of finding out whether money is held or due. Subsection 72 (1) does not give him that discretion. The notice of declaration of agency is made for the purposes of collection and recovery of tax, not for finding out if money is held or due.

Subsection 72 (2) on the other hand gives the Commissioner of Income Tax power to find out. He may issue a notice in writing to the bank and require the Bank to furnish a return not less than 30 days from date of service showing if any moneys are held or due to the tax payer.

A failure to comply with such a notice is an offence under clause 81 (a). On the other hand the Commissioner of Income Tax may find out the requisite information from the tax payer himself or from other reliable sources, and then issue the notice of declaration of agency against the bank for such moneys held.

So there is no excuse, no right and no discretion for issuing blanket notices. The allegation, and this not disputed, is that all these notices have been issued arbitrarily and indiscriminately. Such actions are clearly wrong, improper and without any legal basis. Accordingly it would be correct to describe those notices as oppressive and unreasonable, and should therefore be set aside.

The discretion of the Commissioner of Income Tax must be exercised within its legal boundaries. Those boundaries have been set in subsection 72 (1), and it is not open to this court to make any extensions beyond what is stated in that provision.

It is trite law that taxing statutes are to be construed strictly (Partington v A.G. (1869)L.R 4 HL100. In Cape Brandy Syndicate v I.R.C. [1921] I.K.B.64 at p71 Rowlett J. stated:

"... in a taxing Act one has to look merely at what is clearly said. There is no room for intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Under subsection 72 (1), the Commissioner of Income Tax therefore can only exercise his discretion when either there is money held or money due. If there is no money held or money due then he has no discretion to exercise. If he does not know, he can find out under subsection 72 (2) before deciding whether to exercise his discretion to issue a notice of declaration or not.

Now under ground 4 and ground 5 of the Westpac Bank Corporation and National Bank of Solomon Islands Limited - appeals respectively, the discretionary power of the Commissioner of Income Tax is being challenged.

However, after considering those points raised I am not satisfied that they can prevent the Commissioner of Income Tax from exercising his discretion, or his judgment. The discretion is given by statute. If in exercising his discretion he declares the bank a statutory agent of a certain payment, then the bank is under the force of law to comply with the requirements as set out in that subsection (provided of course that there is moneys held or moneys due).

The case of Tournier v National Provincial & Union Bank of England Ltd [1923] All E.R (Reprint) 550 is an authority which recognises that the special confidential relationship between the banker and the customer can be interfered with under compulsion of law.

All the matters raised under ground 4 and 5 are purely matters within his discretion to consider in respect of each individual tax payer and the bank. If after considering those matters he decides to issue a notice of declaration of agency then that is perfectly valid.

In Halsbury's Laws of England, 4th EDITION VOL. 44 Para 912, the learned author stated:

"... it is not open to a court to narrow the operation of a taxing statute, once its meaning has been ascertained by the application of the ordinary rules of construction, by consideration of hardship or of business convenience or the like..."

Also in Partington v Attorney General (1869) LR4 HL 100 at page 122 Per Lord Cairns L.C. he states:-

"If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be."

I do note the reference above is to the taxing of a tax payer, however the principle behind the construction of the statute is applicable to the present case.

Subsection 72 (5) defines the ambit within which the bank is to be legally accountable once the declaration of agency is made.

Moneys standing to the credit of the tax payer in the bank are moneys held for the tax payer. The question of what moneys stand to the credit of the tax payer is a factual one. However what is important to note is that the fact that those moneys held may be kept in a cheque account, passbook account, a term deposit account or even held as security against a loan makes little difference to the legal responsibility that the bank has as a statutory agent.

If there is to be any inconvenience, loss or hardship, that is a matter for the bank to consider and to adjust and adapt itself so that it can accommodate and absorb such losses, inconveniences and hardships. The matters listed under ground 4 and 5 of the Westpac Banking Corporation and National Bank of Solomon Islands Limited cannot stop the Commissioner of Income Tax from exercising his discretion nor can they be regarded as sufficient grounds for setting aside a properly exercised discretion to

declare the bank a statutory agent of a certain tax payer. In other words those matters raised are proper matters for the Commissioner of Income Tax to consider when exercising his discretion.

If after considering those points about the moneys held by the Bank for a particular tax payer and the Commissioner of Income Tax decides to issue a notice of declaration of agency on that bank, then that is the end of the matter, and the bank is obliged to pay up pursuant to the provisions of section 72.

It is trite law that a discretion must be exercised honestly and in the spirit of the Act. It is to be exercised according to the rules of reason and justice, and not private opinion (see *Rookes (1598) 5 Co Rep 996* at page 100a).

The terms "according to his discretion" has also been defined as "according to law and not humour, it is to be not arbitrary, vague, and fanciful, but legal and regular" (*R v Wilkes*, 4 Burrow Reports 2839 per Lord Mansfield).

