IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0007 of 2017
(High Court No. HBT 3 of 2016)

BETWEEN	:	**TREASURE ISLAND LIMITED**
		Appellant
AND	:	**THE CHIEF EXECUTIVE OFFICER** **FIJI REVENUE & CUSTOMS AUTHORITY**
		Respondent

Coram	:	**Calanchini, P** **Chandra, JA** **Kumar, JA**
Counsel	:	**Mr. C B Young for the Appellant** **Mr. O Verebalavu for the Respondent**
Date of Hearing	:	**2 July, 2018**
Date of Judgment	:	**5 December, 2018**

JUDGMENT

Calanchini, P

[1] I have had the advantage of reading in draft the judgment of Chandra JA and agree that the appeal should be allowed. I also agree with his proposed orders.

Chandra, JA

[2] This is an appeal against the judgment of the High Court delivered on 31 January 2017, regarding an application for Review of an Objection Decision made by the Respondent disallowing the Applicant's objection to the Amended Notice of assessment dated 24 June 2015.

[3] The Appellant, a limited liability company incorporated in Fiji has its registered office at Treasure Island Resort which is managed and operated by them. The Appellant had taken out an all risks material damage and business interruption insurance including cyclone risk for the Resort with Lloyds Underwriters of London. The Resort had been extensively damaged by Cyclone Evans in December 2012. The Appellant received $10,458,129.57 from Lloyds in October and November 2013, under the policy they had taken. The payment had been sent by Lloyds Broker in London into the Appellant's bank account in Fiji. By letter dated 22nd May 2013, the Respondent had confirmed to the Appellant that the insurance payments received from Lloyds underwriters of London, will not be subject to VAT. Of the sum received from Lloyds, $4,191,442.14 was for business interruption. Having stated that the payments received were not subject to VAT by letter dated 22nd May 2013, the Respondent by an amended notice of assessment sent on 24 June 2015, stated that the amount of $4,191,442.14 was subject to VAT. The Appellant filed an objection to the amended notices of assessment. On 22 January 2016, the Respondent disallowed the Appellant's objection. On 18 February 2016, the Appellant filed an application to review the objection decision before the Tax Tribunal, and applied to the Tribunal to transfer the

matter to the Tax Court at Suva. By an order of the Tax Tribunal made on 15 March 2016 the matter was transferred to the Tax Court at Suva. The Review of the Objection Decision was heard by the High Court sitting as the Tax Court and the decision was delivered on 31 January 2017.

[4] The Appellant set out the following grounds of appeal in the Notice of Appeal:

> *"(1). That the learned judge failed to consider and apply the proviso to s.3(8); s.15(2); s.16. s.17 and s.18 of the VAT Decree in determining the supplier under paragraph 13 of the Second Schedule and wrongly held that the Appellant was the supplier when it was Lloyds Underwriters of London.*
>
> *(2) That the learned Judge failed to appreciate that the determination of the supplier under paragraph 13 of the second Schedule had to be made at the time of supply under s.18 of the VAT decree and not subsequently when the insurance payments became payable or were received.*
>
> *(3) That the learned judge was wrong to ignore the Appellant's written submissions in determining who was the supplier under paragraph 13 of the Second Schedule to the VAT Decree and was influenced by irrelevant matters.*
>
> *(4) That the learned judge was wrong to hold that the Respondent was entitled to withdraw its letter dated 22nd May 2013 in view of s.15 of the Tax Administration Decree 2009.*
>
> *(5) That the decision of the learned judge is not supported by the facts or the law."*

[5] The Appellant in its application before the High Court sought to have the objection decision of the Respondent dated 22 January 2016, reviewed on the following grounds:

> *"(1) VAT was not payable on the insurance payment received by the Applicant from Lloyds Underwriters, London because:*
>
> *(a) s.3(8) of the Value Added Tax Decree 1991 (VAT) did not apply to a contract of insurance where the supply of that contract was zero rated.*

The contract was zero rated because the supply of services under it was performed by the insurer outside Fiji.

(b) s.3(8) of the Vat Decree did not apply as the supply of services under contract was deemed to be made in England because the insurer belonged in that country.

(2) On 22nd May 2013, Revenue correctly ruled the insurance payment received by the Applicant would not be subject to VAT.

(3) The Applicant relied upon and acted on the Revenue's ruling and spent all the monies received in capital expenditure and repairs to the resort which had been damaged by Tropical Cyclone Evans.

