FIJI TAX TRIBUNAL

Decision

Section 83 *Tax Administration Decree* 2009

Title of Matter:	TAXPAYER C V FIJI REVENUE AND CUSTOMS AUTHORITY	(Applicant) (Respondent)
Section:	Section 83 (1) *Tax Administration Decree* 2009	
Subject:	Application for Review of Reviewable Decision	
Matter Number(s):	VAT Action No 3 of 2016	
Appearances:	Mr VM Mishra, Mishra Prakash and Associates, for the Applicant Mr S. Ravono, FRCA Legal Unit for the Respondent	
Date of Hearing:	Thursday 22 June 2017	
Before:	Mr Andrew J See, Resident Magistrate	
Date of Decision:	15 August 2017	

KEYWORDS: Section 18 Value Added Tax Act 1991; Deposit for Transaction; Partial payment toward purchase price.

CASES CITED:

Ambika Nand Alias Babu Ram v Mohammed Samsudin Sahu Khan & Anor, Civil Appeal No ABU0066 of 1995S, High Court Civil Case No 214 of 1982(14 August 1997)
Case L67 (1989) 11 NZTC 1391
Case R11 (1994) 16 NZTC 6,062
Commissioner of Inland Revenue v Dormer and Anor (1997) 18 NZTC 13446
Commissioner of Taxation v Reliance Carpet CO Pty Limited [2008] HCA 22 (22 May 2008).
Garratt v Ikeda 2001] NZCA 316; [2002] 1 NZLR 577; (2001) (13 September 2001)
Hall v Burnell [1911] 2 Ch.551 at 632.
Lissenden v C A V Bosch Ltd [1940] 1 All ER 425
Martin v Finch [1923] SC NZLR 570

Background

1. The Applicant Taxpayer is seeking a review of the Tax Decision dated 14 December 2016, in which the Respondent Authority claims that the imposition of a value added taxation on land transactions, should be paid when any payment, including that of a deposit, is received by the Taxpayer and not upon settlement of sales and at the stage when the transaction has been completed and land titles are made available.

2. Within the Application for review made on 20 December 2016, the following grounds of appeal are set out:-

   (i) The decision to charge Value Added Tax on the full purchase price when a deposit is paid under a land sale agreement is wrong in law and/or in fact and/or contrary to generally accepted legal principles and practice.

   (ii) The decision that a deposit paid (which can be forfeited with a supply being made) pursuant of a land sale agreement attracts the application of Section 18(1)(b) of the VAT Decree is wrong in law;

   (iii) (a) A deposit paid is not a payment of land and (is) an earnest from performance only and it only becomes a payment for the land when the 'supply of land' takes place which occurs when the land subject of the sale has title and is transferred at settlement or registration;

   (b) That a deposit cannot be treated as consideration for a land sale until settlement or until registration of transfer takes place and a supply of land only takes place under the VAT Decree upon completion of the land sale.

   (iv) Upon completion of transfer of the land a deposit paid for land is only a security or earnest for performance;

   (v) If there is default by purchaser and the deposit is forfeited despite the fact there is no supply that the same is not subject to Value Added Tax;

   (vi) The natural and ordinary meaning of the relevant legislation relating to Value Added Tax is that the sale of land takes place upon its supply and this takes place when possession of the land being sold can be given. That possession is of a definite and defined area with a Title in a sub-division sale and this can only occur when titles are issued by the Registrar of Titles are available and when settlement occurs.

