IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 245 of 2016

BETWEEN : **WESTBUS (FIJI) LIMITED** a duly incorporated company having its registered office in Lautoka.

PLAINTIFF

AND : **FIJI ISLAND REVENUE & CUSTOMS AUTHORITY** a body corporate duly constituted under the Fiji Revenue & Customs Authority Act 1998 and having its registered office at Revenue House, 1 Ratu Sukuna Road, Suva, Fiji.

DEFENDANT

Counsel : Ms. Dotton for the Plaintiff
Mr. Verebalavu for the Defendant

RULING

INTRODUCTION

1. The applicant is asking this Court to injunct or stay a process set in motion by the Fiji Islands Revenue & Customs Authority (**"FIRCA"**) to recover outstanding VAT assessed against a company namely Westbus (Fiji) Limited's (**"WFL"**) until determination of the issues between the parties. The process in question is the issuing of a Garnishee Notice to the Intercontinental Resort & Spa (**"Intercon"**).

2. There is a contract between WFL and Natadola Bay Resort Limited (**"NBRL"**) trading as Intercon whereby WFL is to provide transport service for staff of NBRL. FIRCA's Garnishee Notice seeks to divert monies payable to WFL from the said contract towards the settlement of its (WFL's) assessed VAT liability.

THE CONTRACT

3. As far as I can gather from an affidavit of Vijendra Kumar sworn on 16 November 2016, WFL and Intercon first entered into such an agreement on 01 April 2013 for 2 years. A second Agreement was signed on 01 June 2016 to commence from 01 April 2017 for three years. It is not clear to me whether there was a contract governing the period in between the above two.

4. Notably, clause 1.2, 3 and 6 of the 2013 agreement provide that:

> 1.2 **THE** agreement for transportation of staff is a charter all employees associated with InterContinental Fiji Beach Resort & Spa.
>
> 3.0 **ACCOUNTS** will be paid by the Customer (i.e. WFL) within 30 (thirty) days of issue of the invoice.
>
> 6. The Supplier will immediately, in writing, report any matters of concern relating to safety, staff behavior or scheduled runs to the Director of Human Resources or General Manager.

5. Clauses 2, 4, 5 and 10 of the 2016 agreement provide as follows:

> 2. The agreement for transportation of staff is an exclusive "public service" to all employees of the Customer, and employees of any affiliated business operating g at our near the premises of the Customer, as approved by the Client.
>
> 3. .....
>
> 4. All services will be undertaken in accordance with the approved schedule which will subsequently be billed accordingly on the monthly statement.
>
> 5. Accounts will be paid by the Customer within 30 (thirty) days of the invoice date.
>
> .....
>
> 10. The Supplier will immediately, in writing, report any matters of concern relating to safety, staff behavior or scheduled runs to the Director of Human Resources or General Manager.....

FIRCA'S POSITION

6. FIRCA had been reviewing WFL's VAT returns. Following a desk audit in 2016, it had found some discrepancies in the WFL's VAT accounting.

7. On 26 May 2016, FIRCA would write to WFL to communicate its findings that WFL *inter alia*, had been carrying out a charter service for Intercontinental Resort in the coral coast.

8. FIRCA had reached that conclusion on the basis of the agreement (see above). The finding that WFL was carrying out a charter service meant that WFL would not be entitled to the benefit of zero-rating on VAT collected from bus fares.

9. The benefit of zero-rating is only available on fares collected from a bus service operating as a public service vehicle.

10. This benefit is conferred by section 27 of the Second Schedule of the VAT Decree 2009.

11. FIRCA's letter to WFL asserted that Westbus had issued VIP notices for its Charter Services and had collected VAT for these.

12. Westbus' VAT returns for the period January to December for the years 2009, 2010, 2011, 2012, 2013, 2014 and 2015 as well as for the period January to March for the year 2016 had failed to declare output tax on income received from its said charter service. Instead, WFL had been zero-rating its sales.

13. The total output tax (sales) omitted by Westbus for the above period was $522,415.73.

14. When Westbus did not settle the assessed omitted output (tax) sales of $522,209.59, FIRCA, on 14 November 2016, would issue a GARNISHEE Notice to Intercontinental Fiji Golf Resort & Spa pursuant to section 27 of the TAX ADMINSTRATION DECREE (No. 50) of 2009.

