FIJI TAX TRIBUNAL

Decision

Title of Matter:	**COMPANY P**	**(Applicant)**
	V	
	FIJI REVENUE AND CUSTOMS SERVICES	**(Respondent)**
Section:	**Section 82 *Tax Administration Act* 2009**	
Subject:	**Application for review of tax decision**	
Matter Number(s):	**VAT Action No 03 of 2018**	
Appearances:	**Mr D Nair, Nilesh Sharma Lawyers for the Applicant** **Ms R Malani, FRCS Legal Unit for the Respondent**	
Dates of Hearing:	**12 August 2019, 26 November 2019, 18 March 2020, 15 May 2020.**	
Before:	**Mr Andrew J See, Resident Magistrate**	
Date of Decision:	**17 June 2020**	

KEYWORDS: Value Added Tax Act 1991; Section 46 Penalty for making false or misleading statement; *Tax Administration Act* 2009.

CASES RELIED UPON:

Investments Ltd Company v Fiji Revenue and Customs Authority [2013] FJTT 13; Income Tax Appeal 4.2013 (3 October 2013)

Investment Ltd Company v Fiji Revenue & Customs Authority [2015] FJHC 348; HBT10.2013 (13 May 2015)

Background

[1] This is an application for review of an Objection Decision of the Fiji Revenue and Customs Service dated 4 May 2018, in which the Taxpayer Company P raised objections to the Value Added Taxation (VAT) Notices of Assessment (NOA) issued to it for the periods 2012 to 2016. The effect of those NOA's, was that the Revenue Service demanded the payment of $4,793,081.65 in outstanding taxation and penalty payments consisting of $2,738,903.80[1] in underpayments and $2,054,177.85 being penalties imposed in accordance with Section 46(2) (a) of the *Tax Administration Act* 2009.

[1] See summary of how that figure came about within the Respondent's Bundle of Documents filed on 2 September 2019 (Exhibit R3).

[2] Like most of these matters, the case is quite a simple one. The Taxpayer has claimed tax credits in the relevant periods, on goods that it had not paid any taxation on. The result of which was that over a five year period, the Taxpayer had deprived the Revenue Service taxation in the amount of $2,738,903.80. The penalties for statements or omissions made knowingly or recklessly, were calculated based on 75% of that amount.

[3] In considering the respective positions of the parties, the Tribunal has had regard to the following:

- Application for review of the Taxpayer filed on 30 May 2018;
- Respondent's Section 83 Documents filed on 8 August 2018;
- Affidavit of XFC filed on 8 August 2018;
- Respondent's further documents filed on 2 September 2019;
- Submissions of the Applicant filed on 11 September 2019;
- Closing Submissions of the Applicant dated 3 January 2020;
- Closing Submissions of the Respondent dated 30 January 2020
- Applicant's Submissions in Reply filed 21 February 2020;
- Respondent's Submissions filed on 30 April 2020; and
- Applicant's Further Submissions filed on 6 May 2020.

Proceedings before the Tribunal

[4] As is always to be expected in these cases, the legal representatives have been most assisting in providing the Tribunal with all relevant information required to make an informed decision. While the matter was initially to be heard on 12 August 2019, given that it appeared there was not sufficient information before the Tribunal, additional time was given in order that the case of the Applicant could be properly made. This included the Respondent providing the Applicant with all VAT returns the subject of the dispute[2]. In addition, it seemed imperative that the accountant of the Taxpayer give evidence to assist the Tribunal understand the events that had transpired and some of the thinking that underpinned the conduct of the Taxpayer. This evidence was seen as being critical to an analysis of the issues, given that one of the themes running through the submission of the Taxpayer was that it was not its act, but that of its external accountant. Ultimately that evidence was given on 26 November 2019.