In the context where money is held by the bank for the tax payer and the Commissioner of Income Tax decides to declare the bank a statutory agent even after considering the points raised in grounds 4 and 5 respectively, that is a proper exercise of the discretion of the Commissioner of Income Tax. They are matters within his discretion to exercise and this court will not lightly interfere.

The same analogy can be drawn from the employer/employee relationship and the landlord/tenant relationship. There are bound to be losses, inconvenience and hardships. But these are purely matters of discretion for the Commissioner of Income Tax to consider. If the Commissioner of Income Tax declares the employer or the tenant to be the statutory agent of that particular tax payer then they are under a legal duty to comply with the provisions of section 72, and to absorb any loss hardship etc.

I now turn to ground 6 of the Westpac Banking Corporation appeal which is the same as ground 7 of the National Bank of Solomon Islands Limited appeal.

In a way these grounds have been disposed of as a consequence of the way I have ruled as to the applicability and construction of section 72.

However, for completeness sake I make the following points:

1. There is no obligation on the banks to exchange confidential information with each other concerning a tax payer

2. The bank as statutory agent is answerable to the Commissioner of Income Tax alone and not to the other banks. Its obligation is limited to the amount of the tax due as specified in the notice and the payment of such amount of such money as is held for the tax payer will be a sufficient discharge for the bank of its obligation under the statute.

If the correct procedures as outlined have been followed then there would have been no confusion and uncertainty. Much of the confusion that has arisen have been as a result of the blanket notices issued, through a lack of proper understanding of the workings of the provisions of section 72.

Ground 7 and ground 9 of the Westpac Banking Corporation and National Bank of Solomon Islands Limited appeals have been dealt with by my ruling. The actions of the Commissioner of Income Tax to make all trading banks collectors of tax indiscriminately is wrong and contrary to the purposes of section 72. I need not repeat myself here about the proper construction and application of the provisions of section 72.

I now turn to ground 8 of the Westpac Banking Corporation appeal. This ground has already been dealt with in my judgment.

Suffice to say that the minimum time limit under subsection 72 (2) is to be taken from the date of service of the notice and not within 30 days from the date of the request.

Further, the request for a return to be furnished showing monies to be held over a period of 12 months from date of service of the notice is both impracticable and unreasonable, and therefore improper, and should be ignored by the banks.

Item 9 in the grounds of appeal of Westpac Banking Corporation seems to have subsection 72 (1) in mind, at least this is how I see it.

The notice to declare an agency can be seen as having the effect of "freezing" the accounts of the tax payer on receipt of such a notice. This is so because within 30 days from the date of service of the notice, the agent is required to pay to the Commissioner of Income Tax such sum as is held by the bank.

So although there is no direct provision under which the Commissioner of Income Tax can require accounts to be frozen, a similar effect would seem to be set in motion by a proper notice of declaration of agency.

However, it needs to be pointed out that the banks can still comply with the requirements of subsections 72 (1) and subsection 72 (3) without having to freeze the accounts.

I do note that the learned counsel for the Commissioner of Income Tax has not taken issue over this point and accordingly these notices requiring the accounts to be frozen have already been set aside.

Ground 10 of both appeals relate to the assessment of tax of the tax payer by the Commissioner of Income Tax.

There is no obligation on the Commissioner of Income Tax to serve the statutory agent with a notice of assessment. All that subsection 72 (1) requires is that the tax due is specified in the notice. I do not think it can be rightly said that the requirement of specifying the tax due could be extended to include providing details of the assessments of the tax to the agent.

Issues arising from the assessments by the Commissioner of Income Tax are matters for the tax payer to take up with the Commissioner of Income Tax.

The declaration of agency is for the purpose of collection and recovery and accordingly it has nothing to do with questions of assessment. What needs to be borne in mind and this was pointed out by Mr. Ashley in his submissions is that the tax due from the tax payers have been outstanding for several years already and have been finalised pursuant to subsection 68 (1) of the Income Tax Act.

The banks responsibility as statutory agent therefore is to accept the assessment as final and to accept the notice specifying the tax due as the correct amount unless there is good grounds to show otherwise.

Ground 11 has been dealt with already and I need not repeat myself here. It would be sufficient to summarise that the notices of declarations of agency are all being set aside on the grounds that they have been improperly made, without due regard and consideration of the requirements as set out under section 72.

I have gone to some extent to set out the proper procedures as stipulated^d in section 72, which if followed should be in line with the purposes of Part XI and the Act as a whole, and in order.

Accordingly, I Order as follows:

All Notices in the appeals of the Westpac Banking Corporation and National Bank of Solomon Islands Limited are hereby set aside, with costs to the appellants.

(A. R. Palmer)
JUDGE

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