

QQQ WHOLESALE LIMITED -v- CONTROLLER OF CUSTOMS

High Court of Solomon Islands

Civil Case No. 260 of 1991

Hearing: 12 December 1991

Judgment: 31 January 1992

Jennifer Corrin for Appellant

Charles Ashley for the Respondent

Muria J: The petitioner was ordered by Magistrates Court on 23 October 1991 to pay to the Comptroller of Customs the sum of \$4,139.20 being for duty due and underpaid on 2,990 cartons of assorted juice imported from overseas. The goods arrived on 29 May 1990 and were valued at \$20,696-00. Duty was then calculated at 30% which worked out to be \$6,208.00 which the petitioner paid. Subsequently it was discovered that the proper percentage of duty to be charged was 50% and not 30%. This, the respondent says, was based on the Customs and Excise (Duties)(Amendment)(No.3)Order 1990 which appears in Legal Notice No.33 of 1990 (hereinafter referred to as "the No. 3 Order"). That Order was effective as of 23 March 1990.

The petitioner does not dispute the facts of the case but it disputes the percentage of duty to be charged. Counsel for the petitioner contended that the proper rate of duty payable is 30% which the petitioner had already paid. Counsel bases her argument on the Customs and Excise (Duties) (Amendment) (No.8) Order 1990 published in Legal Notice No. 47 of 1990, (hereinafter referred to as "the No. 8 Order").

In support of its petition, the petitioner pursues four grounds namely -

"(a) the learned Magistrate erred in holding that section 7 of the Customs and Excise Act does not empower the Minister to amend and/or delete the First Schedule to the Customs and Excise Act (Cap 58);

(b) the learned Magistrate erred in holding that the Customs and Excise (Duties) (Amendment) (No 8) Order, 1990 is ultra vires;

(c) the learned Magistrate erred in holding that there is a difference between amending the said Schedule and amending the parts in the said Schedule;

(d) *alternatively, that if the learned Magistrate was correct in his finding that the Minister has no power to amend the First Schedule to the Customs and Excise Act (Cap 58) that the Customs and Excise (Duties) (Amendment) (No.3) Order, 1990, contained in Legal Notice 33 of 1990 is also ultra vires and the learned Magistrate erred in holding that the said duty was still in place."*

It became apparent in the course of arguments that the case turns upon the proper construction of section 7 of the Customs and Excise Act (Cap.58). That section provides:

"7. *It shall be lawful for the Minister from time to time by order -*

(a) to impose import or export duties of customs upon any goods whatsoever which may be imported into or exported from Solomon Islands and to revoke, suspend, reduce, increase or alter any such duties, and to provide for the importation or exportation of any goods without payment of customs duty thereon:

Provided that all import or export duties of customs and all exemptions from duties of customs set out in the First Schedule shall continue in force until revoked, suspended, reduced, increased or altered in the manner provided in this Ordinance;

(b) [repealed by Customs & Excise Act No. 9 of 1974]

(c) to impose excise duties upon any goods whatsoever manufactured in Solomon Islands and to revoke, suspend, reduce, increase or alter any such duties and to provide for exemptions therefrom."

In order to appreciate how the powers under this section has been exercised it is necessary to look at the provisions of the section and the Orders made pursuant to the powers conferred by the section.

The Customs and Excise Act came into force on 1st April 1960. Section 7 then did not have paragraphs (a), (b) or (c) and the powers conferred by the section did not include the power to "suspend" but only the powers to *revoke, reduce, increase or alter any such duties*. By the Customs (Amendment) Act No. 9 of 1963 Section 7 was divided

into paragraphs (a) and (b) and the word "suspend" was added in paragraph (a) and in the proviso. Thus the High Commissioner (now the Minister) was empowered to *suspend* duties which before 1963 he could not have done except to revoke, reduce, increase or alter any such duties. Section 7 was further amended in 1966 by the Customs (Amendment) Act No. 14 of 1966 which added paragraph (c). Also it was this 1966 amendment that changed the long title to the Act and it became the Customs and Excise Act. The last amendment to section 7 was made by the Customs and Excise (Amendment) Act No. 9 of 1974 - which deleted paragraph (b) and thereby removing from the Minister the power to amend part II of the First Schedule.

