

ALLARDYCE LUMBER CO. LTD, KALENA TIMBER CO. LTD, GOLDEN SPRINGS INTERNATIONAL (SI) CO. LTD, HYUNDAI TIMBER CO. LTD -v- THE PREMIER OF WESTERN PROVINCE

High Court of Solomon Islands
(Muria, C.J.)

Civil case No. 234 of 1994

Hearing: 28 October 1994

Judgment: 14th March 1995

J. Sullivan & T. Kama for the Plaintiffs

J.D. Robinson for the Defendant

MURIA C.J.: The plaintiffs have brought this application seeking declarations in respect of the Western Province Business Licence Ordinance 1993 and the Regulations made thereunder and the business licence fees imposed on the plaintiffs by the defendant pursuant to the Ordinance and Regulations. The order sought by the plaintiffs are:

1. *A declaration that the Western Province Business Licence Ordinance 1993 and the Western Province Business Licence Regulations 1993 in so far as they impose annual business licence fees in respect of Round Log Timber Exporting are ultra vires The Western Provincial Executive and The Western Provincial Assembly.*
2. *A declaration that business licence fees sought to be imposed by the Defendant on the Plaintiffs for the year commencing 1 April 1994 are of no force and effect and that the Plaintiffs are not liable to pay the same.*

The plaintiffs are logging companies operating within the Western Province in the businesses of round log exporting, timber felling, saw milling, timber sales and, in the case of the second plaintiff, also sea transportation. In or about August 1994 each of them received a letter of demand from the defendant in connection with the payment of outstanding licence fees pursuant to the Western Province Business Licence Ordinance 1993 ("the Ordinance") and the Western Province Business Licence Regulations 1993 ("the Regulations"). In response each of the plaintiffs had written to the defendant stating that the fee was unlawful and so could not be paid unless otherwise stated by the High Court.

The main contention by the plaintiffs is that the fees are void as either they affect Solomon Islands' international trade and commerce or they are taxes not within the Province's power to impose. In support of this contention, Mr. Sullivan relied on section 106

of the Constitution and section 33 of the Provincial Government Act 1981. Those provisions are as follows:

"No taxation shall be imposed or altered except by or under an Act of Parliament "
(Section 106, Constitution)

and Section 33 of the Provincial Government Act provides:

" 33 (1) A Provincial Assembly has power to make laws only if and to the extent that -

- (a) they relate to matters within the legislative competence of the Assembly; or "*
- (b) they are merely incidental to or consequential on other provisions, and those provisions relate to matters within the legislative competence of the Assembly.*
- (2) A Provincial Assembly has no power to make laws extending to any part of Solomon Islands other than the province.*
- (3) A Provincial Assembly has no power to make laws which would have the effect of amending any provision of this Act; but this subsection does not prevent the amendment by Ordinance of any enactment mentioned in Schedule 5 or 8.*
- (4) A Provincial Assembly has no power to make laws affecting the international obligations of Solomon Islands, including trade and commerce with countries outside Solomon Islands.*
- (5) A Provincial Assembly has no power to make laws imposing, altering or abolishing any tax, except where power to do so is expressly conferred on the Provincial Assembly by or under this Act."*

Mr. Robinson for the Defendant on the other hand argued that the licence fees imposed by the Province are within the legislative competence of Province to impose and as such are properly regarded as fees and not taxes. In support of his contention, Counsel relied on sections 28(3) and schedule 4 to the Provincial Government Act.

Section 28 (3) provides as follows:

"(3) A devolution order in respect of a province may declare which of the matters included in Schedule 4 shall be within the legislative competence of the Provincial Assembly for the purpose of this Act."

Para. (1) of Schedule 4 allows the Province to legislate over "Local licensing of professions, trades and businesses" Para(4) of the same Schedule provides that the Province may raise revenue through:

- "(a) head tax;*
- (b) property tax,*
- (c) fee for services performed or licences issued by or on behalf of the Provincial Executive (other than services performed or licences issued by them as agent of another); and*
- (d) such other means as may be approved for the purposes of this paragraph by the Minister by order.*

The power of the Provincial Assembly to charge fees for a business licence is provided for under section 10 of the Ordinance which provides as follows:

"10.(1) The fees for any business licence including production based business licence fees, shall be determined by the Executive by way of subsidiary legislation PROVIDED HOWEVER that when an application for a business licence is made for a category of business not specified in this Ordinance Regulations made under or any amendments thereto then the Executive shall determine an interim fee for that business to be paid by the applicant to enable the licence to issue, such fee to remain in force and to be included by amendment to regulations made under this Ordinance as soon as practicable.

