

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU0091 OF 2006
(High Court Civil Action No. 15 of 2005)

BETWEEN : **GURDIAL SINGH BROTHERS LIMITED**

Appellant

AND : **THE COMMISSIONER OF INLAND
REVENUE**

Respondent

Coram : John E. Byrne - Justice of Appeal
D. Pathik - Justice of Appeal
I. Mataitoga - Justice of Appeal

Counsel : Vijay Maharaj & A. Bale for the Appellant
: Ms F. Gavidu & S. Tagicaki for the
Respondent

Date of Hearing: 29th August 2007
Date of Judgment: 5th November 2007

JUDGMENT OF BYRNE J.A.

[1] This is an appeal from a judgment of Coventry J. in the High Court who was asked by the parties to answer this question, "Can the Value Added Tax Tribunal grant a Stay

of recovery of taxes pending its adjudication upon an appeal?" The Judge answered that question in the negative and it is from his judgment of the 16th of December 2005 that this appeal is now brought. The litigation between the parties arose as a result of a dispute between the Appellant and Respondent as to the liability of the Appellant to pay Value Added Tax on unprocessed Kava. The Appellant has a business which deals in processed and unprocessed Kava and until the 24th of February 2005 the Respondent had a policy of not charging VAT on raw unprocessed Kava.

- [2] On the 24th of February 2005 the Respondent notified the Appellant that henceforth it would be liable to pay VAT on all sales irrespective of whether the Kava was unprocessed or processed. The Respondent then assessed the tax allegedly owing by the Appellant at \$800,000.00 but this was varied downwards twice and at the time of hearing before Coventry J. the Respondent stated that a rebate of approximately \$80,000.00 was owing from the Respondent to the Appellant.
- [3] Sometime after the Respondent made its assessment it began to garnishee rent from the Appellant's tenants to satisfy the tax assessed.

- [4] The Appellant then appealed to the VAT Tribunal for an Order staying the garnisheeing by the Respondent of the Appellant's tenants and in a Ruling dated the 28th of July 2005 the Tribunal ordered the Respondent to cease all recovery proceedings including garnishee proceedings until the hearing and determination of the Appellant's appeal to the Tribunal.
- [5] On the 16th of December 2005 Coventry J. held that the VAT Tribunal had no statutory power to order a Stay. He held that the regime for the collection of taxes in Fiji is sui generis. In fact this meant that the Respondent is the only statutory authority which has the power of levying taxes or granting time to pay them or to decline to charge any tax to a tax payer who has submitted a return. The Judge based his decision mainly on Section 50(7) of the VAT Decree 1991 which states that:

“the obligation to pay and the right to receive and recover any tax chargeable under this Decree (including any interest, costs and penalties) shall not, unless the Commissioner so directs, be suspended by any objection or appeal or pending the decision of the Tribunal under Section 55 of this Decree but, if any assessment is altered

on objection or appeal or in conformity with any such decision, a due adjustment shall be made, amounts paid in excess being refunded subject to Section 65 of this Decree and amounts short paid being recoverable”.

According to the VAT Decree provided to this Court it is sub-section 8 of Section 50 which gives the Respondent these powers but the numbering is unimportant for the purposes of this judgment.

[6] **The Value Added Tax Tribunal**

Section 51 of the VAT Decree establishes the Value Added Tax Tribunal. Its purpose is to hear and determine appeals under Section 50 of the Decree. It has powers and authority similar to those vested in a Judge of the High Court under what is now Section 120 of the current Constitution. The Respondent argues that those only are its powers and it can not go beyond them, which it is claimed, it did in the instant case.

- [7] The VAT Tribunal in granting the Stay relied in part on a Decision of Singh J. in **Pacific Transport Limited v. The Land Transport Authority and Sunbeam Transport Ltd.** HBC No. 126 of 2004. The powers of the Tribunal

established under the Act are stated in Section 46 and it is to be noted that they do not include any power to grant a Stay pending the determination of any appeal to the Tribunal. However, under sub-section 2 the Tribunal on hearing any appeal may dismiss the appeal or make such order as it thinks just and reasonable in the circumstances directing the Authority to issue, transfer or cancel any licence, certificate or permit, or to impose, vary, or remove any condition or restriction in respect of a licence, certificate or permit, and the Authority must comply with that order. At page 3 of his decision Singh J. said:

“One of the purposes for setting up the Tribunal is to avoid dissatisfied parties proceedings to the High Court for Review. The Tribunal can on appeal under Section 46(2) direct the Authority to cancel a licence. Given such a power, it is only proper that the Tribunal should be able to direct a Stay of a decision pending appeal which is only a temporary measure. One has to give a purposive approach to interpreting Section 46(2) so parties are not compelled to go to the Tribunal on merits and ask for a Stay pending appeal in the

High Court because of some procedural defects. Proceedings to two different forums would be time consuming and expensive. I am of the view therefore that the Tribunal on application made to it can grant Stay pending appeal”.

