

**IN THE COURT OF APPEAL OF TONGA**

**CIVIL JURISDICTION**

**AC 7 of 2016**

**NUKU'ALOFA REGISTRY**

**[CV 56 of 2015]**

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**BETWEEN: MINISTER OF REVENUE AND CUSTOMS**

**- Appellant**

**AND : 1. RUDRA PRASAD  
2. PRATITA PRASAD**

**- Respondents**

**Coram : Moore J  
Blanchard J  
Hansen J  
Tupou J**

**Counsel : Mr. 'A. Kefu SC for the Appellant  
Mr. W. Edwards for the Respondents**

**Date of Hearing : 5 September 2016**

**Date of Judgment : 14 September 2016**

## JUDGMENT OF THE COURT

### **Introduction**

[1] This is an appeal and a cross appeal from a judgment of the Lord Chief Justice of 16 May 2016 addressing the jurisdiction of the Supreme Court to resolve issues concerning the operation of the Revenue Services Administration Act (RSA Act) and the Income Tax Act (Tax Act). The appellant is the Minister of Revenue and Customs (the Minister). The respondents and cross appellants are two individuals, Rudra Prasad and Pratita Prasad (the Prasads). The Minister approaches the appeal on the basis that leave to appeal was necessary because the judgment of 16 May 2016 was an interlocutory judgment. The appeal raises important issues concerning the operation of the RSA Act. While counsel for the Prasads formally opposes the grant of leave, he accepts that the issues raised were important. Accordingly leave to appeal is granted.

[2] The Prasads were directors and shareholders of a company, Moapa Enterprises Limited (Moapa), that ceased trading in April 2015. On 14 April 2015, Mr Prasad entered into an agreement with a third party to sell Moapa's business, assets and stock.

The Ministry of Revenue and Customs (the Ministry) was, on the same day, advised of the sale. On both that and the following day, the Ministry sent Mr Prasad four income tax assessments for Moapa for the period July 2011 to June 2014 and a consumption tax assessment for Moapa for the period September 2007 to August 2010. The total amount assessed as payable was almost TOP \$2.5 million.

- [3] On 15 April 2015 three notices were issued under s15(3) of the RSA Act directed to two banks, the Westpac Bank of Tonga and the ANZ Bank and, additionally, directed to the purchaser of Moapa's business. In substance, the notices required both banks to hold all deposits in bank accounts in the name of Moapa or the Prasads up to the outstanding amount of Moapa's tax liability. The purchaser was required to hold any payments to Moapa, again up to the outstanding amount of Moapa's tax liability. Mr Prasad was served with copies of the notices on the same day. Also on 15 April 2015, a lawyer representing the Prasads corresponded with the Ministry disputing any liability on their part for any tax debt of Moapa. In response the lawyer was informed of the Ministry's position that the Prasads were personally liable for the company's tax debt because of s29 of

the RSA Act. By 27 April 2015, at the latest, the lawyer acting for the Prasads was aware that the procedures under Part IV of the RSA Act provided a mechanism for challenging taxation decisions and limits existed on seeking their review by way of judicial review in the courts. He was told those matters in a letter from the Ministry.

[4] In the ensuing months further notices were issued under s15(3) and correspondence continued between the lawyer representing the Prasads and the Ministry though it is not necessary either to detail what occurred or embark on a consideration of how those further notices should be characterised as a matter of law. It is sufficient to note one further step taken by the Ministry namely the service on Mr Prasad on 30 September 2015 of a document entitled "Notice under s 29 of the [RSA Act]" explaining why, in the Ministry's opinion, that section was applicable.

[5] On 19 October 2015 the Prasads commenced proceedings in the Supreme Court by way of writ and statement of claim. The statement of claim recited the Prasads' account of the relevant facts that was a more detailed account of the facts just outlined. Thereafter, in each of four sections, the statement of claim

identified, in a heading, what were described as a cause of action followed by a number of paragraphs setting out contentions of fact and law followed by a description of the relief sought. The first cause of action was, in substance, a claim that for specified reasons, the s15 notices were void and the decision to issue them was ultra vires. The relief sought was a declaration that the s15 notices were void and of no effect and consequential relief including costs. The second cause of action focused on the question of whether the two banks on which s15 notices had been served owed money to the Prasads, contending they did not and also contending that, in the result, the issuing of the s15 notices was ultra vires. The relief sought was a declaration that the issuing of or acting upon the s15 notices "was or will be" ultra vires and consequential relief including costs.

