HIGH COURT OF SOLOMON ISLANDS

IN THE MATTER OF INCOME TAX ACT (CAP. 12) SECTION 79 AND IN THE MATTER OF AN APPEAL BY CABLE AND WIRELESS PLC, CABLE AND WIRELESS PLC -v- THE COMMISSIONER OF INLAND REVENUE

Civil Case No. 141-146 of 2003

Date of Hearing: 6 December 2006
Date of Ruling: 15 December 2006

J. Sullivan QC with L. Puimana for the Plaintiffs
Attorney-General (by the Solicitor-General in proceedings leading to hearing) for the Commissioner of Inland Revenue

RULING on appeal by the company against the disallowance by the Commissioner of the appellant's objection against the Commissioner's notice of assessment to tax

Brown, J: In June 2003 Cable and Wireless PLC (C & W or "the company") appealed the decision by the Commissioner to disallow the company's objections to various notice of assessment for tax .(going back to the tax year 1991) given the company and dated 3 August 1998 The reason for the apparent delay in complaint will appear from these reasons.

By earlier notice of assessment dated 23 December 1997, the company was assessed for tax for the year 1990 (ended 31 December 1990) and that was objected to by notice dated 4 February 1998. This assessment was the first by notice given C & W. This notice and objection became the subject of a "test case" to this court for the Commissioner had disallowed the objection by C & W which argued that it was not liable to furnish a return in the particular circumstances for that it was a foreign company entitled to the benefit of the *"double taxation arrangements"* between the Solomon Islands and the United Kingdom.. That "test case" was heard by this court which dismissed the companies appeal against the Commissioners Notice of Assessment in a material part and allowed the appeal in part.

As a consequence the company unsuccessfully appealed this court's decision finding the company liable to tax to the Court of Appeal which delivered its ruling on the 18 December 2001. The result was that *"management fees"* were held to be income chargeable to tax in Solomon Islands The Court of Appeal decision put paid to the company view that all

its receipts from its share-holdings in Solomon Telekom Company Limited fell outside the purview of the tax regime of this country.

As a result of the appeal court decision given on 18 December 2001, returns of income were prepared and lodged by the company for 1992 through to 1996 (in respect of these tax years for which notices of assessment by the Commissioner had issued), returns claiming deductions against the taxable income of "*management fees*" as expenditure incurred in such fee generation. Thus the apparent late returns were related to the decision by the company to await the appeal court's judgment.

The Commissioner has refused to reconsider his notices of assessment notwithstanding the lodgement of all the necessary returns for the tax years. C & W is aggrieved for it asserts were reassessment to be done, having regard to the lodged returns, the company's liability for tax would be substantially reduced by virtue of the fact that the Commissioner has failed to take account of the company's expenditure shown in its returns, expenditure related to its fee generation.

This argument was brought by way of appeal (under s. 79 of the Income Tax Act) before Justice Kabui, earlier but the judge declined to hear it for reasons unrelated to the merits or otherwise of the company's case. The Commissioner contended that his assessments in default of return (for that the company had failed to lodge any returns before the fact of the Commissioner assessments) effectively fixed liability in the sum assessed, so that the company appeals were without legal foundation. As a consequence of the judges' refusal to deal with the appeal on its merits, the Court of Appeal directed this court to consider the appeal as argued. But since the time of the judge's refusal to rule on the appeal and the appeal courts decision to send it back for decision, Justice Kabui retired from the Bench having reached the statutory retiring age.

That shortly is why I am now dealing with the original appeal from the Commissioners refusal to readdress his default assessment and why argument has again been necessary before me.

One regrettable matter which calls for comment is the absence of the Attorney-General despite, I am satisfied, knowledge of the hearing having been fixed for today.

