IN THE TAX COURT OF FIJI
AT SUVA

HBT No : 05 of 2016

IN THE MATTER of an Appeal under the Tax Administration Decree from a decision of the Tax Tribunal dated 5th July 2016 **by NADI METHODIST DIVISION HOLDING COMPANY LIMITED** (Appellant)

Between : **NADI METHODIST DIVISION HOLDING COMPANY LIMITED**

APPELLANT

And : **CHIEF EXECUTIVE OFFICER, FIJI REVENUE & CUSTOMS AUTHORITY**

RESPONDENT

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr. J. Savou for the Appellant
Mr. O. Verebalavu, Mr R. P. Singh with him, for the Respondent.

Date of Hearing : 24 February 2017
Date of Judgment : 22 November 2017

JUDGMENT

1. This is an appeal by the Appellant praying for an order that the Decision of the Tax Tribunal dated 5 July 2016 be set aside because the Tribunal erred:

(1) In law in holding that there were never any refund due and payable to the Appellant when the Notice of Assessments showed there were refunds.

(2) In holding that the Respondent (sic) was not entitled to claim input credits outside the 3 year period provided under s.39(6) of the Value Added Tax Decree (Decree) as the evidence showed the Appellant had not claimed Input Credit contrary to the said limitation period.

(3) In law in holding that s.65(1) precludes the Respondent from making any refund to the Appellant for the taxable periods concerned.

(4) The grounds for the appeal are that:

(a) The Tribunal failed to consider s.39(6) of the Decree did not apply to the situation of the Appellant as it did not deduct nor seek to deduct input credits from the output tax amount.

(b) The Tribunal failed to consider the sole issue it had to determine was whether the Respondent could forfeit refunds assessed to the Appellant.

(c) The Tribunal erred in reading into the Decree an interpretation purporting to place limitations on the Respondent's (sic) entitlement to input credits.

(5) The Appellant seeks the following orders:-

(1) That the Respondent incorrectly forfeited the Refunds assessed to the Appellant.

(2) That the Respondent comply with the Decree and set off the Refunds owed to the Appellant against future taxes of the Respondent.

2. At the hearing the Counsel for the Appellant submitted that the sole issue was the refund of VAT. The elders developed the land gifted to them. The Appellant registered for VAT and income tax which were granted. The VAT returns were filed. There was no output tax but there was input tax on the suppliers to the Appellant. The VAT was credited to the Appellant. The Revenue issued notices of assessments. Counsel said the Revenue could keep the money but should not forfeit the tax credited. The provision of 3 years does not apply to the Appellant.

3. At this juncture, both Counsel said they cannot tell when the first sales were made.

4. Counsel continued that the Appellant did not make an application for refund. There was no time limit to holding the refunds by the Revenue.

5. Counsel for the Revenue then submitted. He said the refund was forfeited under s.65 (1) of the Decree. The assessments were made lawfully. The input tax exceeded the output tax because there were nil sales. The Revenue calculates the VAT payable under s.39(2). Under s.65(1) excess tax is only refunded if an application is made within 3 years. Here the application was made on 16 June 2015.

6. The Revenue backdated the application made under s.22(5)(b) to be registered only for the information of the Revenue and not for the purpose of validating the application for a refund for it to come within the 3 years.

7. At the end of the arguments I said I would take time for consideration. I now deliver my decision. The grounds of appeal make it crystal clear that the sole issue before the Tribunal was whether the Respondent could forfeit refunds assessed to the Appellant.

8. I will go straight to section 65(1) of the Decree. This states that where the C.E.O (Revenue) is satisfied that tax has been paid in excess of the amount properly calculated in respect of any taxable period, the CEO shall refund the amount paid in excess "provided that no

refund shall be made.....after the expiration of the period of 3 years immediately after the end of the taxable period, unless written application for the refund is made by or on behalf of the registered person before the expiration of the period."

9. Pausing to read s.2(1) together with s.22(1) the Appellant is clearly a registered person who carries on any taxable activity.

10. I return to s.65(1). I discern quite clearly that the Legislature's intention in the use of the imperative "shall" twice is that it is mandatory meaning obligatory for the Revenue to refund the excess tax just as it is equally mandatory or obligatory for the taxpayer, the Appellant, to make a written application for the refund before the expiration of the specified 3 years period. In other words absent the application absent the refund.

11. Here it is common ground between both sides that the Appellant never made any written application for a refund within the said 3 years period. It only made an objection through its corporate tax expert, Jactak Consulting's letter dated 24 September 2015 which from the record was received by Revenue on 25 September 2015. If this letter were the application for refund it was clearly outside the specified 3 years period as it related to the taxable periods, September 2007, December 2007, December 2008 and March 2009.

12. It also bears repeating that the Appellant's Counsel in his oral submission said the Appellant did not make any application for a refund.

13. At this point I will respectfully adopt and apply to the present case the following passage from the judgment of Rowlatt J. in the leading tax case of Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 1 K.B at page 71: "It simply means that 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".

14. Thus it is clear that this Court has to read the sections in the Decree in their plain language so that any tax refund under either s.38(4) or s.39(8) are by the express wording of these sub-sections themselves, to be refunded to the taxpayer pursuant to section 65, the import of which I have alluded to in para 10.

15. I shall finally deal with the term "forfeit" used by the Revenue. Osborn's Concise Law Dictionary (7th edition) defines "forfeiture" as "the deprivation of a person of his property as a penalty for some act or omission". It can immediately be seen that Revenue was using the wrong term for what it has done. Revenue is not penalizing the Appellant for some wrongful act or omission. It is merely saying the Appellant cannot be entitled to a refund simply and purely because it did not comply with a valid requirement of a lawful Act of Parliament that it first make a written application within the specified period. By no stretch of the imagination can this be considered as a forfeiture. Consequently there is nothing unconstitutional or illegal about the Revenue's action, as it follows the night the day the Revenue was not required to provide any refund.

16. If I may say so with respect, the Revenue's use of the words "(Refund forfeited under Section 65)", in the Notice of Amended Assessment while both unhappy and inappropriate cannot detract nor derogate from the correct legal position of Revenue. In my opinion the Revenue could not and did not forfeit any refund because in the first place there was no refund to be paid at all. And by the same token there was no amount to be offset against any future tax payable.

17. In the light of my decision, there is consequently no need for me to consider any other question or issue raised by the Appellant because all would have fallen to the ground. In the result I uphold the Tribunal's Decision dismissing the Application for Review.

18. However, in the circumstances I shall order each party to bear their own costs throughout these proceedings, both here and below.

Delivered at Suva this 22nd day of November 2017.

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David Alfred

Judge

High Court of Fiji