The Customs Single Administrative Document[3]

[5] On 30 April 2020, in response to further Directions issued by the Tribunal, the Respondent provided submissions in relation to the way in which the customs procedures adopted by the Revenue and Customs Service conform with the requirements of the Automated Systems for Customs Data (ASYCUDA)[4]. The submissions of the Respondent are that:

(i) In the ASYCUDA system, the main document that is used to control import and export is called the Single Administrative Document (SAD);

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[2] Documents filed on 2 September 2019.

[3] This information is drawn from the additional submissions requested to be made by the Respondent in relation to this issue and filed on 30 April 2020.

[4] As designed by the United Nations Conference on Trade and Development (UNCTAD).

(ii) Field 1 of the SAD represents the type of declaration model/regime which directs the system whether the declaration is for an import, export, transit or any other circumstance possible in a Customs environment;

(iii) The model of declaration is a table that links each Customs Procedures Code (CPC) to the import or export declaration model. CPC is used to identify the Customs regimes to which goods are being entered and from which they have been removed.

(iv) The model of declaration links each model to a corresponding CPC to facilitate the preparation of the declaration or SAD;

(v) The model of declaration screen allows description of the model type to be defined for display to users. For example, IM4 – is Import declaration or direct import and sets an alphanumeric character as a prefix for the reference and assessment numbering series;

(vi) The Code identifies to the system how the data input from the declaration is to be handled and how the declaration is to be processed.

(vii) The descriptions of IM4:

a. Represents entry for home consumption or home use;
b. A duty element and an entry fee will be attached to this entry. For instance it will depict the portion of Customs duties such as Fiscal, Import Excise and etc., including the entry fee;
c. Field 47 of the SAD shows the calculation of taxes for goods that is to be consumed or used.

(viii) The descriptions of IM7:

a. Represents entry for warehousing or to be store at the warehouse for future use;
b. There is duty element attached to this entry except for an entry fee;
c. Field 47 of the SAD shows the calculation of taxes for warehouse goods;
d. Field 49B displays the accounting details of the warehouse entry (IM7). Total declaration will be located at the end of this field;
e. Total declaration will always be $7.15 for IM7;

(ix) An IM4 entry form is used to remove goods from the warehouse. Duties and taxes (VAT) are paid prior to removal.

[6] It is this manner by which the Taxpayer claimed VAT input credits arising out of the processing of the form IM7 that gives rise to the dispute between the parties. Specifically, Item 47 within that declaration form (IM7) sets out the proposed taxation that will be charged on the statistical value of that consignment. Yet as the above principles indicate, there is no taxation paid at the time of the initial entry of those goods. The trigger for when that payment is due, is when the goods are removed and processed utilising the form IM4. The only payment made upon entry of the goods is the entry fee of $7.15. Exhibit R2 gives an illustration of the way in which the tax discrepancy has arisen. For example in the VAT Return for the period January 2012 to December 2012 period, the Taxpayer had claimed a tax input credit associated with the importation of 200 cartons of wine. The following taxation calculations were identified from the IM7 form (Exhibit R1) coinciding with that consignment:

47 Calculation of taxes	Type	Tax base	Rate	Amount	MP
	ID	1200.00	4.590	5508.00	0
	IEX	348692.00	15.000	52303.80	0
	VAT	406504.00	15.000	60975.60	0
			Total :	118787.40	0

48 Deferred payment XXXXXXXXXX

49 Identification of warehouse S00001 / 365

B ACCOUNTING DETAILS

Mode of payment : CASH
Assessment Number : A 66626 Date : 27/11/2012
Receipt Number : R 23864 Date : 30/11/2012
Guarantee : 118787.40 Date :

Total fees : 7.15 N.C.U.
Total declaration : 7.15 N.C.U.

