

CABLE AND WIRELESS -v- THE COMMISSIONER OF INCOME  
TAX ACT (CAP. 123) SECTION 70 FOR YEAR 1996

HIGH COURT OF SOLOMON ISLANDS

F.O. Kabui

Civil Appeal Nos. 141, 142, 143, 144, 145 and 146 of 2003.

Date of Hearing: 17<sup>th</sup> August 2004

Date of Ruling: 24<sup>th</sup> August 2004.

J. Sullivan and R. Kingmele for the Appellant

N. Monshinsky, QC with J. Deve for the Respondent

RULING

**Kabui, J.** There are six appeals filed by Cable & Wireless PLC, ("the taxpayer"), a British Company incorporated in the United Kingdom, being the minority shareholder in Solomon Telekom Company Limited ("Telekom") incorporated in Solomon Islands and carrying on business in Solomon Islands. These appeals were each filed on 23<sup>rd</sup> June 2003 under section 79 of the Income Tax Act, (Cap. 123) ("the Act") and are identical in terms of the facts and issues raised in each of them. They are appeals challenging the default tax assessments the Commissioner of Inland Revenue ("the Commissioner") made against the taxpayer in respect of the years 1991 to 1996. There is a Services Agreement under which the taxpayer provides technical and management services to Telekom for which the taxpayer receives fees. As a shareholder, the taxpayer also receives dividends. The taxpayer believing that it is exempted from tax in Solomon Islands, did not bother to lodge tax returns with the Commissioner for the years 1990 to 1996. As regards the tax assessment for the year 1990, the taxpayer lodged an objection which was disallowed by the Commissioner whereupon the taxpayer appealed to the High Court. The taxpayer had objected on the ground that it was not liable to pay tax as it did not trade or carry on business through a permanent establishment in Solomon Islands. The High Court having dismissed the appeal, the taxpayer appealed to the Court of Appeal. The Court of Appeal dismissed that appeal on 18<sup>th</sup> December 2001. The taxpayer had on 14<sup>th</sup> May, 2002 lodged its tax returns for the years 1991 to 1996 and is awaiting its tax position to be dealt with by the Commissioner. The taxpayer had in the meantime paid the tax payable for the year 1990 following the Court of Appeal's determination. The Commissioner had treated the taxpayer's objections to the assessments for 1991 to 1996 as being insufficient which the taxpayer took the Commissioner's letter of 11<sup>th</sup> March 2003 (Document 32) as being a refusal to consider its objections and further calls for reassessment of tax liability following the lodgment of tax returns. The Commissioner had also imposed a tax penalty of 10% of the tax outstanding in

each case to which the taxpayer also objected. The appeals are to seek the indulgence of the Court to rectify the position of the taxpayer.

### **The common appeal issues arising from the six appeals.**

The issues which arise as points of law from the taxpayer's stand point as set out in each of the Notice of Appeal are summarized at page 8 of the taxpayer's bundle of documents setting out the facts and issues. I restate them here for the sake of convenience. The first issue has two parts. The first part is that notwithstanding a default tax assessment done under section 71(3) of the Act, the taxpayer can still lodge its tax returns and have its tax liability re-assessed on the basis of the tax returns. This is the case for the taxpayer. The opposing argument by the Commissioner which is the second part is that the default tax assessment is final and any subsequent lodgment of tax returns would not change that position. The second issue also has two parts. The first is that the judgment by the Court of Appeal on 18<sup>th</sup> December 2001 for 1990 tax year determines the tax liability of the taxpayer for the subsequent years of 1991 to 1996 because the facts and issues are the same in all of them. This is the case for the Commissioner. The case for the taxpayer being the second part is that the effect of the judgment by the Court of Appeal is that tax liability arising from the Services Agreement demands that the taxpayer must lodge its tax returns for the subsequent years in accordance with section 57 of the Act which requires the Commissioner to either issue fresh assessment or re-assessment in the light of the tax returns. I regard these issues as being the main appeal points of law from the stand point of the taxpayer. In the reply dated 17<sup>th</sup> August 2004, the Commissioner agreed with issues raised in 1(a) and (b) in the taxpayer's statement of facts and issues bundle of documents filed on 12<sup>th</sup> August 2004 but disagreed with the issues raised in 2 (a) and (b) as set out therein. In addition, the Commissioner also raised separately the following as further issues to be determined by the Court-

1. The validity of each the penalty objection within the meaning of section 79 of the Act.
2. The competency of the appeal within the meaning of section 79 of the Act.
3. The effect of the Agreement alleged in paragraph 13 of the Notice of Appeal as being an unlawful fetter on the Commissioner's duty to recover and collect tax.

