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

Tax Court Appeal No: HBT 03 of 2016

IN THE MATTER of the Value Added Tax Decree 1991 as amended

AND IN THE MATTER of Sections 17, 82 and 88 of the Tax Administration Decree No. 50 of 2009

AND IN THE MATTER of an Appeal by Treasure Island Limited against the Objection Decision dated 22 January 2016

BETWEEN : **TREASURE ISLAND LIMITED**

Applicant

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

Respondent

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr. B.C Patel with Mr. C.B Young for the Applicant
Ms. S. Nasiga with Ms. F Gavidi for the Respondent

Dates of Hearing : 25 and 26 January 2017
Date of Judgment : 31 January, 2017

JUDGMENT

1. This is an Application by the Applicant for Review of an Objection Decision made by the Respondent (Revenue) dated 22 January 2016 (Decision) wholly disallowing the Applicant's Objection to the Amended Notice of Assessment dated 24 June 2015.

2. The Applicant seeks orders, inter alia, to set aside or vary the Decision and for the Revenue to refund to the Applicant the tax collected from it, on the following grounds.

   (1) VAT was not payable on the insurance payment received by the Applicant from Lloyds Underwriters, London because:

      (a) s. 3(8) of the Value Added Tax Decree 1991 (VAT) did not apply to a contract of insurance where the supply of that contract was zero rated. The contract was zero rated because the supply of services under it was performed by the insurer outside Fiji.

      (b) s. 3(8) of the VAT Decree did not apply as the supply of services under the contract was deemed to be made in England because the insurer belonged in that country.

   (2) On 22 May 2013, Revenue correctly ruled the insurance payment received by the Applicant would not be subject to VAT.

   (3) The Applicant relied upon and acted on the Revenue's ruling and spent all the monies received in capital expenditure and repairs to the resort which had been damaged by Tropical Cyclone Evans.

   (4) The Revenue could not withdraw their letter of 22 May 2013 (letter) pursuant to s.15 of the Tax Administration Decree 2009 (TAD) because that section did not apply since the letter did not contain a mistake and the mistake, if any, involved a dispute as to the interpretation of the law and the facts of the case.

(5) The letter was a private ruling made pursuant to s.64 and s.66 of the TAD and could not be withdrawn under s.67.

3. At the outset, if, I may say so, ground (3) is irrelevant because the payments received from the insurer were meant to be solely utilized for the repairs regardless of what the Revenue's ruling was.

4. I also note the leading Counsel for the Applicant had in the course of his oral submission expressly withdrawn reliance on ground (5) (private ruling).

5. Both sides had filed a Statement of Agreed Facts etc which included, inter alia, the following:

<u>Agreed Facts</u>

(1) The Applicant received $10,458,129.57 from Lloyds Underwriters of London (Lloyds).

(2) By the letter, Revenue confirmed the insurance payments received by the Applicant from Lloyds "will not be subject to VAT".

(3) By Notices of Amended Assessment dated 24 June 2015, Revenue assessed the Applicant for VAT on the $4,191,442.14 part of the monies received from Lloyds.

(4) The Applicant has paid the VAT charged in the total sum of $540,823.97.

<u>Issues</u>

(1) Is VAT payable on the insurance monies received by the Applicant from Lloyds.

(2) Is Revenue bound by its ruling dated 22 May 2013 (ruling) that the insurance monies would not be subject to VAT.

(3) Can Revenue withdraw its ruling if the letter did not contain a mistake, and the mistake, if any, involved a dispute as to interpretation of law and facts.

6. At the commencement of the hearing, Counsel on both sides agreed that the following were the only issues before the court:

    (1) Whether the insurance monies paid after Cyclone Evans in December 2012 are VAT zero rated.

    (2) Whether the proviso to s.3 (8) of the VAT Decree applied.

7. The Applicant's first witness was Ms. Lily Oi Kin Chow (PW1). She said she has been the Financial Controller of the Applicant since February 2014 and insurance matters came within her sphere. Insurance Holdings (Pacific) Limited (IH) were the insurance brokers of the Applicant since 2007. IH were retained to obtain insurance cover from Lloyds of London and the Applicant paid them their service fee.