[7] As is illustrated above, based on an item price of $191,800.00,[5] there is a nominal calculation made for import duty ($5,508.00), for import excise ($52,303.80) and for VAT ($60,975.60). There is also common agreement between the parties that the only fees paid by the Taxpayer at the time of the (IM7) declaration being made, were those shown at Item 48 - the entry fee in the amount of $7.15. Yet within the VAT Return coinciding for this period and has been extracted from the January to December 2012 return (**as under**), it can be seen that the Taxpayer has claimed an input credit for purchase/deductions in the amount of $60,975.60. This amount, was not due and payable at that time. Based on the evidence of the Respondent's only witness, that amount was only due and payable following the issuing of the form (IM4) at the time that the said goods were to be released.

PURCHASE / DEDUCTIONS

7 VAT on local supplies $ 3,351 03

add

8 VAT paid to or invoiced by Customs $ 60,975 60

add

[8] As can be ascertained from the Section 83 documents filed on 8 August 2018, an analysis of the VAT returns for the periods from January 2012 to December 2016[6] show that similar claims were made throughout that period, that is, where the Taxpayer was claiming input credits reliant on the way in which the tax calculations are show in the Form IM7, despite the fact that no taxation was paid at that time.

[9] The Company's defence to this repeated erroneous claim for input credits, was that it relied on the advice and actions of its accountant. During the giving of his evidence, Mr Anthony Oh, the former accountant to Company P, defended the approach that he had taken in providing the advice. The company accountant suggested that the language of the *Value Added Tax Return* form created a circumstance that allowed the claim for the projected VAT amount, regardless as to whether or not it had been paid at the time or not. That is, he suggested that the IM7 VAT calculation had been "invoiced by customs". This position adopted by the former company accountant is somewhat strange, for at one stage during proceedings when giving evidence, Mr Ho had suggested that providing the Taxpayer had provisioned for the later payment of the VAT calculated amount as shown on the Form IM7, that the treatment of the deduction would be lawful. That makes no sense seeing that there is no evidence

[5] See Exhibit R1 and R2.

[6] See Section 83 Documents.

of any compulsion for the entity who brought the goods into the customs warehouse to be the same one that sought their release.

[10] This Tribunal does not accept the evidence of Mr Ho, nor the way in which it was given. First and foremost when pressed on the question, the Witness was unable to provide any understanding of the way in which Company P did make such provisioning for taxes that may have been nominally calculated at the time of consignments entering the country. The Tribunal remains very sceptical of the evidence given by Mr Ho that he was unaware of any provisioning and expenditure coinciding with any accumulated liabilities, associated with the input claims. It is likely that for this reason that the accountant then gravitated to the second defence, where he states that the language of the VAT Return enabled the deduction in the case where VAT had been "invoiced by customs". Again, there is no evidence that the IM7 is regarded by anyone in the industry as an invoice. The point simple is that a VAT amount to be paid at a further stage in the supply chain could not be regarded as being invoiced to the Taxpayer. The Single Administrative Document is not an invoice, but more a comprehensive system for standardising the way in which goods are traded and accounted for within international export and import markets. The accrual of the large money amounts that gave rise to taxation credits being issued in the corresponding periods, should have at least put the accountant on notice that even if the input was to be claimed, that there would be some well understood protocols to ensure that the liabilities if they fell due on Company P, were ultimately paid. In the Witness box Mr Ho almost appeared indifferent to the question, as to how and in what circumstances he anticipated a reconciliation of the claimed credit to the actual payment being made.

[11] The Tribunal understands that the position of the Taxpayer is that now it fully accepts that the claims made were incorrect and that the taxation amount of $2,738,903.80 is due and payable. At issue is whether or not the Revenue Service should be imposing a penalty of 75 per cent of that amount, for the purposes of Section 46(1) of the *Tax Administration Act* 1991.

Section 46 Tax *Administration Act* 2009

[12] Section 46 *Penalty for Making False or Misleading Statement* is reproduced as follows:

[Section 46] Penalty for Making False or Misleading Statement

(1) This section applies to a person— a) who makes a statement to a tax officer that is false or misleading in a material particular or omits from a statement made to a tax officer any matter or thing without which the statement is false or misleading in a material particular; and b) the tax liability of the person or of another person computed on the basis of the statement is less than it would have been if the statement had not been false or misleading (the difference being referred to as the "tax shortfall").