The general tenor of the language used in section 7 is permissive and the words used by Parliament showing the powers which the Minister is permitted to exercise under the section are clear and unambiguous. Parliament has given the Minister powers to impose duties on any goods whatsoever which may be imported into, export from or manufactured in Solomon Islands and to *revoke, suspend, reduce, increase or alter any such duties*.

In order to appreciate the Orders made pursuant to the powers conferred by section 7 before and after Independence, it is necessary to briefly look at it in the light of the legislative authorities prevailing at the time. Before 1970 the legislative power over the then Protectorate was vested in the High Commissioner who made laws with the advice of and consent of the Legislative Council for the peace order and good government of the Protectorate. This is provided for under section 31 of the British Solomon Islands Order 1967 which states:

"31. Subject to the provisions of this Order, the High Commissioner, with the advice and consent of the Legislative Council, may make laws for the peace, order and good government of the Protectorate."

The High Commissioner also had executive powers which he could exercise under section 7 of the Customs and Excise Act by making orders which he was empowered to make. However when he exercised his powers under section 7, the High Court Commissioner was required to consult with the Executive Council as provided under section 8 of the said British Solomon Islands Order 1967 which states:

"8(1) Subject to the provisions of this section, the High Commissioner shall consult the Executive Council in the exercise of all powers conferred upon him by this Order or by any other law for the time being in force in the Protectorate, except -

- (a) *any power conferred upon him by this Order which he is empowered to exercise in his discretion; or*

- (b) *any power conferred upon him by any other law which he is empowered, either expressly or by implication, to exercise without consulting the Council.*

With the changeover to Governing Council in 1970 the legislative structure was basically the same except that the High Commissioner could make laws with the advice and consent of the Governing Council (see section 33 of the British Solomon Islands Order 1970) and when exercising his powers under section 7 of the Custom and Exercise Act, he was required to consult with the Governing Council (see section 22 of the said Order).

The next legislative change came in 1974 when the British Solomon Islands Order 1974 was made and established the Legislative Assembly. Section 48 of the Order vested the legislative power over the Protectorate in the Governor who acted with the advice and consent of the Legislative Assembly. In exercising his powers under any law, such as section 7 of the Customs and Exercise Act, the Governor had to consult the Council of Ministers - (see section 22 of the Order) There were other amendments in 1975, 1976 and 1977 to the British Solomon Islands Order 1974 but the law-making powers remained basically the same until July 1978.

On Independence the power to make laws for the peace order and good government of Solomon Islands is vested in the National Parliament of Solomon Islands. Section 59(1) of the Constitutions provides:

"59(1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Solomon Islands".

Each Minister exercises functions assigned to him by the Governor General under section 37 of the Constitution. Since Independence therefore, the powers conferred by section 7 of the Customs and Excise Act are exercisable by the Minister responsible.

The next question is what is the extent of the Minister's powers under section 7 of the Act? Has he the same extent of powers as those previously exercised by the High Commissioner? As we have already seen, prior to Independence, the legislative power to make laws for the peace order and good government of the then Protectorate was vested

in the High Commissioner and later the Governor who exercised that power with the advice and consent of the Legislative Council, later, with the advice and consent of the Governing Council and later still, with the advice and consent of the Council of Ministers. The High Commissioner, and later, the Governor therefore also had the power to amend those laws as it was done in the Customs and Excise (Amendment) Act No. 9 of 1974. Further when one looks at the Customs and Excise (Duties)(No. 4) Order 1974 one sees the Governor in the exercise of his legislative power amended the Act by deleting the whole of the First Schedule and substituting therefor a new Schedule. Again on 1st February 1978, just a few months before Independence, the Governor after consultation with the Council of Ministers exercised his legislative power by making the Customs and Excise (Duties) Order 1978 which amended the Act by deleting the First schedule and substituting therefor a new schedule. Thus, the High Commissioner possessed with the legislative competence to make laws must, as a matter of law, also possess the power to amend the Customs and Excise Act by deleting or repealing the First Schedule and substituting therefor a new schedule in addition to his powers to make orders imposing duties or revoking, suspending, reducing, increasing or altering any such duties.

