IN THE TAX COURT OF THE HIGH COURT OF FIJI
AT SUVA

HBT Appeal No **1 of 2015**

IN THE MATTER of the Decision of the Tax Tribunal on the 6th January 2015

IN THE MATTER of the Value Added Tax Decree 1991

IN THE MATTER of Section 107 of the Tax Administration Decree 2009 (Decree 50 of 2009)

BETWEEN: EXPORT FREIGHT SERVICES LIMITED

APPELLANT

AND: CHIEF EXECUTIVE OFFICER, FIJI ISLANDS REVENUE AND CUSTOMS AUTHORITY

RESPONDENT

Coram	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr Richard Naidu, Ms N. Basawaiya with him, for the Appellant Ms F. Gavidi for the Respondent
Date of Hearing	:	18 August 2015
Date of Judgment	:	1 June 2017

JUDGMENT

1. Before me is the Appellant's Notice of Appeal against the decision (Decision) of the Tax Tribunal on the 6th January 2015, seeking the following Orders:
   (1) That the Decision be set aside.
   (2) That the amended assessments issued on 23 August 2013 for the periods ending December 2010, December 2011 and December 2012 (Amended Assessments) be revised or set aside.
   (3) That the Respondent (Revenue) refund the sum of $151,528.50 being VAT collected under the Amended Assessments.
   (4) That the Revenue pay interest on the sum of $181,834.40 (including $30,305.70 paid as penalties) from the date of receipt of the Appellant's payments.
   (5) That the Revenue pay the costs of this Appeal and of the Application for Review.

2. The Grounds of Appeal include the following:
   (1) The Tribunal erred in concluding that para 15 of the Second Schedule of the Value Added Tax Decree 1991 (Decree) was relevant to the interpretation of para 10 of the Second Schedule (on which the Appellant relies) leading to a failure to understand that the Appellant was a transport provider and NOT an entity providing services to transport providers.
   (2) The Tribunal failed to comprehend that VAT is a tax on supply by reference to the value of that supply, such that "direct" costs to the Appellant in making that supply are irrelevant to the question of whether VAT is or is not to be charged at zero per cent on that supply.
   (3) The Tribunal erred in holding that the Appellant was a broker of a transport supply or service when it was a supplier of transport services.
   (4) The Tribunal erred in taking no account of the treatment by the tax authorities of Singapore and Australia of the services of freight forwarding companies and that it is alien to the principle of VAT to charge VAT on a profit margin of the supply when VAT is charged on the total value of the supply in accordance with s.15 of the Decree.

3. At the hearing, Counsel for the Appellant submitted that freight forwarders should be zero rated. The Appellant is a forwarder handling imports of goods. The nub of the issue is international freight. The Revenue says the Appellant is not a supplier but a facilitator of services. He said freight forwarders are different from shipping agents as they are principals. The essence of VAT (s.15) is that it is a tax on supply. The Tribunal says VAT is charged on the margin that the Appellant passes to the customer. The Appellant is a provider and entitled to the benefit of zero rating. It is asking for interest at the rate of 12.5% p.a for it's not having the use of the tax paid.

4. Counsel for the Revenue then submitted. She said VAT is a tax on the supply of goods and services and is leviable under para 15 and not para 10 of the Schedule. The Revenue has disallowed the margin and says the mark up is subject to VAT and the international freight cost is zero rated. The mark up is subject to VAT, while the actual cost is zero rated. The Revenue says the Appellant is a facilitator and that is why they looked at para 15 and not para 10. They should not be paying interest on any refund, relying on s.21(3) of the Tax Administration Decree.

5. The Counsel for the Appellant in his reply said para 15 is not what the Tribunal relied on.

6. At the conclusion of the arguments, I said I would take time for consideration. Having done so, I now proceed to deliver my judgment.

7. The Statement of Agreed Facts contain the following facts which I consider are relevant:
(1) The Appellant is a freight forwarder.
(2) It is not the owner or charterer of the ship, but is purchasing space in the ship.