THE GARNISHEE NOTICE

15. The said Notice said thus:

> 14 November 2016
> The Assistant Financial Controller
> Intercontinental Fiji Golf Resort & Spa
> Private Mail Bag
> Nadi.
>
> Dear Sir/Madam
>
> 1. In accordance with the provision of Section 27 of the TAX ADMINISTRATION DECREE (DECREE NO 50 of 2009) which is printed at the back thereof and forms part of the notice – you are required to deduct or extract $522,209.59 from any amount payable, or any amount to become payable by you within twelve months from the date of this notice to the registered person whose name is shown below.
> 2. The amounts so deducted must be paid to the District Office issuing this demand within three (3) days. Please show the full name and the Tax Identification Number (TIN) of the registered person in each case with the amount deducted.
> 3. Deductions must be made notwithstanding any objection by the registered person.
> 4. If the registered person claims to have paid the amount required to be deducted he should be advised to communicate with this Department immediately in order that you may be given written notice of revocation. This notice remains operative until either the total amount specified is deducted and paid or you receive from this Department a Notice of revocation.
> 5. Please acknowledge this notice by completing and returning that annexed slip.
>
> Yours faithfully,
>
> .....
> for Chief Executive Officer
> Westbus (Fiji) Limited
> P.O. Box 437
> NADI.

Ex-Parte INJUNCTION

16. On 18 November 2016, I did grant an urgent *ex-parte* injunction on the application of Rams Law, the solicitors for WFL.

17. That Order restrained FIRCA from enforcing a Garnishee Notice that it had issued to Intercontinental Fiji Golf Resort & Spa and from taking any other form

of enforcement proceedings against WFL until I have dealt with the application *inter-partes*.

***Inter-Partes* HEARING**

18. The application was heard *inter-partes* before me on 05 December 2016. The onus was still on WFL then to convince this Court that the injunction should continue as an interim injunction until determination of the substantive matter. To succeed in this regard, WFL must show:

(i) that there is a serious issues to be tried.
(ii) that damages are not an adequate remedy.
(iii) that the balance of convenience lies in favor of continuing the injunction.
(iv) that there are special factors favoring so.

PARTIES' SUBMISSIONS

Charter Service Or Public Service Vehicle?

19. WFL refutes the allegation that it was operating a charter service, let alone that it had failed to declare output tax on income derived from charter service. It concedes that it was issuing VIP invoices and was collecting VAT while zero-rating on its VAT Returns to FIRCA. However, WFL relies on a Deed of Agreement between the Government of the Republic of Fiji and the Fiji Bus Operators Association dated 07 January 2011 which allows bus operators to zero-rate on all bus fares with effect from 01 January 2011 and to retain the 12.5% VAT collected thereon.

Deed of Agreement Between Government & FBOA

20. The relevant clauses of the said Agreement are as follows:

> 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 the bus operators will no longer be payable to Fiji Islands Revenue & 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.

21. Apparently, the above arrangement has since been "formally" incorporated in section 27 of the Second Schedule of the VAT Decree.

Some Procedural Issues

22. Ms. Dotton firstly, said that the Garnishee Notice to Intercon was an irregular and defective notice. She submits that there is a prescribed minimum amount which can be deducted from any amount payable to the taxpayer. That amount is 20% of the amount of payment due to the taxpayer "as remuneration". FIRCA's Garnishee Notice to Intercontinental demanded upfront payment of the full amount purportedly owing. The Notice therefore did not comply with this and, accordingly, the decision of the CEO was *ultra vires* and an abuse of power.

23. Mr. Verebalavu submits that Ms Dotton has not identified which particular provision she relies on. He presumes that it is section 27(5) of the Tax Administration Decree 2009. He submits that section 27(5) applies only to payments to individuals such as salary, pensions or other employment

remunerations. In WFL's case, the income in question derives from its normal course of business and is not caught under section 27(5).

24. Section 27(5) provides:

> (5) If a notice served under subsection (3) requires a payer to deduct amounts from pension, salary, wages, or other remuneration payable at fixed intervals to the taxpayer, the amount required to be deducted by the payer from each payment must not exceed 20 per cent (20%) of the amount of each payment of pension, salary, wages, or other remuneration.

25. I agree with Mr. Verebalavu's submission.

26. Ms Dotton also submits that the Notice was not signed personally by the CEO of FIRCA. Rather, it was signed by an unidentified person. She argues that section 27 requires that the said Notice be signed by the CEO. She relies on **Hira v Reginam** [1967] FJLawRp45; [1967] 13 FLR 176 92 September 1967) as authority that there must be strict proof of authority to sign a demand notice on behalf of the Commissioner of Inland Revenue.