(4) The Revenue could not withdraw their letter of 22 May 2013 (letter) pursuant to s.15 of the Tax Administration Decree 2009 (TAD) because that section did not apply since the letter did not contain a mistake and the mistake, if any, involved a dispute as to the interpretation of the law and the facts of the case.

(5) The letter was a private ruling made pursuant to s.64 and s66 of the TAD and could not be withdrawn under s.67."

[6] However, at the commencement of the hearing before the High Court, Counsel on both sides had agreed that the following were the only issues before Court:

(1) Whether the insurance monies paid after Cyclone Evans in December 2012, are VAT zero rated.

(2) Whether the proviso the s.3(8) of the VAT Act applied.

[7] The Appellant had contended that Lloyds was the supplier, as in effecting the policy with Lloyds, the premiums had been paid by sending out same out of Fiji with the approval of the Reserve Bank, that the proposal was accepted in London by Lloyds, Lloyds was in London and did not have a branch nor agent in Fiji, that the insurance contract was made in London, that the claim was lodged, processed and paid in London and that the claim was

paid in London into the account of the Appellant. The Respondent had not disputed that the policy had been made in London.

[8] The Learned High Court Judge while dismissing the application of the Appellant concluded that the Appellant was the supplier, and that although the Respondent made a mistake in relying on s.15 of the Tax Administration Act regarding the withdrawal of its earlier decision, that they could still rely on the common law position as stated in **Punja & Sons Limited v. Commissioner of Inland Revenue** CA No. ABU 99/2005s.

[9] Considering the sequence of events, the Respondent had by letter dated 22 May 2013, stated that the amount of $4,191,442.14 of the amount received from Lloyds was not subject to VAT. Thereafter by amended notices sent on 24 June 2015, the Respondent had stated that the said amount was subject to VAT. The Respondent had sought to justify the withdrawal of its earlier position by having recourse to s.15 of the Tax Administration Act.

[10] VAT being a tax on the supply of goods and services is payable by the supplier. In the present case it was the supply of services that had to be considered, as according to section 3(1) of the Act "supply" includes all forms of supply.

[11] The main issues that were to be considered as stated above were whether the insurance monies that were paid were VAT zero rated and whether the proviso to s.3(8) of the VAT Act applied. Therefore the main issue in this case revolves round the interpretation of s.3(8) and its proviso and the related sections in the VAT Act. The other matter that involves consideration is the effect of s.15 of the Tax Administration Act 2009 under which the Respondent had changed its earlier stand.

[12] S.3(8) provides:

> *"Subject to this section, except for subsection (8A), if a registered person receives a payment under a contract of insurance, whether or not the person is a party to the contract of insurance, the payment is, to the extent*

that it relates to a loss incurred in the course or furtherance of the registered person's taxable activity, deemed to be consideration received for a supply of services performed by the registered person -
(a) on the day the registered person receives the payment; and
(b) in the course or furtherance of the registered person's taxable activity,

provided that ***this subsection shall not apply in respect of any payment received pursuant to a contract of insurance where the supply of that contract of insurance was-***

(i) exempted;
(ii) zero rated;
(iii) *in respect of an entitlement for loss of earning within the meaning of the Workmen's Compensation Act 1964 or the Motor Vehicle (Third Party Insurance) Act 1948 or accidental personal injury or damages.*

[13] In terms of s.3(8) if a registered person, such as the Appellant in the present case, received a payment under a contract of insurance where it relates to a loss incurred in the course or furtherance of the registered person's taxable activity (in this case the running of the resort) such payment is deemed to be consideration received for a supply of services performed by the registered person.

[14] However, according to the proviso, s.3(8) shall not apply in respect of any payment received pursuant to a contract of insurance where **the supply of that contract of insurance** was **zero rated.** Therefore if the supply of the contract of insurance is zero rated the payment received by the Appellant will not be deemed to be consideration for the purpose of levying VAT.

[15] The payment received by the Appellant on which the claim has been made by the Respondent is the payment made by Lloyds in pursuance of the claim made by the Appellant in terms of the policy entered into with Lloyds. The payment therefore refers to the supply of that contract of insurance, which can refer only to the contract of insurance with Lloyds. It is clear therefore that the supply is the contract of insurance.