8. The AGREED ISSUES are whether the charges to its customers for international carriage of goods provided by it should be zero-rated under para 10 of the Schedule or the mark up should not be zero-rated because, as contended by the Revenue, the Appellant is not an actual provider of international carriage of goods.

9. I note the Second Schedule is marked as Zero-rated supplies (Section 2). Section 2 – Interpretation – states in (1) that Zero-rated supply means a supply described in the Second Schedule to this Decree. Para 10 thereof reads as follows:
The supply of transport services relating to the international carriage of passengers and goods-
(a) from a place outside Fiji to another place outside Fiji; or
(b) from a place in Fiji to a place outside Fiji; or
(c) from a place outside Fiji to a place in Fiji; or
(d) from a place in Fiji to another place in Fiji to the extent that the transport is by aircraft and constitutes "international carriage" for the purposes of the Civil Aviation Act.

10. The significant wording here is "supply of transport services". Of these words, only "services" is defined in section 2(1) of the Decree as "anything which is not goods or money".

11. S.3(1) of the Decree states "supply" has the same meaning as in s.2 of the Sale of Goods Act (Cap 230) where supply in relation to services includes "provide, render".

12. I therefore turn to the Oxford Advanced Learner's Dictionary of Current English to provide the definitions of the other words. "Service" means "something done to help or benefit another" and "transport" means "carry (goods, persons) from one place to another".

13. Therefore for present purposes I would define the wording alluded to in para 10 above as *providing a service to carry goods from one place to another.*

14. But I shall not stop there for the term "freight forwarder" also needs to be defined. The English Oxford Living Dictionaries defines this as "a company that receives and ships goods on behalf of other companies".

15. Having defined the words in issue it only remains to define the issue before me. It is this. Is the Appellant entitled to be Zero-rated under para 10 of the Schedule for the taxable activity carried on by it. If it is, then the sum collected under the Amended Assessment has to be refunded. If it is not, then the sum does not have to be refunded. In resolving this issue there is no need to resort to s.15 of the Decree.

16. The Court is reminded by the judgment of the Supreme Court, Fiji in Jamnadas & Ors and Commissioner of Inland Revenue [2003] FJSC 4 that "The primary task of a Court construing revenue legislation is to address itself to the statutory text".

17. To my mind, the lawmaker's intention behind para 10 of the Schedule with regard to the instant case appears to be, if a supplier is responsible for the international carriage of goods from a place outside Fiji to a place in Fiji then that supplier is entitled to have that activity, from start to finish, zero-rated for VAT.

18. Here the Appellant cannot claim it is doing the above. From the horse's mouth comes the salient evidence that the Appellant is only providing the service of transporting the goods from a port of Fiji to its customer's address in Fiji. It is merely a freight forwarder, or in its own words below, a broker.

19. The best evidence of this is to be found in the Bundle of Agreed Documents. The Appellant's Tax Invoice No 00052740 therein contains the following information:
    (1) The Consignor is Hisense International HK Co. Ltd.
    (2) The Consignee is Courts (Fiji) Limited.
    (3) The Broker is the Appellant.
    (4) The vessel/voyage is Itajai Express/317/157.
    (5) The origin is Ningbo, China.

(6) The container number is given.

(7) The destination is Suva, Fiji.

All the above, makes it crystal clear that the Appellant is not the shipper/transporter of the goods but only purchasing space in a ship , on its customers behalf for the carriage, of its customer's goods, from Ningbo in China to Suva in Fiji.

20. At the end of the day, accepting the Appellant's own description of its taxable activity it is as plain as a pikestall that it cannot come within the ambit of para 10 of the Second Schedule, and therefore cannot be entitled to receive a Zero-rating.

21. Finally, if I may say so, it is inexpedient to refer to or follow decisions made under different VAT or GST tax regimes, in other countries.

22. In the result, I shall affirm the Amended Assessments and decline to order the Respondent to pay interest to the Appellant as claimed.

23. The Appeal is hereby dismissed with no order as to costs both here and in the Tribunal.

Delivered at Suva this 1st day of June 2017.

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David Alfred
JUDGE
High Court of Fiji