IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 23 OF 2023
[High Court at Suva Case No. HBC 201 of 2017]

BETWEEN	**:**	**ORIX HOLDING LIMITED**
		Appellant
AND	**:**	**LUPING ZOU**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Qetaki, JA** **Clark, JA**
Counsel	**:**	**Mr. S. Singh and Ms. K. Saumaki for the Appellant** **Ms. A. Tuiketei for Respondent**
Date of Hearing	**:**	**05 November 2024**
Date of Judgment	**:**	**28 November 2024**

JUDGMENT

Prematilaka, RJA

Factual background

[1] By writ of summons accompanied by the statement of claim, the appellant (original plaintiff) claimed *inter alia* that the respondent (original defendant) owed a sum of $115,335.00, being reimbursement for Value Added Tax (VAT) paid by the plaintiff to the Fiji Revenue & Customs Service (FRCS) in relation to a sale of property comprised in Certificate of Title No. 14291 for a sum of $660,000.00.

[2] On 23 January 2014, the appellant had entered into a Sale and Purchase Agreement with one Xin Zhe for the transfer of property comprised in Certificate of Title No 14291 for the sum of $660,000.00. This agreement had provided for the nomination of a purchaser in place of Xin Zhe and by transfer dated 06 May 2014 the said Xin Zhe had nominated the respondent to purchase the said property pursuant to the Sale and Purchase Agreement. Accordingly, the property was transferred to the respondent.

[3] The statement of claim states that the parties contracted on the basis that the sale was zero-rated for VAT in terms of section 15(2) of the Value Added Tax Act 1991 (as amended from time to time) ('VAT Act'). It was also agreed that in the event the plaintiff paid VAT on the date of settlement or a later date, as advised by the plaintiff the defendant will pay the VAT together with any penalty imposed and interest for late payment. Subsequently, FRCS deemed the sale to be subject to VAT at the rate of 15% and imposed penalties on the plaintiff totaling a sum of $115,335.00.

[4] The respondent in her defence had stated that the contracting party remained Xin Zhe and the nomination did not transfer the obligations under the Sale and Purchase Agreement to her. The respondent had further gone on to say that the appellant failed to deliver a tax invoice to her and by failing to deliver a tax invoice, the appellant deprived the respondent of the opportunity to pay VAT and reclaim the same from FRCS. The respondent also asserted that registered entities are entitled to reclaim VAT paid to FRCS within a period of 3 years and the VAT assessment arose from an audit of the appellant's tax affairs which revealed irregularities. The respondent alleged that as a result the appellant was penalized for making false statements, failing to maintain proper records, late payment and lodgment.

[5] The appellant in response had stated that by taking a transfer of the property as nominee under the Sale and Purchase Agreement, the respondent was liable for the claim and that VAT only became an issue when the FRCS conducted an audit and raised an assessment for VAT to be paid on the sale. The appellant further stated that VAT invoice could only be raised once the respondent makes payment of the claim and that there were no irregularities in the plaintiff's tax affairs.

High Court Judgment

[6] The High Court in the judgment delivered on 22 February 2023 declined the appellant's claim and ordered the appellant to pay $2000.00 as cost summarily assessed. This appeal arises from this judgment.

[7] The High Court identified four issues for determination.

(i) *'Is the plaintiff able to enforce the terms of the Sale and Purchase Agreement against the defendant?*
(ii) *If so, what is the extent of that liability?*
(iii) *Is the plaintiff entitled to its claim against the defendant?*
(iv) *Who is entitled to the costs of this action and on what basis?*

[8] The court answered the first question in the affirmative stating that the respondent was bound by the term of the Sale and Purchase Agreement.

[9] The trial judge seems to have answered the second and third questions collectively and based on section 41 read with clause 25.2 of the Sale and Purchase Agreement, decided that the appellant had not issued a VAT invoice which was mandatory; nor had the appellant made a demand to the respondent. Accordingly, the judge had declined the appellant's claim.

