

IN THE COURT OF APPEAL, FIJI  
ON APPEAL FROM HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0036 OF 1998S  
 (High Court Civil Action No. JR HBJ0002 of 1993)

BETWEEN:

MINISTER OF FINANCE

*Appellant*

AND:

EVERCRISP SNACK PRODUCTS  
(SOUTHSEAS) LTD

*Respondent*

Coram: The Rt. Hon. Sir Maurice Casey, Presiding Judge  
 The Hon. Sir Mari Kapi, Justice of Appeal

Hearing: Tuesday, 23 February 1999

Counsel: Mr. A. V. Bale with Miss. B. Malimali for the Appellant  
 Mr. F. G. Keil for the Respondent

Date of Judgement: Friday, 26 February 1999

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JUDGMENT OF THE COURT

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This is an appeal from a decision of the High Court dated 4<sup>th</sup> June 1998 wherein the Court (1) granted an order in the nature of certiorari against the decision of the Minister for Finance dated 26<sup>th</sup> June 1992 and (2) granted an order in the nature of mandamus directing the Minister for Finance that he by order or written direction to the Commissioner of Inland Revenue approve the respondent as a company in an approved trade or product to be eligible for export incentive relief for the years 1985, 1986 and 1987.

The judicial review proceedings in the High Court from which this appeal lies, arose out of claims made by the respondent for export incentives relief by way

of tax deductions or rebate under the provisions of Fifth Schedule to *Income Tax Act* (Cap 201).

The background to the proceedings in the High Court is as follows. In a letter addressed to the Minister for Finance dated May 5 1976, the respondent made a proposal to establish a joint-venture company in Fiji to manufacture and market "snack foods". In the letter, the respondent offered the Government of Fiji an equity in the joint-venture. The proposed joint-venture was intended to supply snack foods to the local market in Fiji as well as to other countries in the Pacific. The respondent enclosed A Project Appraisal Information form setting out all the details of the proposed project. The proposal sought assistance from the Government in the following terms:

*"Assistance sought will be of a type and level comparable with assistance granted to AMATIL joint-venture projects in other countries (Papua New Guinea, Malaysia, Indonesia). We do not consider it appropriate to simply list possibilities without the opportunity to personally discuss this proposal with Government Authorities. Topics we would look forward to discussing could include:-*

- duty exemptions for capital equipment and raw materials*
- tax holiday (possibly based on paid up capital, labour utilisation, capital expansion, etc.)*
- construction finance, should factory be built rather than leased*
- export incentives*
- dividend tax exemptions*
- import duties on manufactured product*

The Permanent Secretary for Commerce, Industry and Co-operatives responded in letter dated 28<sup>th</sup> June 1976 in the following terms (excluding the formal parts):

*"The Government has studied your proposal to set up a joint-venture in the name and style as of above to manufacture and market snack foods, and has granted the company the following assistance/concessions:*

- (a) concessionary rate of Free Fiscal and 5% Customs duty on the import of flavours and colours;*
- (b) concessionary rate of Free Fiscal and 7% Customs duty on the import of packaging film subject to the condition that the company complies with the following clause:*

*'the operating company shall purchase within Fiji all materials, supplies and services required in the course of the manufacture, where such materials, supplies and services are locally available at reasonable prices and of reasonable quality and shall give preference to the locally produced or manufactured materials, supplies and service'.*

- (c) income tax concessions for three years effective from the date of commercial production,*
- 2. Export Incentive relief shall be provided to the company so long as it complies with the Fifth Schedule of the Income Tax Ordinance.*
  - 3. The company's request for dividend tax exemption has not been approved.*
  - 4. Further, if rice and corn, which are duty free now, become dutiable in the future, there shall be no duty remission as the company should use the locally produced rice and corn.*
  - 5. As regards the request for duty exemption on capital equipment, the company shall be advised of the decision thereon in due course.*
  - 6. You are advised to get in touch with the Comptroller of Customs for the necessary documentation to effect the concessions mentioned above."*

In so far as it is relevant to the present case, the letter approved tax concessions pursuant to the Third Schedule and Export Incentive Relief under the Fifth Schedule. We will return to discuss the true nature of this letter later in the judgment.

The respondent commenced production of snack foods in Fiji in October 1976. It appears that the respondent made no claims under the Third Schedule or the Fifth Schedule for the years 1977, 1978 and 1979.