Mr. Sullivan QC with Mr. Puhimana represents the company and has had the benefit of the Attorney's written argument prepared by Mr. Moshinsky QC, the former Solicitor-General who appeared on the original hearing before my brother judge, Kabui J.. Mr Sullivans argument given this court has been made addressing the respondents written submissions which are before me. So to that extent, the Attorney has been heard. Mr. Sullivan

has been at pains to fairly put his client's case in the absence of the Attorney today, although as I have explained, the written argument and cases in support by Mr. Moshinsky are before me and have been acknowledged by Mr. Sullivan.

Certainly the Court of Appeal's reasons leave me in no doubt that this court may apply its Rules to manage the procedure for such appeals from the determination of the Commissioner, where the Income Tax Act 79 (3) is deficient in guidance, so that Justice Kabui's concern about statutory appeals where our Rules appear silent, has effectively been laid to rest. I am minded of my powers in that regard when I proceeded to hear the appeal in the physical absence of a representative of the Attorney.

There is consequently power to hear the Commissioners argument about the Tax Act under the High Court (Civil Procedure) Rules 1964 (the "Rules") to *"stay or dismiss actions and to strike out pleadings which are vexatious or frivolous and are in any way an abuse of the court".* (The White Book – Supreme Court Practice Vol 1 (1979) para. 18/19/I).

Mr. Moshinsky says the pleadings are in fact the appellant company's Notice of Appeal for each year case. He says none raise an arguable claim or question fit to be decided by a judge. (The White Book; para 18/19/5). The first proposition about pleadings finds favour, but his reliance on argument that the agreement to a "test case" effectively fetters the Commissioners duty and thus is contrary to law, is denied by the company. It is not so much the law of "fettering" which is in issue, but rather the factual circumstances, here cannot amount to the "fetter" as understood in the authorities, pleaded by the Commissioner.

That argument of the Commissioner is stated in its Statement of Facts and Contentions:

> *"14 ...that an agreement ("the agreement") was made between the parties that this Assessment and Notice of Objections ... be treated as a test case... and payment due further to these assessments be held in abeyance, pending the determination of the "test case".*
>
> *15.....*
>
> *16. It is therefore contended that the agreement comprises an unlawful fetter upon the Respondent's (Commissioner) discretion and is therefore unenforceable. Thus the tax assessed by each of the said Notices (default assessments) become due and payable on the dates referred to in para. 13 hereof".*

On the face of the Statement the flaw is apparent. The discretion of the Commissioner has not been shown to have been affected. He chose to issue default assessments in 1998 in respect of those earlier tax years. He

chose to reject the objections of the company. He has not been shown to have been inhibited in his acts, certainly he cannot be said to have "contracted out of" his power to assess for tax, nor his ancillary power, to charge a penalty for late payment. For those penalties by way of Income Tax Account dated 25 March 2003 were served with the various notices of Assessment (the subsequent assessments to those 1998 default assessments) which assessed the company to tax upon its *management fees* for the earlier tax years, (a concession it appears to those earlier default assessments which also included assessment upon *dividends*).

Those acts and notices were done under the powers enabled by the Act. (There is no suggestion other powers available to him, recovery of tax for instance have been fettered). I do not see any fetter in terms of that understood in the cases relied upon by Mr Moshinsky. In *Ansett Transport Industries (Operations) Pty Ltd –v- The Commonwealth* (1977) 139CLR 54 the question for the Australian High Court involved consideration of the suggested fetter of a discretionary power conferred on the Secretary by the Customs (Prohibited Imports) Regulations. The Commissioner has not pointed to any particular provision of the taxing Act which he has by the agreement to mount a test case, been constrained from applying in its terms. The Commissioner has both made assessments and charged penalties for late payment.

In *Birkdale District Electric Supply Co. –v- Corporation of Southport* (1926) AC355, the House of Lords held that an agreement affecting the company's right to charge prices for electricity, when unilaterally increased and at variance to those charged by the Corporation, did not offend against particular Electric Lighting Acts and was not void at common law as being incompatible with the due discharge of the company's duties.