8. At this juncture, Ms. Nasiga informed the Court that Revenue had no objection to the tendering of the entire bundle of Applicant's Documents (AD) as Exhibits 1 – 21.

9. PW1 continued, saying the payment of the premium to Lloyds was made through IH. Lloyds paid the Applicant through its London brokers, Bennet Gould & Partners Limited (BG) directly into the Applicant's bank account. BG is based in London. A total of $4,191,442.14 was received in October and November 2013 for the business interruption claim. The dispute is on the VAT payable on the aforementioned sum which was originally zero rated. The total VAT paid was $540,823.97 (the sum).

10. At this time Ms. Nasiga informed the Court that sections 64, 66 and 67 of the TAD were still not in force (on 25 January 2017).

11. PW1 concluded her examination in chief by saying the Applicant seeks the sum back from Revenue with interest thereon from the date of payment to the date of repayment.

12. Under cross – examination PW1 confirmed the Applicant received $10,500,000 (less because of the exchange rate).

13. In re- examination PW1 said the actual amount was $10,458,129.57.

14. The next witness, PW2 was William Lecomte Higginson, the Chief Executive Officer (CEO) of Insurance Holdings (Pacific) Limited. IH was to insure the Applicant on the London market with good cover for natural disasters like cyclones. They went through BG in London who are for Lloyds. Exhibits 4 and 5 are BG's debit notes, as the premium is payable in London.

15. The premiums were paid by the Applicant, with the approval of the Reserve Bank of Fiji to send the premiums out of Fiji. The proposal was accepted in London by the underwriters. All the underwriters are not in Fiji. Lloyds do not have a branch nor an authorized agent in Fiji. BG has no branch and no agent in Fiji. IH were never the agent for Lloyds in Fiji nor the agent for BG in Fiji. IH did not receive any brokerage fees from Lloyds or BG. The insurance brokerage fees were paid by the Applicant. The insurance contract was made in London; the premium debit note was issued in London; the policy was issued in London and the premium was paid in London.

16. At this juncture Ms. Nasiga said Revenue are not disputing the policy was made in London.

17. PW2 continued that the claims were lodged, processed and paid in London. The claim was paid by BG in London into the account of the Applicant.

18. When cross – examined by Counsel for Revenue, PW2 said the premiums were paid by the Applicant, went through IH, for events occurring in Fiji. He confirmed payments went directly to the Applicant.

19. Counsel for the Applicant now informed the Court that the Applicant had no objection to the bundles of Respondent's Documents 1 and 2 being tendered as exhibits.

20. In re- examination PW2 said part of a broker's duty is to facilitate the payment of a claim. With this the Applicant closed its case.

21. The Respondent then opened its case. Its first witness, DW1, was Navitalai Koroi Bogitini, the principal auditor in Revenue's Transfer Pricing audit team. Their findings in this case were unique in that the Applicant is claiming zero rating on an insurance indemnity received. The amendment to the VAT Decree's s. 3(8) captures every indemnity payment and subjects it to VAT under s. 15 (1).

22. DW1 said Revenue disallowed zero rating based on s.3 (8) of the VAT Decree. Revenue felt the Applicant should not be zero rated. With regard to exhibit 13 page 2a, Revenue felt on the law that zero rating is wrong.

23. When cross examined by Counsel for the Applicant, DW1 said Revenue changed its position based on the VAT amendments, and relied on s.15 of the TAD to reverse their earlier decision.

24. The next witness was Joji Rabete Vaka, DW2, the Chief Auditor of Revenue. He said they were rectifying the contents of the letter of 22 May 2013 (Exhibit 9) (the letter) as it was a mistake. It was based on a section which had been repeated 3 years earlier. The zero rating is negated because the insurance payment is subject to 15% VAT. The mistake was to categorise the payment as two, when it was an insurance indemnity and the whole thing is subject to VAT. For a zero rate to apply the supply has to be captured in one of the paragraphs in the Second Schedule of the VAT Decree. The insurance payment comes within the ambit of s.3 (8) of that Decree which defines what is a supply. A Fiji company needs to export goods or services abroad to be zero rated.

