IN THE COURT OF APPEAL AT SUVA, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO.ABU 59 of 2019

[Civil Appeal No. HBT 09 of 2018
in Tax Tribunal VAT Action No.04 of 2017]

BETWEEN : **WESTBUS FIJI LIMITED**

Appellant

AND : **CHIEF EXECUTIVE OFFICER, REVENUE AND CUSTOMS AUTHORITY**

Respondent

Coram : **Basnayake, JA**
Lecamwasam, JA
Dayaratne, JA

Counsel : **Mr R. P. Singh for the Appellant**
Mr E. Eterika with Mr. E. Qalo for the Respondent

Date of Hearing : **02 November, 2022**

Date of Judgment : **25 November, 2022**

JUDGMENT

Basnayake, JA

[1] I agree with the reasons and conclusion arrived at by Dayaratne JA.

Lecamwasam, JA

[2] I agree with the reasons given and the conclusion arrived at by Dayaratne JA.

Dayaratne, JA

This Appeal

[3] This is an appeal against the judgment dated 15 February 2019 of the High Court of Suva sitting in its jurisdiction as the Tax Court. The High Court affirmed the decision of the Tax Tribunal made on 18 June 2018 by which it had dismissed an application for review filed by the Appellant against an Assessment made by the Fiji Revenue and Customs Authority (Respondent) under the Value Added Tax Act 1991 (VAT Act).

The background

[4] On 07 January 2011, the Government of the Republic of Fiji and the Fiji Bus Operators Association (of which the Appellant was a member) entered into a Deed of Agreement (Deed) and its primary purpose was to ensure that 'the bus fares currently paid by the travelling public' would not be increased by the bus operators despite the increase in VAT. In return for not increasing the bus fares, the Government agreed to 'zero-rate' the VAT payable in respect of all bus fares from 01 January 2011(with the result that the 12.5% VAT on bus fares being then collected and paid by the bus operators would no longer be payable to the Respondent and could be retained by the bus operators).

[5] In order to understand the exact nature of the agreement reached between these two parties in terms of the said Deed, I wish to quote the following clauses contained therein;

> *"1. There will be no increase in the bus fares currently paid by the travelling public as a result of the increase in VAT by 2.5%.*
>
> *2. In consideration of no change in the bus fares, VAT will be zero rated for all bus fares with effect from 1 January 2011, with the result that the 12.5% VAT on bus fares being currently collected and paid by bus operators will no longer be payable to Fiji Islands Revenue and Customs Authority and will now be retained by the bus operators.*
>
> *3. For the avoidance of doubt, VAT will only be zero rated on bus fares and this will not extend to other outputs of a bus operator. Bus operators will be entitled to a refund of VAT currently paid by the bus operators on all inputs in relation to bus fares which are subject to VAT."*

[6] On 14 January 2011, the Government introduced an amendment to the VAT Act by virtue of Value Added Tax (Amendment) Decree No 6 of 2011, through which paragraph 27 was introduced to Schedule 2 of the VAT Act.

[7] Paragraph 27 of Schedule 2 of the VAT Act reads as follows;

> *"The supply of transport services relating to the carriage of passengers and goods from a place in Fiji to another place in Fiji by an omnibus licensed as a public service vehicle and constitutes "carriage" for the purpose of the Land Transport Act 1998.*
>
> *For the purposes of this paragraph the terms –*
>
> *Omnibus has the same meaning given in section 2 of the Land Transport Act 1998; and passenger means, any person other than a driver carried in or on a vehicle within the meaning of the Land Transport Act 1998".*

[8] The Appellant who is a bus operator in Fiji, had agreed to provide staff transport services to Intercontinental Fiji Beach Resort & Spa (the Hotel). There were three agreements that had been entered into between the Appellant and the Hotel. They were in 2009, 2013 and 2016.

[9] By letter dated 27 April 2016 the Respondent informed the Appellant that it has undertaken a VAT desk audit of the Appellant's VAT returns for the period January 2013 to December 2015 and on the basis that the Appellant had not declared output tax on income received from the services it provided to the Hotel, had been assessed to pay a sum of Fiji $262,628.38 (subsequently assessed at Fiji $522,415.73 including the year 2016).