(2) The fees for any business licence may be reviewed annually."

Regulation 14 of the Regulations then provides for the actual fees to be charged for round logs to be exported. That provision is in the following term:

"14. In the case of a round log timber exporting business the business licence fee shall be the dollar per cubic metre amount listed at Schedule G to these regulations for every cubic metre of logs or unmilled timber originating in Western Province exported or cut by the Applicant for export during the twelve months immediately preceding the year for which the business licence is being sought, provided however

that a company which has not been in the business of round log exporting from Western Province for a full year preceding the year for which the business licence is sought, the flat rate fee provided in Schedule G shall be the business licence fee."

The central issue here, really, is whether the business licence fees charged by the defendant pursuant to the Province's Business Licence Ordinance are not fees as such but rather are duties of customs and excise and as such are form of taxes which are outside the power of the Province to impose. The onus is on the plaintiffs to establish this to the satisfaction of the Court and Regulations on the usual civil standard of proof.

It will be observed that regulation 14 of the Regulations imposes fees, expressing it in terms of dollars per cubic metre. The actual words used in *regulation* are "... *the business licence fee shall be the dollar per cubic metre for every cubic metre of logs exported or cut for export during the twelve months immediately preceding the year which the business licence is being sought...*"

The actual rate prescribed in schedule G to the Regulations is "\$10.00 m³" or a flat rate of \$50,000.00 (for the first year operator) only.

There can be no doubt that the Province has power to raise its revenue by the imposition of some form of taxes, such as head tax, property tax and licence fees (which in effect is a form of tax as well) see *Schedule 4, para. 4 of the Provincial Government Act*. However the Province's power in this respect is very limited as can be seen from section 33 of the Act. This limitation on the Province's power is one clearly in recognition of the Constitutional prohibition on taxation as envisaged in s.106 of the constitution. Lest it may be doubted, only the National Parliament has been given exclusive right to impose taxes in the form of duties of customs or excise. It does so by enacting the Customs and Excise Act (Cap.58) which by virtue of sections 7 of that Act empowers the Minister in the National Government to make order for the imposition of duties of customs upon goods imported into or exported from Solomon Islands as well as make order for the imposition of excise duties upon goods manufactured or produced in Solomon Islands.

Any form of tax therefore, whether expressed as licence fee or otherwise imposed by the Provincial Assembly having the effect of an impost or duty upon goods exported or to be exported must clearly be beyond the competence of the Provincial Assembly to impose. Similarly licence fee imposed by the Provincial Assembly upon goods manufactured or produced in Solomon Islands is a tax imposed on the production of the goods and as such,

amounts to a duty of excise falling outside the legislative competence of the Provincial Assembly.

The plaintiffs strongly argued in the present case that what the Province charges are customs and excise taxes. In support of that argument, Mr. Sullivan cited a number of authorities including *Leake -v- Commissioner of Taxation* (1933) 36 WALR 66 for the proposition that compulsory pecuniary impost by the relevant authority on general body of subjects (including corporations) for the support of the Government and public needs is a tax; *Atlantic Smoke Shops Ltd -v- Conlon* (1943) LJ PC 68, that customs and excise duties are within the exclusive sphere of the central government; *Commonwealth -v- The State of South Australia* (1926) 38 CLR 308, that licence fees are a tax and their substance must be ascertained in order to see whether they fall within the permitted head of taxation; also *Gosford Meats Pty Ltd -v- N.S.W.* (1984 - 1985) 155 CLR 369, that licence fee as a compulsorily exacted by a public authority for public purposes and not as a payment for services rendered is a tax; *Dennis Hotels Pty Ltd -v- Victoria* (1960) 104 CLR 529, that taxes levied on goods at some steps in their production are duties of excise. Other cases were also referred to by Counsel but I need not list them here. Suffice to say that they are also useful in shedding some light to resolution of the issues now before this Court.