- [6] The third cause of action was simply described as Certiorari. The substance of the account following this heading was that before making a decision adversely affecting the Prasads, the Minister had to observe the rules of natural justice and that there had been a denial of natural justice with the result that the Minister's decisions were void ab initio. The relief sought was an

order of certiorari quashing the "s15 notices and the s29 notice", judgment for the Prasads and consequential relief including costs. The fourth cause of action was described as Judicial Review. Thereafter, the pleading recounted a number of identified considerations that either had not been taken into account or had not been given due and proper consideration. This was followed by contention that the Minister reached a decision that no reasonable decision maker would have made. The relief sought was, again, an order of certiorari quashing the "s15 notices and the s29 notice", judgment for the Prasads and consequential relief including costs.

- [7] In summary, the case advanced by the Prasads in their pleadings sought to impugn, in the main, the decision to issue the s15 notices or the notices themselves though, in addition, the case also sought to impugn the "s29 notice". On 1 December 2015, the Minister made an application to have the writ set aside on the basis that the Supreme Court did not have jurisdiction to adjudicate on the claims or that the proceedings constituted an abuse of process. The judgment of 16 May 2016, which is the subject of this appeal, determined that application.

## Legislation

[8] It is convenient to set out, at this point, the legislative provisions which are of central relevance to this appeal. The first is s15 of the RSA Act which provides:

(1) *For the purposes of sections 15, 16 and 17, "payer" means a person who owes or may subsequently owe money to the taxpayer, or who holds or may subsequently hold money for, or on account of, the taxpayer or who holds money on account of some other person for payment to the taxpayer, or who has authority from some other person to pay money to the taxpayer, and includes the Crown.*

(2) *This section shall apply where a taxpayer is liable to pay an amount of tax and —*

(a) *the tax has not been paid by the taxpayer by the due date for payment; or*

(b) *the Minister has reasonable grounds to believe that the taxpayer will not pay the tax by the due date for payment.*

(3) *Where this section applies, the Minister may, by notice in writing, require any person who owes money to the taxpayer to pay the amount specified in the notice to the Minister. The amount to be specified in a notice under this subsection shall not exceed the amount of tax that has not been paid or the amount that the Minister believes will not be paid by the due date.*

(4) *Subject to subsection (5), a payer shall pay the amount specified*

*in a notice under subsection (3) by the date specified in the notice. The date for payment specified in the notice shall not be a date before the date that the amount owed to the taxpayer becomes due to the taxpayer or held on the taxpayer's behalf.*

*(5) A payer shall not pay an amount under this section in excess of the amount owed to the taxpayer.*

*(6) A copy of the notice served on the payer shall be served on the taxpayer.*

This section creates a mechanism whereby a third party can be obliged, by notice in writing, to pay an amount specified in the notice to the Minister and, in substance, to do so in partial or complete satisfaction of a tax debt of another person.

[9] The next provision is a definition of "taxation decision" in s2 of the RSA Act which includes, as a defined decision, "(e) a decision by the Minister to issue a notice under section 15(3) or 16(3)". This definition is relevant because the RSA Act establishes a mechanism in Part IV by which a taxpayer who is dissatisfied with a "taxation decision" can impugn that decision by a process commencing with an objection to the Minister within 30 days (s8) and, if dissatisfied with the decision following



the objection, seek a review by the Tax Tribunal (s9). The President of that Tribunal must be a Judge of the Supreme Court (s59). From the Tax Tribunal there is a right of appeal on a question of law to the Supreme Court (s10). In addition, the process of review established by Part IV is intended to be the sole mechanism of review and appeal of tax decisions. This is sought to be achieved by s6 which provides:

*Except in proceedings under part IV of this Act —*

*(a) no taxation decision shall be disputed in the Tax Tribunal, in any Court, or in any other proceedings on any ground whatsoever; and*

*(b) ...*

[10] The definition of "taxation decision" does not expressly include or refer to anything done under or by reference to s29 of the RSA Act. Section 29 provides:

*(1) This section shall apply where an arrangement has been entered into with the intention or effect of rendering a company unable to satisfy a current or future tax liability under any revenue law.*

*(2) In this section — "arrangement" means any contract, agreement, plan, or understanding whether express or*

*implied and whether or not enforceable in legal proceedings; “associate”, in relation to a person, means any other person who acts or is likely to act in accordance with the wishes of the person as a result of any connection between the persons or common ownership or control; “controlling shareholder”, in relation to a company, means any person who beneficially holds, either alone or together with an associate or associates —*

