

## FIJI TAX TRIBUNAL



# Decision

Section 89 *Tax Administration Decree 2009*

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**Title of Matter:** COMPANY M (Applicant)  
v  
FIJI REVENUE AND CUSTOMS AUTHORITY (Respondent)

**Section:** Section 82 *Tax Administration Decree 2009*

**Subject:** Application for Review of Reviewable Decision

**Matter Number(s):** Action No 1 of 2015

**Appearances:** Mr N Prasad, for the Applicant  
Ms. S. L. Nasiga & Ms F Gavidi, FRCA Legal Unit for the Respondent

**Date of Hearing:** Monday 23 November 2015

**Before:** Mr Andrew J See, Resident Magistrate

**Date of Decision:** 25 March 2016

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**PLACE OF SUPPLY; Imposition of Tax on Supply-Section 16 Value Added Tax Decree 1991; Deeming of goods supplied outside of Fiji.**

### Background

1. The Applicant is a company incorporated in the Republic of Fiji and is involved in the provision of security services. Those services include the transportation of gold and currencies to and from various banks and foreign currency exchange institutions. The issue in dispute concerns the taxation that has been applied by the Respondent on the provision of these services, in the case where it is said that the services are provided on behalf of other overseas entities. The dispute concerns taxation returns submitted by the Taxpayer for the financial years, 2012, 2013 and 2014.
2. The Respondent has deemed that in accordance with Section 16(4)(A) of the *Value Added Tax (VAT) Decree 1991*, that the services that had been supplied by the Taxpayer on behalf of these entities and any income derived from these services, is taxable. The Taxpayer on the other hand, has sought to claim an exemption for taxation, on the basis that the goods should be deemed 'zero rated supplies' for the purposes of the Second Schedule to the VAT Decree. The

Applicant contested the assessments<sup>1</sup> and was subsequently issued with an Objection Decision dated 27 January 2015. It is against that decision, that this application for review has been brought.

#### **Statement of Agreed Issues for Determination**

3. On 23 November, the parties, sought leave of the Tribunal to amend the Statement of Agreed Issues to read:
  - (i) Whether the Commissioner had erred in interpreting the Second Schedule Paragraphs 10, 13, 14 and 15 of the *Value Added Tax Decree 1991*; and
  - (ii) Whether the Commissioner was wrong in disallowing the appellant's objection under Section 16(4) and 17 of the *Value Added Tax Decree 1991*.
  
4. The parties have identified that there are four specific paragraphs within the Second Schedule to the Decree that are the source of dispute or warrant interpretation. These have been identified as Paragraphs 10, 13, 14 and 15. Having said that, neither party had spent any time canvassing the way in which Paragraph 13 of the Second Schedule would apply. That exemption relates to "the supply of services which are physically performed outside Fiji". It is assumed that during the course of this review process, that common ground was reached as to what, if any services were in fact physically performed outside of Fiji.<sup>2</sup>

#### **The Nature of the Services That Have Been Taxed**

5. The Applicant's Outline of Submissions<sup>3</sup> describes the services provided as follows:

*The security services provided concern the protection and guarding of valuables in respect of which tangible and intangible items are the subject of security services by the provision of guards who are armed and either attend to the guarding of the items in question at specific locations, or ensure their safe delivery via transit on road, air and/or sea transportation to and from Fiji.*

6. In its submissions, the Applicant contends that it has for some time as a course of conduct and business, been retained by overseas security firms to render professional services to them. According to the Applicant, two of these overseas firms had retained the services of the Applicant and its staff to collect foreign currency and gold at the port of disembarkation upon arrival into Fiji and thereafter to transport the same, to the various locations as and where required. The services also involved the similar collection of these items and return back to Australia. The calculation of taxation has come about in respect of the invoices

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<sup>1</sup> See Objection to Assessment dated 28 October 2014.

<sup>2</sup> The staff security services that were identified and charged in the Invoices that formed part of the Affidavit of Mr S at Annexure IS-3, being a case in point.