[16] Part 4 of the VAT Act deals with the imposition of tax on supply (s.15), Place of supply (s.16), place where the supplier or recipient of services belongs (s.16, s.17) and Time of Supply (s.18) which become relevant in dealing with the present case.

[17] Section 15 of the VAT Act, 1991 provides:

> *"15 (1) Subject to the provisions of this Act, the tax shall be charged in accordance with the provisions of this Act at the rate of nine 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."*

[18] In terms of these provisions, tax would not be charged where the supply is zero-rated. The definition of 'zero rated supply' is in s.2(1) of the VAT Act and is defined as 'a supply described in the Second Schedule to this Act'. In the second schedule, paragraph 13 defines zero-rated supply as "the supply of services which are physically performed outside Fiji".

[19] The place of supply is dealt with in ss.16 and 17 of the VAT Act.

> *"s.16 (1) For the purposes of section 15 of this Act, the following provisions of this section shall apply for determining, for the purposes of the charge of tax whether goods and services are supplied in Fiji.*
>
> *(2) In relation to a supply of goods which does not involve their removal from or to Fiji, those goods shall be deemed to be supplied in Fiji if those goods are in Fiji, and otherwise shall be deemed to be supplied outside Fiji.*
>
> *(3) In relation to a supply of goods which involves their removal (a) from Fiji, those goods shall be deemed to be supplied in Fiji: (b) to Fiji, those goods shall be deemed to be supplied outside Fiji.*
>
> *(4) Subject to this Section, a supply of services shall be deemed to be –*
>
> > *(a) in Fiji if the supplier belongs in Fiji; or*
> >
> > *(b) in another country, if that supplier belongs in that other country.*

s.17. (1) Subsection (2) of this section shall apply for determining, in relation to any supply of services, whether the supplier belongs in one country or another and subsections (3) and (4) of this Section shall apply for determining, in relation to a supply of services, whether the recipient belongs in one country or another.

(2) The supplier of services shall be deemed to belong in a country if the supplier – (a) has there a taxable activity establishment or some other fixed establishment and no such establishment elsewhere, or (b) has no such establishment there or elsewhere but the supplier's usual place of residence is there' or (c) has such establishment both in that country and elsewhere and the establishment of the supplier which is most directly concerned with the supply is there.

(Sub-section (3) and (4) deal with situations involving an individual)

(5) For the purposes of this Section-

(a) a person carrying a taxable activity through branch or agency in any country shall be deemed to have a taxable activity establishment there; and

(b) the expression usual place of residence, in relation to a body corporate, means the place where it is legally constituted."

[20] The time of supply is dealt with in s18 of the VAT Act.

"s.18(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."

[21] The policy of insurance with Lloyds was made in London which was not disputed by the Respondent. As stated above at paragraph [10] the supply was the contract of insurance in terms of s.3(8) .

[22] In terms of s17 the place of supply of the contract of insurance was London and in terms of s18(1) the time of the services performed by Lloyds was in relation to the issuance of

the policy to the Appellant, which was by issuing a tax invoice in London for the payment of the premiums in terms of s18(1)a) or when the insurance premiums were received by Lloyds in London in terms of s18(1)(b) or when the policy was issued in terms of s18(1)(c).

[23] A consideration of the effect of Sections, 16, 17 and 18 and their application to the present instance would show that the supplier of services was Lloyds of London that the place of supply was London which satisfy the requirement of zero rated supplier as provided for in the VAT Act. Therefore the payment received by the Appellant on which VAT was sought to be levied by the Respondent would be exempted from the levy of VAT in terms of the proviso the s.3(8).

[24] The Respondent submitted that their position was supported by the decision in **Commissioner of Inland Revenue v. Ghim Li Fashion (Fiji) PTE Limited** Civil Appeal No. ABU0056 of 2001. This decision was based on s.3(8) and not on the proviso to s.3(8) and therefore this decision has no application to the present case.

[25] The learned High Court Judge had concluded that the Appellant was the supplier, on the basis of his interpretation of s.3(8) according to which the receipt of the payment is considered to be consideration received and therefore subject to VAT. However, the learned Judge failed to consider the effect of the proviso to s3(8) which takes away that position if the payment is received pursuant to a contract of insurance which was zero rated, which was the position in this case.