(2) Subject to subsection (3), a person to whom this section applies is liable— a) if the statement or omission was made knowingly or recklessly, for a penalty equal to 75% of the tax shortfall; or b) in any other case, for a penalty equal to 20% of the tax shortfall.

(3) The amount of penalty imposed under subsection (2) on a person is increased by— a) 10 percentage points if this is the second application of this section to the person; or b) 25 percentage points if this is the third or a subsequent application of this section to the person.

(4) The amount of penalty imposed under subsection (2) on a person is reduced by 10 percentage points if the person voluntarily discloses the statement to which the section applies prior to the earlier of— a) discovery by the CEO of the tax shortfall; or b) the commencement of an audit of the tax affairs of the person to whom the statement relates

(5) No penalty is payable under subsection (2) if— a) the person who made the statement did not know and could not reasonably be expected to know that the statement was false or misleading in a material particular; or b) the tax shortfall arose as a result of a self-assessment taxpayer taking a reasonably arguable position on the application of a tax law to the taxpayer's circumstances in filing a self-assessment return.

(6) For the purposes of this section, a statement made to a tax officer includes a statement made, in writing or orally— a) in any application, certificate, declaration, notification, tax return, objection or other document furnished or lodged under a tax law; b) in any information required to be furnished under a tax law; c) in any document furnished to a tax officer; d) in answer to a question asked of a person by a tax officer; or e) to another person with the knowledge or reasonable expectation that the statement would be passed on to a tax officer.

[13] It does not appear to be controversial that the lodging of the VAT returns containing incorrect claims of input credits, can be characterised as statements which are false or misleading in a material particular. Section 46 of the *Tax Administration Act* 2009 provides for a scale of penalty, based on whether there were aggravating circumstances in the case where the statement or omission was made knowingly or recklessly. The case of the Respondent is that the act was a knowing one. That is, it was made knowing to be wrong. In this regard the language of the Respondent is quite clear within the Objection Decision of 30 August 2019, where it states:

Reference is made to Tax Tribunal Direction order dated 13 August 2019 to provide reasons for reaching Objection Decision dated 4 May 2018 in relation to the claim that the applicant had maintained a scheme that was deliberate with reckless and wilful intention of defrauding FRCS. The Applicant had claimed Customs VAT Input totalling (sic) $2,738,903.80 which they we (sic) not supposed to claim as per Section 39(b) (i) of VAT Act 1991.

The Applicant had acknowledged that they had claimed VAT on IM7 customs entries. The Applicant is accusing their former Accountant (Anthony Ho & Associates) for the fraud. Moreover the Applicant claims they had no knowledge of VAT and had given everything to the accountants to do. Furthermore the Company had argued on the basis that they had no intention to defraud FRCS. They had no knowledge that they could not claim IM7 custom entries VAT.

The Applicant has been in operation from 2010 and should have knowledge on business related issues. The Applicant should have been aware of IM4 and IM7 custom entry process, and not taking advantage of the refund without paying any VAT at that point in time.

FRCS is of the view that the Applicant should have known if he had not been paying any VAT on the import, and somehow receiving large sum of VAT refund. The Applicant should have enquired with the Respondent that there is large sum of refunds being deposited into the Applicant's account. The Applicant has the responsibility to acquire correct information. Moreover, the Applicant had given all the responsibility to the registered tax agent however as a registered person for VAT purpose, company is wholly responsible for the conduct of business affairs.

Furthermore, if FRCS had not audited the Applicant he would have been claiming more VAT refunds. It is only through the audit that such large discrepancy has been ascertained. It is

clear that it is a VAT fraud as VAT had been claimed on entry for which not VAT had been paid at all due to the nature of customs entry and Applicant had decided to take the benefit of the refund at that point in time.

