COMMISSIONER OF INLAND REVENUE -v- CHEE

**High Court of Solomon Islands**
**(Muria ACJ)**
Civil Case No. 63 OF 1991
Hearing: 10 June 1992
Judgment: 6 July 1992

P. Afeau for the Plaintiff
A. Nori for the Defendant

MURIA ACJ: The plaintiff claims against the defendant the sum of $603,121.86 being for unpaid income tax due and payable for the years 1984 - 1987. The claim is denied by the defendant.

On 13 July 1990 the plaintiff issued to the defendant Notices of Assessment (Nos. 7843, 7844, 7845 and 7846) of income tax for the years 1984, 1985, 1986 and 1987. The assessments were said to have been made following investigation into the business operation of the defendant. Following the receipt of the Notices of Assessment the defendant objected to the assessment on 28 August 1990. The plaintiff rejected the defendant's objection on 31 August 1990. Consequently the defendant filed a Notice of Appeal on 30 November 1990 appealing against the Commissioner of Income Tax's assessment. The appeal was, however, withdrawn on 21 February 1991. The plaintiff then issued these proceedings to recover the alleged amount due as a Crown debt.

The plaintiff's case basically is that the Notice of Appeal by the defendant was out of time and so the assessment by the Commissioner of Income Tax was final. In any case, the plaintiff says, even if the appeal was lodged in time, when it was withdrawn, the assessment was final and the amount assessed was due and payable.

Counsel for the Defendant, on the other hand, argued that the appeal was lodged in time and the withdrawal was made following an agreement with the then Commissioner of Inland Revenue that the defendant's income tax would be re-assessed (the suggestion strongly denied by the plaintiff).

The first question to be decided is whether the appeal lodged by the defendant was in time or not. The right of appeal against the Commissioner's decision on a

taxpayer's objection is provided for under section 66 of the Income Tax Act (Cap. 61 which is as follows:

> *"66 (1) Any person who has given a valid notice of objection to an assessment and, consequent thereon has been served with a notice under section 65(3) may, within sixty days after the date of service upon him of such notice, give notice to the Commissioner in Form 2 of the Fifth Schedule, that he intends to appeal to the Court, and stating the grounds of the appeal, and such application shall be heard and determined as hereinafter provided.*
>
> *(2) Notice in writing of the appeal shall be lodged with the Registrar of the Court within sixty days after the date of service upon the appellant of the notice under section 65(3).*
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> *(3) The appeal shall be heard in chambers on such terms as to costs and otherwise as the Court may direct.*
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> *(4) The onus of proving that the assessment objected to is excessive shall be on the person assessed.*
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> *(5) In determining the appeal the Court may confirm, reduce, increase or annul the assessment or make such order thereon as may be thought fit, whereupon, subject to any appeal under section 67, the Commissioner shall make such adjustments thereto as are consequent upon such determination.*
>
> *(6) The decree following the decision of the Court shall have effect, in relation to the amount of tax payable under the assessment as determined, as a decree for the payment of such amount, whether or not the amount of such tax is specified in the decree".*

The period within which the notice of appeal should be lodged is thus ***"within sixty days after the date of service"*** upon the appellant of the notice under section 65(3) and in particular, in this case, the notice of the Commissioner's refusal to amend the assessment and confirming his earlier assessment.

The defendant's argument that the appeal was in time was based on the letter written by the plaintiff notifying the defendant that the objection was rejected and the assessment was confirmed. That letter was dated 31 October 1990. There was no dispute that the letter dated 31 October 1990 was served on the defendant on 4 September 1990 and that there was no dispute also that the defendant gave notice on 29 October 1990 of his intention to appeal to the Court against the plaintiff's decision, the notice of which had been served on him under section 65(3) of the Act. Mr Konia gave evidence that the letter of notice dated 31 October 1990 was wrongly dated. The date of the letter should be 31 August 1990. Mr Konia realised the mistake in date after the letter was already sent to the defendant. Mr Konia corrected the date on his copy but did not inform the defendant of the mistake in the date. However Mr Konia gave evidence that the letter with the date, 31 October 1990 was served on the defendant on 4 September 1990. It was also tendered in Court the Notice dated 29 October 1990 under section 66(1) of the Act of the defendant's intention to appeal. It is clear on

those evidence that although the letter of notice issued under section 65(3)(b) of the Act had the date 31 October 1990 typed on it, the letter could not have possibly been written on that date because it was served on the defendant on 4 September 1990. Also the defendant's notice to the Commissioner of his intention to appeal was written and signed by the defendant on 29 October 1990 which shows that he must have received the notice under section 65(3)(b) prior to 29 October 1990. I therefore accept Mr Konia's evidence that the letter dated 31 October 1990 was written on 31 August 1990 and that the date 31 October 1990 was a typing error.