[10] In its reply to the Respondent dated 03 May 2016, the Appellant has taken up the position that VAT was zero-rated in respect of the services it provided to the Hotel as per the provisions contained in the Deed. In subsequent correspondence with the Respondent, the Appellant refuted the position of the Respondent that it was not entitled to zero-rated VAT in terms of paragraph 27 of Schedule 2 of the VAT Act and maintained that it came within the definition found therein.

[11] However, the Respondent did not agree and issued its 'Objection Decision' on 07 February 2017 and concluded that the Appellant was not entitled to the benefit of the zero-rated concession.

[12] It was this Objection Decision made by the Respondent on 07 February 2017 that was sought to be reviewed by the Appellant before the Tax Tribunal.

<u>The decision of the Tax Tribunal</u>

[13] The Tax Tribunal has taken great pains to consider whether the services provided by the Appellant to the Hotel came within the characterization found in paragraph 27 of Schedule 2 of the VAT Act and for that purpose analyzed in great detail the relevant provisions contained in the Land Transport Act (LTA) and the VAT Act.

[14] Having considered the nature of the services provided by the Appellant to the Hotel as well as the provisions contained in the LTA in respect of the grant of licenses, he has arrived at the conclusion that there has been no 'road permit' issued as required under the LTA and thus in effect the said services do not '*constitute "carriage" for the purpose of the Land Transport Act 1998'*. The Tribunal has also considered as to whether the Deed had any provision which would have given a different construction but has concluded that it did

not. As such it determined that the said services would not attract zero-rating of VAT in terms of paragraph 27 of Schedule 2 of the VAT Act.

The Judgment of the High Court sitting as the Tax Court

[15] A perusal of the Judgment of the High Court dated 15 February 2019, reveals that the learned High Court Judge approached it somewhat differently and has paid more attention to the nature of the services provided by the Appellant to the Hotel in terms of the three Agreements. Nevertheless he came to the same conclusion. He observed at paragraph 8 of his judgment that *"The crux of the matter is whether the services provided by Westbus was a charter service. If so, then Revenue was entitled to levy VAT"*. Having observed thus, he went on to conclude that the services offered by the Appellant to the Hotel had all the characteristics of a charter service as opposed to a transport service provided to the public for a fair which was what the Government sought to capture in terms of the Deed. He perhaps adopted that approach since the Appellant had relied heavily on the concession granted under the Deed in insisting that VAT in respect of its services to the Hotel too were zero-rated.

[16] He went on to observe that *"certainly this cannot be found in para 27 of the Second Schedule to the VAT Act 1991 because that relates to the carriage of passengers "by an omnibus licensed as a public service vehicle"*". He was in agreement with the finding of the Tax Tribunal that the Appellant did not possess a public service permit at the relevant time and hence did not come within the definition of paragraph 27 of Schedule 2 of the VAT Act. He went on to hold that he has not been persuaded as to why he should not accept the conclusion arrived at by the Tax Tribunal after a full hearing and therefore, has affirmed the decision of the Tax Tribunal and dismissed the appeal.

Grounds of Appeal

[17] The Appellant had urged seven grounds of appeal in his Notice of Appeal dated 05 August 2020. They are;

> *1. **THAT** the learned judge erred in law and in fact when it found that the service provided by the Appellant was not Zero Rated for Value Added Tax (VAT) when at all material times the Appellant provided service*

amounting to carriage of passengers from a place in Fiji to another place in Fiji.

