COMMISSIONER OF INLAND REVENUE v TROPIK WOOD INDUSTRIES LTD (ABU0089U of 2005S)

COURT OF APPEAL — CIVIL JURISDICTION

SCOTT, WOOD and MCPHERSON JJA

15, 24 November 2006

Practice and procedure — appeal — question of fact — whether "wood chipping" farming activity — no clear indication of activity taxpayer was engaged in during relevant tax year — whether concessions invalidly granted — Court of Appeal Act s 12(1)(c) — Income Tax Act 1974 ss 16(1)(ii), 16(2)(f).

The Respondent taxpayer conducted a business of wood chipping. In 1987, it applied under the Income Tax Act 1974 for concessions and allowances in connection with its business. The relevant minister advised the Respondent that the government has granted an income tax holiday for 5 years, an accelerated depreciation allowance and an export incentive allowance. By 31 December 1999 and 31 December 2000, the Respondent had in those 2 tax years, earned income which, apart from concessions granted in 1987, would have attracted liability for income tax. In reliance on those concessions, the Respondent claimed to carry forward losses incurred in previous years and to set them off against income earned in the 2 tax years in question.

The Appellant Commissioner (Commissioner) disallowed those claims and assessed the Respondent tax without reference to the 1987 concessions. The Commissioner disallowed the claims on the view that: (1) the concessions were invalidly granted in 1987; (2) the minister exceeded his authority in granting them to the Respondent; (3) that he acted ultra vires of the powers conferred on him by the Income Tax Act; and (4) his decision was a nullity.

When the Commissioner rejected the appeals against the assessments the Respondent appealed to the Court of Review which upheld the appeal against the Commissioner's assessments. The Commissioner appealed to the High Court but the appeal was dismissed.

Held — (1) The evidence established that the record before the Court of Review and the court contained no clear indication of precisely what activity the Respondent was in fact engaged in at relevant times, except that it was engaged in the business of wood chipping of pine trees or logs, during the tax years in question or the preceding period going back to 1987. However, what the Commissioner sought in the proceedings was a declaration from the court that the Respondent's activity was not and was incapable of constituting farming or agriculture within the meaning of s 16 of the Income Tax Act or the Seventh Schedule. This was something the court cannot and ought not to undertake without the illumination that was inevitably provided by the facts on which the decision must be made.

(2) The court held that there were other and cognate reasons for rejecting the appeal. An appeal to the court from the High Court is permissible on a ground "which involves a question of law only" under s 12(1)(c) of the Court of Appeal Act. The appeal in this instance was one that involved questions of fact even if the appellant did not condescend to identify the facts on which a question of law might arise.

(3) The court further explained that the decision of the Court of Appeal in *Commissioner of Inland Revenue v Walker* is authority for saying that the proper construction of a statute is a matter of law. On the other hand, the determination of the common understanding of a word, which was essentially what the Commissioner intended about "farming" and "agriculture" had been said to be a question of fact. It was only "where all the material facts are fully found, and the sole question was whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment" that the question becomes one of law only. The problem here was that all the

material facts have not been "fully found". Moreover, the court explained that it seemed likely on what little would the court know of the facts that different conclusions about the matter in issue were reasonably possible, so that the determination of which was the correct conclusion would be a matter of fact. On that footing, the court said that the appeal was not authorised by s 12(1)(c) of the Court of Appeal Act.

Appeal dismissed.

Cases referred to

Clifton v Masini [1967] VR 718; *Fitzgerald v Muldoon* [1976] 2 NZLR 615; *Hope v Bathurst City Council* (1980) 144 CLR 1; 29 ALR 577; *Re Day and Deputy Commissioner of Taxation* (2004) 86 ALD 224; [2004] AATA 1305; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439; [2001] HCA 12; *Re Vicmint Partners Pty Ltd & Chief Executive Officer of Customs* (1997) 48 ALD 475, cited.

Inland Revenue v Walker [1963] NZLR 339; *O'Reilly v Mackman* [1983] 2 AC 237; [1982] 3 All ER 1124, considered.