- (a) more than 50 per cent of the voting rights in the company;*
- (b) more than 50 per cent of the rights to dividends; or*
- (c) more than 50 per cent of the rights to capital; and*

*“director”, in relation to a company, means any person occupying the position of director of the company.*

- (3) Subject to subsection (4), where this section applies, every person who was a director or controlling shareholder of the company at the time the arrangement was entered into shall be jointly and severally liable for the tax liability of the company.*
- (4) A director of a company shall not be liable under this section for the tax liability of the company where the Minister is satisfied that the director derived no financial or other benefit from the arrangement and —*

*(a) the director has on becoming aware of the arrangement, formally recorded with the company his dissent and notified the Minister in writing; or*

*(b) the director satisfies the Minister that, at the time the arrangement was entered into —*

*(i) the director was not involved in the executive management of the company; and*

*(ii) the director had no knowledge of, and could not reasonably have been expected to know of the arrangement.*

[11] At this point, it is appropriate to note four features of this section.

The first is that its focus is on the consequences of there being an "arrangement" as defined which has the intention or effect of rendering a company unable to satisfy its tax liabilities. The second is that in the circumstances specified in subsection (1) (that such an arrangement exists), a director or controlling shareholder, as defined, will be liable for the tax liability of the company by operation of subsection (3). The third is that liability arising under subsection (3) is not expressed to arise as a result of some decision being made or step being taken to enliven the subsection such as the giving of notice. That is to say, the section itself creates the liability if the circumstances identified in subsection (1) exist. The fourth feature, and in a sense it is a

qualification to the third, is that an administrative step can be taken involving the formation of an opinion by the Minister that would render inapplicable the direct effect of the combined operation of subsections (1) and (3).

### **The issues**

[12] The legal issues raised in the appeal and cross-appeal, though important, are narrow in compass. The first, raised in the appeal, is whether there was a decision under s29 that was amenable to judicial review. The Chief Justice concluded there was. This first issue could possibly be expressed more broadly, as it was by the Chief Justice in the penultimate paragraph of his judgment, namely whether the Prasads could challenge their liability under s29 by way of judicial review. The second issue, raised in the cross-appeal, is whether the only available mechanism for challenging the notices under s15 was that found in Part IV of the RSA Act. The Chief Justice concluded it was the only available mechanism. It is unnecessary to repeat the thorough and detailed reasoning of the Chief Justice leading to these two conclusions. We deal with each issue in turn commencing with the issue raised in the cross-appeal.

### **The cross appeal**

[13] The Lord Chief Justice's conclusion that the only mechanism for challenging the notices issued under s15 was under Part IV was based on the effect of s6. We agree with this conclusion and his Honour's reasons. The terms of that section are clear and emphatic. The Prasads argue in their cross-appeal the reasoning of the Lord Chief Justice placed inappropriate reliance on New Zealand judgments, and in particular the judgment of the Supreme Court of New Zealand in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2012] 2 NZLR 153 and did so notwithstanding that in New Zealand, unlike Tonga and Australia, there is no written constitution. The Prasads draw attention to clauses 82, 83A, 79 and 90 of the Tongan Constitution and argue that s6 unlawfully derogates from the constitutional role of the Supreme Court. But s 4 of the Supreme Court Act clearly contemplates that a law of Tonga can confer exclusive jurisdiction on another court or tribunal and thereby limit the jurisdiction of the Supreme Court. It has never been held that this section offends the Constitution. In any event Part IV creates a role for the Supreme Court as the final arbiter of legal issues arising in any challenge under that part to a taxation decision because s10 of the RSA Act creates an unqualified

right of appeal (though to be made within 30 days) to the Supreme Court on a question of law which may have arisen in the proceeding before the Tax Tribunal. The Prasads have not demonstrated, in their cross-appeal, any error on the part of the Lord Chief Justice and the cross-appeal should be dismissed.