[10] In answering the fourth question, the judge without setting out any basis had imposed a cost of $2000.00 on the appellant.

[11] The grounds of appeal raised by the appellant are as follows.

1. *The Learned Judge erred in law erred in law and in fact in holding that the requirement to issue a tax invoice is mandatory under the Act and the Sale and Purchase agreement.*

2. *The Learned Judge erred in law and in fact in dismissing the Plaintiff's claim for a reimbursement of Value added tax from the Respondent when the Value added tax was imposed by the Fiji Revenue and Customs Services after the sale had been completed.*

3. *The Learned Judge erred in law and in fact in not considering the full clause 25 of the agreement and in dismissing the Plaintiff's claim.*

[12] Central to all grounds of appeal is the proper interpretation of section 41 of the VAT Act and clause 25 of the Sale and Purchase Agreement.

[13] Following the Sale and Purchase Agreement on 23 January 2014, the Transfer in Fee Simple had been signed by the appellant on 06 May 2014 transferring the absolute ownership of the property concerned to the respondent. The Transfer had been registered by the Registrar of Titles on 09 July 2014. The Settlement Statement issued by the appellant's solicitors to the respondent's solicitors on 08 July 2014 had stated that zero VAT applies to transaction which is the basis on which both the appellant and the respondent had entered into the Sale and Purchase Agreement (see clause 25.1 of the Sale Agreement).

[14] For the first time, FRCS had informed the appellant on 31 July 2015 that the property was a trading stock for the appellant company and not a capital gain and the sale of the property concerned should be captured under section 11(1) of the Income Tax Act. FRCS had also informed that no output VAT had been declared for the sale in question which constituted a supply made by the appellant company and therefore subject to VAT at the rate of 15% calculated to be $103,304.35 (VAT - $86,086.96 plus penalty - $17, 2017.39).

[15] The appellant through a firm of Chartered Accountants had challenged the FRCS's position on 10 August 2015 in that it was argued that the property was not a trading stock of the appellant company but it was a residential zoning exempt from VAT and therefore output VAT should not be applicable. FRCS had responded on 17 August 2015 stating that in terms of the definitions on 'supply' and 'sale' respectively under section 3 of VAT Act and section 2 of Sale of Goods Act, the sale of the property was a supply made by the appellant, a VAT registered person and it will be subject to 15% VAT in terms of section 15 of the VAT Act. FRCS had further stated that sale of property in a residential zone was not captured under the First Schedule – Exempt supplies of the VAT Act. Thus, FRCS had stood by its decision. In a further response by the appellant's Chartered Accountants on 21 August 2015, it had been stated *inter alia* that the general understanding was that VAT was not applicable on residential property. In reply, FRCS had clarified on 01 September 2015 that the sale of this property was not captured in paragraphs 2 and 7 of the said First Schedule– Exempt supplies of the VAT Act and sale

of vacant land was a taxable supply and subject to VAT. Once again, in response to the appellant's solicitor's letter on 04 September 2015 on the issues whether there was a taxable activity in so far as the relevant transaction was concerned and whether the supply was exempt, FRCS had stated on 09 September 2015 that the appellant's taxable activity was property development and leasing out and to carry out this activity it had to deal with property and therefore the supply made in the course or furtherance of taxable activity. Therefore, it is clear that the appellant had tried its utmost to have the land transaction with the respondent exempted from VAT. Failing all its efforts, the appellant had no option but pay VAT to FRCS in respect of the land transferred to the respondent.

