IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 413/94

BETWEEN: COMMISSIONER OF INLAND REVENUE c/- the Department of Inland Revenue:

Plaintiff

A N D: LE GODINET BEACHFRONT HOTEL LTD whose registered office is at Sogi, Apia, Western Samoa:

Defendant

Counsel: P Tanielu for plaintiff
T Malifa for defendant

Hearing: 4 April 1996

Judgment: 11 April 1996

JUDGMENT OF SAPOLU, CJ

This is an action brought by the Commissioner of Inland Revenue, as plaintiff, under the provisions of the now repealed Goods and Services Tax Act 1986 (GST Act 1986) to recover from the defendant, a registered company which operates a hotel with a restaurant and public bar at Sogi, unremitted goods and services tax (tax) with which it has been assessed as well as default penalties. Counsel for the defendant does not now dispute the facts as alleged by the plaintiff in the statement of claim, but he raised two technical defences with which I will deal later in this judgment.

Essentially the facts alleged by the plaintiff are that an assessment was made against the defendant under the provisions of section 13 of the GST Act 1986 for tax which should have been collected by the defendant for the period from 1 February 1992 to 30 November 1993. Penalties were also imposed under section 30 of the GST Act 1986 for the defendant's failure to collect the correct amount of tax. The total amount of the tax assessment made together with default penalties is $128,800.39. That amount is now being claimed by the plaintiff from the defendant.

To deal with the first technical defence which is based on section 23 of the GST Act 1986 as raised by counsel for the defendant, it is necessary to refer to those provisions of the GST Act which deal with *tax collected* and those provisions which deal with *tax which should have been collected*. But in order to have a clear understanding of those provisions it is necessary to refer first to other relevant provisions of the Act. Section 2 of the Act defines a 'consumer' to mean any person who pays a fee to a provider for any goods or services. The word 'provider' is not defined in the Act but the definition of 'consumer' clearly suggests that a 'provider' is a person to whom a consumer pays a fee for goods or services. The word 'fee' is also defined in section 2 of the Act to include any charge, credit charge, cost, payment, sum of money or other value, but not tax. And 'tax' is also defined in the same provision to mean goods and services tax imposed by the Act.

Under section 4 of the Act, tax is levied and paid on every fee paid by a consumer for goods or services. And under section 5, the amount of tax levied is 10% of the fee which is paid by a consumer for goods or services. It must of

course be clear from the definition of 'consumer' in section 2 that the fee payable for any goods or services is paid to a 'provider'.

Now if one refers to part III of the Act which contains sections 7, 8 and 9, it would be clear that those provisions deal with *tax collected by a provider*. Section 7(1) and (2) require every provider, as agent for the Department of Inland Revenue, to collect tax from a consumer at the same time the consumer pays the fee to which the tax relates. Section 8 then provides that all tax collected by a provider is to be held by the provider upon trust for the Government. Section 9 then goes on to provide that every provider by the 10th day of every month must lodge with the Department of Inland Revenue a return of the tax collected by him together with a remittance for the amount of tax he has collected. Thus the whole of part III of the Act deals with the actual collection of tax by a provider from consumers and the remittance to the Department of Inland Revenue of an amount equivalent to the amount of tax collected.

Part V of the Act which contains sections 13 to 19 deals with *tax which should have been collected by a provider* as opposed to *tax collected by a provider* or tax which is actually collected by a provider. Section 13(1) and (2) empowers the Commissioner of Inland Revenue, who is the plaintiff, to make an assessment of the amount of tax which should have been collected by a provider and the amount of such an assessment is the amount to be remitted by the provider to the Department of Inland Revenue. Section 14 further empowers the Commissioner of Inland Revenue to make an amended assessment if necessary and section 16 gives the provider in respect of whom an assessment is made the right

to lodge an objection against the assessment. Section 17 then provides for how the Commissioner of Inland Revenue is to determine an objection to an assessment and section 18 provides for a case stated to the Supreme Court where an objector is dissatisfied with a determination by the Commissioner. Section 19 is not relevant for our present purpose.

