

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO.: HBC 162 OF 2006

BETWEEN: MANOJ KUMAR AMARSHI KHERA

PLAINTIFF

A N D: FIJI ISLANDS REVENUE & CUSTOMS AUTHORITY

DEFENDANT

Mr. A. Sen for Plaintiff

Mr. B. Solanki for Defendant

Date of Hearing: 19<sup>th</sup> June 2006

Date of Judgment: 6<sup>th</sup> July 2006

## JUDGMENT

Manoj Kumar Amarshi Khera operates a jewellery business at Ba, Lautoka and Nausori. In July 2005 Fiji Islands Revenue & Customs Authority (FIRCA) assessed that he owed FIRCA \$3.458 million in VAT. It issued a Departure Prohibition Order (DPO) which means Mr. Khera cannot leave Fiji for the next three years unless he pays the tax or makes satisfactory arrangements for its payment. Mr. Khera is challenging the validity of the DPO as it violates his freedom of movement under the Constitution.

The issues before the Court are :

- (1) Is the DPO unconstitutional?
- (2) If the Court rules it is not unconstitutional, then is the restraint reasonable and justifiable in a democratic society?

## ISSUE 1 - IS THE DPO UNCONSTITUTIONAL?

### Statutory Provisions:

Section 34(3) and Section 34(7)(c) of the Constitution are relevant to the consideration of the two issues. They deal with a citizen's right to freedom of movement. Section 34(3) provides :

***"Every citizen, ... has the right to move freely throughout the Fiji Islands and the right to leave Fiji Islands."***

Subsection 7 provides for limitations which may be imposed upon such right. For our purposes subsection 7(c) is the relevant one. It provides :

***"A law may limit, or may authorize the limitation of, the right of a person to freedom of movement.***

***(c) for the purpose of imposing a restriction on the person that is reasonably required to secure the fulfillment of an obligation imposed on the person by law but only to the extent that the limitation is reasonable and justifiable in a free and democratic society."***

### **Meaning of obligation imposed by law:**

Section 34 first defines the right and then also allows restrictions on movement of persons. One of the grounds on which movement may be restricted is an ***"obligation imposed by law"***. An obligation imposed by law is an obligation imposed by a superior authority as opposed to a purely private debt like arising

out of contract: Sunderjee Brothers Limited v. Geoffery John Coulter – 33 FLR 74; Westpac Banking Corporation & Satish Chandra – HBC 356 of 1991. These cases discussed the meaning of the above phase under the equivalent 1970 Constitution. It drew a distinction between purely private debt and one imposed by law. It ruled that the restriction imposed by the Debtors Act on freedom of movement was unconstitutional so far as it related to purely private debts only not in cases of impost.

The obligation imposed in the present case is one imposed by the VAT Decree. It is an obligation to pay tax. It is not a private debt.

#### **Objective of DPO:**

The DPO provisions were inserted into the Income Tax Act by Income Tax (Budget Amendment) Act 4 of 2004. It provided that where the Commissioner has reason to believe that a taxpayer might leave Fiji without paying assessed tax, he may issue a DPO. The effect of the order as the name suggests is that the taxpayer cannot leave Fiji. He can only leave if he pays the assessed tax or provides for adequate security. The order remains otherwise on foot for three years.

A DPO may therefore be seen is akin to a statutory writ ne exeat civitate. The Commissioner can impose it without having to go to a court. Obtaining a writ ne exeat civitate is cumbersome and time consuming. At times before the writ is issued some taxpayers abscond. A DPO is a quick and ready method of ensuring that those who owe tax leave the country after paying tax. It provides for effective remedy. As long as the Commissioner has good reason to believe that a taxpayer will abscond, he can issue a DPO. He cannot act arbitrarily or unreasonably. Factors like the amount of tax owed, whether a person has a citizenship elsewhere or a permanent residence or a business running in another country or whether other members of his family live in Fiji or elsewhere are all relevant factors.



I find nothing repugnant in the provisions of Section 77A of Income Tax Act to render it invalid or repugnant to Section 34 of the Constitution.

## ISSUE 2 - IS THE RESTRAINT IMPOSED ON MANOJ KHERA REASONABLE AND JUSTIFIABLE IN A FREE AND DEMOCRATIC SOCIETY?

For the restraint to be held valid it must be reasonable, it must be justifiable. There is a further qualification of reasonableness in a free and democratic society. A state must use no more restrictive means than are necessary to achieve the purpose of the limitation.