Here, the agreement to place a "test case" cannot be said to be incompatible with Commissioner of Tax's duties under the Tax Acts for I have not had any particular provision of the Act brought to my attention which expressly or by implication prohibits such a step on the Commissioner's part. Common law cannot advance the Attorney's argument for the Commissioner is a creature of statute. What may be said of the duties of the Commissioner is that his act in agreeing to a "test case" may be seen as a step in furtherance of his duty under the Tax Act to assess to tax liable companies, for that liability was denied and the final arbiter on that issue is this Court. Once the Commissioner's assessment was confirmed, it stands to reason those assessments for subsequent years were available to be made by the Commissioner and the company cavils not at the confirmed right to assess, rather the manner of assessment. So the purpose; to assess to tax liable companies was actually furthered by the agreement, for the Court of Appeal upheld the trial judge's finding on that liability, and that issue was determined in the Commissioners favour.

What remained however was the validity of the various assessment amounts. Mr Moshinsky does not point to any particular part of the "agreement" which fetters the Commissioner in that act of assessment (for the act must precede the objection). The "objection" and subsequent appeal by the taxpayer if successful, may adversely affect the assessments (for that they bring to account the whole of the company management fees without allowance for the cost of earnings such fees) but that possibility of an adverse **effect** by ruling of this court cannot be said to be a fetter on the Commissioner for it is unrelated to his "acts" or duties. It lies within the province and jurisdiction of this court. So it cannot be said to be a "fetter" to seek definitive order as to the company's liability to tax nor can it be said to be a fetter where the company lodges an objection and subsequent appeal to the appropriate arbiter, this court..

In *Birkdale's* Case, Mr Moshinsky referred to the reasons given by the Earl of Birkenhead's judgment by the Lords where at 364 he said;

> ***"The appellant have relied strongly on a well established principle of law, that if a person as public body is entrusted by the Legislative with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divert themselves of these powers and duties. They cannot enter into any contract or take any action incompatibly with the due exercise of their powers or the discharge of their duties."***

For in *Birkdale's* case, it was argued that it was the Electric Supply Company's *"business to determine the rates at which it will supply electric energy to its customers; and that if it binds itself to demand and charge the rates fixed by the Southport Corporation, that in effect amounts to a transfer to the latter body of the powers of the company (a fetter) to determine its own rates and charges".* The problem in this case, was, on the facts, to bring this case within the principle enunciated above.

For the agreement to mount a "test case", Mr Moshinsky says offends the principle. But the primary purpose or obligation of the Commissioner to assess to tax has not been shown to have been affected. Nor can the agreement to mount a "test case" be seen in the light of an agreement to contract out as it were, whether a contract actual or ostensible for such an agreement cannot be a contract in the sense understood in the line of authorities collected in *Birkdale's* case. The agreement reflects the practicalities faced by the parties to seek resolution by the final arbiter, the court so as to mutually benefit and advance both parties in their future conduct. Such motive does not detract from the Commissioner's duty to assess to tax, and Mr Moshinsky has not satisfied me, on these facts, that I should some-how view this conduct of the parties to seek the Court's decision, as analogous to a "contract" impinging on the Commissioner's obligation. It is not the Commissioner's action or his discretion or the manner of their exercise that is affected by the arrangement, rather the Commissioner and the company are bound by law in terms of the ruling of

the Court. Taken to its logical conclusion, the arrangement it may be argued precludes the court from its decision making role if it can be shown to affect the right in the Commissioner to assess to tax. Such result is plainly wrong, for it is incompatible with the right of the tax-payer to object in terms of the Tax Act. The obligation was partially upheld by the High Court finding the foreign company liable to tax to the extent of its "*management fees*" earned in country. Having been found liable to tax, following ruling of the court in support of the Commissioners determination, the Commissioner should also be presumed to have accepted the right in the company to object in accordance with the Act. As Mr. Sullivan says, the Commissioner cannot approbate and reprobate, yet that is what the Commissioner appears to be doing by denying the companies right under the Act to object.