*2. **THAT** the learned judge erred in law and in fact when it found that the service provided by the Appellant to the employees of Natadola Bay Resort Limited and Sofitel Fiji Resort and Spa amounted to charter service when as a matter of fact it was found by the Tax Tribunal that the service provided by the Appellant to the employees of Natadola Bay Resort Limited was deemed to be carriage of passengers from a place in Fiji to another place in Fiji, a carriage of passengers within the meaning of the Land Transport Act.*

*3. **THAT** the learned judge erred in law and in fact in holding that the employees of Natadola Bay Resort Limited and Sofitel Fiji Resort and Spa utilizing the services provided by the Appellant cannot be classified as the travelling public.*

*4. **THAT** the learned judge erred in law and in fact when it failed to consider that the Appellant had proper approval from the Land Transport Authority by way of the Land Transport Authority letter dated 3 of May 2016 to provide the service/transportation to the employees of Natadola Bay Resort Limited and failed to consider that there was a moratorium on new Road Route Licences to be issued by the Land Transport Authority.*

*5. **THAT** the learned judge erred in law and in fact when it did not consider that the Tax Tribunal had found as a matter of fact the service provided by the Appellant to the employees of Natadola Bay Resort Limited was deemed to be carriage of passengers and goods from a place in Fiji to another place in Fiji, a carriage of passengers within the meaning of the Land Transport Act.*

*6. **THAT** the learned judge erred in law and in fact in not considering that when the Tax Tribunal had found as a matter of fact that the service provided by the Appellant to the employees of Natadola Bay Resort Limited was deemed to be carriage of passengers and goods from a place in Fiji to another place in Fiji, a carriage of passengers within the meaning of the Land Transport Act, therefore making the service provided by the Appellant Zero Rated for VAT pursuant to Section 2 of the Value Added Tax (Amendment) Act (No 6 of 2011).*

*7. **THAT** the learned judge erred in law and in fact when the High Court failed to consider that the Deed executed on the 7 of January 2011 between the State and the Fiji Bus Operators Association provided an exemption from VAT to the operations of the Appellant and the said Deed was sufficient to class the service the service provided by the Appellant as Zero Rated for VAT.*

[18] Although seven separate grounds of appeal have been urged, in its written submissions filed in this court on 06 April 2021 as well as in the oral submissions of learned counsel, the Appellant dealt with the first six grounds together on the basis that they overlap with each other. The seventh ground was dealt with separately. Infact they do overlap with each other and hence I too will do likewise.

Grounds of Appeal 1 - 6

[19] I must state at the very outset that in arriving at a decision as to whether the Objection Decision made by the Respondent on 07 February 2017 was erroneous or not, what is of paramount importance is to consider as to whether that decision was consonant with the VAT legislation of Fiji prevalent at the time. Nonetheless, it is also necessary to consider as to whether the provisions contained in the Deed could have created any other understanding since as stated earlier, the Appellant placed much reliance on it.

[20] The Tax Tribunal has engaged in a thorough examination of the facts and the applicable law. As stated earlier, the Tax Tribunal has considered in great detail, the provisions contained in the LTA in order to demonstrate as to how a conclusion can be arrived at whether the services provided by the Appellant to the Hotel would come within the definition found in paragraph 27 of Schedule 2 of the VAT Act. Probably that is what has prompted the learned High Court Judge to refrain from engaging in a detailed discussion of such interpretation and venture instead to agree with the conclusions reached by the Tax Tribunal.

What is Value Added Tax?

[21] A brief reference to the nature of VAT would be an ideal start to the determination of this matter. The Tax Tribunal has quoted from an article published in a Revenue Law Journal that has dealt with how Fiji had introduced and applied VAT and hence I too consider it appropriate to quote a portion of its contents. *'It is a multistage tax imposed at all levels on all providers of goods and services (save those exempted). The essential features of VAT is that it taxes final and intermediate sales at each stage of the production and distribution process. This is usually implemented using a credit offset mechanism, otherwise known as the invoice method. Using the invoice method, credits are given for inputs purchased. In*

effect, each firm is taxed only on the "value added" to the product. In other words, tax is levied on taxable sales minus purchases of taxable inputs. This means that, when the tax at each stage of the transaction is aggregated and credits subtracted, the total amount of tax paid is equivalent to the final consumer price times the VAT rate' – Qionibaravi, Litia and Green, Richard (1993) "The adoption of a Consumption Tax in Fiji", Revenue Law Journal: Vol 3: Iss.2, Article 6.

