

THE TAX COURT ( HIGH COURT)  
AT SUVA, FIJI

Appeal HBT No. 4 of 2017

IN THE MATTER of the Tax Administration Decree 2009 and the Income Tax Act 1974

AND IN THE MATTER of an appeal pursuant to section 83(1) of the Tax Administration Decree 2009 and Section 18 of the Value Added Tax Act 1991 against the decision of the Tax Tribunal made on 15<sup>th</sup> August 2017 in Miscellaneous Action (VAT) No. 03 of 2016.

BETWEEN : CEE CEE VEE INVESTMENTS LIMITED

APPELLANT

AND : CHIEF EXECUTIVE OFFICER FIJI REVENUE & CUSTOMS SERVICE

RESPONDENT

CORAM : The Hon. Mr. Justice David Alfred

COUNSEL : Mr. V. M. Mishra for the Appellant  
Mr. S. Ravono for the Respondent

Date of Hearing : 15 October 2018

Date of Judgment : 5 December 2018

## JUDGMENT

1. This is an appeal against the decision of the Tax Tribunal made on 15 August 2017, seeking the following orders:
  - (1) The Appeal be allowed with costs.
  - (2) The Appellant pay Value Added Tax (VAT) on its land sales in the VAT period following completion of sale and not in the VAT period following payment of any deposit for a sale.
  - (3) Section 18(1)(b) of the VAT Decree does not oblige payment of VAT on the full purchase price in the VAT period following the payment of any deposit for a land purchase.
  - (4) A deposit paid for a land purchased is an earnest for performance or a guarantee by the Purchaser and does not attract VAT until the purchase is completed and settlement takes place.
  
2. The grounds of appeal are that the Tribunal erred:
  - (1) In holding the CEO of the Respondent (Revenue) was correct in law to decide that a deposit (which can be forfeited without a supply being made) attracts the application of S.18(1)(b) of the VAT Decree.
  - (2) In not holding that a deposit paid is an earnest for performance or a guarantee by a Purchaser that he will complete the purchase.
  - (3) In holding the decision to charge VAT on the full purchase price when a deposit is paid under a land sale agreement is correct in law and/or in compliance with accepted legal principles and practice.
  - (4) In rejecting the proposition that the supply in a land sale only takes place when the land has a title and is transferred at settlement or registration.
  - (5) In rejecting case law that a deposit cannot be treated as consideration for a land sale until settlement or registration of transfer.
  - (6) In holding that a supply of land can take place under S.18(1)(b) of the VAT Decree upon payment of any deposit irrespective of completion or transfer or handing over of possession.



- (7) In not taking into account that:
- (a) If there is default by a Purchaser in paying the full purchase price, the deposit is forfeited despite there being no supply of land and therefore not subject to VAT.
  - (b) Supply means handing over possession of the land.
  - (c) There are other decided cases.
3. The hearing commenced with Mr. Mishra submitting the Revenue charged VAT on the full purchase price and not on the deposit only. The deposit is not part payment of the purchase price unless the sale goes through. Here 2 agreements were tendered to the Tax Tribunal; the first went through and VAT went through; the second did not go through and the deposit was \$10,000 on a sale price of \$550,000. The Revenue said pay VAT on \$550,000 but it was not paid.
4. Mr. Ravono then submitted. He said the deposit is part of any payment that attracts VAT under S.18(1). Revenue says the trigger is the payment of the deposit to the supplier (vendor) and therefore VAT is 9% of \$550,000. Under S.3 of the Decree when the deposit is forfeited, VAT is 9% only of the deposit. He said the Australian legal position is different from that in New Zealand and Fiji. He concluded by saying the deposit is part payment of the purchase price.
5. Mr. Mishra replied that VAT should not be charged until the whole purchase price is received.
6. At the conclusion of arguments, I said I would take time for consideration. Having done so, I shall now deliver my decision.
7. I start by turning to the Copy Records of the proceedings before the Tribunal, and to the Decision of the Resident Magistrate. At para thereof 9 he states "The argument of the Applicant runs, that if a deposit is not payment for the land, then the supply of land cannot be deemed to have taken place." The Appellant relies on the Australian case of Commissioner of Taxation v Reliance Carpet Co. Pty Limited [2008] HCA 22 (22 May 2008)(Reliance). Thus it argues payment of tax on supply should coincide with the registered transfer of land (para 12).

8. The Revenue on the other hand takes the stand that payment of the tax is due and payable at the time of the deposit which forms part of the payment towards the acquisition of supply (para 14).
9. The Tribunal found that a deposit of the type paid to the Taxpayer must be regarded as falling into any payment received by the supplier for the purposes of S.18(1)(b) and the trigger for determining the time of supply and the obligation to meet the taxation (para 23). The Tribunal dismissed the Application.
10. To my mind, the pivotal issue is the judicial construction of a deposit in a land sale and purchase situation. So I turn to the Oxford Dictionary of Law, 9<sup>th</sup> edition, which defines “deposit” as “A sum paid by one party to a contract to the other party as a guarantee that the first party will carry out the terms of the contract. The first party will forfeit the sum in question if he does not carry out the terms, even if the sum is in excess of the other party’s loss. If the contract is completed without dispute the deposit become part payment.”
11. In plain English, a deposit is a sum paid by the Purchaser to the Vendor of the land. It will in the event be part of the consideration for the supply of the land.
12. I turn next to the Value Added Tax Act 1991, the crucial section of which is S18(1) which reads “Subject to this Act, a supply of goods and services shall be deemed to take place at the time-
  - (a) a tax invoice is issued by the supplier or the recipient; or
  - (b) any payment is received by the supplier; or
  - (c) the delivery of the goods and services take place,whichever is the earlier.
13. The operative word in (b) above is “payment”. This is defined by the Concise Oxford English Dictionary, 12<sup>th</sup> edition, as “1. the action of paying or the process of being paid. 2. an amount paid or payable.”
14. Thus in the present context, I opine the deposit as soon as it is paid to the Appellant triggers S.18(1)(b) into operation. The Supplier here is the Appellant who is the vendor of the land and the Purchaser has paid the Appellant the deposit as a guarantee that he will carry out the terms of the contract which



will result in the supply of the land to him. Any payment causes the imposition of VAT on the recipient/supplier. That is the intention of the legislature and that is what the Court will enforce. So it is a red herring to describe a deposit as not part payment or not a payment of the purchase price.

15. I have perused the Reliance authority and find it does not assist the Appellant's case here because there it is stated at para 10 of the Judgment of the High Court of Australia that "GST does not apply to the taking of a deposit as security for the performance of an obligation (unless the deposit is forfeited or is applied as consideration). GST is not attributable prior to forfeiture".

I am not advised this is the position here, regarding VAT.

16. I have found it unexpedient to trawl through the other cases cited by the Counsel which are from within and without these shores. Suffice it to say they do not assist a court in reaching a resolution of an issue arising from a piece of legislation governing the tax regime of Fiji. There of course maybe others who may consider that to be an useful exercise.

17. In the result I shall uphold the Tribunal's decision. I find and I hold that according to the tax regime of Fiji, the obligation to pay VAT arises when a deposit in a land transaction is paid. Consequently none of the Orders sought can be granted.

18. Accordingly:

- (1) The appeal filed on 12 September 2017 is hereby dismissed.
- (2) Both parties shall bear their own costs here and throughout these proceedings.

Delivered at Suva this 5<sup>th</sup> day of December 2018



David Alfred  
JUDGE  
High Court of Fiji