[16] In terms of clause 25.1 of the Sale and Purchase Agreement both the appellant and the respondent had agreed that they were contracting on the basis that the sale was zero rated pursuant to section 15(2) of the VAT Act and therefore VAT payable was 0%. It is not in dispute that two experienced legal firms namely Parshotam Lawyers and Patel Sharma & Associates had advised the appellant and the respondent respectively in this process. Therefore, it is inconceivable that both legal advisers were ignorant of exempt supplies and zero-rated supplies as defined in section 2 of the VAT Act and described in Schedule 1 and 2 respectively. It is more likely that at the time the Sale and Purchase Agreement was entered into in January 2014 and Settlement Statement was issued in July 2014, both of them believed (at least the general understanding was that VAT was not applicable on residential property according to the appellant's Chartered Accountants) that the sale of this residential property was not a 'taxable activity' as per section 4 of the VAT Act and even if that were the case, the sale of that property was in particular a zero-rated supply or an 'exempt supply' made in the course or furtherance of a taxable activity as per paragraph 7 of Schedule 1 of the VAT Act. Unfortunately to the surprise of both the appellant and the respondent, after a year and a half of the Sale and Purchase Agreement, FRCS decided otherwise.

[17] However, both the appellant and the respondent, obviously on the advice of their respective legal advisers, had envisaged retrospective VAT liability on the transaction and made provision for this contingency in paragraph 25.2 of the Sale and Purchase Agreement. Paragraph 25 under the heading VAT as agreed to by both parties is as follows.

25.1 In the event that the parties are contracting on the basis that the sale is zero rated pursuant to Section 15 (2) of the Value Added Tax decree 1991, the VAT is payable at 0%.

25.2 If the purchaser is to pay VAT (in addition to the purchase price) then:

a) the purchaser shall pay the Vendor VAT in full on the date of settlement or such other date after the Date of Settlement as the Vendor shall advise the Purchaser.

b) if VAT is not so paid to the Vendor by the Purchaser as set out in clause 25(a), then the Purchaser shall pay to the Vendor:
(i) any default VAT.
(ii) interest at the appropriate rate payable for late payment of VAT calculated from the;
(iii) date the payment was due to the date actually paid.

c) it shall not be a defence to a claim by the Vendor against the Purchaser for payment of any default VAT and interest that the Vendor has failed to obtain to mitigate the Vendor's damages by paying the amount of VAT when it fell due;

d) if VAT is payable under this agreement, then the Vendor will deliver a tax invoice to the Purchaser stating the VAT amount;

e) "Default VAT" means any additional Vat, penalty or other sum levied against the vendor under the VAT Act by reasons of non-payment of the VAT payable in respect of the supply made under this agreement but does not include any sum levied against the vendor by reason of a default by the vendor after the payment of the VAT to the vendor by the purchaser.

f) If VAT is paid by the purchase as required herein, then the vendor shall indemnify the purchaser and keep the purchaser harmless against any claims or prosecution in respect of such VAT.

Grounds of appeal 1, 2 and 3

What is Value Added Tax (VAT?

[18] Admittedly, VAT became payable on the sale of the property. It is convenient to consider all three grounds together as they are so inextricably interwoven. VAT, exemptions and zero-rating have been described[1] in Fiji as follows.

'It is a multistage tax imposed at all levels on all providers of goods and services (save those exempted). The essential features of VAT is that it taxes final and intermediate sales at each stage of the production and distribution process. This is

[1] See paragraphs [21], [22] and [23] in **Westbus Fiji Ltd v Chief Executive Officer, Revenue and Customs Authority** [2022] FJCA 142; ABU59.2019 (25 November 2022)

usually implemented using a credit offset mechanism, otherwise known as the invoice method. Using the invoice method, credits are given for inputs purchased. In effect, each firm is taxed only on the "value added" to the product. In other words, tax is levied on taxable sales minus purchases of taxable inputs. This means that, when the tax at each stage of the transaction is aggregated and credits subtracted, the total amount of tax paid is equivalent to the final consumer price times the VAT rate'

'It is a tax on the final consumer of goods and services, in as much as the final consumer is unable to recover or claim credit or the VAT included in the cost of supplies made to him'.

'Exemptions and zero-rating are mechanisms by which a benefit is sought to be granted to the final consumers and such exemptions and zero-rated supplies are determined by the legislature from time to time.'