[22] Halsbury's, Volume 49 (1) Fourth ed, at page 4 has described VAT as; *'It is a tax on the final consumer of goods and services, in as much as the final consumer is unable to recover or claim credit or the VAT included in the cost of supplies made to him'.*

Zero-rating of VAT in terms of the VAT Act

[23] The imposition and collection of VAT in the Republic of Fiji is governed by the Value Added Tax Act No. 48 of 1991 as amended from time to time (having been first introduced as a Decree in 1991) and the Regulations made thereunder. Exemptions and zero-rating are mechanisms by which a benefit is sought to be granted to the final consumers and such exemptions and zero-rated supplies are determined by the legislature from time to time.

[24] Since the matter under consideration hinges on characterization for purposes of zero-rating and thus involves the interpretation of paragraph 27 of Schedule 2 *viz a viz* the services provided by the Appellant to the Hotel, I will refrain from any further discussion of the provisions contained in the VAT Act other than what is directly relevant to such determination.

[25] The meaning of the term 'supply' has been explained in detail in Section 3 of the Act and 'zero-rated supply' has been defined in Section 2 to mean *'a supply described in Schedule 2 to this Act'*. It is stated in Section 2(2) that *'For the purposes of this Act, a reference to goods and services includes a reference to goods or services'*. Schedule 2 is titled *'Zero-Rated Supplies'*. The services that are relevant to the matter in issue in this case is found in paragraph 27 of Schedule 2.

[26] I have quoted paragraph 27 of Schedule 2 herein before, but will reproduce that having broken it into three limbs, for ease of interpretation;

> (a) *The supply of transport services relating to the carriage of passengers and goods from a place in Fiji to another place in Fiji*
> (b) *by an omnibus licensed as a public service vehicle and*
> (c) *constitutes "carriage" for the purpose of the Land Transport Act 1998*

[27] It is important to bear in mind that if any services were to be treated as being entitled for zero-rating for purposes of VAT, such services ought to necessarily come within the ambit of the relevant characterization and hence in this instance get captured within all three of the above limbs. That becomes critical to the determination of this matter. An interpretation in this regard cannot be undertaken in isolation since this involves a statutory interpretation and thus would require an incisive analysis of the provisions contained not only in the VAT Act but of the LTA and its scheme.

[28] The Tax Tribunal appears to have appreciated the importance of such an exercise and has formed the view that the manner in which the former CEO of the Respondent has interpreted the relevant provisions, namely as; *"bus industry – bus fares for scheduled trips only and not charter services"* was not satisfactory and has observed that although that may have been his interpretation, *'that in itself is an insufficient basis to attempt to give meaning to a statute* (at para 11 and 12 of the Decision). With regard to the first limb as identified by me, adverting to the types of carriage that is found in the LTA and having referred to the manner in which Murphy J has defined 'carriage' in the case of **Civil Aviation Safety Authority v Caper Pty Ltd** (2012) 207 FCR 357, he goes on to conclude that '*The transportation of employees between their place of work and their homes or to another destination as part of that journey, would amount to "carriage of passengers and goods from a place in Fiji to another place in Fiji"*' (at para 15 of the Decision).

[29] It is not necessary to labour too much to decide as to whether the services provided by the Appellant to the Hotel comes within the first limb. There cannot be much doubt that the transportation of the employees of the Hotel would fall under the category of 'carriage of passengers from a place in Fiji to another place in Fiji'.

[30] However, it must be pointed out here that the conclusion of the Tax Tribunal as quoted by me above, has been arrived at as part of its interpretation of the first limb as identified by me and is not an interpretation of all three limbs. I wish to point this out at this stage since Ground 2, 5 and 7 as postulated by the Appellant are wrongly premised.

[31] That conclusion, as pointed out by me earlier, by itself does not resolve the issue at hand. It remains to be found out as to whether the transportation of the staff of the Hotel by the Appellant as undertaken in terms of the three Agreements, the 'service', would come within the definition of '*by an omnibus licensed as a public service vehicle' and 'constitutes "carriage" for the purposes of the Land Transport Act 1998'* as required under the second and third limbs respectively.

Have the omnibuses of the Appellant been licensed as public transport vehicles to provide the relevant services in keeping with the LTA?