### **The appeal**

[14] We turn to consider the issue raised in the appeal. As noted earlier, the definition of "taxation decision" does not expressly include or refer to anything done under or by reference to s29 of the RSA Act. Accordingly, s6 does not, in terms, prohibit a challenge to anything done under or by reference to s29 in a Court. However we do not share the view of the Chief Justice that, in some way, the operation of s29 is enlivened by an administrative decision under that section amenable to judicial review. The provision is self-executing: see Aronson, *Judicial Review of Administrative Action*, 4th edition at [2.220]. As Lord Dunedin observed in *Whitney v Inland Revenue Commissioners* [1926] AC 37 at 52 at a high level of generality, the declaration of liability for tax is the work of the taxing statute. Ultimately, of course, it will be necessary to consider the terms of the particular taxing statute to ascertain the effect of any specific

provision creating, directly, liability under it. However two comparatively recent examples where it has been determined tax liability arises by the direct operation of the tax legislation are *Commissioner of Taxation v H* (2010) 188 FCR 440 and *Layala Enterprises Pty Ltd v Federal Commissioner of Taxation* (1998) 86 FCR 348. Also, as noted earlier, the RSA Act does not provide for the "issuing" of a notice under s29. In the result, the case pleaded by the Prasads and summarised earlier is entirely misconceived because no challenge can be made in the Supreme Court to the s15 notice or any decision to issue it. In so far as the case relates to s29, it is based on a challenge to a decision relying on orthodox administrative law grounds. Yet there is no decision amenable to judicial review. The same can be said of the second statement of claim (filed after and pursuant to the judgment of 16 May 2016) which is in broadly the same but truncated terms as the original statement of claim summarised above but focusing more on s29.

[15] However notwithstanding these observations we do not accept what appears to be the ultimate position advanced by Minister, namely that necessarily the only mechanism for challenging liability said to arise by operation of s29 is, in a case such as the

present, by challenging under Part IV the notices under s15 (which, on the Minister's approach, cannot now be done because any such challenge is now time-barred) and collaterally challenging what is said by the Minister to be the effect of s29. Subject to a possible issue about whether the Prasads were each a "taxpayer" standing in the shoes of Moapa for the purposes of s15, we accept that (putting to one side limitation questions) such a collateral challenge could be made, in this case, in a direct challenge under Part IV to the s15 notices. It could also be raised in any proceedings brought under s14 seeking to recover from the Prasads amounts allegedly owing by operation of s 29. Section 6 cannot be taken to prevent the Prasads from challenging what is said to be the effect of section 29 in this case given that, as noted earlier, anything done under or by reference to s29 does not constitute, itself, a "taxation decision" as defined.

[16] Courts have long recognised a jurisdiction to entertain proceedings seeking only declaratory relief concerning the legal rights or liabilities of parties to a legal controversy: see, for example, the commentary in Chapter 19 of Wright, Remedies 2nd edition 2014 and, by way of illustration, the discussion in



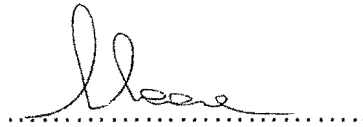
*Taione v Kingdom of Tonga* [2004] TOSC 47; [2005] Tonga LR 67 at 125-126. While this court should not express a concluded view about whether such a proceeding can be brought by the Prasads as this issue was not argued in this appeal and cross-appeal it is probable that such a proceeding could be brought in and determined by the Supreme Court subject to the operation of Order 39 of the Supreme Court Rules. That Order creates specific limits on proceedings, inter alia, seeking a declaration against a public body including an individual charged with public duties. But that is not the case the Prasads are presently advancing in their pleadings and to the extent that they do seek declaratory relief it is directed to the s15 notices. They do not raise the narrow issue of whether they are liable under s29 for the tax liability of Moapa. The Minister's application of 1 December 2015 sought the dismissal of the Prasads' claim on the basis that the Supreme Court did not have jurisdiction or that it was an abuse of process. As presently framed, it is in our view an abuse of process and for that reason should be dismissed.

### **Result**

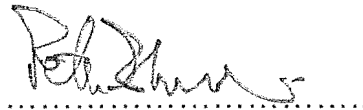
[17] Accordingly, Court orders:

- (i) The appeal is allowed.

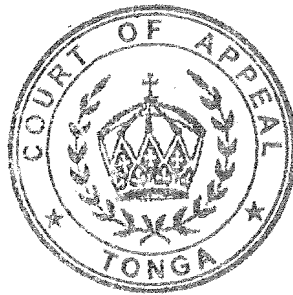
- (ii) Proceedings CV 66 of 2015 are dismissed as an abuse of process.
- (iii) The cross appeal is dismissed.
- (iv) The Prasads pay the Minister's costs of the appeal and cross-appeal to be taxed if not agreed upon.



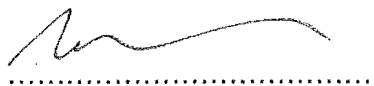
**Moore J**



**Blanchard J**



**Hansen J**



**Tupou J**