J.P. ENTERPRISES LIMITED –v- COMPTROLLER OF CUSTOMS AND EXCISE

HIGH COURT OF SOLOMON ISLANDS
(FRANK O. KABUI, J)

Civil Case No. 031 of 2002

Date of Hearing: 9th, 11th and 12th April 2002
Date of Judgment: 24th April 2002

Mr G. Suri for the Applicant
Mr P. Afeau & Ms A. Mekau for the Respondent

JUDGMENT

(Kabui, J): By a Further Amended Originating Summons filed on 13th February 2002, the Applicant seeks the determination of the following questions-

(1) **Whether the Certificate of Approval, No. 5/2002, issued to the Applicant on 31 January 2002, under section 7(3) of the Investment Act (Cap. 142), by the Foreign Investment Board entitles the Applicant to be granted exemption by the Comptroller of Customs and Excise under clause 18 of the Exemption Schedule of the Customs Harmonised Tariff as read with section 7 of the Customs and Excise Act (Cap. 121).**

(2) **Alternatively, Whether the Certificate of Approval, No. 5/2002, issued to the Applicant by the Foreign Investment Board on 31 January 2002, under section 7(3) as read with section 7(5) of the Investment Act (Cap. 142), constitutes a valid and a legitimate expectation to the Applicant that it would be granted duty exemptions on export of round logs by the Respondent.**

(3) **If the answer to the question 1 is in the affirmative for an order that the Comptroller of Customs and Excise grants forthwith to the Applicant tax exemption under clause 18 of the Exemption Schedule of the Customs Harmonised Tariff as read with section 7 of the Customs and Excise Act (Cap.121).**

(4) **Alternatively, if the answer to question 2 is in the affirmative for an order that damages for loses suffered in expected export duty, exemption be paid the Applicant, which may be set off against duty exemptions payable by the Applicant.**

(5) **An order that the Comptroller of Customs and Excise do endorse and/or release to the Applicant all export or shipping documents necessary for clearing and drawing Bank proceeds of any logs exported by the Applicant so as to facilitate the terms of these Orders.**

(6) Such further or other Order the Court may make as the nature of the case may require.

(7) Costs of and incidental to this application.

The Applicant also seeks consequential orders in (3) (4) and (5) plus other orders in (6) and costs in (7) in the Originating Summons.

The Facts

The Applicant is J.P. Enterprises Limited of P.O. Box R225, Honiara (the Applicant). The Applicant is engaged in the business of the exporting of logs to overseas market. The Applicant's operation is based in the Western Province. The shareholders in the Applicant are local persons. The Applicant is therefore a local company. On 7th July 2000, the Applicant through its directors signed an application form for approval of a technology agreement by the Investment Board. The technology agreement covered Management, Technical, Financial Marketing and Machinery. There was an arrangement whereby 60% of the revenue earned from the sale of logs would go to Emmett Logging (S.I) Limited, P.O. Box 1827, Honiara, said to be locally incorporated and owned by an Australian citizen. The Applicant had applied for full duty exemption on the first 10,000 m3 of round logs and thereafter 50% duty exemption for the export of all logs. Full duty exemption was also sought on the import of machinery plus tax holiday for 5 years. The Certificate of Approval was dated 31st January 2002. Paragraph 8 of the Certificate of Approval says the duty exemptions and tax holiday sought by the Applicant would have to be sought from both Comptroller of Customs and Excise and Commissioner of Income Tax respectively. The Applicant exported 2, 379.256 m3 of round logs on 18th January 2002 on MV Century Oak v-10. The round logs were 429 pieces in terms of quantity. The value was US$155,507.48. The claim for duty exemption was dated 25th January 2002. The duty exemption was $259,590.26 under the Technology Agreement. The Comptroller of Customs and Excise has refused to grant the customs duty requested by the Appellant. The duty payable by the Applicant as assessed by the Comptroller of Customs and Excise is $221,783.36.

The Issues

The first issue in this case is whether or not the Certificate of Approval No. 5/2002 does entitle the Applicant to be granted duty exemption under section 7(3) of the Investment Act (Cap. 142) as read with clause 18 of the Exemption Schedule of the Harmonised Tariff and section 7 of the Customs and Excise Act (Cap. 121). The second issue is whether that Certificate of Approval does constitute a valid and legitimate expectation that the incentives applied for would be granted to the Applicant.