27. Ms Finau Tabualevu, the Acting Manager for the Debt Management Unit at FIRCA, Lautoka deposes that she was the one that issued the Garnishee Order to Intercon on 14 November 2016. She annexes to her affidavit an Instrument of Authorization signed by the CEO of Fiji Revenue & Customs Authority effective from 01 January 2010. The said Instrument details a host of various powers which the CEO has delegated to various specified officers. Notably, he has delegated the power to issued a garnishee notice under section 27(3) to *inter alia* the Asst Manager DMU Lautoka.

28. The said Instrument of Authorisation is issued pursuant to section 27(4) of the Fiji Revenue & Customs Act 1998.

(4) Notwithstanding anything in any other written law, **the Chief Executive Officer may delegate to any other officer or employee of the Authority any of his powers under this Act or under the laws specified in the First Schedule** except the power of delegation under this subsection and the power to compound offences in section 59 of the Tax Administration Decree.

29. The laws specified in the First Schedule to the 1998 Act includes *inter alia* the Tax Administration Decree and also the VAT Decree. Under section 2 of the said Decree, *"tax"* is defined as meaning *"an amount payable under a tax law"*. *"Tax law"* is defined as meaning *"a law listed in the Second Schedule"*. The Second Schedule includes *inter alia* the Value Added Tax Decree. *"Taxpayer"* means in the case of VAT, a registered person or any other person liable for VAT.

30. Section 27 (3) of the Tax Administration Decree which the CEO has delegated by the above Instrument provides:

(3) (a) If this section applies, the CEO may, by notice in writing, require a payer[1] in respect of the taxpayer to pay the amount specified in the notice to the CEO, being an amount that does not exceed the amount of tax that has not been paid or the amount that the CEO believes will not be paid by the due date.
(b) the notice in subsection (3) (a) shall remain effective for a period of 12 months from the date of its issue.
(4) A payer must pay the amount specified in a notice under subsection (3) by the data specified in the notice, being a date that is not before the date that the amount owed to the taxpayer becomes due to the taxpayer or held on the taxpayer's behalf.

31. I accept that Ms Tabualevu is a properly authorised officer to issue a Garnishee Notice and that the said Garnishee Notice was properly issued under section 27(3) of the Tax Administration Decree. No issue was raised before me as to whether the said Notice was sustainable given that it was issued to the business

[1] "Payer" is defined in section 27(1) as:
27. — (1) In this section, "payer" means a person who —
(a) owes money to a taxpayer;
(b) holds money, for or on account of, a taxpayer;
(c) holds money on account of some other person for payment to a taxpayer; or
(d) has authority from some other person to pay money to a taxpayer.

name of the company (i.e. Intercon) rather than to the company (i.e. NBRL). I say no more on this point.

Does Court Have Power To Injunct A Tax Recovery Process Set In Motion By the CEO FRCA?

32. Fiji's Tax Administration Decree zealously protects the finality of a "tax decision". This is provided for under section 14.

> *Finality of Tax Decisions*
>
> 14. — (1) Except in proceedings under Division III of this Part, a tax decision and all material particulars must be deemed to be conclusive and correct, and any liability of the person being assessed or notified of a tax decision will be determined accordingly.

33. A "tax decision" is defined in section 2 as:

> "tax decision" means –
>
> *(a)* a tax assessment; or
> *(b)* in relation to a tax law, a decision on any matter left to the discretion, judgement, direction, opinion, approval, consent, satisfaction, or determination of the CEO, other than such decision made in relation to the making of a tax assessment

34. The term "tax assessment" is defined as meaning "an assessment or determination listed in the First Schedule". The First Schedule defines "tax assessments" as including **"an assessment of VAT....."**.

35. An assessment, once completed, is final and can be disturbed only by a process known to law.

36. The Act makes provision under Division III for objections and appeals to a tax decision.

37. Section 21 (3) and (4) provide:

> (3) Subject to subsection (4), the tax due under a tax assessment is payable notwithstanding that an objection, application for review by the Tax Tribunal, or notice of appeal to the Tax Court has been lodged by the taxpayer in respect of the assessment.

(4) The CEO may, upon application in writing by a taxpayer, agree to stay recovery of the tax in dispute under a tax assessment.

38. There is nothing before me to suggest that WFL did ever apply in writing to the CEO to stay recovery of the assessment made against it.

39. In **Eagle Ridge Investment (Fiji) Ltd v Commissioner of Inland Revenue** [2008] FJHC 396; HBC0563. 2007 (7 October 2008), Mr. Justice Jiten Singh was dealing with an application to stay a garnishee order that had been issued by the Commissioner of Inland Revenue. Both counsel cited the principles in this case in their written submissions.