In a letter dated 6<sup>th</sup> September 1979 addressed to the Minister for Commerce & Industry, the respondent's accountants, Coopers and Lybrand, requested to extend the approval given under the Third Schedule for a period of three years. In a letter dated 27<sup>th</sup> November 1979, Permanent Secretary for Commerce and Industry extended the period by two years. There is no issue before us on any claim under the Third Schedule.

In a letter dated 6<sup>th</sup> July 1982, the accountants for the respondent requested the Minister for Finance for approval of export incentives under the Fifth Schedule in the following terms:

*"On behalf of the company we are now applying for your approval that in accordance with Section 16 (2) of the Income Tax Act, the company's trade and products be specified as being expedient for the economic development of Fiji and qualify for export incentives under the provisions of the Fifth Schedule to the Act in respect of the income year commencing 1<sup>st</sup> November 1981".*

In response to this application, the Director for Economic Development Board of Fiji in a letter dated 26<sup>th</sup> August 1982, pointed out that the Minister had already approved export incentive relief in the letter dated 28<sup>th</sup> June 1976 and directed that the respondent should liaise with the Department of Inland Revenue in order to qualify for

a tax deduction or rebate under the Fifth Schedule.

In response to this letter, the accountants in a letter dated 15<sup>th</sup> September 1982 confirmed that export incentives had been granted by the letter dated 28<sup>th</sup> June 1976 and that this approval will expire in 1984 and requested the Director to approve export incentive relief for the year commencing 1<sup>st</sup> November 1981.

The Director responded in letter dated 7<sup>th</sup> October 1982 pointing out the approval in letter dated 28<sup>th</sup> June 1976 and advised:

*"Now, the company wishes to defer the date from 1976 to 31<sup>st</sup> October 1981 and we advise that the company should liaise direct with the Department of Inland Revenue stating reasons for deferment so that due consideration could be given to their request".*

The accountants taking this advice wrote to the Commissioner of Inland Revenue in a letter dated 20<sup>th</sup> October 1982. In a letter dated 21 April 1983, the Commissioner directed the accountants to take the respondent's claim to the Minister for Finance.

Acting on this advice, the accountants wrote to the Minister for Finance in a letter dated 21<sup>st</sup> June 1983 setting out the background to the claim and repeated the request in the original application made on 6<sup>th</sup> July 1983 with up to date information.

In a letter dated 26<sup>th</sup> September 1983, the Permanent Secretary for Finance advised that the Minister was unable to approve the application on the basis that he had

no power to extend the commencement of the approval given in the letter dated 28<sup>th</sup> June 1976 to 1981. It is not necessary to set out the details of what happened to this particular claim as it was not the subject of a judicial review and it is not the subject of the appeal before us.

In the meantime, the respondent had claimed export incentive relief in the tax returns for 1985, 1986 and 1987. The Commissioner for Inland Revenue disallowed these claims in absence of approval from the Minister for Finance under the Fifth Schedule. It appears from the record that the respondent then filed an objection to the assessment with regard to the year 1987. In a letter dated 15<sup>th</sup> April 1988 the Commissioner disallowed the objection. The respondent appealed to the Court of Review. We are uncertain about what has become of this appeal.

In a letter dated 28<sup>th</sup> August 1990, solicitors for the respondent took up the matter of a letter written by the accountants dated 25<sup>th</sup> August 1986 in which the respondent requested the Permanent Secretary of Finance & Economic Planning to approve export incentive relief under the Fifth Schedule and repeated the same request. In a letter dated 6<sup>th</sup> December 1990, the Permanent Secretary did not give approval on the basis that "there is no statutory authority to enable the Minister to extend time once the eight (8) years had lapsed".

In a letter dated 7<sup>th</sup> December 1990, the accountants wrote to the Minister for Finance and pointed out that the Commissioner of Inland Revenue had not yet decided the approval in respect of 1987 and repeated the request for approval including

the claims for years 1985 and 1986.

In a letter dated 30<sup>th</sup> April 1990, the solicitors repeated the request for approval for export incentive relief. In a letter dated 26<sup>th</sup> June 1992, the Permanent Secretary for Finance & Economic Planning did not give approval on the same basis set out in the letter dated 6<sup>th</sup> December 1992. The refusal to approve prompted the respondent to take out judicial review proceedings in the High Court.