It will be seen that subsection (2) of section 66 speaks of the ***"date of service"*** of the notice under section 65(3) upon the appellant and not the date of the notice or letter. That being so sixty days after 4 September 1990 (the date of service of the notice upon the defendant) will fall on 3 November 1990. Any appeal by the defendant had to be ***"lodged"*** by 3 November 1990 if it was to comply with section 66(2). In this case although the Notice of Appeal was prepared and signed on 30 October 1990 (when it was still in time) it was not ***"lodged"*** with the Registrar of the Court until 30 November 1990 (when it was already out of time). I must conclude that the appeal was lodged with the Registrar outside the time limit as required by section 66(2) of the Act.

Has the assessment become final and conclusive? Counsel for the plaintiff argued that by virtue of section 68(1) of the Act, the assessment was final and conclusive. This, counsel says, is because the appeal was lodged out of time, thereby preserving intact the assessment. Further it was argued that as the assessment was final and conclusive the Commissioner had no power to re-assess the amount due. I have already found that the appeal was lodged out of time. But was the assessment ***"as made"*** final and conclusive? We are dealing with a taxing statute here, a law that imposes taxes on a subject and as such it must be construed strictly. As Rowlatt, J. said in ***Cape Brandy Syndicate -v-I.R.C.*** *[1921] 1 KB 64 at p. 71:*

> *"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 tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

Counsel for the plaintiff put forward two arguments on the application of section 68(1) of the Act. I shall briefly deal first with the argument that the Commissioner has no power to re-assess a person's income for the purposes of ascertaining the amount of tax to be paid once the assessment was ***"final and conclusive"*** under section 68(1). I think counsel's argument is misconceived especially when one sees in subsection (2) that the Commissioner has power to make <u>additional assessment</u>. The words ***"Nothing in this section shall prevent the Commissioner from making additional assessment .....,"*** clearly put it beyond argument that the Commissioner has power to

make additional assessment of a taxpayer's income. The proviso to subsection (2) further added support to the argument that the Commissioner has power to re-assess a person's income. The proviso reads:

> *"Provided that where any fraud or any gross or wilful neglect has been committed by or on behalf of any person in relation to tax for any year, the Commissioner may make an additional assessment on that person for such year even if it involves reopening a matter which has been determined on appeal".*

To accede to counsel's argument would be putting undue strain on the language used in the section in order to read in or implied meanings of the words used, a course of action which Rowlatt J., strongly warned against in ***Cape Brandy Syndicate -v-I.R.C.***

Further if counsel's argument is correct, it would mean that where an assessment was made and the matters specified in section 68(1)(a) and (b) have been satisfied, the assessment is final and conclusive and the Commissioner has no power to consider further assessment even though he subsequently found out that by fraud or wilful neglect, the taxpayer withheld substantial materials showing the true position of his income. Obviously it would be totally unacceptable if the Commissioner were to be powerless in such a situation. On the other hand if the taxpayer were to be taxed twice due to some oversight on the part of the Commissioner who assessed the taxpayer twice, the Commissioner must have the power to review his assessment if the error is brought to his attention because a person cannot be taxed twice in respect of the same subject matter.

Thus, I cannot accept the argument by counsel that section 68 does not empower the Commissioner to re-assess a taxpayer's income for the purpose of ascertaining the amount of tax payable.