What is clear from this discussion, is that under the scheme of the GST Act 1986 there is a clear distinction between *tax collected by a provider* which is dealt with under part III and *tax which should have been collected by a provider* which is dealt with under part V. It is important to bear that distinction in mind when considering the first technical defence raised by counsel for the defendant. He submitted that the statement of claim should be struck out as the wrong defendant has been sued. He further submitted that the proper defendants to be sued in this case are the directors of the present defendant company and not the company itself. He based his submissions on section 23 of the Act. That provision states :

> "If a provider is a corporation then the directors of that
> "corporation shall, *together with the corporation*, be jointly
> "and severally liable to remit *tax collected* by the corporation
> "or pay any penalty imposed upon the corporation". (italics mine)

Looking at the wording of section 23, it is clear that it provides for the liability of a corporation and its directors in respect of the remittance of *tax collected* by a corporation and not *tax which should have been collected* by a corporation. Hence section 23 does not apply in the present case which is concerned with an assessment made by the plaintiff under section 13 of part V of

the Act for tax which should have been collected by the defendant as a provider. Furthermore, even if it is assumed that section 23 applies, the provision is clear that the corporation directors, together with the corporation itself, are jointly and severally liable to remit tax collected by the corporation as a provider. Therefore any failure to comply with section 23 would necessarily make both the corporation and its directors jointly and severally liable, and the corporation would thus be quite a proper defendant to be sued.

The first technical defence raised by counsel for the defendant is therefore misconceived and is rejected. The point about the directors being responsible for the management of a company is also of no assistance to the defendant in this case. A company is a legal entity with a separate existence quite distinct from that of tis directors and shareholders. It is clear that the assessment made by the plaintiff under section 13 part V of the Act for tax which should have been collected and remitted to the Department of Inland Revenue was made directly and solely against the defendant company as a provider and not against its directors who are not providers. That being so, the proper and logical person to be sued as defendant in this case is the company and not its directors unless there is a statutory provision making the directors also liable for the remittance of tax which should have been collected by the company. But there is no such provision in the GST Act 1986.

As to the second technical defence raised by counsel for the defendant which is that the GST Act 1986 has been repealed by the Value Added Goods and Services Tax Act 1992/1993 (VAGST Act 1992/1993) and that the savings provisions of the VAGST Act 1992/1993 do not preserve any liabilities accrued or proceedings

arising out of or commenced under the GST Act 1986, the answer to that defence is found in section 19(e)(viii) of the Acts Interpretation Act 1974. That provision of the Acts Interpretation Act was acknowledged by counsel for the defendant and raised and relied upon by counsel for the plaintiff in her counter-argument. Insofar as it is relevant, section 19(e)(iii) provides :

> "The provisions following shall have general application in
> "respect to the repeals of Act.... that is to say, the repeal
> "of an Act.... shall not affect any right to any Government
> "revenues....or any....taxes....penalties.... or prevent any
> "such Act.... being put in force for the collection or
> "recovery of any such revenues,.... taxes,.... penalties,
> ".... or otherwise in relation thereto".

In terms of section 2 of the Acts Interpretation Act 1974 and of section 19 itself, the latter provision applies to every repealed Act except in certain circumstances as provided in sections 2 and 19 themselves. It was not argued that any of those exceptions apply in this case and in my view none applies here.

Coming back to section 19(e)(vii), it is clear that it preserves a right, which has accrued under a repealed Act, to any taxes or penalties as well as the collection or recovery of any such taxes or penalties. It follows that section 19(e)(vii) also preserves proceedings brought in Court to enforce such right, which has accrued under a repealed Act, to collect or recover any taxes or penalties. In the present case, the Commissioner of Inland Revenue as plaintiff has brought proceedings to collect or recover tax assessed against the defendant and penalties imposed on the defendant under sections 13 and 30 of the repealed GST Act 1986 respectively. The right to bring those proceedings is preserved by section 19(e)(vii) of the Acts Interpretation Act 1974. The second technical

defence raised by counsel for the defendant must therefore also fail.

As the defendant does not dispute the facts alleged by the plaintiff, judgment is therefore given for the plaintiff in the amount claimed of $128,800.39 together with costs to be fixed by the Registrar plus any disbursements.

I make no award on the interest claim as the basis of that claim is not clear and counsel did not in their submissions address that issue. Counsel for the plainitff, however, may file submissions in writing within seven(7) days if she wants to pursue that issue. An equivalent period of time will then be allowed to counsel for the defendant to file submissions in writing in reply.

T F M Sapolu
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CHIEF JUSTICE