25. Under cross – examination by Counsel for the Applicant, DW2 said after 2010, VAT is payable so the letter was a mistake. Paragraph 13 of the Second Schedule says services must be performed outside Fiji but it does not say the supplier has to be a Fiji supplier. If a Fiji registered taxpayer exports, that is zero rated. Under s.18 of the Decree the Applicant is deemed to be a supplier. Under s. 17, Lloyds belongs to the United Kingdom. DW2 said he only looked at the payment of the indemnity into Fiji. He did not agree that this was not subject to VAT. The Applicant is not in the business of insurance but in the hotel resort business.

26. While being re – examined, DW2 said for paragraph 13 of the Second Schedule to apply the Applicant must have performed the services outside Fiji in order for the indemnity payment to be zero rated. The Applicant did not perform any services overseas. If it did, payments received by the Applicant will be zero rated.
With that the Respondent closed its case.

27. Leading Counsel for the Applicant now submitted. He said Revenue had looked at the wrong section (s. 3(8)). They did not look at the proviso in 2012 when the contract of insurance was made. He asked the Court to set aside the Revenue's decision and to determine whether VAT is payable on the insurance monies coming from London to the Applicant.
The Court has to determine the time of supply. He said the place of supply is London under s.16(1) and (4). Withdrawal is not possible under s. 15. The only issue is, is VAT payable. The supplier is Lloyds in London and the services were provided outside of Fiji, on 26 and 27 September 2012, by the issue of the tax invoice by BG.

28. Counsel for the Applicant then submitted that the Court should not look at the Court of Appeal decision in Civil Appeal No. ABU 0099 of 2005S : Punjas Limited And Punja And Sons Limited – Appellants AND: Commissioner of Inland Revenue – Respondent

which he contended can be distinguished because s. 15 of the TAD came into force in 2009.

29. Leading Counsel now took over again and submitted that s. 15 of the VAT Decree is unique in being a form of statutory estoppel and the Court must give effect to it unless Parliament does something to it. He concluded by asking for interest on the refund of the VAT paid to the date of its repayment.

30. Counsel for Revenue then submitted. She said the first issue is whether VAT is payable on the insurance moneys. She relied on the Supreme Court decision in Civil Appeal No. CBV 0008 of 2007S : Ghim Li Fashion (Fiji) Limited - Petitioner AND Commissioner for Inland Revenue – Respondent.

31. She said VAT is payable on everything. The Applicant is the supplier. S. 18(1) (b) of the VAT Decree applies viz the time when the insurance money is received by the Applicant. S.18 (1) (a) does not apply because no tax invoice was issued by the Applicant. Therefore the date the Applicant received the insurance money is the earlier. The Applicant is in Fiji and the supply of services is in Fiji, and is by the Applicant to cover the loss suffered by it in Fiji in furtherance of a taxable activity. S. 15(1) of the VAT Decree at the material time applies a rate of 15%. The zero rate does not apply, because paragraph 13 of the Second Schedule is inapplicable as the Applicant did not export and did not perform any services outside Fiji.

32. Counsel continued that Exhibit 9 was a mistake because Revenue followed Ghim Li in dividing s. 3(8) into 2 categories. This should not have been done as that was based on the repealed s. 3(8). Exhibit 14 (the letter of withdrawal) stated Revenue made a mistake so it was withdrawing Exhibit 9. She said s.15 applied because Revenue should not have categorized payments into two since the new s. 3(8) came into force in 2010. S.15

applies because there was a mistake and it does not involve any interpretation of law. She asked for the Application to be dismissed with costs.

33. Counsel for the Applicant replied that there was no mistake because Revenue had stated business interruption and loss of revenue is not subject to VAT.

34. At the conclusion of the arguments, I informed that I would take time to consider my decision. Having done so I now proceed to deliver my judgment.

35. In embarking here on an exercise of decretal interpretation, I have as the lodestar what was said by the learned judges in the following three cases.