- [8] Two comments may be made about those remarks. First, that the VAT Tribunal does not have the same equitable power as the Land Transport Act Tribunal to make orders such as it thinks just and reasonable in the circumstances of a case. Secondly, whilst it may be permissible to interpret the Land Transport Act liberally, as Singh J. did, different constructions have historically applied to statutes imposing burdens. That well known Judicial Authority on Revenue Law in the 1920s and 30s, Rowlatt J. said in Cape Brandy Syndicate v. IRC [1921] 1KB 64 at p71:

“In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a 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”.

- [9] The Respondent argues that whatever procedures might be followed in other Tribunals, for example the Land Transport Authority, with such an explicit statement of powers, the Tribunal cannot give to itself under its general description of jurisdiction a power to over-ride that statutory power.
- [10] The Appellant does not accept this statement of the law. It states that the words "*similar to*" in the VAT Decree creating the Tribunal link its powers to those of the High Court as described in the Constitution.
- [11] The Appellant then says that if the powers given to the Tribunal are made similar to those of the High Court, the High Court itself has inherent jurisdiction to regulate its own procedure and prescribe procedures and practices necessarily incidental to the exercise of its main functions. In that regard the ability to stay, pending the outcome of an appeal, the recovery of tax is a fair and necessary adjunct to the operation of the Tribunal.
- [12] Coventry J. said that sub-section 7 in his view clearly placed the decision concerning the suspension of the payment of any assessed taxes during the currency of any appeal with the Commissioner. He said that the words in

sub-section 7 necessarily must take precedence over the ancillary jurisdiction given to the Tribunal by Section 51(4). As Lord Parker C. J. said in Regina v. Leicester Licensing Justices Ex-parte Bisson [1968] 1WLR 729 at p.723:

“It seems to me that it would be perfectly right to give a wide meaning to the word “similar” a word which anyhow does not mean identical ...”

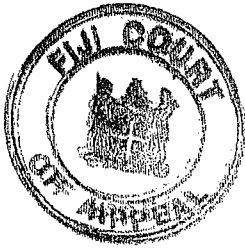
- [13] In Action No. HBCO289.OOL Native Land Trust Board v. Oddyar & Others Gates J. had to consider the powers given to the Agricultural Tribunal by the Agricultural Landlord and Tenant Act Cap. 278 and whether the Tribunal had power to stay its awards pending the determination of an appeal from its decisions. He held that the powers given to the Tribunal, although purporting to be those of Magistrates' Courts, did not give all the powers of those Courts and, specifically a power to stay proceedings. The regulations under the Act however gave the Tribunal power to make any order which it considered necessary for doing justice. In those circumstances, the Judge declined jurisdiction for the High Court to grant a Stay and referred the matter to the Agricultural Tribunal registry for appropriate action.

[14] To illustrate further the Respondent's contention that the powers of any Statutory Tribunal are limited according to the Act establishing the Tribunal, counsel referred the Court to Section 9 of the Commissions of Inquiry Act Cap 47 which sets out the powers of Commissioners under the Act. These are limited as, just as the Respondent contends and Coventry J. held, the powers of the VAT Tribunal are equally limited.

[15] I find much force in these submissions given the fact, that the VAT Decree has now been held constitutional by this Court notwithstanding the fact that it never passed through the filtering process of debate in Parliament. That said however, it must not be forgotten that the powers of the Commissioner of Inland Revenue are also limited in this respect that he cannot grant an injunction or stay as can the High Court. That avenue is still open to the Appellant but in the circumstances of this case we must uphold the judgment appealed from.

[16] At page 7 of the Court Record Coventry J. said that the appeal to the High Court had no effect as far as the present Appellant was concerned. He therefore ordered costs against the Respondent in the sum of \$5,000.00. That Order has not been set aside. The Respondent asks

for costs of the appeal to this Court. I fix these at \$750.00 and order that this sum be set off against the sum of \$5,000.00.



John D. Byrne
Byrne JA

At Suva

5th November 2007