[32] In determining as to whether the services provided by the Appellant to the Hotel can be termed as "carriage" for the purposes of the LTA, it is important to note that one cannot simply take into consideration the fact that the Appellant's buses come within the classification of an omnibus or the fact that the Appellant may have had a road route license to operate a public bus service carrying passengers on an approved route, perhaps the Denarau to Nadi route. What becomes relevant is to find out as to whether the omnibuses were duly licensed as public service vehicles under the LTA to enable the Appellant to legally provide the services to the Hotel. The word 'licensed' appearing in paragraph 27 of Schedule 2 becomes very relevant and cannot be loosely construed.

[33] The Tax Tribunal has engaged in a detailed analysis of the relevant provisions of the LTA and arrived at a conclusion. What is required of this court is to determine as to whether that conclusion is legally tenable and whether it was incumbent on the Appellant to have a valid **'road permit/road contract license'** if its omnibuses were to get captured as 'licensed' under the legal regime found in the LTA.

[34] In pursuing that task, it is imperative for me to advert to the relevant provisions of the LTA. However, I will do so only to the extent necessary to justify my conclusions. What would be relevant is Part 6 of the LTA which is titled "Public Service Vehicle Licensing". Section

61(1) states that *'a motor vehicle used for the carriage of passengers for hire, reward or other consideration is deemed to be a public service vehicle for the purposes of this Act and regulations'*. Considering the nature of the services provided to the Hotel by the Appellant, its vehicles without doubt would fall into this category.

[35] In order to operate such vehicle, it was necessary for the Appellant to have them *'licensed as a public service vehicle'* in terms of Section 62(1). As per Section 62(2) no person shall use any public service vehicle contrary to the terms of a *'public service vehicle license or public service permit'*. A contravention of Section 62 (1) or (2) is identified as an offence in terms of Section 62(4).

[36] Section 63(1) confers power on the Land Transport Authority (Authority) to issue a 'public service vehicle license' (of any of the classes mentioned in subsection (3)) and the **owner of such public service vehicle is expected to use such vehicle *'in the manner described in a public service permit held by that person'*** (emphasis added). Section 63(2) in turn specifies that *'a public service vehicle license shall only be issued to the holder of a public service permit'*.

[37] Section 63(3) spells out the *'classes of public service licenses'* that can be issued (five classes in all). What would become relevant to the Appellant is the class that is spelt out in (d)(i) of Section 63(3), namely; *'a road service vehicle license, which shall only be issued in respect of - an omnibus which, for the purpose of this Act, is a motor vehicle equipped for the conveyance of not less than 16 persons excluding the driver …………'*.

[38] Importantly, Section 64(1) stipulates that the motor vehicle can be used only ***'in accordance with such conditions as may be prescribed in the public service permit'*** (emphasis added).

[39] Section 65(1) spells out that there will be different 'types' of public service permits and Section 65(2) describes five such types. What would apply to the Appellant would be the provisions contained in (d) of Section 65(2) namely; *'a* ***<u>road permit</u> which authorizes the use of a motor vehicle licensed as a road service vehicle subject to this Act*** *and subsection (3) and license and permit conditions, except that - (i) only a* ***road permit*** *may authorize a person to conduct a regular service between 2 terminating points'* (emphasis added).

Section 65(3) spells out three types of 'road permits' a person may apply for (described in (a), (b) and (c)). What would be relevant to the Appellant is found in subsection (b) which is *'**a road contract license** authorizing the **conduct of one or more road services for the transportation of passengers and goods on the basis of a contract**, either express or implied, between the holder of the license and another person'* (emphasis added).

[40] According to Section 65(4), using a public service vehicle without or contrary to conditions of a public service permit is an offence. As pointed out earlier, the type of public service permit the Appellant required for the purpose of providing the services to the Hotel was a **'road permit'** in respect of a '**road contract license'**.

[41] The above analysis would clearly demonstrate that if one were to be identified as operating '*an omnibus licensed as a public service vehicle* and *constitutes "carriage" for the purpose of the Land Transport Act 1998'* it is mandatory to be compliant with all requirements as discussed above. A **road permit** in respect of a **road contract license** will thus become mandatory for the Appellant to legitimately offer the 'services' it had undertaken to provide to the Hotel, irrespective of whether such service is termed as a 'charter' or otherwise.