B. Solanki and *M. Scott* for the Appellant

J. Apted and *N. Basawaiya* for the Respondent

[1] Scott, Wood and McPherson JJA. The Respondent taxpayer has for a number of years conducted a business of or including wood chipping. In 1987 it applied under the Income Tax Act 1974 for concessions and allowances under the Act in connection with that business. On 17 August 1987 the relevant minister advised that the government had granted the following:

(1) an income tax "holiday" for 5 years under the Seventh Schedule to the Act;

(2) an accelerated depreciation allowance on buildings, plant and equipment subject to fulfilling the requirements of Legal Notice 6 of 1981; and

(3) an export incentive allowance subject to fulfilling the requirements of the Fifth Schedule to the Act.

[2] By 31 December 1999 and 31 December 2000 the taxpayer had in those two tax years, earned income which, apart from concessions granted in 1987, would have attracted liability for income tax. In reliance on those concessions, the taxpayer claimed to carry forward losses incurred in previous years and to set them off against income earned in the two tax years in question.

[3] However, the Appellant commissioner disallowed those claims and assessed the taxpayer to tax without reference to the 1987 concessions. In doing so, the commissioner essentially took the view that the concessions had been invalidly granted in 1987, in that the minister had exceeded his statutory authority in granting them to the taxpayer. In the result, or so it was and is submitted, the minister had acted ultra vires the powers conferred on him by the Income Tax Act and accordingly his decision was a nullity.

[4] We do not have a complete record of all material available at the intermediate steps by which this appeal comes to the Court of Appeal. But when the commissioner rejected appeals against his assessment, the taxpayer appealed to the Court of Review, which on 9 February 2005 upheld those appeals against the commissioner's assessments. Against the Court of Review's decision the commissioner then appealed to the High Court, where the appeal was heard by Jiten Singh J, who dismissed it on 2 September 2005. The result is that the decision of the Court of Review allowing the appeal against the commissioner's decision will stand unless it is set aside on this appeal.

[5] Superficially at least, the appeal turns on a number of provisions of the Income Tax Act pursuant to which the tax concessions purported to be granted in 1987. It is necessary to set out those provisions at length. Adopting the abbreviated form in the commissioner's written outline, they are as follows:

> 16 (1) The Minister may, by order, provide that —
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> … (ii) the income (in sub-paragraph referred to as "prescribed farming income"), derived from any other farming activity, including fishing and forestry but excluding cane farming, shall be exempt from normal tax for a period of 4 years commencing on 1 January 1987 subject to the conditions that the individual shall deliver to the Commissioner a return of his total income in accordance with the provisions of this Act.
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> (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 —
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> (f) specify [on or before 31st of December 2000,] upon such conditions as he thinks fit, any company engaged in any agricultural enterprises designated by him [or engaged solely in agricultural contracting] as being a company to which the tax concessions contained in the Seventh Schedule shall apply, and such company shall accordingly enjoy such concession.
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> SEVENTH SCHEDULE
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> AGRICULTURAL ENTERPRISES INCENTIVES
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> 1. Any company which have been specified in accordance with the provisions of section 16(2)(f) shall be exempt from the payment or tax under the provisions of this Act on the profits or gains derived from the agricultural enterprise in respect of which the concession has been granted during any 5 out of 10 years from such date as may be appointed by the Minister as the date on which the company is deemed to have commenced commercial production, which 5 years together are hereinafter referred to as the "tax-free period" …
> 5. Any company wishing to apply for the benefit of the concessions contained in this Schedule shall provide the Minister responsible for economic planning and development with such details as he may, in his discretion, require of the agricultural enterprise in which the company is engaged or proposes to engage, whereupon the: Minister responsible for economic planning and development shall make his recommendation to the Minster of Finance who may specify he company pursuant to section 16(2)(f), upon such conditions as he thinks fit, as a company to which the concessions contained in this Schedule apply…
> 10. Any company engaged in any of the farming activities specified in sub-paragraphs (i) and (ii) of paragraph (c) of section 16(1), or in processing agricultural produce or in exporting agricultural produce, or engaged solely in agricultural contracting my qualify for the concessions contained in this Schedule.