The agreement to mount a text case, cannot be seen as *"an agreement staying liability (to tax)"* as Mr Moshinsky has argued, and thus somehow contrary to the provisions of the Tax Act. The liability to tax arises upon the default assessment. There followed the constitutive legal act of the judgment of this Court finding the company liable to tax with respect to its income from "*management fees.*" This constitutive legal act is the determination of the question raised in the stated case, (The liability to Tax by the foreign company claiming exemption in all events) necessary for the adjudication of the relief from liability. The machinery for determining the correct amount of tax payable is set out in the Act, and as happened here, includes the circumstance where the taxpayer has had "default assessment" issued against it. For it must be remembered that no tax return by the company had been filed with the Commissioner before the Commissioner saw fit to issue such default assessment, exercising his powers under S.71(3). Once that constitutive legal act of the judgment takes effect, the machinery of the Act, (interrupted for the purpose of the objection as to liability) or the *"process of applying the Act to a state of fact"* comes into play. It is *"that process which must be exposed to the Court and with which the Court is exclusively concerned in an appeal by the taxpayer. The Act confers on the Commissioner the power and duty of assessment"* (per Barwick CJ in *Bailey v Federal Commissioner of Taxation* (1977) 136 CLR 214 at 216, 217). With that view I concur for to accept the Commissioner's assertion that, in the circumstances of this case, the *"default assessment"* given under S.71(3) finally disposes of the question about the sum due by the taxpayer rather ignores the machinery of the Act. For the machinery envisages an assessment by the Commissioner (in this instance pursuant to S.71(3) in default of a return of income by the person sought to be made liable for tax); a consequent Notice of Assessment; and service of the Notice of Assessment in accordance with S.74.

Having been found liable to tax in accordance with the earlier decision of this Court, Mr Sullivan for the company says the issue to be decided is whether:-

(i) *as C & W contends, notwithstanding the issue of a default assessment under S.71(3) of the Act, it remains liable to make a Return of Income for the relevant years under S.57 of the Act and is entitled to have its liability to tax assessed, by way of amended assessment, on the basis of that Return, or*

(ii) *as the Commissioner contends a default assessment under S.71(3) is subject to objection and appeal, a final assessment f a taxpayers liability to Tax, which cannot be amended on the basis of a subsequently lodged Return of Income.*

The issue reflects the Commissioner's assertion that, once a default assessment has issued, liability to pay the sum assessed is not affected by returns filed subsequent to the notice. The company's objections in the event, to assessment are invalid for that such returns did not accompany the company's objections. That last assertion as to validity turns, as Mr Sullivan says on the retrospective effect, or otherwise of the amending Act No.2 of 1998 which came into force on the 21 December 1998 by including a new subsection (2) to S.77 which provided:-

"(2) Where the assessment objected to has been made in the absence of a return, the notice of objection shall not be valid unless it is sent with a return of Income duly made."

The company's objections were lodged on the 1 October 1998, although the returns were not lodged until 14 May 2002, after the Court of Appeal's judgment on the test case given on the 18 December 2001. Mr Moshinsky does not seem to have addressed the fact that the company's objections were made before the coming into operation of the subsection imposing a pre-requisite by way of the need for a Return before objections to notices of assessment are deemed valid. His argument does not address the presumption against the retrospective operation of a statute, relying as he does on the supposed effect of the "fetter" on the Commissioner's power.

Mr Sullivan's reliance on the judgment given by the Judicial Committee of the Privy Council in ***Colonial Sugar Refining Co. Ltd –v- Irving (1905) AC 369(PC)*** is well founded for the principle which I am bound to apply here is stated by Lord MacNaghten at 372, 373 of the decision.

"...On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition [to strike out the appeal] is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is,

Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure?

It seems to their Lordships that question does not admit of any doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring it to a new tribunal. In either case there is interference with existing rights contrary to the well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested".....