On attainment of Independence, the power to enact laws has been given to the National Parliament and hence, only Parliament can amend the Customs and Excise Act by deleting the First Schedule and substituting therefor a new Schedule unless the power to do so has been expressly conferred on some other subordinate authority. The Minister can only lawfully under section 7 made orders to impose duties and to *revoke, suspend, reduce, increase or alter any such duties*. The change of name from "High Commissioner" to "Minister" does not automatically entitle the Minister to exercise all the powers which were once exercised by the High Commissioner under section 7, but only such powers as the law authorises him to exercise.

Turning to the grounds of the petition, the first ground complains that the learned Magistrate erred in holding that section 7 of the Customs and Excise Act does not empower the Minister to amend and/or delete the First Schedule to the Act. As the second ground is closely connected with the first I will consider them together. The powers conferred by section 7, if exercised by the Minister, would have amending effects on the First Schedule to the Act. An order revoking or reducing or increasing any of the duties is in effect amending the First Schedule. Such an amendment affects the subject matter of the Schedule, that is, the items in the Schedule. But it is a different matter altogether when an amendment is made deleting the whole of the First Schedule and substituting therefor a new Schedule. This is because such an amendment amounts to an amendment of the Act by repealing the entire Schedule and replacing it with a new one. The schedule is part of the Act just as much as section 7 which

introduces it and as such it can only be amended by Parliament unless the power to amend the principal Act has been delegated to the Minister.

Section 7 clearly shows that it confers powers on the Minister only to impose duties and to *revoke, suspend, reduce, increase or alter any such duties*. Those words are plain words and Parliament has used those plain words to make its intention clear beyond doubt. As such the court is obliged especially in a taxing statute such as the Act we are concerned with, to give to those words their plain meanings unless the context clearly shows that such a construction cannot be given to those words. This I believe is the view as expressed by Viscount Haldane LC in *Lumsden -v- IR Commrs.* [1914] A.C. 877 at 896 where he said:

"..... the duty of judges in construing statutes is to adhere to the literal construction unless the context renders it plain that such a construction cannot be put on the words. This rule is especially important in cases of statutes which impose taxation"

I am obliged to give to the words *revoke, suspend, reduce, increase or alter any such duties* their plain meanings and there is nothing that I can see that renders such a construction inappropriate to those words. As such the powers exercisable by the Minister under section 7 do not confer any power on the Minister to make amendments to the principal Act. Paragraph 2 of Customs and Excise (Duties)(Amendment) (No.8) Order 1990, LN No. 47 of 1990, purports to delete the entire First Schedule and replace it with a new Schedule. That is in fact an amendment to the Act by repealing or deleting the whole of the First Schedule and substituting therefor a new schedule. The court is therefore obliged to see whether the Minister has acted within his delegated power or not. In my judgement when the Minister made the No. 8 Order purporting to deleting the whole of the First Schedule and substituting therefor a new Schedule, he was in effect amending the Act and as such he was acting beyond his powers given to him by section 7. The learned Magistrate was therefore correct to hold that the Minister does not have such power and when he made the No. 8 Order which has the effect of amending the Act, he was acting beyond the limits of his powers given to him by section 7. The result therefore is that the Customs and Excise (Duties) (Amendment)(No 8) Order 1990 is ultra vires.

The first and second grounds of petition are dismissed.

The third ground of complaint is that the learned Magistrate erred in holding that there is a difference between '*mending the said schedule*' and '*amending parts of the said schedule.*' On the face of it, there appears to be no difference between the two expressions since any amendments to the parts of the schedule can be regarded as

amending the schedule. Section 7, as I have already stated, give the Minister power to 'revoke, suspend, reduce, increase or alter' customs and excise duties. In the event the Minister makes an order, for example, to increase customs duties on particular items in the First Schedule, he is amending the said Schedule even if the increase affects only one or more of the items in the said schedule. However, where, as in this case, the Minister exercised his powers under section 7 and sought to repeal or delete the whole of the First Schedule to the Act and replace it with a new Schedule he was not simply amending the First Schedule or parts of the said Schedule but he was in fact effecting an amendment to the Act. Although I agree with Counsel that, there is no difference between 'amending the said Schedule' and 'amending parts of the schedule' as the two can have the same result, that is, an amendment to the Schedule, it is the nature or the character of the proposed amendment that determines whether it is simply an amendment to the Schedule or an amendment to the Act. Having seen the Customs and Excise (Duties) (Amendment) (No. 8) Order 1990 it is clearly intended to have the effect of amending the principal Act by repealing the entire First Schedule and substitute therefor a new Schedule.