<sup>3</sup> See Submissions filed on 20 July 2015.

created by the Applicant and charged to the overseas entities for the provision of these services.<sup>4</sup>

7. The Applicant says that

*“the supply of services in terms of its initiation emanates from within Australia requesting the undertaking of the security services when the goods are shipped, be it via air or sea to Fiji, and then upon collection transported under secured armed protection to the destinations in question. ...  
(and) that the physical concept of supply of services, in terms of its physical performance with respect to supply occurs outside of Fiji.”<sup>5</sup>*

### **The Value Added Tax on Supply and the Zero Rating Scheme**

8. The *Value Added Tax Decree* 1991 and the way in which the zero rating scheme has been applied has been canvassed in a number of decisions of this Tribunal.<sup>6</sup> There appears to be no dispute between the parties that the Taxpayer is both registered for the purposes of Section 22 of the Decree and involved in a taxable activity as the expression is defined within Section 4(1). The analysis really only concerns itself with the manner in which tax is charged on the supply of goods and services for the purposes of Section 15 of the Decree and the categories of case that arise out of the definition of what constitutes 'zero rated ' supply, found at Section 2 and thereafter the Second Schedule to the Decree.

9. Section 15 provides specifically:-

*(1) Subject to the provisions of this Decree, the tax shall be charged in accordance with the provisions of this Decree at the rate of fifteen percent on the supply (but not including an exempt supply) in Fiji of goods and services on or after the 1st day of July 1992, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply.*

*(2) Where, but for this subsection, a supply of goods and services would be charged with tax under subsection (1) of this Section, any such supply shall be charged at the rate of zero percent where that supply is a **zero**-rated supply*

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<sup>4</sup> See Exhibits A1 and A2 that show the invoices for the relevant period.

<sup>5</sup> See Outline of Submissions at [12] and [13].

<sup>6</sup> See for example, *Taxpayers S and G v Fiji Revenue and Customs Authority* [2012] FJTT 20; *A Distributing Company v Fiji Revenue and Customs Authority* [2012] FJTT 15; *A Suva Supermarket v Fiji Revenue and Customs Authority* [2013] FJTT 2; *A Freight Services Company v Fiji Revenue and Customs Authority* [2015] FJTT 1; *Company A v Fiji Revenue and Customs Authority* [2015] FJTT 4.

### **Witness Evidence Called by the Taxpayer**

10. The Taxpayer called its General Manager to provide evidence in relation to the nature of the services that it supplies. Mr S, spoke of the way in which works orders were received from overseas entities and how these services were delivered by the Taxpayer. In his evidence, the General Manager told the Tribunal about earlier audits that had been conducted by the Respondent in relation to the taxable activity and said that on these occasions, no irregularity or claim for taxation on these services had arisen. Following cross examination by Counsel, it became clear that the actual invoiced amounts for the provision of these services had two components. The first the cost of the transportation (including the special purpose vehicles that were used in the case of transporting monies and gold) and secondly the labour costs associated within that delivery service.
11. As part of the Closing Submissions, Mr S has provided an Affidavit sworn on 18 January 2016, in which he sets out the split between the costs of transport and labour within the invoices that have been issued to the two overseas entities. It is noted that 55% of the security costs are deemed to be transportation costs, with the remainder being allocated as labour costs.

### **Witness Evidence Called by the Respondent**

12. The Respondent called its VAT Auditor, Ms Ranjeeta Prasad, to explain the events that gave rise to the amended assessments being issued by the Authority. According to Ms Prasad the Respondent initially requested a copy of the relevant contract documents governing the services, but was not provided with one from the Applicant. The witness said, that following a random audit that was undertaken, discrepancies of the Taxpayer were identified and rectified. Ms Prasad indicated that a penalty was imposed against the Taxpayer, in part due to the lack of co-operation that was provided in assisting the Respondent reconcile the issues. A further witness, Mr Upnesh Prasad, was called to give evidence on behalf of the Respondent in his capacity as an Auditor of the Audit and Compliance Section. Mr Prasad provided an elaboration of the rationale behind the Respondent's Objection Decision<sup>7</sup> and wanted to correct the fact that there was a request for review made in 2010 and not an audit of the Taxpayer.<sup>8</sup> The witness stated that as part of that review, the Authority had sought clarification regarding the actual sales that were identified as being 'zero rated'.
13. The Tribunal heard from Mr Prasad that in 2010, it was deemed that the sales did not justify that classification, based on a service spread revealing:-
  - 40% movement of gold from a local mine;
  - 50% foreign exchange and bank transport to Nadi Airport; and
  - 10% inter country movements.
14. The witness was shown the agreements between the Taxpayer and the overseas entities.<sup>9</sup> He stated that the Respondent had concluded that Paragraph 10 to the Second Schedule, pertained to 'transport services' for the international carriage of passengers and goods and

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<sup>7</sup> See Exhibit R1 at Tab 9.