36. Lord Simonds in Russell (Inspector of Taxes) v Scott [1948] AC 433, said "There is a maxim of income tax law which, though it may sometimes be overstressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him".

37. Rowlatt J in Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 K.B at page 71 said "It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

38. Lawton LJ, in dicta in: Macarthys Ltd v Smith [1979] 3 All ER at 332 said "As the meaning of the words ... is clear, and no ambiguity, whether patent or latent, lurks within them, under our rules for the construction of Acts of Parliament the statutory intention must be found within those words".

I would pause here to state that I am not advised that a Decree is ipso facto to be construed in some other way than an Act. Therefore I would substitute "lawmaker's intention" for "statutory intention".

39.In the light of the decision I am reaching, it would be inexpedient to refer to the antipodean legislation and authorities cited by Counsel on both sides.

40. I have before me a Gordian knot, an unique case so Revenue says. According to the Applicant, Revenue cannot withdraw its ruling (that no VAT is payable) because it cannot fullfill the twin requirements of s. 15 viz (i) a mistake which is apparent from the record and (ii) the mistake does not involve a dispute as to the interpretation of the law or facts. Therefore it cannot rely on s. 15. According to Revenue those 2 requirements have been met, so s. 15 applies. However, unlike the knot before Alexander the Great, the knot here will be cut by the judicial pen.

41. A perusal of Exhibit 14 shows Revenue is stating that Exhibit 9 is "withdrawn as this is in line with Section 15 of the Tax Administration Decree 2009". In my view, Revenue is mistaken in relying on s. 15 to do this and Counsel on both sides are following along. This is because Revenue was not rectifying a mistake but withdrawing an earlier decision. S. 15 only allows Revenue to rectify a mistake by amending the letter. However, this is not the end of the matter.

42. In my opinion, just because the Revenue had made a mistake in relying on s. 15, does not by any means compel the Court to follow suit. Revenue should have and could still rely on the common law position as stated in the Punjas judgment.

43. In paragraph 88 of that judgment the Court said "(The Commissioner) cannot be encumbered by any previous position which he had taken up. He must be free to exercise his judgment and discharge his statutory functions as and when he thinks proper. In short, he is entitled to change his mind and take up a new position and disavow one that he has taken up previously".

44. I therefore find and I hold so that the Revenue has full entitlement to change its decision and that full entitlement has not been curtailed nor fettered in any way by its mistaken assumption that it was acting in line with s. 15 of the TAD.

45. Having cut the Gordian knot, the way is now clear for the Court to proceed to the nub of this matter, which is whether VAT is payable on the insurance moneys. The crucial section is s. 3(8) which I paraphrase as follows:

    If a registered person (undeniably the Applicant) receives a payment of insurance money, that payment if it relates to a loss incurred in the course of the Applicant's taxable activity (running a hotel resort) is deemed to be a consideration received for a supply of services performed by the Applicant on the day the Applicant receives the insurance money and in the course of the Applicant's hotel resort business unless the insurance money received was zero rated.

46. According to the Oxford Advanced Dictionary of Current English, "deem" is defined as "consider". Thus the intention of the lawmaker of the VAT Decree is to consider the insurance payment to be a consideration received for a supply of services. I see no reason for the Court not to give legal and judicial effect to this intention.

47. Here it is as plain as a pikestaff that the Applicant does not come within the ambit of paragraph 13 of the Second Schedule (which would otherwise have entitled it to have the insurance money treated by Revenue as a zero rated supply) because para 13 reads "The supply of services which are physically performed outside Fiji".

48. The Applicant's business and therefore the supply of services is solely that of a hotel resort. The hotel resort is operated exclusively in Fiji. Thus it is clear as daylight that the Applicant's services were not and could not be physically performed outside Fiji. It is a red herring to talk of the insurance premiums being paid in London or to say that Lloyds was the supplier or that the services came within the VAT net.

49. In the result, the Application is dismissed, the orders sought are not granted and there shall be no order as to costs.

Delivered at Suva this 31st day of January, 2017.

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David Alfred
JUDGE of the High Court of Fiji.