There is no clear intention to be found in the amending Act to suggest retrospectivity. At the time the objections to assessment were made by C & W on 1 October 1998, there was no requirement that objections be accompanied with a return.

The Court is left, then with the Commissioner's argument that liability to pay the sum assessed is not affected by returns filed subsequent to such objections.

His first argument that the Commissioner cannot lawfully make an agreement to stay the liability to pay moneys due under the assessment has not been made out on the facts. That was not shown to be envisaged by the agreement, nor has it greater weight by reference to the judgments of Mason J in *Ansett Transport Industries (Operations) Pty Ltd –v- The Commonwealth of Australia* (1977) 139 CLR54, 57 for that case may be distinguished by the very fact of an agreement in the accepted sense of contractual arrangements.

The Commissioner's argument that the "default" assessment under S.71(3) is somehow sacrosanct for that the Section should be read so as to afford it certainty in tax assessment and thus finality fails since it is counter to the principle in ***Bailey's Case*** which points to the ***process*** underlying the Tax Act when considering the concept of assessment, not just the Commissioner's determination under S.71(3). The company has utilised the steps in the process and has lodged objection required by S.77.

That leads me to Mr Sullivan's argument about the effect of the company's returns on the Commissioner's obligation under S. 71(2) which states:

"Where a person has furnished a return of income the Commissioner may:-

(a) accept such return and assess him on the basis thereof; or

(b) if he has reasonable cause to believe that such return was not true and correct, estimate, according to the best of his judgment, the amount of the income of such person and assess him accordingly. ."

To use Mr Sullivan's phraseology.....

..."*S.71(2) is on all fours with* Finance Facilities Pty Ltd v Federal Commissioner of Taxation *(1971) 127 CLR 106, where "may" was held to be obligatory where the prerequisite conditions were satisfied (in s. 71(2) the lodging of the return). See in particular the extensive analysis of Windeyer J at 134-135, during which he said-*

"The question then is, must the permitted power be exercised if one of those conditions is fulfilled?

This does not depend on the abstract meaning of the word "may" but whether the particular context of words and circumstances make it not only an empowering word but indicate circumstances in which the power is to be exercised – so that in those events the "may" becomes a 'must". ...I select one other reference out of a multitude: Macdougal v Paterson *(1851) 11 CB 755; 138 ER 672. There Jervis CJ said in the course of argument "The word "may" is merely used to confer the authority; and the authority must be exercised, if the circumstances are such as to call for its exercise". And, giving judgment, he said (138 ER 679):*

"We are of the opinion that the word "may" is not used to give a discretion, but to confer a power on the court or judge; and that the exercise of such power depends, not on the discretion of the court of judge, but upon the proof of the particular case out of which such power arises".

I consider that directly applicable to the present case".

The Commissioner cannot disregard the fact that returns have been filed. For that obligation remained once liability to tax had been established by the Court of Appeal's decision under the concluding words in S.71(3). The company had liability (to furnish returns) under the Act.

It follows then, the Commissioner must have regard to the returns furnished on hearing the objections under S.77, for the circumstance, the fact of the lodgement of returns, have been fulfilled and the mechanics of re-assessment obligates the Commissioner to take account of the precise grounds of the objections going as they do, to the material demonstrating the cost of service provision in the particular returns.

I see no reason why the principle in *MacDougall –v- Paterson* (referred to above) should not be extended beyond that expressly identified to be an authority exercising judicial powers to one exercising administrative powers under statute, such as the Commissioner, so that the principle may be shortly expressed to be that where a statute confers a power to do a judicial or administrative act in a way envisaged, it is imperative on those so

authorised, to exercise the power when the case arises as envisaged, and its exercise is duly applied for by a party interested, and having the right to make the application.

In this case, the plaintiff clearly is such a party having such a right to ask of the Commissioner.

The Commissioner's application to strike out C & W's several appeals must fail.

The Notice of Appeal is competent.

THE COURT