Agreed Statement of Facts

3. The following Statement of Agreed Facts were filed by the parties on 16 March 2017 :-

   (i) The Applicant is subdividing its Certificate of Title NO 29632 situated in Nadi, Fiji into separate Lots in three stages;

(ii) For its second stage the Applicant obtained consent of the Director of Town and Country Planning for sub-division into seven lots subject to development conditions;

(iii) When Engineering plans were approved the Applicant engaged a contractor, engineer and surveyor to develop the site to make the roads, sewage, drainage and other facilities;

(iv) The Applicant entered into sub-division sale Agreements for purchase of some of the Lots. Subject to the agreement it took deposits on the same to assist in its development cost of the subdivision;

(v) The sale and settlement is to take place and possession of the land is to be given when separate titles for the sub-divided portions are issued;

(vi) Separate titles are only issued when the development by the Applicant is completed and approved certificates are obtained by the relevant authorities;

(vii) The consents and Certificates of the following government bodies have to be obtained for the sub-division before completed survey plans for the seven job plans are lodged with the Registry of Titles;

a. Road names approval by Fiji Roads Authority for the new roads created by the sub-division;
b. National Fire Authority compliance certificate;
c. Water Authority of Fiji compliance certificate;
d. Fiji Electricity Authority compliance certificate;
e. Engineers Certificate;
f. Calibration report;
g. Compliance certificate by Nadi Town Council

(viii) The Applicant asked to pay Value Added Tax (VAT) upon settlement of its sales of the sub-divided land when it provides title and possession to the Purchasers;

(ix)

a. For instance there is an agreement to sell for $550,000.00 plus VAT (Totalling $599,500) to Mr Lokesh Lal. Settlement and sale is to be completed upon issue of titles for the sub- divided Lot No. 3.

b. A deposit was paid of $10,000.00 by the purchaser Mr Lokesh Lal to the Applicant. This will have to be returned to Mr Lal if the sub-division does not go through.

c. If the FRCA ruling stands the Applicant is obliged to pay VAT at nine percent of $49,500.00 even though title has not yet issued and the effect of which will be that the Applicant has to fork out money out of its own finances with no guarantee that the settlement will actually happen.

(x) The Respondent has refused to accept that the Applicant pay full amount of VAT on sales when titles for the sub-divided lots are issued and when settlement goes through;

(xi) Presently titles for the second stage sub-division has not been issued but survey plans and certificates have been completed and obtained and have been lodged with the Registry of Titles.

The Case of the Applicant

4. In considering the case of the Applicant, the Tribunal has had regard to the following materials:-

   - Outline and Written Submissions of the Applicant, filed 1 June 2017;
   - Affidavit of Chandar Sen, filed 6 April 2017;
   - Affidavit of Dorsami Naidu, filed 7 April 2017;
   - Affidavit of Anjani Prasad, filed 12 April 2017;
   - Written Submissions of the Applicant/Appellant After Oral Hearing, filed 6 July 2017;
   - List of Authorities for Written Submissions of the Applicant/Appellant After Oral Hearing, filed on 7 July 2017;
   - Reply to Written Respondent's Closing Submissions, filed 28 July 2017.

5. The Applicant accepts that Section 15 of the Act imposes taxation on the supply of goods and services 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. Within its Outline and Written Submission, reference is made to the meaning of supply as set out within Section 3 of the Act to:

   ..... *include all forms of supply and without limiting the generality of the term has the same meaning as in section 2 of the Sale of Goods Act, Cap. 230*

6. Further it is rightly pointed out that Section 2 of the *Sale of Goods Act* defines that term as follows:

   "supply", when used as a verb, includes-

   (a) in relation to goods - the supply by way of sale, exchange, lease, hire or hire purchase; and

   (b) in relation to services - provide, render, grant or confer and when used as a noun has a corresponding meaning..

7. As the Applicant makes clear, the critical provision within the *Value Added Tax Act* 1991, for the purposes of this analysis, is Section 18. The provision reads:-

   Time of Supply

   (1) 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 takes place, - whichever is the earlier.

When Does Supply Occur and Is a Deposit a Payment for the Purposes of Section 18(1)(b) of the Act ?