[19] Value added tax ("VAT") is, therefore, a tax on goods and services. It represents a move away from the traditional forms of taxation which for the most part tax you on your income or the turnover of your business. Under the VAT regime, you pay tax on the goods and services which you as a consumer choose to pay for. This form of indirect taxation has become one of the most successful ways in which governments raise revenue[2].

[20] Value Added Tax (VAT) is a type of indirect tax imposed on the value added to goods and services at each stage of production or distribution. It is ultimately borne by the end consumer but is collected and remitted to the tax authorities by businesses. VAT operates under the principle of input and output taxes:

1. ***Input Tax****: The VAT a business pays on its purchases.*
2. ***Output Tax****: The VAT a business charges on its sales.*

The business remits the difference between the output tax and input tax to the tax authorities.

[21] Legal explanation and judicial precedents on VAT in other jurisdictions.

1. Principle of Neutrality

VAT is designed to be neutral for businesses, as they can claim credit for the input tax paid. In ***Fisher (HM Inspector of Taxes) v Bell*** *[1976] STC 438, the court*

[2] **Fiji Revenue and Customs Service v Treasure Island Ltd (In Liquidation)** [2022] FJSC 14; CBV0001.2019, CBV0004.2019 (29 April 2022)

considered VAT's operation and emphasized its neutrality in ensuring businesses are not double-taxed.

2. Taxable Supply and Economic Activity

*In **Card Protection Plan Ltd v Customs and Excise Commissioners** [1999] 2 AC 601, the European Court of Justice (ECJ) held that VAT applies to any supply of goods or services made in the course of an economic activity, regardless of its profitability.*

3. Exempt Supplies

*Some transactions are exempt from VAT. In **Abbey National plc v Customs and Excise Commissioners** [2001] UKHL 6, the UK House of Lords ruled that VAT exemptions must be interpreted strictly, as they deviate from the general rule of taxability.*

4. Right to Input Tax Deduction

*In **Kretztechnik AG v Finanzamt Linz** [2005] EUECJ C-465/03, the ECJ clarified that a business is entitled to deduct input VAT even if the goods or services purchased are not directly linked to taxable supplies, provided they are used for the company's overall economic activity.*

5. Reverse Charge Mechanism

*In **Commissioners for Her Majesty's Revenue and Customs v Weald Leasing Ltd** [2011] UKUT 183 (TCC), the court discussed the reverse charge mechanism, where the recipient of goods or services accounts for VAT instead of the supplier, often in cross-border transactions.*

6. Fraudulent VAT Claims

*In **Kittel v Belgium and Belgium v Recolta Recycling SPRL** [2006] EUECJ C-439/04, the ECJ ruled that businesses cannot claim input VAT if they knew or should have known they were participating in a transaction connected with VAT fraud.*

[22] Key features of VAT are (i) broad tax base: it applies to almost all goods and services unless explicitly exempted (ii) multi-stage collection: VAT is collected at each stage of the supply chain (iii) consumer burden: the tax is ultimately paid by the final consumer. The principles derived from these cases demonstrate that VAT law balances revenue collection with economic fairness and operational neutrality.

Exempted Supplies

[23] Exempted Supplies and Zero-Rated Supplies are two distinct categories in the Value Added Tax (VAT) system, though both result in no VAT being charged to the customer. The key difference lies in their treatment under the VAT chain and their implications for businesses.

[24] Exempted supplies are goods or services on which VAT is not chargeable. Businesses making exempt supplies cannot claim input VAT on purchases related to those supplies. Examples of exempted supplies are financial services, education services, health care services, insurance and reinsurance, charitable activities etc. Exempt supplies provide relief to end consumers but restrict businesses from recovering input VAT.

[25] Businesses providing exempt supplies are not required to charge VAT. They cannot reclaim input VAT incurred on goods or services used in the production of exempt supplies. Exemption narrows the tax base and creates "hidden VAT" in the supply chain, as input tax becomes a cost. In **Abbey National plc v Customs and Excise Commissioners** [2001] UKHL 6, it was held that exemptions must be interpreted narrowly because they deviate from the general principle of taxability. In **College of Estate Management v Customs and Excise Commissioners** [2005] EWCA Civ 1490, the court analyzed whether certain educational activities were exempt, emphasizing the functional nature of exemption categories.

