

THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action HBT No. 1 of 2018

IN THE MATTER of the
Fringe Benefit Tax Act 2012

AND

IN THE MATTER of Section
82 of the Tax Administration Act 2009

BETWEEN : VUVALE RESTAURANT (FIJI) LIMITED

APPLICANT

AND : CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND CUSTOMS
SERVICE

RESPONDENT

CORAM : The Hon. Mr. Justice David Alfred

COUNSEL : Mr. B. Solanki for the Applicant
Mr. S. Ravono for the Respondent

Date of Hearing : 17 October 2018

Date of Judgment : 4 December 2018

JUDGMENT

1. This is the Applicant's Application for Review whereby the Applicant seeks the following Orders:

- (i) To review or set aside the Objection Decision of the Respondent (Revenue) dated 10 November 2017 disallowing the 19 April 2017 objection by the Applicant to the Fringe Benefit Tax (FBT) Notices of Assessments for the periods October to December 2012, 2013, 2014 and 2015 demanding payment by the Applicant of \$104,625.23 (Disputed Sum) as FBT and penalties.
- (ii) That the Revenue withdraws or amends the FBT notices of assessment issued on 21 February 2017 for the periods October to December 2012, 2013, 2014 and 2015.
- (iii) That the Revenue refund to the Applicant all moneys resulting from the withdrawal or amendment of the assessment as ordered by the Court together with interest at a rate to be determined by the Court.

2. The grounds of the application are as follows:

The Objection Decision is wrong in law and in fact is not taking account of the following matters:

- (a) That section 7(1)(d) of the Fringe Benefit Tax Act 2012 (Act) exempts the meal and refreshment benefits provided by the Applicant to its employees.
- (b) That section 13 of the Decree does not apply since the Applicant's meal and refreshment benefit to its employees is an exempt benefit under Section 7(1)(d)
- (c) That the Applicant provides meals and refreshments (meals) to its employees at a 50% discount and the same must be consumed in the dining room provided by the Applicant at its Macdonald's restaurants.
- (d) That the said dining rooms are exclusively used by the Applicant's employees for the consumption of the said meals.

- (e) That apart from the dining room in each restaurant, the employees are not permitted to eat the meals in any other parts or areas of the restaurants including those designated for customers' use.
- (f) Employees are not permitted to consume the meals prepared or purchased from outside at the restaurant including the dining room.
- (g) That the penalties are excessive, unfair and unreasonable as the Applicant has not made any false or misleading statements to the Respondent.

3. The Statement of Agreed Facts and Issues (SAFI) include the following:

(a) FACTS

- (1) The Applicant provides meals and refreshments (meals) to its employees at a 50% discount, to be consumed in the dining room provided.
- (2) The dining room is exclusively used by the employees for the consumption of their meals provided.
- (3) The employees are not permitted to eat their meals provided in any other areas including those designated for its customers' use.
- (4) The employees are not permitted to consume the meals prepared or purchased from outside of the restaurants at the restaurants including in the dining room.

(b) ISSUES

- (1) Whether Section 7(1)(d) of the Act exempts the meals and refreshments (meals) benefits provided by the Applicant to its employees.
- (2) At what stage is the meal provided to the employee in terms of Section 7 (1)(d) of the Act.
- (3) Whether Section 13 of the Act does not apply since the meals benefit is an exempt benefit under Section 7 (1)(d) of the Act.

(c) DISPUTED ISSUE

- (4) Whether the Applicant made a false and misleading statement in its FBT Returns to justify the Revenue imposing penalties at 20% of the tax shortfall.
4. The hearing commenced with the Applicant's first witness, Marc McElrath (PW1). He has been the Managing Director of the Applicant for 23 years. He said the front counter staff serve customers, collect money and serve the food which the staff prepare in the kitchen. The staff are entitled to one meal per 8 hour shift and free drinks throughout. The staff order the meal from the front counter, which is served by the Manager and they take the meal and drink to the staff dining room where only they can consume meals. Other people cannot eat in the staff/crew room.
 5. Under cross-examination, PW1 said the crew room is the same as the dining room but in a different location. The meal is the same as that given to customers but drinks are smaller but the same as that given to customers.
 6. With that, the Applicant closed its case and the Revenue opened its.
 7. Their first witness was Keni Raceva (DW1) Principal Auditor in Revenue. He said they conducted an Audit on the Company and Directors in 2016. The staff were receiving staff meals. The Revenue advised the Applicant of discrepancies, that they never declared meals given to staff. The Applicant's tax team informed Revenue that the staff were not receiving the same kind of meals as that given to customers but were all from the same counter as that customers received their meals. Other fringe benefits were motor vehicle benefits, utility bills, mobile bills, and housing allowance paid by the Company. The FBT total of \$104,652.23 includes all undeclared meal and other benefits above stated.
 8. Under cross examination DW1 said the only issue is the meals and beverages provided to employees. The cost is reduced by the amount paid by the employee. There was a separate dining room but no cooking. The employee received food from the same counter as the customer. There is a separate eating area where the staff have meals at discounted rates.