[26] It has also to be noted that s.3(8) had been the subject of amendment. In 2010, the proviso to s.3(8) had been deleted and in January 2012, the deleted proviso was re-enacted. It was the 2012 amended version that was applicable for the insurance payments that were received by the Appellant in October and November 2013. It would appear therefore that the decision of the Respondent to disallow the objection of the Appellant to the amended

notice of assessment was based on the 2010 amendment whereas the subsequent reinstatement of the proviso in 2012 was the provision that applied.

[27] The other issue that needs consideration is the reliance of the Respondent on s.15 of the Tax Administration Act regarding its withdrawal of its earlier decision on 22 May 2013 and the sending of the amended notice of assessment on 24 June 2015.

[28] Section 15 of the Tax Administration Act provides:

> *"If the CEO is satisfied that an order made or document issued by the CEO under a tax law contains a mistake which is apparent from the record and that the mistake does not involve a dispute as to the interpretation of the law or facts of the case, the CEO may, for the purposes of rectifying the mistake, amend the order or document any time before the expiry of 6 years from the date of making or issuing the order or document."*

[29] The authority conferred on the CEO under this provision would be where:

(a) the document contains a mistake which is apparent from the record; and

(b) the mistake does not involve a dispute as to the interpretation of the law or facts of the case.

[30] The learned High Court Judge concluded in his judgment that the Respondent was mistaken in relying on s.15, because the Respondent was not rectifying a mistake but withdrawing an earlier decision. However, the learned Judge went on to hold that the Respondent could rely on the common law position as stated in the **Punjas** judgment.

[31] The letter of 22 May 2013, was withdrawn by the Respondent not on the basis of the common law position but on a specific provision of the law being s.15 of the Tax Administration Act which was not applicable in this case. The conclusion of the learned Judge is to the effect that based on the **Punjas** judgment, the Revenue Authority has full entitlement to change its decision and that full entitlement has not been curtailed nor

fettered in any way by its mistaken assumption that it was acting in line with s.15 of the Tax Administration Act.

[32] The decision in **Punjas** was in relation to the variation of an assessment arrived at by consent which was subsequently altered by the Revenue Authority. Whereas in the present case the variation of the decision of the Revenue Authority on a failure to apply the relevant provision of law, namely the proviso to s.3(8) of the Vat Act, and which was sought to be justified by the Revenue Authority in terms of s.15 of the Tax Administration which was held by the learned High Court Judge as being erroneous. In the present case, the amended notice by the Respondent was on the basis that s.3(8) applied before it was amended on 10th January 2012 which was effective from 1st August 2010. The 2012 amendment brought in the proviso according to which the payment received by the Appellant was exempt from VAT as s.3(8) would not apply in such a situation as discussed above.

[33] The decision in **Punjas** case therefore is distinguishable from the situation in the present case, and the principle relied on by the learned High Court Judge from **Punjas** decision would not be applicable in the present instance.

[34] In view of this position, the judgment of the High Court is set aside and the appeal is allowed. The Amended Assessments Nos.1 and 2 dated 24 June 2015 are set aside and the Respondent is to refund the sum of $540,823.97.

[35] The Appellant in their application to the High Court and in its appeal to this Court sought interest at 12.5% under s.67(2)(z) of the Vat Act on the amounts to be refunded to the Appellant from their respective payment date to 1 August 2016, and thereafter at the rate fixed by the Reserve Bank of Fiji to the date of judgment or at such rate as the Court shall determine.

[36] Section 67(2) refers to interest payable in respect of refunds in terms of s.65. Section 65 refers to refunds pursuant to s.38(4) or 39(8). Section 38(4) refers to particulars required to be furnished by s.37. Section 37 refers to a situation where there has been a change in

the accounting basis. Section 39(8) referred to in s.65 relates to calculating tax in respect of output with reference to taxable periods.

[37] No interest is payable on the refund as s.67(2) and the related sections referred to above have no reference to the supply of services as in the present case and therefore s.67(2)(z) has no application to the refund in this case.

Kumar, JA

[38] I agree with the reasons and conclusion of his Lordship Justice Chandra, JA.

Order of Court:

1. *The Appeal of the Appellant is allowed and the judgment of the High Court is set aside.*
2. *The Respondent to refund the sum of $540,823.97 to the Appellant within28 days.*
3. *Costs in a sum of $4,000 to be paid by the Respondent to the Appellant within 28 days.*

.....
Hon. Justice William D. Calanchini
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Justice Suresh Chandra
JUSTICE OF APPEAL

.....
Hon. Justice Kamal Kumar
JUSTICE OF APPEAL