The Procedure

I set out hereunder section 7 in full for the sake of convenience.

..."7. (1) Any investor may make application in the prescribed form to the Board for the grant of incentives in respect of any proposed or existing investment or enterprise.

(2) Where the Board receives an application referred to in subsection (1), the Board shall give notice of the application to the appropriate Ministries and Government Agencies and seek their approval in respect of the investment or enterprise.

(3) On receipt of confirmation from the appropriate Ministries and Government Agencies that the investment or enterprise is approved as it complies with the requirements of the relevant or qualifying Acts, the Board may approve such investment or enterprise as an approved enterprise.

(4) Where the investment or enterprise does not qualify for incentives in terms of any relevant or qualifying Acts, the Board shall inform the applicant accordingly.

(5) On receipt of approval from the Board, the approved enterprise shall be entitled to the agreed incentives provided for under the Income Tax Act, the Customs and Excise Act and other relevant or qualifying Act.

Whilst section 7 speaks for itself, the procedure prescribed in that section is that upon receipt of an application for the grant of incentives in respect of an investment or enterprise, the Investment Board must notify the appropriate Ministries and Agencies of the application and seek their approval. The appropriate Ministries and Agencies will then confirm to the Investment Board that the investment or enterprise has been approved on the ground that such investment or enterprises has complied with the provisions of the relevant or qualifying Acts. The Investment Board may then approve such investment or enterprise as an approved enterprise. Where the investment or enterprise does not qualify under any relevant or qualifying Acts, the Investment Board will inform the investor accordingly. If on the other hand, the appropriate Ministries or Agencies have approved the incentives applied for and the Investment Board has accordingly approved the investment or enterprise, the approved investment or enterprise shall be entitled to the agreed incentives provided for under the Income Tax Act, the Customs and Excise Act and other relevant or qualifying Acts as from the time it receives approval from the Investment Board. My understanding of the intent of section 7 is that the onus of approving incentives has been shifted to the Ministries and Agencies that are responsible for the implementation of the Acts being directly affected by the proposed incentives. If those Ministries or Agencies have approved the proposed incentives, the Investment Board would most likely follow suit almost as a matter of formality. If not, the Investment Board would refuse approval also and thus the use of the word "may" in subsection 3. The effect of an approval by the Investment Board is clearly a guarantee that the incentives will be effected by the appropriate Ministries or Agencies concerned. The logic is that those Ministries or Agencies

will not refuse to implement what they had already approved as incentives applied for by an investor. In this case, the appropriate authority was the Minister of Finance. In this regard, paragraph 8 of the Certificate of Approval was premature. As a matter of fact, no Certificate of Approval should have been granted until section 7 (2), (3), (4) and (5) of the Investment Act had been complied with by the Minister of Finance. This appears to be the procedure for local investors because section 5 appears to be intended for foreign investors but in the main the procedure in both cases are similar if not the same.

The Certificate of Approval

A Certificate of Approval can be issued by the Investment Board to approved investors under section 4(e) of the Investment Act. The Certificate of Approval (No. 5/2002) in this case must have obviously been issued under section 4(e) of the Investment Act. In terms of section 7(5) of the Investment Act, the Applicant would be entitled to the agreed incentives provided for under the Customs and Excise Act and the Income Tax Act. However, paragraph 8 of the Certificate of Approval is misleading because it does not represent the proper procedure prescribed by section 7 of the Investment Act. It seems to suggest that section 7(2) had not been complied with in this case. That is, the Investment Board had not given notice of the Applicant's application to the relevant Ministries and Agencies and as a result the relevant Ministries had had no reason to respond in terms of section 7(3) of the Investment Act. In this regard, paragraph 7 of Mr Maetoloa's affidavit filed on 13th February 2002 is pertinent. This paragraph reads..."**The Board did not consider the Applicants' request for exemptions/concessions, like similar applications from other investors, because the Minister of Finance then, who was the Deputy Chairman of the Board asked the Board, and the Board agreed that these matters should be sought directly from the Ministry of Finance, hence the wording in the paragraph 8 of the Certificate of Approval"...**