Did the Appellant have a road contract license?

[42] The Appellant has admitted that it did not have a **road permit/road contract license**. It has also been admitted that there was a freeze in the grant of licenses for public service vehicles at the relevant time consequent to a cabinet decision.

[43] At the Tax Tribunal, the Appellant had taken up the position that it applied to the Authority for a road contract license for its omnibuses to provide the services to the Hotel and when it was followed up, the Authority had informed the Appellant that new licenses could not be issued in view of the freeze imposed by the government. When the CEO of the Authority was contacted to find out how it would affect the services it had undertaken to provide to the Hotel, the Appellant had apparently been informed that it could run the service as *'it was a service necessary for the transport of staff of the Hotel'* (vide Affidavit of the Managing Director of the Appellant filed in the Tax Tribunal).

[44] The former CEO of the Authority in his Affidavit filed before the Tax Tribunal has confirmed that the 'road contract license' could not be issued in view of the freeze by the Government and that the Appellant was informed of same. Nevertheless, he goes onto state that the Authority granted consent to the Appellant to provide the services. At paragraph 17 of his Affidavit he says that; *'The application process of an RCL is different from a Road Route License [RRL]. With an RRL one has to apply first before they can start operating. With an RCL the priority is to win the tender process, demonstrate performance over a period before acquiring a contract. If a supplier is already locked in with a customer without any objection from anyone there is no need to stop the supplier, even if a freeze is imposed. Common sense has to prevail and certain discretions are exercised when facilitating services to the general public. Intercon required the service from Westbus Fiji Limited as it is essential for the transportation of their staff on a daily basis and as such Westbus Fiji Limited was granted approval to provide that service'.*

[45] I consider this to be a rather casual attitude towards the performance of statutory duties by a public officer. In any event, neither the Appellant nor the Authority was able to confirm this assertion by producing the letter by which the purported approval/consent was granted by the Authority. Instead, a letter dated 30 May 2016 from the then CEO of the Authority addressed to the Appellant has been produced (which says that it is in response to a letter of the Appellant dated 12 May 2016) by which the CEO of the Authority says that certain information in their possession is missing but; *'However we can confirm that LTA was **involved in** approving vehicles to transport staff of Intercontinental Hotel which basically is in the provisions of the LTA Act'*(emphasis added).

[46] The learned counsel for the Respondent submits that a license could not have been issued in view of the freeze imposed by the Cabinet and has also pointed out that in any event, the Appellant has failed to prove before the Tax Tribunal that it had obtained the purported approval/consent.

[47] With regard to this aspect, the Tax Tribunal has held that *'Within paragraph 16 of the Affidavit of the former LTA Chief Executive Office, Mr. Tuinaceva filed on 2 February 2018, it is stated that the Applicant provided its services to the hotel in question, pursuant to a consent issued on 2 February 2009. Yet nowhere in the materials does that consent*

appear to be located' (at para 30 of the Decision). On this issue, the learned High Court Judge says that *'In any event there could not be any in the light of the Cabinet Decision on 15 March 2011 imposing a temporary freeze on the further issuance by the LTA of 'All public Service Vehicle (PSV) Licenses in Fiji"* (at para 20 of his Judgment).

[48] All parties including the former CEO of the Authority admit that there was a freeze in the issue of new licenses in view of the Cabinet Decision and therefore no new licenses were issued and in particular, that a road contract license has not been issued to the Appellant. The Appellant seeks to overcome this obstacle by relying on the purported consent/approval of the Authority. It is specifically admitted by the former CEO of the Authority that the Authority did not issue any new licenses to anybody in view of the Cabinet Decision. If so, could it have in the alternative granted approval or consent to the Appellant? I think not.