40. The plaintiff in that case was disputing liability for tax, not quantum.

41. Singh J observed that the Commissioner of Inland Revenue had a duty to assess and then collect tax imposed by the relevant tax legislation. Once a notice of assessment is served on a taxpayer, it creates a legal liability on the taxpayer to pay tax. That legal liability remains until it is set aside on objection or appeal and the courts, accordingly, do take the view that tax is due and owing until the assessment is set aside. The fact that a taxpayer has lodged a review with the Court of Review is not a fetter upon the Commissioner to receive or recover tax, nor does it suspend a taxpayer's obligation to pay. A challenge on quantum is not enough, nor is a challenge on liability. The fact that commissioner may have varied his assessments is not enough either.

42. The provisions I have cited above regurgitate the same principles.

43. In **Eagle Ridge**, Singh J said that an applicant seeking to invoke the Court to exercise its discretion to injunct a recovery process set in motion by the Commissioner must therefore have very compelling reasons. To succeed, he or

she must show abuse of office by the Commissioner or extreme hardship to the taxpayer.

44. The affidavit of Vijendra Kumar sworn on 16 November 2016 deposes at paragraphs 8 and 9 that Westbus derives approximately $50,000 per month from its services to Intercon. The Notice demands payment of $522,208.59 within 12 months which is equivalent to **$43,517.38** per month. If the Garnishee is enforced, Westbus will not be able to repay its financiers of its loan to the tune of $4,557,000-00 which is secured by bills of sale over its omnibuses. Westbus is servicing this loan at the rate of **$47,906.61**. To enforce the Garnishee Order will mean that Westbus operation will cease entirely. Westbus' drivers will also suffer in that they will not be paid.

45. I marvel at WFL's ability to service its loan at $47,906.61 for an operation for which it receives $43,517.38 per month and yet, according to Finau Tabualevu's affidavit, is still generating significant sales from the Intercon contract.

46. Mr. Verebalavu submits that Westbus has not demonstrated abuse of office or extreme hardship such as to warrant the interference of the Court in the lawful exercise of FIRCA's statutory functions.

Serious Issue To Be Tried

47. The basic issue is whether Westbus has been operating a charter service or whether it was deploying its omnibuses as public service vehicles in its business arrangement with Intercontinental. As far as I can gather from the provisions of the contract cited above, WFL has been providing a bus service exclusively for staff members of Intercon. That service is paid for by Intercon at a price which

Intercon and WFL had agreed to by contract. There is no payment of a "bus fare" involved on the part of the employees for whom the service was being paid for by their employer.

48. The provisions of the Land Transport Act will also have to be examined to assist in the determination of this issue.

Would Damages Be An Adequate Remedy?

49. As I have said above, the scheme of the tax legislation is to give the Fiji Revenue & Customs Authority such wide powers in the public interest. The Courts are very slow to interfere in the exercise of the Commissioner's statutory powers. A taxpayer who disagrees with quantum or liability may still recover any payment made on account of a wrong assessment, but a dispute as such per se is usually not enough reason for any Court to act. In other words, a taxpayer will always be able to recover in damages if it comes to that but he or she must be able to demonstrate abuse of power and/or extreme hardship in order to persuade any court to interfere, so a lot turns eventually on whether or not he or she can demonstrate extreme hardship.

Balance of Convenience

50. The prejudice likely to be suffered by Westbus must be balanced against the very important public role that the FIRCA serves.

51. Ms Tabualevu deposes that WFL has been declaring significant sales in their VAT Returns and that the company, accordingly, is able to settle its assessed Vat liability.

52. Ms Dotton annexes evidence to the effect that WFL owns some unencumbered real property upon which FRCA could levy execution instead of the Garnishee Notice. I am of the view that this only goes to show the ability of WFL to pay for its assessed VAT liability as the said property could be applied as security to raise funds for the settlement of assessed VAT liability or it could be sold by WFL and the proceeds of sale applied to settle the same.

Other Consideration

53. If, in the event WFL were to succeed in its argument that it was indeed not running a charter service, it could always recover the amount paid pursuant to the Garnishee Notice from FRCA.

CONCLUSION

54. The injunction granted *ex-parte* on 05 December 2016 is hereby dissolved. Costs to the respondent which I summarily assess at $1,000 (one thousand dollars only).

55. Case adjourned to Monday 13 February 2017 for mention at 10.30 a.m.

.....

Anare Tuilevuka
JUDGE
30 January 2017.