The Minister of Finance then as the Deputy Chairman of the Investment Board was slightly correct. The Secretary to the Investment Board should have forwarded the Applicant's application to the Minister of Finance after the meeting on 9th October 2000 as a corrective measure with the view of calling another Meeting of the Investment Board at a later date to consider the response from the Minister of Finance. Even if that were done, it still would have been wrong because under the procedure, no meeting should have taken place in the first place until the Investment Board had received response from the relevant Ministries and Agencies. Once approval had been given under section 7(5) and conveyed by a Certificate of Approval, the investor would be entitled to the agreed incentives requested by the investor. This was not done in this case. That is, section 7 (2), (3) and (5) had not been complied with on the basis that no notice of the Applicant's application had been sent to the relevant Ministries and thus no response upon which the Investment Board would have acted in terms of section 7(4) and (5) of the Investment Act. No Certificate of Approval as I have said should have been issued at all in the first place. The fundamental objective of the Applicant's application being the incentives were yet to be addressed by the

Investment Board and the Minister of Finance. On this basis therefore it cannot be said that the Certificate of Approval (No. 5/2002) issued by the Investment Board on 31st January 2002 does entitle the Applicant to be granted the incentives sought by the Applicant. The fact is that no incentives have been agreed by the Minister of Finance so as to be communicated to the Applicant in terms of section 7 (5) of the Investment Act. The Certificate of Approval (No. 5/2002) was a false alarm, which must be disregarded by both parties.

H.M. Customs and Excise Tariff

The rates of duty specified in the Schedule to the Harmonised Customs Tariff are rates specified by the Minister of Finance for now and can be amended from time to time. Counsel for the Applicant, Mr Suri, argued that the Applicant's incentives could be accommodated under clause 18 of the Exemption Schedule without the need for the Minister of Finance to make specific exemption orders under section 7 of the Customs and Excise Act (Cap. 121). The definition of the word **"goods"** under section 2(1) of the Customs and Excise Act is that the word includes **"all kinds of goods, wares, merchandise and livestock".** The dictionary meaning of the word **"goods"** is **"movable property, things for sale, merchandise, things carried by rail other than passengers".** (See Oxford Advanced Learner's Dictionary by A.P. Cowie, 4th Edition, at 538). I think for the purposes of the Customs and Excise Act, I am prepared to say that round logs can be regarded as goods. However, three points arise. First, even if clause 18 applies to round logs, the agreed incentives must have first been approved by the Comptroller of Customs and Excise, endorsed by approval of the Investment Board and communicated by the Investment Board to the investor. In practice it would have meant that the application was sent to the Minister of Finance who then in consultation with the Comptroller of Customs and Excise advised the Investment Board that the incentives were agreed and if the Investment Board agreed, it would approve them and issue a Certificate of Approval to that effect to the approved enterprise. The approved enterprise would then be entitled to the agreed incentives on receipt of such approval in the form of a Certificate of Approval. As I have said, the evidence of Mr Maetoloa suggests that this was not what happened in this case. Second, section 7 of the Customs and Excise Act does not empower the Minister to delegate his powers to the Comptroller of Customs and Excise. Also, section 35 (5) of the Interpretation and General Provisions Act (Cap. 85) prohibits the delegation of the power to make subsidiary legislation or to exercise any judicial function. In fact, section 7 of the Customs and Excise Act speaks in terms of the Minister providing for the importation or exportation of any goods without payment of custom duty. There is no question of the Comptroller of Customs and Excise exercising discretion by delegation from the Minister of Finance. Section 7 of the Customs and Excise Act does clearly envisage forthright exemption of duty by the Minister of Finance alone on importation or exportation. Third, clause 18 would seem to apply to importation of goods. This view is confirmed at page 10 of the Annex to the Harmonised Customs and Excise Tariff on commodity export. In the result, clause 18 of the Exemption Schedule relied on by Counsel for the Applicant, Mr Suri, does not

apply to the Applicant. The end result is that I will answer question (1) posed by the Applicant in the negative. The answer is no.

