

IN THE SUPREME COURT OF SEYCHELLES

COMMISSIONER OF TAXES

PLAINTIFF

VERSUS

DARELL DAVID GREEN

DEFENDANT

Civil Side No 297 of 2004

Ms M. Cecile for the Plaintiff

Defendant in Person

JUDGMENT

Perera J

The Commissioner of Taxes seeks to recover a total sum of Rs.40,273.70, being business taxes and late payment penalties due from the defendant in respect of assessment years 2000, 2001 and 2002, under the provisions of Section 125(1) of the Business Tax ACT (Cap 20). It is not in dispute that the defendant, who was engaged in the business of “Take-Away and Cafeteria” submitted his business Tax Return for year ended 31st December 2000 on 25th May 2001, for the year ended 31st December 2001 on 9th April 2002 and for the year ended 31st December 2002 on 9th June 2003. The Commissioner, on 27th September 2001, 9th May 2003 and 22nd October 2003 issued notices of assessment in respect of those three years. Subsequently on 16th April 2002, the Commissioner amended the year 2000 notice of assessment to increase the taxable income and served the same on the defendant on 9th May 2003.

By a letter dated 9th May 2003, the defendant sought a revision of the amended tax assessed for the years 2000 and 2001 (P8), Accordingly the Commissioner on 10th October 2003 adjusted the amended tax assessed for the years 2000 and 2001 resulting in a decrease of the amended tax. Such amendment was served on the defendant on 22nd October 2003.

The Commissioner further amended the 2002 assessment on 28th November 2003 and served the same on the defendant.

It is averred that the defendant did not object to the notices of assessments, and the

subsequent amended notices of amendment under the provisions of Section 104(1) of the Business Tax Act. Consequently the following outstanding taxes are claimed from the defendant-

“The outstanding taxes owed by the Defendant to the Plaintiff are as follows;

Particulars:

2000 Amendment D.D. 8/6/2003	SR.	9,269.50	
Less Credit 2 nd Amendment	SR	<u>1,070.60</u>	
			SR
8,198.90			
Add; Late payment penalty	SR	<u>1,768.00</u>	
Total			SR <u>9,966.90</u>
2001 Assessment D.D. 8/6/2003	SR	23,826.80	
Less Credit Assessment	SR	<u>1,190.00</u>	
			SR 22,636.80
Add; Late payment penalty	SR	<u>5,088.00</u>	
Total			SR <u>27,724.80</u>
2002 Assessment D.D. 21/11/2003	SR	4,867.25	
Less Credit Amendment	SR	<u>2,579.25</u>	
	SR	2,288.00	
Add; Late Payment Penalty	SR	<u>294.00</u>	
Total			SR <u>2,582.00</u>
Total Due & Owing			SR <u>40,273.00</u>

Merna Gabriel of the Taxation Division testified substantiating the averments in the plaint, and produced copies of the relevant notices of assessment and the correspondence with the defendant with regard to the deductions he sought. She stated that for the year 2000, the assessment was amended on the basis of an audit conducted by the Department for the years 1998 and 1999 to a sum of Rs.9,269.50. With a deduction of Rs1070.60 as credit for the 2nd amendment, and a late payment penalty of Rs1768.00, the tax payable for the year 2000 was Rs.9,966.90. The defendant sought further deductions, and he was asked to produce documentary evidence. As he failed to do so, the assessment was finalized for the years 2000/2001. The tax payable for 2001 was decreased by Rs.1190.

For the year 2002, after the notice of assessment was served, the defendant objected by telephone. Subsequently, after negotiations, the tax payable was decreased by Rs2579.25, and with a late payment penalty of Rs297, the tax payable was Rs.2582. The amended assessment was served on the defendant, but no further objections were received from him.