[49] The learned Counsel for the Appellant submitted that the Authority has the power to enable the provision of services by operators of public service vehicles despite the freeze brought about by the decision of the Cabinet of Ministers. He relied on Sections 8 and 9 of the LTA in support of his argument that the Authority is conferred with the power to do what is necessary to give effect to its mandate although such power may not be explicitly stated in the Act. He has cited several authorities to buttress his submission. However, I find the context here to be different since this is a situation where the power to issue a license has been explicitly conferred but there existed a fetter on such power in view of the cabinet decision. That contention therefore in my view is misconceived and it must also be pointed out that the law does not allow a public authority to do indirectly what it cannot do directly. The Authority could not circumvent such barrier on grounds of expediency. In any event, as stated earlier, there was no evidence that such a step had been taken.

[50] The very fact that the Appellant applied for a road contract license at the very inception, is a clear admission that it was a pre-requisite for the provision of the agreed services to the Hotel. The preamble to the RTA states as follows; *'An Act to establish the Land Transport Authority,* ***to regulate the registration and use of vehicles****, the licensing of drivers of vehicles and the enforcement of traffic laws and to provide for the repeal of the Traffic Act and for related matters'*(emphasis added). All vehicles therefore will have to be used in

accordance with the provisions of the LTA and if any vehicle has been used for the provision of any services in contravention of its provisions, such services cannot be legally construed to be services ('carriage' in this instance) constituted for the purposes of the LTA. It therefore is clear that the services that the Appellant provided to the Hotel cannot legally be termed as 'carriage' as constituted by the Land Transport Act and consequently would not be entitled to be zero-rated for purposes of VAT in terms of paragraph 27 of Schedule 2 of the VAT Act. The first to the sixth Grounds of Appeal therefore will fail.

Deed of Agreement dated 07 January 2011

[51] Ground 7 as formulated by the Appellant revolves around the interpretation of the provisions contained in the Deed.

[52] As stated herein before, the Appellant has steadfastly maintained that it was entitled to the concession contained in the Deed in respect of the services it provided to the Hotel.

[53] It must be re-iterated that the determination as to whether the said services were entitled to be zero-rated for purposes of VAT has to be looked at purely in terms of the applicable law, namely the VAT Act. It would not be conceivable to presume that an agreement entered into between parties could override a statutory requirement. Nevertheless, I will venture to consider the impact of that Deed since the Appellant contends that it relied on its contents.

[54] A perusal of the Deed makes it clear that the intention of the Government was to provide relief to the general public who travel by public transport, in the wake of the increase in VAT. It was inevitable that bus operators transfer the increased VAT on to commuters and hence the Government has stepped in to ensure that *'there will be no increase in bus fares currently paid by the travelling public'* and in return the *'VAT will be zero rated for all bus fares with effect from 1 January 2011'* (clause 2 of the Deed).

[55] The High Court as well as the Tax Tribunal have gone into the aspect as to whether the concession the Government intended to provide through the Deed would extend to the services the Appellant provided to the Hotel in terms of the three Agreements. A careful examination of the terms of those Agreements reveal that it was not a public transport

service that had to be provided for a fixed fare to the general public but a private transport service provided exclusively to the employees of the Hotel for a fixed rate *'per run'* (as per Schedule 1 of the Agreements) for which payment was to be made directly by the Hotel to the Appellant. It would not be possible to construe that the Government intended to offer the concession it extended by virtue of the Deed to a select group of persons, namely the Hotel's employees, who clearly do not belong to the category envisaged under the Deed.

[56] A salient feature of the VAT regime as stated earlier, is that it is intended to apply to the ultimate consumer. What was sought to be done by virtue of the xero-rating was to pass on a benefit to that final consumer. In this instance the Deed sought to afford a benefit to the general travelling public as discussed above and not to the class of persons that get captured under the agreements the Appellant had with the Hotel.

[57] It is interesting to note that in the Agreement dated 01 June 2016, the service to be provided by the Appellant to the Hotel is described in a manner different to that of the two previous Agreements. In the 2009 and 2013 Agreements, it reads as; *'The agreement for transportation of staff is a charter for the* ***exclusive use of all employees associated with Intercontinental Fiji Beach Resort & Spa'*** (emphasis added. clause 1.2) whilst the 2016 Agreement states that *'The agreement for transportation of staff* ***is an exclusive 'public service'*** *to all employees* ***and employees of any affiliated business operating near the premises of the Customer by the Client'*** (emphasis added). The 2016 Agreement has been entered into after the Respondent's initial assessment of the Appellant for purposes of VAT. The Appellant may have entertained a belief that a change of that nature was desirable if it were to offer an interpretation beneficial to it in terms of the Deed. That appears to be a futile and belated exercise.