9. In re-examination DW1 said staff have meals in area which is within the kitchen which provides meals to the customers.
10. The next witness was Epeli Tokaicaudua Naua (DW2). He is the officer in charge of the Objection and Review team. The key issue is the meals and refreshment provided to staff. The team looked into this and decided that the Applicant did not qualify under Section 7(1)(d) - non cash benefits.
11. The taxpayer did not provide a canteen or cafeteria or dining room. He said the staff gets the same food as the customer from the same counter as the customer but the only difference is he pays a lesser amount. A female staff of the Applicant said the staff can (1) bring food from home (2) only staff who could afford to buy the food benefited (3) staff who could not afford to pay did not have this benefit. The crew room is not a canteen, cafeteria or dining room but is the crew room mentioned in McDonald's policy.
12. Under cross examination, DW2 said he did not personally visit the restaurant. He agreed a dining room is a place where people eat their meals. A person could bring a meal from home and eat it in a dining room. Generally it is not necessary for cooking facilities in a dining room. He understood "provide" to mean food prepared in the dining room and solely for employees. Section 7(1)(d) does not refer to prepared food. He accepted that the law does not require food to be prepared in a dining room and does require separate preparation of food for staff and for customers.
13. In re-examination DW2 said no meal was provided in a canteen, cafeteria or dining room whereas McDonald refers to crew room and not to cafeteria, canteen or dining room.
14. With that, Revenue closed its case and both Counsel began their resubmissions.
15. Mr. Solanki said that because of SAFI, a crew room functions as a dining room within the legislation. Staff purchased food from a manager. Staff can only consume food in a crew room. Where the preparation is, is not a relevant determination of this issue. There is no requirement that the food for staff must be different from food for customers. A discount is not triggered by legislation. Customers cannot enter the staff dining room. Provide meals means allow meals in dining room.

16. Mr. Ravono then submitted. He said a crew room is not a dining room for the purpose of Section 7(1)(d). The penalty under section 46(2) of the Tax Administration Act (TAA) is imposed for other infringements e.g housing, utilities. The penalty was imposed because the taxpayer made a false statement. The FBT was correctly imposed because Revenue was correct not to exempt under Section 7(1)(d).
17. Mr. Solanki in his reply said the decision in *Punjas v. C.I.R* does not apply to SAFI as Revenue agreed to it and Revenue cannot resile from it. The penalty is 20%.
18. At the conclusion of the arguments, I said I would take time for consideration. Having done so, I now deliver my decision.
19. The pivotal issue here is what is a dining room? Revenue says the Applicant only had a crew room while the Applicant's witness (PW1) said under cross examination that a crew room is the same as a dining room but in a different location.
20. The SAFI says in 3 places that the Applicant provides meals and refreshments to its employees to be consumed in the dining room in each of the Applicant's restaurants in Fiji.
21. I note the SAFI is dated 19 June 2018 and signed by Mr. Solanki for the Applicant and Mr. Ravono for the CEO Revenue. Counsel had informed the Court on 18 April 2018 that they required one month to finalize the SAFI. On 21 June 2018, Counsel appeared and obtained the hearing date of 17 October 2018. Thus clearly the SAFI is the province of the High Court Rules and therefore in my considered opinion binding on both sides in this litigation. The province of the Revenue is to change its position regarding the tax imposition, the amount of tax and the incidence of tax. An issue on what is a legal matter can be agreed by parties. I am fortified in my decision by the Supreme Court Practice 1995 volume 1 at para 25/4 which states the purpose for admissions and agreements (O.25, r.4) is to save the cost of the parties. Any admission that can reasonably be made ought to be made. The result will be to save the costs of calling witnesses at the trial and to shorten the length of the trial and generally.

22. If I may say so, with respect Counsel for Revenue knew at the material time that “dining room” was in 3 places specifically mentioned in the SAFI.
23. Even more, I am satisfied from the evidence led on both sides that the other requirements set down in Section 7(1)(d) have been satisfied by the Applicant. S.7-(1) reads “The following fringe benefit are exempt fringe benefits - (d) a meal or refreshment provided in a canteen, cafeteria, or dining room operated by or on behalf of an employer solely for the benefit of employees and which is available to all non-casual employees on equal terms.”

These are:

- (1) The meal or refreshment (meal) is provided in a dining room operated by the Applicant.
 - (2) It is solely for the benefit of employees, the customers eating elsewhere in the restaurant.
 - (3) It is available to all employees on equal terms. The fact that some employees are unable to afford the discounted price meals provided by the Applicant and bring their own food does not, in my view detract from the fact that the meals are available to all non-casual employees.
24. At the end of the day the factual issues has been decided based entirely on the evidence at the trial and the pre-trial agreement in the course of the litigation by Counsel on both sides. It is therefore unexpedient for the Court to refer to any of the cases cited.
 25. In my view, the meals were provided in dining rooms and therefore qualify for exemption under S.7(1)(d) of the Act.
 26. In the event, I do not find that the Applicant had made a false and misleading statement regarding the meals and refreshments in its Fringe Benefit Tax Returns. Therefore in so far as the meals and refreshments fringe benefits are concerned, no penalties can be imposed under Section 46 of the Tax Administration Act 2009.
 27. In the result the Application for Review filed on 8 December 2017 is allowed and I make the following orders:

- (1) The Respondent shall refund the Applicant all Fringe Benefit Taxes and Penalties paid by it for the periods, October to December 2012, 2013, 2014 and 2015 where only the fringe benefits of meals and refreshments are concerned.
- (2) The payment under (1) shall be made by the Respondent without payment of any interest thereon.
- (3) Each party shall bear their own costs of these proceedings.

Delivered at Suva this 4th day of December 2018



David Alfred
JUDGE
High Court of Fiji