Miss Gabriel on being cross-examined by the defendant stated that prior to the assessment years 2000, 2001 and 20002, the defendant's business was "*cafeteria and take away*". Since the year 2000, the defendant had stated in the tax return that he had limited his business to "*take away*". The defendant's grievance is that despite that change and reduction in business the plaintiff continued to assess his income as before. He claimed that he furnished proof of sales, but they were not accepted by the plaintiff. It was however submitted by the plaintiff that the defendant did not provide properly audited documents to substantiate his objections, which in any event were not presented in the prescribed form.

The defendant stated that the plaintiff added Rs.1000 on the basis that he was consuming food from his own take-away and added Rs12,000 per year. He denied that, and stated that he grew his own vegetables, did his own fishing, and had his own animals. He therefore stated that the addition of Rs12,000 was unjustified as his own produce constituted a sale to the business. Further he fell into a higher tax bracket for purposes of assessment. The defendant further stated that no deductions had been made for depreciation on equipments, and purchase of equipments. The plaintiff claimed that no documentary proof of such purchases was produced although called for.

As regards depreciation of equipments, the defendant stated that the fee of the quantity Surveyor was Rs10,000, which he could not afford to pay. His main complaint therefore is that the defendant did not consider his objections properly.

Section 97(1) of the Business Tax Act (Cap 20) gives wide powers to the Commissioner of Taxes to make alterations or additions to an assessment where necessary. However where a business has made a full disclosure of all material facts, no amendment can be made after the expiration of three years from the end of the tax year in which the assessment was made. Section 104(1) permits the owner of a business to object to any assessment made by the Commissioner, within 60 days after being served with such assessment, in writing "*stating fully and in detail the grounds for his objection*". After the Commissioner has made a determination thereon, and if the owner of the business is not satisfied with the decision, he may request the Commissioner to treat his objections under Section 104 as an appeal to the Supreme Court.

In the present case, the defendant had not made any formal objections under Section 104, but merely made representations regarding matters which the Commissioner ought to have considered in the assessment, without making a full disclosure or furnishing supporting documentary evidence when called for. Hence an appeal under Section 106 did not arise, and the defendant himself did not seek such an appeal.

The present matter is an action filed by the Commissioner under Section 125(1) of the Act for recovery of tax. Sub Section (2) provides that –

"In an action for the recovery of tax, a copy of the notice of assessment shall be received as evidence that the tax is due and payable and the Court before the proceedings are brought shall not entertain any plea that the tax assessed is not properly assessed or that the assessment is subject of an objection, appeal or reference."

In the case of **Commissioner of Taxes v. Felix Amelie** (C.S. 215 OF 1994), the Commissioner claimed Rs.155,704.52 being the business taxes and penalties due in respect of the years 1998, 1989 and 1990. The defendant averred that he had already paid Rs.181,423.64 leaving a balance of only Rs.4,248.12, and that in the sum claimed by the Commissioner, a sum of Rs130,187.36 represented penalties. The Commissioner amended the plaint by reducing Rs4,662.09, and thereby limiting the claim to Rs.151,042.43. The Court held *inter alia* that

"The defendant had undoubtedly a right of appeal under Section 112. He did not exercise that right. It is a well recognised principle of law that where an available

right is not exercised, it is deemed to have been waived. In view of the mandatory provision of Section 126(2), the defendant should have appealed against the recent decision of the Commissioner to readjust the claim by reducing a sum of Rs.4,662.09. This he failed to do". Accordingly, the Court declined to entertain any matter questioning the veracity of the penalties claimed.

Similarly, in the case of Commissioner of Taxes v. Ho-Sap (1983) S.L.R. 148, Seaton CJ stated –

"Since the defendant did not ask for an appeal, he cannot now ask this Court to question the amount of income tax and decide whether or not it was a correct assessment.

The instant case falls into the same category. The defendant having failed to exercise his right of Appeal under Section 106, is now precluded from canvassing matters relating to the assessments in the present proceedings.

Accordingly, being satisfied that the defendant is liable to pay outstanding business taxes for the assessment years 2000, 2001 and 2002, the Court enters judgment in favour of the plaintiff in a total sum of Rs.40,273.70 together with costs of action.

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A.R. PERERA
JUDGE

Dated this 15th day of November 2006