There is therefore a combination of issues for the Court to determine as preliminary points of law under Order 27 of the High (Civil Procedure) Rules 1964 "the High Court Rules."

**Order 27 of the High Court Rules does not apply to appeals under section 79 of the Act.**

Both parties seemed to have agreed between themselves that the procedure set out in the above Order is the correct one to apply in this case. The taxpayer filed a summons on 12<sup>th</sup> August 2004, seeking an order that the issues set out in the appellant's statement of facts and issues be determined as preliminary issues in the appeal under Order 27, rule 2 of the High Court Rules. The Commissioner, on the other hand, had filed an earlier summons on 23<sup>rd</sup> March 2004 seeking to strike out the Notices of Appeal under the same Order, rule 4 of the High Court Rules. With due respect, I do not agree. The income tax regime is a creature of statute, the Act. The only provision about appeal is section 79 of the Act. Nowhere in that provision or elsewhere in the Act does it say that any points of law in an appeal may be disposed of in any other way or be struck out than what the Act says in section 79. If any points of law that arise in the appeal under section 79 of the Act are dealt with and disposed of under Order 27 of the High Court Rules, then the assumption is that the matters dealt with are not appeal matters but matters commenced by writ. In principle, an appeal is an appeal; it is not an action commenced by writ or anything else defined as "pleading" defined by Order 1 of the High Court Rules. The definition of the word, "pleading" in Order 1 above is taken word for word from section 225 of the Supreme Court of Judicature (Consolidation) Act, 1925 of the United Kingdom. Appeals under the High Court Rules are dealt with specifically in Order 60. The appeals there are from the Magistrates' Courts to the High Court. Nothing in Order 27 of the High Court Rules is said about appeals under the Act. The Court derives its jurisdiction to hear tax appeals from section 79 of the Act. By being asked to determine the appeal points of law under Order 27 of the High Court Rules is like being asked to make an order to hear the appeal points under Order 27 of the High Court Rules. That is not right. I cannot do that. I have no jurisdiction to determine the appeal points of law filed under section 79 of the Act under the procedure permitted under Order 27 of the High Court Rules though attractive that procedure appears to be in terms of tending to save costs. The question may be asked as to why. The answer is that the Act is a Code in itself. (See **Solomon Telekom Company Limited v. Commissioner of Inland Revenue, Solomon Islands National Provident Fund and Investment Corporation of Solomon Islands**, Civil Case Nos. 255 of 2001 and 020 of 2003). Section 79 of the Act does not allow me to go to Order 27 of the High Court Rules in order to answer legal points of appeal filed under section 79 of the Act. In my view, it is unnecessary to invoke Order 27 of the High Court Rules. Both parties cited no authority in this jurisdiction or elsewhere to justify invoking Order 27 of the High Court Rules to determine points of law that arise by way of a tax appeal under section 79 of the Act. There is no precedent in this jurisdiction for the approach taken by the parties to resolve the tax appeal in this case. In fact, the authorities in this jurisdiction are to the contrary. (See **Commissioner of Inland Revenue v. Chee**, Civil Case

No. 63 of 1991 and **Cable & Wireless v. Telekom**, Civil Case No. 99 of 1999). I would reject both applications on that basis. Even if the procedure in Order 27 of the High Court Rules were applicable, the procedure is done in two stages. First, there must be an application by one of the parties, if there is no consent, for an order that the point or points of law be set down for hearing and be disposed of accordingly. This first step is necessary because the court is required to exercise its discretion in either granting the application or refusing it. As put by Lord Scarman in **Tilling and Another v. Whiteman** [1979] 1 All E. R. 737 at 744, "... Preliminary points of law are too often treacherous short cuts. Their price can be delay, anxiety and expense..." Second, the hearing of the point or points of law takes place and a determination is made by the court. (See **Peter Tahani v. Attorney-General and Commissioner of Lands**, Civil Case No. 245 of 2001). The summons filed by the taxpayer prays that the issues set out in the appellant's statement of facts and issues be determined as preliminary issues. This is jumping one step ahead of the first step. Whether to set down the issue or issues as a preliminary point or points of law must be decided first by the court. There can be no short cut. I do not think I can allow that to happen here in violation of Order 27, rule 2 of the High Court Rules. I would also reject the taxpayer's summons on that basis. I would also reject the Commissioner's summons on the ground that Order 27, rule 4 of the High Court Rules does not contemplate an appeal under section 79 of the Act or any other appeals for that matter being a cause of action, action or defence. An appeal is a right to challenge in a higher court the correctness of a decision of a lower court or in this case, the assessment done by the Commissioner. Both applications filed under Order 27 of the High Court Rules by both parties are therefore dismissed. Each party will meet its own costs.

**F.O. Kabui,**  
**Puisne Judge**