[6] For completeness, it should be added that the expression *processing agricultural products* is defined in the Seventh Schedule to mean:

> processing produce which includes agricultural produce of Fiji representing not less than 50 per cent of the total cost of production of the end product.

The presence here of the word "includes" may be noticed.

[7] The commissioner relies on decisions many of them from Australia which may be briefly summarised as deciding that, in the context of various taxing statutes, "agriculture" has the meaning cultivation or gathering in of plants or their produce: see *Re Vicmint Partners Pty Ltd v Chief Executive Officer of*

Customs (1997) 48 ALD 475 at 476; *Re Day and Deputy Commissioner of Taxation* (2004) 86 ALD 224; [2004] AATA 1305. In *Clifton v Masini* [1967] VR 718 at 721, it was held that "agricultural produce" means the products of agriculture including the raising of livestock and birds and their offspring or progeny. This may be said to represent the primary, or it may be the primitive, meaning or conception of "agriculture" or "agricultural products".

[8] The question of the meaning of a word or language necessarily depends on its context. Section 16(1)(ii) of the Act in this instance does not use the expressions in question simply in their primary sense. It speaks of income derived from "any other farming activity", which is expressly stated to include *fishing* or *forestry*. It may be that, apart from that statutory extension, neither fishing nor forestry would readily fall within the primary incoming of farming; but the express statutory extension that includes those two activities plainly enlarges the context in which "farming" and "farming activity" in s 16(i)(ii) are to be understood.

[9] Likewise, s 16(2)(f) uses the term *agricultural enterprises*, while clause 10 of the Seventh Schedule uses the expressions *processing agricultural produce*, *agricultural produce* and *agricultural contracting*. It was suggested that the Seventh Schedule used *agriculture* or *agricultural* in contrast to "farming" to point up a distinction between those words; but what that distinction is was not elucidated. It is perhaps at least as likely that word "agricultural" was adopted in clause 10 because the draftsman felt there was a certain verbal infelicity in speaking of "farming contracting". In any event, the Seventh Schedule, which is headed *AGRICULTURAL ENTERPRISES INCENTIVES*, simply sets out the concessions, or some of them, to be granted and the terms on which they are to be granted. There is nothing to suggest that it is a function of that Schedule to restrict the subject matter in respect of which the minister may grant the concessions provided for in s 16. Indeed, clause 1 of the Seventh Schedule specifically adverts to s 16(2)(f) in identifying the scope of one of the concessions capable of being granted to a specified company under that section. It was not suggested in argument that s 16(1) was limited to an individual while s 16(2)(f) referred to company or corporate taxpayers.

[10] In any event, these elements of language and its use pale into insignificance when considered in the light of the paucity of factual material that was before the Court of Review or before the learned judge on appeal to him. The record before him and this court contains no clear indication of precisely what is the activity that the taxpayer was in fact engaging in at relevant times during the tax years in question or the preceding period going back to 1987. We know nothing about what was being done except that it was "wood chipping" of pine trees or logs. Whether the taxpayer grew the pine trees itself, or purchased them from another in their felled or their standing condition we are not told. Nor except by inference do we know anything about the process of "wood chipping" or what it involves. Whether the taxpayer itself grew the pine trees might make a considerable, possibly decisive, difference to the determination of whether it was engaged in "farming activity … including forestry". Whether wood chipping is a process of simply reducing pine logs to chips might well be determinative of the question whether the subject activity amounted to "processing agricultural produce", or involved something more.