The case of *Dennis Hotels (supra)* is of course concerning the licensing fee payable in respect of the sale of liquor. The case of *Dickson's Arcade Pty Ltd -v- Tasmania* (1974) 130 CLR 177 is about the fee payable on the sale of tobacco. In both of those cases, the fees were held not to be duties of excise on the goods. However in the present case now before this Court, the fee imposed is clearly in respect of the production and processing of logs. As such it must be a tax on the goods produced or manufactured and then sold overseas or locally. In this regard it is relevant to note the principles found in *M.G. Kailis (1962) Pty Ltd -v- Western Australia* (1974) 130 CLR 245, *Mathews -v- Chicory Marketing Board* (1938) 60 CLR 263 and *John Fairfax & Sons Ltd -v- NSW* (1927) 39 CLR 139 where a fee of one half penny charged on each copy of a newspaper published in editions of more than 15000 copies in NSW and issued for sale and actually sold was a duty of excise. In *MG Kailis* a fee payable in respect of a fish processor's licence was held to be a duty of excise as it was imposed in relation to their production. In that case the statute required a licence to be held for operating a fish processing establishment. The fee was calculated at a percentage of the gross amount of the value of fish caught. The money was payable for the fish purchased for processing in the processing establishment during the period ending 30th June next preceding the commencement of the licence period. Where a processing establishment is not in operations, the Minister may fix the fee in such an amount having regard to his estimate of the probable extent of the annual catches and purchases of fish for processing in

the establishment. The Court found the fee imposed to be a tax on the manufacturing or processing of the goods.

I must bear in mind that the cases cited are authorities for what they decided and do not govern the decisions in later cases. Hence the present case must be decided on its own factual circumstances.

Here the Province charges \$10.00 for every cubic metre of logs exported or cut for export as business licence fee. The particular character of this impost is one clearly and directly related to the volume of logs exported or cut for export rather than or fee for the carrying on of a business. In another word, the licence fee of \$10.00 per cubic metre of logs is a tax upon the goods (logs) exported or to be exported payable by the producers/exporters of round logs and must be outside the competence of the defendant to impose such a tax can only be imposed by the National Government under the Customs & Excise Act.

It is worth noting what Fullagar J. said about the expression "a tax upon goods" in *Dennis Hotels Pty Ltd -v- Victoria (supra)* where His Honour pointed out at page 554 that:

"Goods as such cannot pay taxes: there must be a person to pay them. And what is meant by saying that a tax is a tax upon goods is that the person by whom the tax is payable is charged by reason of, and by reference to, some specific relation subsisting between him and particular goods. A tax will be rightly, regarded as a tax upon goods if the person upon whom it is imposed is charged by reason of and by reference to the fact that he is the owner, importer, exporter, manufacturer, producer, processor, seller, purchaser, hirer, or consumer of particular goods. This list may not be exhaustive"

An impost in the present case is, in my judgement, a tax upon goods imposed on the plaintiffs by reason of and by reference to their relation subsisting between them and their goods. It is a tax which must surely have the effect of controlling the commercial operations of the plaintiffs from production to consumption of the goods concerned. The term "goods" in this respect must undoubtedly be the logs which became goods after they were felled and processed into exportable logs or consumable state.

The other argument raised by the plaintiffs is that the fee imposed based on value of production of goods during the past period is an excise tax. Mr. Sullivan argued that while it is not easy to ascertain whether a fee levied on goods at some step in their production or distribution as taxes particularly where it is based on the preceding year's production, it is

nevertheless, in the present case, a tax, being a duty of excise on the goods (logs) cut or produced in Solomon Islands. Counsel also fortified his argument by the suggestion that the levy as such is imposed not in the respect of any service but rather on the production of the goods.