<sup>8</sup> See Exhibit A3 at Tab 2.

<sup>9</sup> See Exhibit A 3 Tabs 9 and 10.

this was different from the Taxpayer's activities involving security services to facilitate the transport of gold and cash.

### Application of the Relevant Law

15. The Respondent's Submissions rely as its starting point on the definition of 'place of supply' as provided for within Section 16 of the Decree. The Tribunal accepts that for the purposes of Section 16(4), the 'supply of services', other than the security services provided on international flights, is deemed to be in Fiji, as the Applicant Taxpayer belongs in Fiji. The Applicant as the supplier of these services would be deemed to belong to Fiji for the purposes of Section 17(2)(a) of the Decree.

### The Exemptions Provided at Paragraph 10 of the Second Schedule

16. The starting point for the analysis must be Paragraph 10 of the Second Schedule that states:

*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.*

17. There are a couple of critical considerations that emerge. Firstly, does the Applicant Taxpayer supply 'security services' or 'transport services'? Secondly, where are these services provided from and to? And thirdly, do these services relate to the international carriage of goods?
18. Exhibit R4 is an extract from the Respondent's data base, showing that the Taxpayer is registered for the provision of security services. The Tribunal is satisfied that these services are provided and heavily reliant on transportation. Yet the first criteria to be established requires that services are to be related to the international carriage of goods. There is certainly evidence before the Tribunal that the transport activities moving gold and money from within the country requires a large transport cost component,<sup>10</sup> yet these actual services supplied within Fiji, do not have any international carriage component to them. It is clearly true that in a broader sense that they do. But that seems to be a service that is not provided by the Taxpayer. Presumably one of the few international airline services is involved in the international carriage. The intra-national carriage is in my view a different question.
19. They are certainly not transport services provided by the Taxpayer from one place outside of Fiji to another.<sup>11</sup> They are not transport services provided from within a place in Fiji to a place outside Fiji, as they seem to be services that terminate at Nadi airport.<sup>12</sup> Nor are they

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<sup>10</sup> As attested to within the Affidavit of the Mr S, sworn on 18 January 2016.

<sup>11</sup> Thereby not meeting the requirement that is Paragraph 10(a).

<sup>12</sup> Therefore not qualifying to be caught within Paragraph 10(b).

transport services that are provided by the Taxpayer from a place outside of Fiji to within Fiji.<sup>13</sup> Finally, the Taxpayer is not alleging that it is providing transport services by aircraft, that would meet the meaning of the expression set out within Paragraph 10(d). The Tribunal is of the view that Paragraph 10 is of no assistance to the Taxpayer's application for review.

#### The Exemptions Provided at Paragraph 14(e) of the Second Schedule

20. Within the closing submissions of the Applicant, it is also advanced that the exemption found in Paragraph 14(e) of the Second Schedule should apply in the case where there is:-

*The supply of ... services to a person who belongs in a country, other than Fiji (for the) provision of staff.*

21. The Taxpayer has provided at Annexure IS-3 of Mr S's Affidavit, a table that sets out the invoices where staff were required to travel overseas to either collect or transport cash. The total amount identified within the Annexure under this head, is \$2055.60. In relation to Paragraph 14(e), the Respondent concedes that some of the services provided by the Applicant, involving staff travel outside of Fiji, are amenable to the rating of value added taxation at zero. As the Tribunal understands the evidence, allowance has been made for this exemption. The Tribunal recognises that indicatively, if it has not done so already, that the amounts in IS-3, would be an appropriate amount to be claimed under this head.

#### The Exemptions Provided at Paragraph 15(1) of the Second Schedule

22. Finally, the Taxpayer argues that the exemption that is found at Paragraph 15 of the Second Schedule is also available

23. Specifically, Paragraph 15(1) provides:

*The supply to a person in that persons' taxable activity capacity (and not in that person's private capacity) who in that capacity belongs in a country other than Fiji of services comprising of –*

*(a) the handling or storage of goods at or their transportation to or from a place at which they are to be exported or have been imported or the handling or storage of such goods in connection with such transport;*

24. The primary theme that is relied on here, is that these transportation services involve the provision of services to and from an international departure point and are supplied to a person who belongs in a country other than Fiji. The Respondent argues that for the reasons provided within *Auckland Regional Authority v Commissioner of Inland Revenue*<sup>14</sup> the Applicant is not involved in the handling or storage of goods in connection with their international transportation. The submission relies on the language of an amendment to the New Zealand *Goods and Services Tax Act 1985* that has the effect of classifying the handling

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<sup>13</sup> Paragraph 10(c).