[11] What we are being asked to do is, in effect, to decide a question of mixed fact and law without reference to evidence of the facts necessary to enable the court to form an opinion about whether the activity is "farming" or "agriculture" or one of their derivatives. This would require the court to make a declaration in the abstract which, unless compelled to it by legislation, courts are for good reasons to traditionally unwilling to do. What the commissioner is really seeking in these proceedings is in substance a declaration from the court that the taxpayer's activity, whatever it may be, is not and is incapable of constituting farming or agriculture within the meaning of s 16 of the Income Tax Act or the Seventh Schedule. This is something we cannot and ought not to undertake without the illumination that is inevitably provided by the facts on which our decision must be made.

[12] There are other and cognate reasons for rejecting the appeal in this case. An appeal to this court from the High Court in this instance is permissible on a ground "which involves a question of law only": s 12(1)(c) of the Court of Appeal Act. For reasons we have given, the present appeal is one that involved questions of fact even if the Appellant has not condescended to identify the facts on which a question of law might arise.

[13] The decision of the Court of Appeal in *Commissioner of Inland Revenue v Walker* [1963] NZLR 339 is authority for saying that the proper construction of a statute is a matter of law. There can be no doubting that proposition. On the other hand, the determination of the common understanding of a word (which is essentially what the commissioner says here about "farming" and "agriculture") has been said to be a question of fact: *Hope v Bathurst City Council* (1980) 144 CLR 1 at 9; 29 ALR 577 at 577, per Mason J. It is only "where all the material facts are fully found, and the sole question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment" that the question becomes one of law only: see *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439; 178 ALR 1; 32 MVR 289; [2001] HCA 12 at [25] (*Vetter*). And where different conclusions on the facts are reasonably possible, the determination of which is the correct conclusion is a question of fact: *Vetter* at [26]. The problem here is that all the material facts have not been "fully found"; or, if they have been, we are not told what they are. Moreover, it seems likely on what little we know of the facts that different conclusions about the matter in issue are reasonably possible, so that the determination of which is the correct conclusion would be a matter of fact. On that footing, the appeal to this court in this case is not authorised by s 12(1)(c) of the Court of Appeal Act.

[14] Finally, there is the matter of the procedure adopted to bring this matter to the High Court. The originating notice of motion by way of appeal took as its first ground "that the Court of Review erred in law and in fact in holding that the process of farming processing of woodchips fell within the scope of farming activity"; and, as its second ground, "that the Court of Review erred in law in fact in holding that the Respondent had valid reasons for relying on the advice of the Government of Fiji's approval" of the tax concessions granted. One or both of these grounds raises the question of ultra vires previously adverted to. The learned judge held, as to the first ground, that the minister's decision could only be impugned by judicial review and not in the appeal before him; and, as to the second ground, that the directions given by the minister remained in force until the proper form of proceedings were taken to set the decision aside and the reason for the invalidity established in such proceedings.

[15] Much attention was devoted in the written and oral submissions on this appeal to demonstrating that the present case was one that fell within the "collateral challenge" exception to the rule of "procedural exclusivity" enunciated in *O'Reilly v Mackman* [1983] 2 AC 237 at 285; [1982] 3 All ER 1124 at 1134. It is, of course, true to say that the Rule of Law (as Dicey called it) might be set at nought if members of the Executive of Fiji were free to ignore the law and to grant tax concessions not authorised by parliament. It would have the effect of resurrecting the former claim by the executive of a power of suspending the laws, which was outlawed by s 1 of the Bill of Rights enacted in England in 1688: see, for example, *Fitzgerald v Muldoon* [1976] 2 NZLR 615 at 622–3. But the effect of O 53 of the High Court Rules is that, if such challenge is to be made, it must be pursued in the manner prescribed under that procedural provision.

[16] Whatever may be said about the desirability in the abstract of O 53 and the judicial authority that now surrounds it, the practical wisdom of its requirements is clearly evident in these proceedings. If the prescribed procedure had been followed here, directions would have been given that could have been expected to expose the question of law (if that is what it is) that the commissioner was seeking to have determined. Instead, the course adopted of bringing the matter on appeal without following that procedure has failed to present that question either before the High Court or in this court in a form that enabled it to be effectively decided.

[17] In the result, the appeal should be dismissed with costs fixed at $1000.

Appeal dismissed.