Legitimate Expectation

In the alternative, the Applicant asks whether the Certificate of Approval (No. 5/2002) issued to the Applicant by the Investment Board on 31st January 2002 under section 7(3) as read with section 7(5) of the Investment Act constitutes a valid and legitimate expectation by the Applicant that it would be granted exemption on export of round logs by the Respondent. This point had been argued thoroughly by the Attorney-General for which I am most grateful. The fact is that the Applicant put in its claim for duty exemption as early as 25th January 2002 well before the Certificate of Approval was issued on 31st January 2002. By letter dated 31st January 2002, Mr Watts on behalf of the Managing Director of the Applicant informed the Secretary to the Investment Board that the letter dated 22nd November 2000 sent by the Investment Board never reached the Applicant nor did the reminder letter dated 10th January 2001. Mr Watts said that since the matter had been shelved for non-acceptance and non-payment of $2,500.00, fee, the cheque for that amount was being enclosed for that purpose. He referred also to the fact that the matter had been resolved the previous day after a lengthy consultation and close perusal of the Investment Board Files. The Certificate of Approval was issued that same day Mr Watt's letter was dated. The tone of Mr Watts' letter was that the incentives were granted on 9th October 2000 and the late issue of the Certificate of Approval did not take away the Applicant's entitlement to the exemptions granted. There is another fact. There was a previous letter written directly to the then Minister of Finance, through the Prime Minister. This letter was dated 23rd January 2002 and signed by Andrew somebody a director of Tenge/Porere Development Enterprises. This letter reached Edward Hunuehu first, the Minister for Commerce and Trade who in an undated minute informed the Minister of Finance that the Applicant had a Technology Agreement that had been approved by the Investment Board giving incentives at the time of approval. He asked the Minister of Finance to consider the matter. The point is that these facts do show that there is no case for the application of the principle of legitimate expectation in administrative law at all here. If there was any expectation at all, it was not realized until 31st January 2002. That is, if there was any expectation it was the expectation to be informed of the result of the decision of the Investment Board, which was somehow delayed until 31st January 2002. The cause of delay is not known in this case. In this case, the Applicant must expect a **"yes" or "no"** answer from the Investment Board because its application for incentives was fresh and made for the first time. The procedure to be followed by the Investment Board under section 7 of the Investment Act does not provide for any consultation or anything in that nature for the sake of an applicant for incentives. There can be no legitimate expectation in this case in the sense of that principle in judicial review cases. In this case, the Applicant had applied for duty exemption well before the Certificate of Approval was issued on 31st January 2002. It must be the case that it might have been informed of the decision of the Investment Board by someone well before Mr Watts visited the Investment Board Office on 30th January 2002. I

think the bottom-line in this case on this score is that the principle of legitimate expectation in administrative law is not a sword of justice but rather a key to open the door to justice. **(See John Sina v John Mark Matupiko, Civil Case No. 082/2001).** The key being the ground for judicial review, the door being the Court exercising it's power of opening up and reviewing the administrative decision and justice being the granting of the relevant order being sought. It is not a sword because it does not destroy the administrative decision in the sense that such decision is in some way contravenes the legal rights of the applicant and in so destroying that decision the legal rights denied are vindicated. This is not the case here. I will also answer question (2) in the negative. The answer is no.

The Technology Agreement

The Technology and Marketing Agreement with Emmett Logging (S.I) Limited received by the Investment Board on 8th August 2000 was superceded by a Management Agreement entered into on 17th October 2000 with Oceania Trading Company of P.O. Box $89, Honiara. I do not know why the Applicant came to Court about a Technology Agreement that was no longer in force by 17th October 2000. More so, there is no evidence to suggest that the Management Agreement signed on 17th October 2000 had been approved by the Investment Board so as to reactivate the incentives formerly associated with the Applicant. The Applicant therefore misled the Comptroller of Customs and Excise when it claimed exemption of duty on 25th January 2002 when the Technology Agreement with Emmett (S.I) Limited was no longer in force and the succeeding Management Agreement with Oceania Trading Company had not been approved by the Investment Board. Perhaps, the Management Agreement needed no approval from the Investment Board in which case there would have been no basis for the Applicant to claim duty exemption at all in respect of that Agreement. The Comptroller of Customs and Excise was therefore correct in refusing duty exemption claimed by the Applicant. The application by the Applicant is refused with costs.

F.O. Kabui
Judge