[14] The position of the Respondent has not deviated from that which it initially formed at the time of the Objection Decision. The Respondent is of the belief that the scheme employed by the Taxpayer was fraudulent and designed with that specific purpose. That is, it was wilful.

The Defence of the Applicant

[15] Within the Closing Submissions of the Applicant it is correctly pointed out that the precursor to reaching a conclusion of the law within Section 46 of the Act, requires that some consideration be given as to whether the facts of the case are of a kind that would invoke the exclusion provided at Section 46(5). That is, where the person who made the statement did not know and could not reasonably be expected to know that the statement was false or misleading in a material particular; or that the tax shortfall arose as a result of a self-assessment taxpayer taking a reasonably arguable position on the application of a tax law to the taxpayer's circumstances in filing a self-assessment return. The act of the accountant as the tax agent for the Company becomes the act of the company. Neither party suggests anything different. The critical question is whether the tax agent been expected to know that the statement was false or misleading in a material particular. The Tribunal believes that he should have and that there was no arguable position that would otherwise existed to have provided any reasonable excuse. A simple check of reconciling the accrued liability with coinciding expenditure would have been sufficient to have satisfied a skilled professional, as to whether the accounting treatment being applied, was in fact legitimate. Put simply, how many years could the Taxpayer accrue the tax debt, claim the input credit and then not show any evidence of the VAT payment ultimately being made. In pressing its position the Applicant relies on the decision of Kotigalage J in *Investment Ltd Company v Fiji Revenue & Customs Authority*[7] where his Honour stated:

Imposing penalty under Section 46(2) cannot be effected in isolation or arbitrally. The Respondent cannot overlook the Section 46(5) and the said provisions of the said Section should be applied to the facts of the case.

There is no suppression of the information by the Appellant and had provided all the information with 2010 and 2011 Tax Returns. The Respondent had used this information to assess the tax on a different context and definition. As such, I conclude the particulars provided by the Appellant comes within the meaning of Section 46 (5) (a) and as such the Penalty imposed by the Respondent should be withdrawn. The Learned Tribunal had failed to give reasons justifying the penalty and failed to consider the Section 46(5) (a) of the Income Tax Decree and erred in law and fact. I determine the Appellant succeed on this Ground.

[16] Having reviewed the issues relevant within the Tribunal's decision in *Investments Ltd Company v Fiji Revenue and Customs Authority,*[8] the case law applied to the current facts is distinguishable. The case of *Investments Ltd* at first instance reveals that it is true that the money amounts ultimately the subject of taxation were identified by the Taxpayer within the taxation returns, albeit that they had been incorrectly classified. The Tribunal accepts that when it dealt with the decision in 2013 that there were no reasons given to justify the position it took in that case, albeit that the theme underpinning

[7] [2015] FJHC 348
[8] [2013] FJTT 13

that decision was strongly suggestive that the acts of the Taxpayer were quite deliberate and there was no reasonably arguable position. In the present case, there is no transparency in the way in which the returns have been provided. For that to be the case, in each year that the accrued liability would have ensued, the accountant would have been required to later reconcile or take note of the expenditure offsetting that accrual at some later stage. The Taxpayer and its accountant must have been well aware of the fact that taxation credits were accruing or refunds being issued reliant on the taxation having not been paid. That is, it had been claimed as an input, but neither prior to being claimed or thereafter was the taxation paid by the Taxpayer.