These correspondence displays a difference of opinion in the interpretation of s 16 (2) (b) and Fifth Schedule of the *Income Tax Act*. The Department of Finance held the view that the approval given to the respondent in the letter dated 28<sup>th</sup> June 1976 took effect from the first year of approval (1976) and the period 8 years referred to in para. 5 (i) of the Fifth Schedule expired in 1984 and therefore the Minister is unable to grant the approvals for the years 1985, 1986 and 1987.

On the other hand, the respondent and its representatives held the view that the approval given in the letter dated 28<sup>th</sup> June 1976 is an approval of a trade or product in accordance with s 16 (2) (d) and that it has the right to choose any year in which to make a claim for export incentive relief under the provisions of the Fifth Schedule. It says that the first year of approval and the 7 years referred to in para. 5 (i) of the Fifth Schedule commences after this approval is first given.

The High Court upheld the view advocated by the respondent. The Minister of Finance has appealed against this decision on the ground that the trial judge

erred in the interpretation of the provisions of 16 (2) (d) and Fifth Schedule of the *Income Tax Act*.

It is convenient to set out the relevant provisions of the Act:

- “S.16 (2) *The Minister may, either by order, or by written direction to the Commissioner, where he is satisfied that it is expedient for the economic development of Fiji---*
- (d) *specify any trade and any product to be an approved trade and an approved product qualifying for an export incentive under the provisions of the Fifth Schedule and any such sum referred to in that Schedule shall be exempt from tax or chargeable at such reduced rate as may be specified.*  
.....”

“Fifth Schedule

1. *Preliminary:*

*Where the Minister has specified any trade and product as an approved trade or product under paragraph (d) of subsection (2) of section 16, a deduction from chargeable income or a rebate of the tax charged may be allowed in accordance with the provisions of this Schedule.*

2. *Commencement:*

*These provisions shall apply to any fiscal year ending after 1 January 1974:*

3. *Application for Approval:*

- (a) *Every company resident in Fiji for the fiscal year of any year of assessment which desires to avail itself of the deduction under this Schedule shall apply to the Minister for approval to be treated as a company eligible for a deduction or rebate for that year.*
- (b) *The Minister may require a company which applies for approval under (a) to furnish him with particulars which he considers necessary for the purpose of considering the application including, inter alia -*

- i) *the name and address of the company*
- ii) *the nature of the trade in respect of which approval is sought:*
- iii) *the nature of the product in respect of which approval is sought*
- iv) *details of manufacture or production including capacity and amount available, for export and to which countries the company expects to export*

4. *Nature of Trade and Products to be Approved and other Requirements:*

- (i) *The Trade and product which the Minister will approve shall be product of manufacturing or agricultural processing, the manufacture or produce of deep-sea fishing or of production of minor agricultural commodities. Minor agricultural commodities shall be such commodities as the Minister may approve, but will not include sugar or copra but derivatives of manufacture from these commodities may be considered by the Minister as manufactures.*
- (ii) *No deduction will be due in respect of the deduction relating to the increase in exports for any fiscal year in which total export sales of approved products do not exceed \$5,000.*

5. *Method of Relief*

- (i) *In respect of an approved product, a rebate in respect of the export profits relating to such approved product for the fiscal year in which approval is first given and the 7 subsequent fiscal years as follows:-*

*Where the manufacturing cost of the product being exported-*

- (a) *is at least 30 percent but is less than 50 per cent - one half of the tax chargeable on the export profits.*
- (b) *is at least 40 per cent but is less than 50 per cent - three quarters of the tax chargeable on the export profits.*
- (c) *is 50 per cent or more - the full amount of the tax chargeable on the export profits*

*The rebate due for any year of assessment shall be limited to the amount calculated under this sub-paragraph or the tax payable for that income year whichever is the less.*

- (ii) *Where a deduction under this Schedule is admissible in addition to an exemption under the Third Schedule, the exemption under the Third Schedule shall first be allowed and a deduction under this Schedule will be applied to any balance of profits which have not been exempted. Any apportionment or computation under this paragraph shall be applied as if the net profit chargeable were the total profits of the trade.*
- (iii) *Any concession granted under this Schedule prior to 1 January 1982 shall continue to apply and the rebate, commencing from the year of assessment 1982, shall be computed in accordance with sub-paragraph (1).*

.6. *Time Limits:*

- (i) *Except in respect of an application made during the year 1974 in respect of a fiscal year ending in that year, an application for an export incentive deduction shall be submitted to the Minister not later than 3 months after the commencement of the fiscal year the profits of which are to be the subject of an application.*
- (ii) *Provided that satisfactory records are maintained, a taxpayer may continue to claim relief for the year of claim and the 7 subsequent fiscal years.*

7. ....”