Mr. Robinson strongly urged the Court that the reason for imposing the licence fee based on the previous year's production of logs for export is that the previous production would be used to measure the fee for the current year. In addition, counsel argued, the previous year's production would assist the Province in estimating the likely costs in regulating the logging operations in the Province, protecting environment, the fisheries, ensuring reforestation takes place and sustainable logging in the Province. In support of his argument, Counsel relied on *HC Sleigh Limited -v- The State of South Australia* (1977) 137 CLR 475, particularly the comments made by Gibbs J (as he then was) at page 482 and what His Honour stated in his judgement on page 491. The passage referred to respectively are, at page 482:

"On one view the question of the nature of the fee does not bear on the question whether it is a tax upon goods but of whether it is a tax. If it is a tax, for it to be an excise a nexus has to be found between the tax and the goods. If the Dennis Hotels case (1960) 104 CLR 529 is authority for a proposition, it is that when a licence fee is quantified by a reference to dealings in a previous year, which may never be repeated, there is no nexus between the tax and the goods."

and at page 491 - 492:

"The Act in the present case does not impose a tax on goods, because the fee for a licence to carry on the business of selling petroleum products is quantified by reference to the value of the quantity of petroleum products sold during a period preceding that in respect of which the licence is granted. The decisions in Dennis Hotels Pty Ltd v. Victoria (1960) 104 CLR 529 and Dickenson's Arcade Pty Ltd V. Tasmania (1974) 130 CLR 177 establish that such a fee is not a tax on goods and is therefore not a duty of excise."

In the light of what His Honour stated in that case, Mr. Robinson now argue that the fee in the present case being calculated on the previous years production, is not a tax in the current year.

With respect, the conclusion put forward by Counsel is misconceived. The comments by His Honour in *HC Sleigh Limited's* case referred to by Counsel clearly point out: first, there must be a nexus found between the tax and goods for a fee to be a tax in a form of excise duty; second, if *Dennis Hotels* case is to be relied on, the licence fee must be one that relates to previous year's dealings which are not repeated with no nexus between the tax and the goods; third, the licence fee was not a tax on goods and therefore not a duty of excise since the fee was imposed in respect of licence to carry out selling of petroleum. The two cases of *Dennis Hotels and Dickenson's Arcade* likewise are also concerning fees payable in respect of sale of liquor and tobacco respectively. Those cases therefore do not assist the defendant.

The present case concerns a fee payable in respect of manufacture or production and processing of logs and as such a fee calculated based on the value of goods manufactured or produced in the preceding year is a tax being a duty of excise. The case of *MG Kailis (1962) Pty Ltd -v- Western Australia (Supra)* clearly supports this.

A further objection taken by the plaintiffs is in respect of the \$50,000 flat rate licence fee. It was argued by Counsel for the plaintiffs that this form of impost is a tax within the test set out in *Leake -v- Commissioner of Taxation (Supra)*. I think this must be looked at in the light of the purposes of the Ordinance and the Regulations as a whole.

On examination of the legislations in this regard, I see it as the primary purpose of the imposition of the licence fee by the Province is to facilitate the collection of revenue for the Province. It is not for the purpose of controlling the commercial operations of those who undertake business operations in the Province, although, in the course of which, as I have already found, the Province imposes a licence fee which affects the commercial operations of the plaintiffs in this case. However, I feel in this case, the imposition of a flat rate licence fee does not necessarily have the effect of putting a control over the commercial operations of the plaintiffs in the Province but rather a fee for carrying on business in the Province. It is therefore within the competence of the Province to charge reasonable licence fee based on a flat rate.

I hear no argument against the reasonableness of the flat rate licence fee of \$50,000 in this case. In view of the nature of the operations of the plaintiffs in the Province, I see no justification for any objection to the flat rate fee here imposed.

Other matters were raised during the argument, but I do not feel they are necessary to go into for the purpose of answering the questions raised in this case. I will therefore not

deal with those issues. They can await another day. This judgement concerns only a limited issue on the licence fee imposed based on \$10.00 per cubic metre of logs exported or cut for port.

On the materials before the Court and in the circumstances as I have found, the Court will make the following declarations.

1. *I declare that the imposition of an annual business licence fees in respect of round log timber exporting based on \$10.00 per cubic metre of logs exported or cut for export is ultra vires the powers of the Western Province Executive and Western Provincial Assembly.*
2. *I declare that the business licence fees sought to be imposed on the plaintiffs based on \$10.00 per cubic metre of logs exported or cut for export are outside the competence of the defendant to impose and are therefore of no force and effect.*

The costs of the plaintiffs on this application to be paid by the Defendant.

(Mr. Justice GJB Muria)
CHIEF JUSTICE