However despite my finding that there may well be no difference between the phrases "amending the said Schedule" and "amending parts of the said Schedule" the conclusion reached by the learned Magistrate is one which I entirely agree with.

The third ground of the petition is also dismissed.

The fourth ground is an argument in the alternative. Counsel for the petitioner argues that if it is correct that the Minister has no power to amend the First Schedule to the customs and Excise Act, then the Customs and Excise (Duties)(Amendment) (No. 3) Order, 1990 must also be ultra vires.

As I have already stated earlier in this judgement, that when the Minister exercises his powers under section 7 and makes an order, for example, 'increasing' the duties on one or more of the items contained in the First Schedule, he is amending parts of the schedule which in effect, is amending the Schedule. What the Minister has done by the Customs and Excise (Duties)(Amendment) (No. 8) Order 1990 is not amending the First Schedule but effectively has sought to amend the principal law. That, as I have already found, is beyond the powers of the Minister as conferred on him by section 7 of the Act. The Customs and Excise (Duties)(Amendment) (No. 3) Order 1990 in my view does not seek to do what the No. 8 order seeks to do. The No. 3 Order seeks only to amend the subject matters contained in the First Schedule which is within the Minister's powers exercisable under section 7 of the Act. The Customs and Excise (Duties)(Amendment)(No. 3) Order 1990 contained in Legal Notice No. 33 of 1990 is therefore not ultra vires, and the learned Magistrate was correct in holding that the

existing duties on item 053.5 (fruit juices and vegetable juices unfermented) as stated in the No. 3 Order is still in place.

Before leaving this matter I wish to add a comment on a point upon which counsel for the petitioner took objection. Following the hearing of this matter on 10.12.91 after which I reserved judgement, I subsequently called for a further hearing on 12-12-91. The purpose of the subsequent hearing was to enable me to ascertain whether the new First Schedule referred to in paragraph (2) in the Customs and Excise (Duties) (Amendment)(No.8) Order 1990 - [Legal Notice No. 47] does in fact exist or not. The Minister who made the order and the Government Printer who published the Order in the Government Gazette were called. Counsel for the petitioner objected to calling the Minister and the Government Printer on basis that the court has no power to call them to give evidence and that their evidence were inadmissible. Paragraph (2) of the Order in question says

"(2) The First Schedule to the Customs and Excise Act is hereby deleted and the new Schedule appearing herein substituted therefor"

The new schedule referred to in the Order forms part of the Order and as such evidence is receivable to show whether it exists or not and whether it is published along with the rest of the Order or not. The extraordinary Gazette Notice published on 17th April 1990 stated that Legal Notice No. 47 (which contains the Order in question) was published as a supplement to the Gazette.

The Gazette is prima facie evidence of the Order issued by the Minister but I cannot accept that I can simply rely on the Gazette Notice as evidence of the Order and its contents especially where matters forming part of the Order are omitted. The court must be able to ascertain the fact of the existence of those matters forming part of the Order. The new Schedule referred to in paragraph (2) of the Order has not been included with the Order and to ascertain the existence of that Schedule, this court is entitled to hear evidence from the Minister and the Government Printer whose evidence are admissible in such circumstances.

In any case this Court is invested with the power to order or direct evidence to be taken at the hearing of any matter to establish any particular fact. This would appear to be the general tenor of Order 39 rule 3(2) of the High Court (Civil Procedure) Rules, 1964. Further I would be very reluctant to give to section 50(2) and (4) of the Magistrates Court Act any restrictive interpretation which would have the effect of excluding the court's power to order or direct evidence to establish a fact at a hearing such as the present one.

I only need to add that the conclusion I reach on the extent of the Minister's powers under section 7 of the Customs and Excise Act (Cap. 58) in this case would not have been affected by the fact that the new Schedule is in fact in existence.

For the above reasons, I exercise my revisional powers under s.50(2) of the Magistrates Court Act (Cap.3) and dismiss the petition and the orders made by the learned Magistrate stand.

(G.J.B. Muria)

JUDGE