[58] It therefore is clear that a proper interpretation of the provisions of the Deed would result in the conclusion that the Appellant was not entitled to the concession that the Government intended to provide to the general public who travel by public transport in terms of the Deed. Thus, the seventh ground of appeal raised by the Appellant must also fail.

[59] The Appellant in its written submissions has cited several authorities to impress upon this court, the approach it should adopt in the interpretation of the statutory provisions relevant

to this matter. It has pointed out the different approaches from a 'literal interpretation' to a 'purposive interpretation' to a 'golden rule of interpretation' as postulated by the learned judges who decided those cases.

[60] The Appellant relies on the case of **Northern Bus Operators Association v Attorney General of Fiji [1982] FJSC 61: Civil Action 547 of 1982** where the Supreme Court has cited with approval the decision of **Morton v The Union Steamship Company of New Zealand Limited [1951] 83 CLR 402,** wherein the [Full] High Court of Australia has stated that ; *'The ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains. An important consideration is the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned'*

[61] That, I must confess is the approach I have strived to adopt in this instance. I have borne in mind the intention of the Government when it sought to confer the concession through the Deed in my interpretation of the provisions contained in the VAT Act, particularly since it was just a week after entering into the Deed that the Government introduced the amendment to the VAT Act, presumably to align the VAT law in line with the undertaking contained in the Deed.

[62] I have also been mindful of the oft cited case of **Cape Brandy Syndicate v IRC(1921) 12 T.C.,** where Rowlatt J expressed the following view;

> *'Now of course it is said and urged that in a taxing Act clear words are necessary to tax the subject. But it is often endeavoured to give to that maxim a wide and fanciful construction. It does not mean that the words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts. It means this, I think; it means that in taxation you have to look simply at what is clearly said. There is no room for intendment; there is no equity about a tax; there is no presumption as to a tax; you read nothing; you imply nothing, but you look fairly at what is said clearly and that is the tax'.*

[63] The case of **Inland Revenue Commissioners v Westminster (Duke)** [1936] AC 1, also becomes relevant. Lord Russel of Killowen opined that;

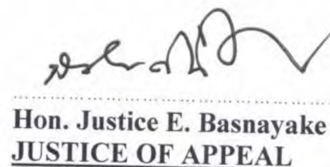
*"I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if, in accordance with a court's view of what it considers the substance of the transaction, the court thinks that the case falls within the contemplation or the spirit of the statute. The subject is not to be taxable by inference or by analogy, but only by the plain words of the statute applicable to the facts and circumstances of the case. As Lord Cairns said many years ago in Partington v Attorney – General [1903] A.C. 299, 'As I understand the principle of all fiscal legislation it is this**: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be.** On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be*" (emphasis added).

Conclusion

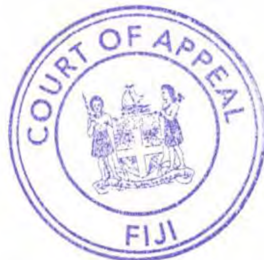
[64] For the reasons stated by me above, I hold that the services provided by the Appellant to the Hotel are not entitled to be zero-rated in terms of the VAT Act. I see no reason to set aside the judgment of the High Court.

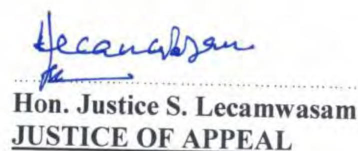
Orders of Court

1. Appeal dismissed.
2. In all the circumstances, I make no order as to costs.

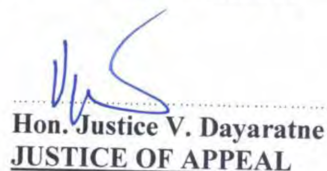


Hon. Justice E. Basnayake
JUSTICE OF APPEAL





Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL



Hon. Justice V. Dayaratne
JUSTICE OF APPEAL