The second argument advanced by counsel on section 68 is that, having satisfied the matters specified in subsection (1)(a) and (b) the assessment ***"as made"*** was final and conclusive and the amount of taxed assessed became **due** as a Crown debt. Counsel relied on subsection (1)(b)(ii) of section 68 which provides:

> *"(1) Where -*
>
> *(b) a valid notice of objection has been given and -*
>
> *(ii) a notice has been served under section 65(3) but no application has been made under section 66;*
>
> *the assessment as made, ..... shall be final and conclusive for the purposes of this Act."*

It will be seen that the assessment which is said to be final and conclusive is the assessment ***"as made"***. The word ***"made"*** is in my view important in this case in determining the assessment that was said to be final and conclusive for the purpose of the Income Tax Act. The evidence adduced in Court is that after the notice was issued to the defendant under section 65(3) on 31 August 1990 attempts had been made by the defendant to have the Commissioner re-consider his assessment of the defendant's income for the purpose of taxation. These include an appeal to the Court which I already found to be lodged out of time. Nevertheless, the defendant continue his attempts to have the assessment re-considered.

Mr Campbell in his evidence in Court stated that consequent to filing of the appeal, there was a meeting on 8 February 1991 between himself, the defendant and the Commissioner during which it was agreed that the matter was to be resolved out of Court. It was thereafter agreed that the Commissioner should be given all the papers and files to acquaint himself with the matter since another officer was handling the matter. Mr Campbell subsequently withdraw the appeal on 21 February 1991 as agreed earlier and the Commissioner was to re-consider the assessment.

On 5 March 1991 a follow-up meeting was held during which, present were the Commissioner, Mr Sogavare (present Commissioner), Mr Konia, Mrs Rohina, Mr Campbell, Mr David Quan (son of the defendant) and Mr Loh of Yam and Co. There is no dispute that the meeting on 5 March 1991 took place at the Commissioner's office and those named were present at that meeting. Mr David Quan kept a **"Diary Notes"** ("DQB") of basically what transpired at the meeting. The "Notes" ("DQB") was accepted by the plaintiff, through counsel, as ***"evidence of the matters discussed on 5 March 1991"***. Part of the Diary Notes contains the following:

> *"However, after consultation with the rest, and their legal adviser, they had agreed that for purposes of practicality, they should reconsider the assessment and try to come to a comprise with the tax payer. In the light of this, Konia should re-examine the new sets of accounts from Yam & Co., and then when a compromise is reached, a new assessment should be issued.*
>
> .....
>
> *Konia also questioned as to what if the Tax Payer kept on objecting and then time will be dragged on.*
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> .....
>
> *Quan then reiterated that he will write and make that undertaking on behalf of the tax payer and that this should be sufficient enough of a guarantee to the Tax Office that we will not object as long as the new assessment is fair, and both parties reached a compromise.*
>
> .....

*It was then agreed that Konia and Loh should sit down themselves and look at the new sets of accounts."*

As the plaintiff has undoubtedly accepted that the meeting of 5 March 1991 took place and that the Diary Notes ("DQB") was the true record of what took place at that meeting, the Court has accepted the evidence relating to that meeting.

Thus despite the appeal lodged out of time and so there was in fact no appeal, the undisputed fact now before the Court is that an undertaking had been reached on 5 March 1991 that the assessment of the defendant's accounts would be re-considered by the Office of the Commissioner. Therefore in my judgement by his express agreement to re-assess (and I have already found that there is nothing to stop him from doing so) the defendant's tax position, the Commissioner had foregone the finality of his earlier assessment. There was, then no assessment yet as ***"made"*** which could be said to be final and conclusive. For the purpose of section 68(1)(b) the assessment as ***"made"*** must be the assessment which is finally made by the Commissioner and nothing furthermore to be done about it. If after the assessment is ***"made"*** and the amount of tax payable under such assessment has not been made on the due date or upon failure to comply with the notice under section 74(1) of the Act, then the tax due may be sued for and recovered as a Crown debt.

I have heard no evidence in this case that when the Writ was issued on 28 March 1991 the assessment was ***"made"*** and there was no evidence to show that the amount of $603,121.86 was the amount of tax payable after the re-assessment agreed to be done on 5 March 1991. I do not know.

This is a tax case and doubts in such cases must be given for the benefit of the subject.

The plaintiff's claim is dismissed with costs.

**(G.J.B. Muria)**
**ACTING CHIEF JUSTICE**