The Canadian case of R. v. Oakes – 26 DLR (4<sup>th</sup> series) 200 discusses the concept of ***“reasonable and demonstrably justifiable”*** in a free and democratic society. It suggested to consider whether a law measured up to being ***“reasonable and demonstrably justifiable”*** one has to first look at the objectives which the law or statute sets out to achieve. It said those concerns must be ***“pressing and substantial”*** and not ***“trivial or discordant”*** - p. 227 Chief Justice Dickson. Secondly Oakes suggests that the means chosen to restrict the right must be reasonable and demonstrably justifiable under three elements of proportionately test namely :

- (a) measures must be carefully designed and rationally connected to the objective.
- (b) There should be minimal impairment of the right in question.
- (c) There must be a sense of balance between the deleterious effect of the measures and objectives to be attained.

The New Zealand Court of Appeal in Moonen v. Film & Literature Board of Review – (2000) 2 NZLR 9 had occasion to discuss the approach to take when considering reasonable limitation on freedom of expression which can be demonstrably justified in a democratic society. It suggested that the way to approach the issue is ***“first to identify the objective which the legislature was endeavouring to achieve by the provision in question. The importance and***

*significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective".*

The Commissioner of Inland Revenue not only has to assess tax but more importantly recover assessed tax. He is responsible for "collection of tax" – Section 3 of the Income Tax Act. The good heart of the nation depends on how much tax is recovered. The aim of DPO is not to punish a taxpayer. It is not meant to last forever but only for three years. It also gives power to commissioner to revoke the order if the assessed tax is paid or even if not paid adequate security is provided. In that way it is not an absolute bar to a movement of a person. The protection of the revenue is the statutory duty of the Commissioner and therein lies the welfare of the country. A DPO achieves that objective.

In the present case the plaintiff has been assessed for tax. He objected to the assessment as provided for under Section 62 of the Act. His objection was rejected. He has appealed. The lodging of the appeal does not assist the plaintiff much. It does not absolve him now of the obligation to pay tax. Once a notice of assessment has been served on the taxpayer, it creates a legal liability to pay tax unless it is set aside on objection or on appeal. The procedure to challenge the substantive liability is contained in the Act. Until the assessment is set aside the court must take the view that the tax is due and owing – Winter v. Federal Commissioner of Taxation - 16 Australian Tax Reports 977.

The plaintiff submits that he will not be able to run his business if he is to pay tax and secondly he cannot pay tax unless his business is allowed to run. Unless he is allowed to travel overseas, his business will not run.



The plaintiff had given an undertaking to pay \$20,000.00 per month. That undertaking was not kept and he defaulted in making those payments. The Commissioner might take the view that the plaintiff's word is not to be taken seriously in view of his default. On the one hand, the plaintiff wishes to travel overseas to do business; on the other hand he considers that he can pay tax if and when he pleases. An opportunity was provided to the plaintiff to provide adequate security. He expects the Commissioner to accept what the plaintiff himself considers is adequate security which is a guarantee from a solicitor. The commissioner wants more than a mere guarantee. It is for the Commissioner to decide on the adequacy of the security and if his reasons are satisfactory and reasonably tenable, the court cannot interfere.

The plaintiff's assessed tax stands at over \$3 million.

According to the defendant, based on financial statements provided for the year 2004, the plaintiff's net assets are worth \$300,281.00. The plaintiff's property is mortgaged to ANZ Bank. The Commissioner therefore believes that there is a strong possibility that the defendant might abscond, which is a reasonable conclusion.

The assessed sum of \$3,485,432.68 is a large sum of money going back to the year 2000. Given the magnitude of the sum involved, the restriction is not unreasonable nor is the Commissioner's search for adequate security for payment. The restraint placed is not unreasonable. It is quite justified.

I answer the questions posed in the issues as follows :

- (1) Is the DPO unconstitutional?  
Answer - No.
- (2) Is the restraint imposed on plaintiff's freedom to leave Fiji reasonable and justifiable in a free and democratic society?  
Answer - Yes.

The application is dismissed with costs summarily fixed in the sum of \$600.00 to be paid in fourteen (14) days.



[ Jiten Singh ]

JUDGE

At Suva

6<sup>th</sup> July 2006