Section 16 (2) (d) deals with approval by way of an order or written direction to the Commissioner which specifies a trade or product for purposes of a claim under Fifth Schedule. This is consistent with the terms of para. 1 of the Fifth Schedule. We point out that the approval relates to a trade or a product and there is no reference to a company which may be engaged in a trade or makes the product.

A company which desires a deduction or a rebate may make an application for approval under the provisions of Fifth Schedule (para. 3 (a) of the Schedule). The approval referred to under s. 16 (2) (d) of the Act and para. 3 of the Schedule are different. This is consistent with para. 5 (i) of the Schedule where the references to “approved product” must refer to approval of a trade or a product under s. 16 (2) (d) and the reference to “approval is first given” must refer to the application made under para. 3 (a) of the Schedule.

These approvals may be given separately and at different times or they may be given together at the same time. Counsel for the appellant has argued that this may result in an absurdity where a company may delay making the application under the Fifth Schedule for many years. We consider that this is a relevant matter which the Minister may take into account when determining an application under the Fifth Schedule.

The question which arises in this case is; when do these approvals begin to run? Section 16 (2) (d) does not have any reference to when such an approval may begin to run. We have no doubt that when the order is made or written direction is given under this provision, the approval for the trade or the product takes effect immediately. There is nothing in the provisions which qualifies when this approval may expire.

When does an approval under Fifth Schedule commence? The combined effect of para. 3 (a) and para. 5 (i) of the Schedule is that the approval commences when approval is first given in a particular year.. There is no requirement as to when the first application may be made after the Minister has approved a trade or product. Para. 3 (a) of the Schedule speaks of when a company "desires to avail itself". This suggests that it is a matter for the company when to make the first application. As we have pointed out previously, the Minister may take into account the lapse of time as a consideration when exercising his discretion.

We have reached the conclusion that the trial judge was correct in his interpretation of s. 16 (2) (b) and the provisions of Fifth Schedule of the *Income Tax Act*.

Application to the Present Case.

What approval was given in the letter dated 28<sup>th</sup> June 1976? There can be no doubt that this letter granted the approval of snack foods as an approved product under s 16 (2) (d) of the *Income Tax Act*.

Whether or not this letter also grants the approval under the provisions of the Fifth Schedule is not so easy to determine as the first matter. In determining this issue, we take into account the terms of the Project Appraisal forwarded by the respondent. This was an application to simply discuss the various issues raised in the proposed joint-venture. It was not an application for deduction or rebate in respect of a particular year under the Fifth Schedule. It could not be because the respondent had not yet commenced their production. Paragraph (2) of the letter clearly indicates that export incentive relief would be provided so long as the respondent complies with the Fifth Schedule. This simply was an indication or an invitation for the respondent to make an application under the Fifth Schedule.

It follows from what we have concluded that the Minister has specified snack foods as an approved product under s 16 (2) (d) of the *Income Tax Act* and that the respondent was entitled to apply for approval for export incentive relief under the Fifth Schedule. As the respondent claims relate to the years 1985 to 1987, the Minister needed to consider the claim first in time to kick start the benefits under the Fifth Schedule. Whether or not approval should be given is a matter in the discretion of the Minister. It is not appropriate for the Court to decide that issue or give any direction as to what decision he should make.

**Result:**


In the circumstances, we would dismiss the appeal in part and affirm the decision of the trial judge quashing the decision of the Minister dated 26<sup>th</sup> June 1992. We would quash the decision of the trial judge in respect of the direction to the Minister to give approvals for export incentive relief under the Fifth Schedule.

We further order that the claim for export incentive relief for the first year of claim (1985) should be considered by the Minister in the light of the interpretation we have given to the provisions of the *Income Tax Act* in this judgment..

In view of the fact that each party is partly successful on appeal, we make no order on costs.



.....  
Sir Maurice Casey  
Presiding Judge



.....  
Sir Mari Kapi  
Justice of Appeal

**Solicitors:**

Legal Officer, Office of the Inland Revenue Department, Suva for the Appellant  
Messrs. Mitchell Keil & Associates, Suva for the Respondent