8. Within the *Outline and Written Submissions of the Applicant* filed on 1 June 2017, it is submitted that:

> *There is ample authority that a deposit for land is security for completion of the purchase. It only becomes part payment on completion, if there is default by purchaser the deposit is forfeited despite the fact there is no supply. For instance Hall vs. Brunnell [1911] 2 Ch 551.*

9. 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. In support of this argument, the primary authority that is relied upon by the Taxpayer, is the case of *Commissioner of Taxation v Reliance Carpet CO Pty Limited.* [1] The decision in *Reliance* considers the question of deposit, from the unique language of the relevant statute, *A New Tax System (Goods and Services Tax) Act* 1999.

10. In that case, Section 99.1 of the Act provides 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.*

11. Further, Section 99.5 of the Australian Act states :-

> *Giving a deposit as security does not constitute consideration*
>
> *(1) A deposit held as security for the performance of an obligation is not treated as * consideration for a supply, unless the deposit:*
>
> *(a) is forfeited because of a failure to perform the obligation; or*
> *(b) is applied as all or part of the consideration for a supply.*

12. The argument of the Taxpayer is quite clear, in that it relies upon the decision of *Reliance* and the more substantive and historical case law pertaining to the purpose of deposits, so as to argue for the deferment of the payment of any tax on supply. That is, it is argued that this payment should coincide with the registered transfer of land.

The Case of the Respondent

13. In considering the case of the Respondent, the Tribunal has had regard to the following:-

- Respondent's Outline of Submissions, dated 27 April 2017;
- Respondent's Closing Submissions, filed on 12 July 2017; and
- List of Case Authorities for Respondent's Closing Submissions, filed 12 July 2017.

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1 [2008] HCA 22 (22 May 2008).

14. The Respondent primarily relies on the New Zealand decision in *Case L67*[2] in support of the way in which the Fijian law should be interpreted. The submission of the Respondent speaks of the nexus between the New Zealand and Fijian laws and relies on the similar statutory language to come to a conclusion consistent with *Case L67,* that payment of the tax is due and payable at the time the deposit forms part of the payment toward the acquisition of supply. A comparison of the relevant New Zealand and Fijian 'time of supply' provisions, is set out within Table 1 for the convenience of the analysis.

Table 1 – Comparison of NZ and Fijian 'Time of Supply' Provision

Section 9(1) Good and Services Tax Act (NZ)	Section 18 Value Added Tax Act 1991
9. Time of Supply (1) Subject to this Act, for the purposes of this Act, a supply of goods and services shall be deemed to take place at the earlier of the time an invoice is issued by the supplier of the time any payment is received by the supplier, in respect of that supply.	Time of Supply (1) Subject to this Decree, 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 takes place, - whichever is the earlier.

Consideration of the Issues: Is the Deposit a Payment?

15. The critical question, is whether a deposit can be regarded as "any payment .. received by the supplier" for the purposes of Section 18(1)(b) of the Act? Within the *Reply to Written Respondent's Closing Submissions,* the Applicant states:

> *If a deposit is not consideration or payment until the sale goes through then the deeming provision (the Respondent) rel(ies) upon cannot apply. It can only apply if in law a deposit is part payment.*[3]

16. The Australian High Court addressed that question within the decision of *Reliance,* when it quarantined the deposit so as it would not be treated as consideration for the triggering of any obligation to pay for supply, where it stated:

> *What if, any principled concerns may support the adoption by the Parliament of this "wait and see" provision? The AAT pointed out in its reasons that in any standard contract of sale of land it may be expected that upon termination by the purchaser for breach by the vendor, the purchaser will be entitled to repayment of the deposit, and upon termination by the vendor for breach by the purchaser the deposit will be forfeited to the vendor. If the sale proceeds to completion the deposit will be applied towards the settlement payment. Until one of these three events comes to pass, the ultimate fate of a deposit will be unresolved. ....*

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2 (1989) 11 NZTC 1391

3 See Paragraph 3 of the Applicant's *Reply to Written Respondent's Closing Submissions* filed 28 July 2017.

The AAT accordingly concluded: "having regard to the 3 possible alternative destinations of the deposit it is understandable that the legislature has put on hold the question of liability for GST until one or other of the events referred to in s99-5(1) has occurred".[4]

17. Insofar as the New Zealand Section 9(1) is to be interpreted, within the Respondent's Closing Submissions, the decision of Wily DJ in *Case R 11,*[5] makes clear,

The only other element of s9 which calls for interpretation is the words "any payment". Once again in my view, those words should be given their ordinary everyday meaning. The legislature has not stipulated for payment in full, but merely receipt of any part of the consideration which is payable in respect of the supply in question. Clearly a deposit such as was paid in this case, comes within that general definition.