Zero-rated supplies

[26] Zero-rated supplies are goods or services taxed at a VAT rate of 0%. Businesses making zero-rated supplies can claim input VAT on related purchases. Examples are basic foodstuffs, medical equipment, books and newspapers, exported goods, international transport services etc. Zero-rated supplies benefit both consumers and businesses by allowing VAT recovery and removing tax costs on essential or exportable goods. Governments use these categories to achieve economic, social, and policy goals while maintaining tax fairness.

[27] Businesses providing zero-rated supplies do not charge VAT but can reclaim input VAT**,** creating a significant financial advantage. Zero-rating supports economic objectives like

encouraging exports or reducing the tax burden on essential goods. The case of **Customs and Excise Commissioners v Redrow Group plc** [1999] UKHL 4 clarified the right to input tax recovery even in zero-rated transactions. In **Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën** (Case C-348/87), the ECJ held that zero-rating is distinct from exemption and ensures neutrality for businesses in the supply chain.

[28] Key differences between exempted and zero-rated supplies.

Aspect	***Exempted Supplies***	***Zero-Rated Supplies***
Output VAT	*No VAT charged*	*VAT charged at 0%*
Input VAT Recovery	*Not allowed*	*Fully allowed*
Supply Chain Effect	*Hidden VAT cost passed down*	*No VAT burden passed down*

[29] In light of the above discussion, it is clear that FRCS was right in insisting on VAT on the land transaction in issue. Neither of the counsel at the hearing of the appeal managed to point out any paragraph in Schedule 2 to the VAT Act where sale of residential property was to be zero-rated. It is an agreed fact that the appellant was charged default VAT by FRCS in the sum of $99,000 and penalties in the sum of $16,335. It is also an agreed fact that the appellant made those two payments to FRCS in 2017. Therefore, clause 25.1 of the Sale and Purchase Agreement was null and void ab initio and could not be enforced. Parties by mutual agreement cannot circumvent the law. Thus, both parties are bound by the VAT regime and cannot escape their respective liabilities. I shall now proceed to deal with the main issues raised in this appeal.

Was the requirement to issue a tax invoice mandatory under the VAT Act and Sale Agreement?

[30] In terms of clause 25.2(a) of the Sale and Purchase Agreement, if the purchaser is to pay VAT (in addition to the purchase price) then the purchaser shall pay the vendor VAT in full on the date of settlement or such other date after the date of settlement as the vendor shall advise the purchaser. In both situations the taxable activity involves neither an exempt supply not a zero-rated supply, for in either of those events there would not be VAT. The former seems to deal with the situation where a liability to pay VAT arises after the date of Sale and Purchase Agreement but before the Transfer and/or date of settlement. The latter could arise if the liability to pay VAT becomes known after the Transfer and/or date of settlement. The date of the transfer as well as the date of settlement in this case is 08 July 2014. However, neither party knew by that date that the

respondent as the purchaser had to pay VAT which was first communicated by FRCS to the appellant on 31 July 2015. Considering its several attempts to get the FRCS to reverse its decision failing which it had settled VAT, the appellant's bone fides cannot be called into question. However, the appellant does not seems to have advised the respondent to pay VAT as required by clause 25.2(a) of the Sale Agreement.

[31] In addition, in terms of clause 25.2(d) of the Sale and Purchase Agreement if VAT is payable under the Sale and Purchase Agreement, then the appellant was required to deliver a tax invoice to the respondent stating the VAT amount. Admittedly, the appellant did not do that either. But, that the appellant paid the VAT in full is not in dispute.

[32] However, the respondent's argument and the trial judge's assertion that the requirement to issue a tax invoice is mandatory under section 41 the VAT Act and clause 25.2(d) of the Sale and Purchase Agreement cannot be sustained for two reasons.