[17] The Taxpayer lays its blame on its former accountant and he in turn claims that he was neither a specialist in the customs forms issued by the Revenue Service, or required to supervise the taxation payment arising out of what is claimed to be the taxation invoiced in the IM forms. That issue and how it should be resolved is one that cannot be addressed through this forum. If the Taxpayer claims that its former accountant has been negligent, then there are clearly claims in tort and contract that could be pursued to test the veracity of those allegations. While the Respondent has not gone to any great length to explore or draw the distinction between the characterisation of conduct that is 'knowing' rather than 'reckless', it has nonetheless suggested that the Taxpayer had embarked upon a fraudulent scheme designed to deprive the Revenue Service of taxation. It is hard to understand why at some point, a company or its then accountant would not have anticipated that such a scheme would have ultimately been detected. To that end, the Tribunal has formed a view and it is one only made on the margins, that the Taxpayer and its accountant were more likely to be reckless rather than deliberately fraudulent. The accountant should have known the consequences of making the claim and given the amount being claimed as an offset realising that somewhere within the accounts of the firm, that the accrual of the debt should have occurred and periodically reduced as the payments for the taxation as due were made. There is no evidence of any of this. It is therefore certainly reckless conduct and the accountant should have reasonably known in circumstances where there is simply no reasonably arguable position otherwise.

Conclusions

[18] In cases of this type it is the Applicant who has the onus of establishing that the decision of the Respondent should be disturbed. The Tribunal adjourned proceedings and issued further Directions to the parties when it became clear that the case of the Applicant was not addressing the central issues required to be examined. Despite that effort to ensure that all information was made available to the Tribunal as part of its inquiry, the burden of proof rests with the Applicant and this has not been discharged. The Tribunal is content with its interpretation of the law, insofar as the conduct of the Taxpayer's accountant as agent for the company appears quite deliberate. There was simply no proof of subsequent payments in the amounts claimed, nor any follow up to ascertain whether any of the amounts even if they had accrued as a future liability, were paid.

[19] At the time of hearing, the legislation had been in force for 18 years. The Tribunal does not accept that it was a mere accident. The claiming of the credit was deliberate and reckless, even though it may not necessarily have been fraudulent[9]. But there was no reasonably arguable position to have adopted the practice that the Taxpayer did. It was almost as if the Taxpayer and its accountant had turned a blind eye to what was transpiring. The Taxpayer would have known that it was securing a 'windfall' on each occasion that the return was being filed, yet there is absolutely no evidence of any further inquiry or verification being made so as to ensure that the credits and refunds being made were not being doneso in error. That standard of professional conduct has been breached, where

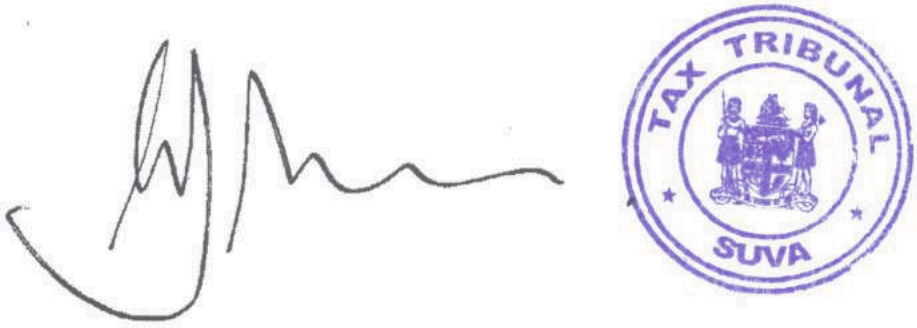
[9] The Tribunal says this, only because it would be very surprised if a qualified accountant could possibly think that such conduct would have remain undetected.

common sense appears to have given way to opportunism. Only the Taxpayer and its accountant will know what has transpired between them in the discussions of this issue over the relevant period. The Tribunal does not accept that the issue would have been one that was not discussed at all. For a company newly operating in Fiji, its Directors would have had a real interest in understanding such matters, particularly where cash flow would have been important. The penalty therefore is appropriate in the circumstances and the accountant and Taxpayer are free to resolve issues of contractual or professional duty in another forum. The application as a result is dismissed, with costs summarily assessed in the amount of $4,000.00. An order to give effect to this decision will now be issued.

Decision

(i) It is the decision of this Tribunal that the Application is dismissed.

(ii) The Tribunal summarily assesses costs to be paid by the Applicant Taxpayer to the Respondent in the amount of $4,000.00.



Mr Andrew J See
Resident Magistrate