18. As was stated within the earlier New Zealand decision in Case L67,

The deposit is 10% of the purchase price of the section and is paid as a part payment of that total price....

there is no progressive or periodical supply of a good because the initial creation of an equitable estate is a chose in action which, by definition, is not a good....

I well understand the concern of many taxpayers and their professional advisers at the manner in which the respondent has interpreted sec 9(1). I fully realise the prejudicial effect this must have on the cash flow and costs of land development.[6]

19. Again it is accepted that one of the primary reasons for adopting a 'wait and see' approach, is where the contract does not proceed to completion. Be that as it may, there is no reason why a deposit cannot be a part payment. As the Applicant itself cites the case of *Hall v Burnell*[7], where Eve J relied upon the earlier judgment of *Howe v Smith,* in which it states:

The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract.

20. The language suggests that the deposit has a dual purpose, as both the earnest to bind the bargain, but also, at least in that case, a contribution to the contract price assuming that the transaction is to be completed. The Applicant relies on other case law that has an emphasis on a deposit assuming only one of these features, that is, as an earnest to bind the bargain, but in the case of *Martin v Finch,*[8] for example, it seems common place, that a deposit can work "as a

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4 *Commissioner of Taxation v Reliance Carpet Co Pty Limited* [2008] HCA 22 (22 May 2008) at [35].
5 (1994) 16 NZTC 6062.
6 (1989) 11 NZTC 1391 at 1397.
7 [1911] 2 Ch.551 at 632.
8 [1923] SC NZLR 570

deposit and in part payment of the purchase money". Such a situation is not the same as that where "the deposit is paid over to a real estate agent, or any other person, to hold as a stakeholder".[9] But this is not one of those cases. In the present case, the deposit funds are provided to the Vendor where it "shall be at liberty to use for its development of the sub-division or at its discretion".[10] In the Applicant's *Reply to Written Respondent's Closing Submissions,* filed on 28 July, further case law has been provided in support of the principle espoused by the Taxpayer that the deposit can and should be seen as discrete from the payment under a contract. The first of these cases is *Garratt v Ikeda*[11], in which has as its focus the manner by which the New Zealand Court of Appeal dealt with the nature of an unpaid instalment deposit, where the vendor had elected to terminate the contract for failure to perform. The second and third cases of *Ambika Nand Alias Babu Ram v Mohammed Samsudin Sahu Khan & Anor*[12] and *Lissenden v CAV Bosch Ltd*[13] concern themselves with the right of a successful litigant to appeal against a decision of a lower court, despite having received monies arising from the successful prosecution of an action in that court. Those cases are concerned with ostensibly, questions of election, waiver and estoppel. That is, receiving the benefits of one thing, but nevertheless pursuing an appeal against that very same thing. The Tribunal simply cannot find any relevance of these cases to the specific question of statutory interpretation that is before it.

The Language of the Contract

21. Finally, it is worthwhile looking at the language of the *Sale and Purchase Agreement Stage 2 – Commercial Lot 4* that was provided as part of the Stage 2 development as tendered by the Applicant.[14] Clause 2 of the Contract stipulates the amount of the deposit to be paid upon execution of the Agreement. Clause 4 provides that "the balance purchase price shall be paid upon settlement." The *Sale and Purchase Agreement, Stage 2 – Commercial Lot 3* is structured in the same way.[15]

22. The only construction that can be given to the expressed words contained within these documents, is that the deposit is a part payment toward the purchase price. The expression in Clause 4, 'the balance purchase price', can take and give no other meaning. That appears to be the way that the parties sought to frame those agreements. The deposit was not earmarked as earnest to bind the bargain and no more. It was a partial contribution to the purchase price. These were funds that were capable of being then applied by the Vendor to use for the development of the sub-division.