<sup>14</sup> (1994) 16 NZTC

or storage of goods in the process of international transportation, as “ancillary” and not direct transport services. In many respects while informative, that case, does not assist. The specific exemption that is found in Paragraph 15(1)(b) is to cater for such ancillary services, where they support international transportation.<sup>15</sup> This appears to have been a deliberate amendment to the scheme.<sup>16</sup>

### Conclusions of the Tribunal

25. The Tribunal is of the view that Paragraph 10 of the Second Schedule is irrelevant to this analysis. These are not the services that the Taxpayer provides. Paragraph 13 would apply in the case of services provided outside of Fiji, such as the provision of security guards on international flights to escort cash or gold shipments. Paragraph 14(e) has a comparable role to perform in that regard. The primary and more likely way in which an exemption could take place, would be with a better analysis of Paragraph 15, that requires the deconstruction of sub-paragraph (1)(a). What it speaks of when we untangle the language, is that zero rating is capable of being claimed where there is:-

- (i) The handling or storage of goods at a place to which they are to be exported or have been imported; or
- (ii) The handling or storage of goods to or from a place at which they are to be exported or have been imported; or
- (iii) The handling or storage of such goods in connection with such transport.<sup>17</sup>

26. It is noted that the definition of “goods” at Section 2 of the Decree does not include money,<sup>18</sup> though it would include the commodity which is gold. To that end, the Tribunal is inclined to the view that based on the evidence, the handling or storage of gold to or from a place which it is to be exported or imported would be caught by this Paragraph. And while it is noted that no argument exists for any application of Paragraph 15(1)(b) that deals with ancillary transport services, including landing berthing and stevedoring, there is some further potential that services that are deployed for the “making of the arrangements for the supply of any of the services” are capable of being ‘zero rated’. While the Taxpayer has not identified any distinct claim for the making of these arrangements, that too may be an issue to be further considered in the context of Paragraph 15(1)(c).

27. The Tribunal is also of the view that there is a need to further review the invoices that have been submitted by the Taxpayer. Any invoices that relate to the handling or storage of gold to or from an international departure point, or for the making of those arrangements,<sup>19</sup> would be capable of being caught by the meaning provided within the second limb of Paragraph 15(1)(a) and Paragraph 15(1)(c) of the Second Schedule. In all other respects, the Taxpayer’s application for review would fail. The consequence of this, is that the tax

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<sup>15</sup> Note the way in which these services are deemed to be included by virtue of Paragraph 15(2).

<sup>16</sup> See Act No 28 of 1999, effective 1 January 2000.

<sup>17</sup> The underlying emphasis is that of the Tribunal.

<sup>18</sup> See also the definition of money at Section 2.

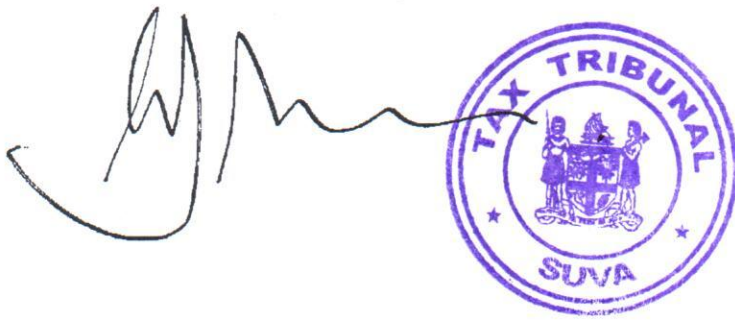
<sup>19</sup> It is likely that there will be no invoices that arise for the importation of gold into Fiji.

assessments are now referred to the Chief Executive Officer to be re-assessed, having regard to the findings of the Tribunal. As neither side have been without error in approach, it is the conclusion of the Tribunal that each side should bear their own costs in this matter.

**Decision**

The Tribunal orders:-

- (i) That the matter be remitted to the Chief Executive Officer to be re-assessed having regard to the findings of the Tribunal.
- (ii) Each party is to bear their own costs.

A handwritten signature in black ink is written over a circular purple official seal. The seal features the text 'TAX TRIBUNAL' at the top and 'SUVA' at the bottom, with a central emblem depicting two figures holding a shield. Two small stars are positioned on either side of the emblem.

**Mr Andrew J See**  
**Resident Magistrate**