Conclusions

23. Whilst the Australian law deliberately adopts what the court has called a 'wait and see' approach to the contractual deposit and its ultimate status, the New Zealand and Fijian law, makes no such arrangement. The case law in New Zealand is quite clear how the legislation has been interpreted and to date there is no indication of any alteration to that approach. The Tribunal has reviewed the remaining case authorities provided by both the Applicant and the Respondent

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9 See *Commissioner of Inland Revenue v Dormer and Anor* (1997) 18 NZTC 13446 at 13458..

10 See Clause 2 of the *Sale and Purchase Agreement Stage 2 Commercial Lot 4* (Exhibit A2).

11 [2001] NZCA 316; [2002] 1 NZLR 577; (2001) (13 September 2001)

12 Fiji Court of Appeal, Civil Appeal No ABU0066 of 1995S, High Court Civil Case No 214 of 1982(14 August 1997)

13 [1940] 1 All ER 425

14 See Exhibit A2.

15 See Exhibit A1.

and there is no other issue that arises out of these authorities that can yield any more light on the issue. The legislation is what it is and there is no capacity to attempt to import the jurisprudence of the Australian taxation law into Fiji, where the statutory schemes are structured in a different way. In the absence of any existing domestic case law on this point, the Tribunal accepts that the proper approach to adopt, having regard to the comparative provisions set out within Table 1 above, is to consider the manner in which the New Zealand courts have determined such issues and in the absence of any other argument to support a contrary view, follow that case law accordingly. As such the Tribunal finds that a deposit of the type paid to the Taxpayer, must be regarded as falling into the expression when "any payment is received by the supplier" for the purposes of Section 18(1) (b) of the Act. This must be the trigger for determining the Time of Supply and the obligation to meet the taxation that is imposed as a result.

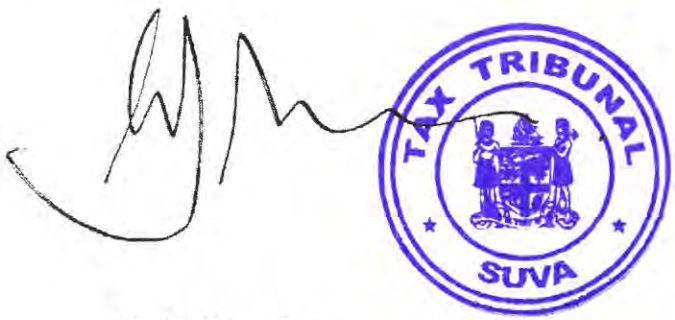
24. Whilst, the Tribunal appreciates the arguments that have been flagged by the Applicant, it remains the case that the legislation in its present form does not produce the result that the Taxpayer desires. Some solace should be found within Sections 65 and 66 of the Act, that provide for the refunding and offsetting arrangements, in the case where an excess of taxation has been charged. That may be of some assistance where contracts do not go to completion, but will still not address the cash flow concerns that are made obvious through this analysis. The Tribunal is of the view that the Applicant Taxpayer has not made out its case and the application must be dismissed on that basis.

25. Finally, by way of recommendation only, the Authority is asked to confer with the Taxpayer in a bid to see whether an alternative payment scheme could not be entered into, having regard to an instalment arrangement of some kind. Of course, this may have a bearing on the Sales and Purchase Agreements that are currently drafted in a way that assumes the majority payment is to be made on settlement and not progressively, so as to better coincide with possible progressive taxation obligations.

Decision

The Tribunal orders:-

(i) That the Application be dismissed.
(ii) The Respondent is free to apply for costs within 28 days hereof.



Mr Andrew J See
Resident Magistrate