[33] Section 41 of the Value Added Tax Act states:

> *Except as otherwise provide by regulation, a supplier, being a registered person, making a taxable supply to a recipient,* ***shall issue a tax invoice containing such particulars as specified by regulation at the time that the supply takes place,*** *provided that –*
>
> *a) It shall not be lawful to issue more than one tax invoice for each taxable supply.*
>
> *b) If a registered person claims to have lost the original tax invoice, the supplier or the recipient, as the case may be, may provide a copy clearly marked "copy only.*(emphasis added)

[34] Firstly, the issuance of a tax invoice is compulsory '*at the time that the supply takes place*'. However, the law does not explicitly state that the absence of a tax invoice extinguishes the supplier's entitlement to recover VAT. Instead, the tax invoice serves primarily as evidence of the transaction and VAT amount. Clause 5(a) of the Sale and Purchase Agreement which says that the appellant shall issue a VAT invoice (*if applicable*) in favour of the respondent for the full price is consistent with this position. A tax invoice is crucial for compliance with VAT laws and enables the recipient to claim input VAT credits, if eligible. However, the appellant is not seeking to enforce compliance with VAT laws but to recover a debt owed under the contract. The absence of

a tax invoice does not invalidate the appellant's claim, especially when there is substantial evidence supporting the tax liability on the respondent.

[35] In this case both parties acted as if there was no VAT payable on the transaction. VAT Act is silent as to the position when VAT becomes payable after a purported exempted or zero-rated supply had been already completed and FRCS subsequently determines that supply not to be VAT exempted or zero-rated as in this case. Thus, issuance of a tax invoice under section 41 the VAT Act at the time of the supply did not and could not arise in this instance. *Impossibilium nulla obligatio est* (a legal obligation that is impossible to perform must be excused).

[36] Clause 25.2 (a) of the Sale and Purchase Agreement explicitly contemplates scenarios where VAT becomes payable after settlement. Clause 25.2(b) imposes an obligation on the purchaser to reimburse the vendor for VAT, default VAT, and associated penalties. The issuance of a tax invoice is a procedural requirement and does not negate the purchaser's primary obligation under the contract.

[37] In **Commissioner of Inland Revenue v First National Bank of South Africa Ltd** [2002] 4 SA 768 (CC)**,** the court emphasized that non-compliance with administrative requirements, such as issuing a tax invoice, does not necessarily nullify the underlying tax obligation if the substantive transaction is taxable.

[38] On the other hand, delivery of a tax invoice when VAT became payable on 31 July 2015 was not mandatory as the world 'will' in clause 25.2(d) suggests but only directory or optional. Therefore, given that the appellant as the vendor took every effort to get the transaction VAT exempted but in the end had to pay as a result of FRCS not being amenable to any of its arguments to the contrary, the failure to issue a tax invoice when VAT became payable cannot and should not be held against the appellant to the extent of defeating its claim. Because, first and foremost the burden of paying VAT was fairly and squarely on the respondent as the purchaser. Clause 25.2(c) has specifically permitted the appellant to pay VAT when it fell due and contemplates a scenario where the payment may also be made by the appellant belatedly by stating that such a late payment is not a defense in respect of a claim for default VAT and interest by the vendor against the purchaser. This is what exactly the appellant had sought in this action.

[39] The basic principle of VAT is that it is intended to tax only the final consumer. The incidence of the tax falls on the final consumer.[3]

[40] If the respondent's position is that had the appellant issued a tax invoice on VAT on 31 July 2015 or thereafter, she was ready to pay, there was no reason as to why the respondent failed to do so when writ of summons and statement of claim were served. On the contrary the respondent's position was that the nomination did not transfer the obligations under the agreement to her, the plaintiff failed to deliver a tax invoice to her and registered entities are entitled to reclaim VAT paid to FRCS within a period of 3 years thus by failing to deliver a tax invoice, the plaintiff deprived her the opportunity to pay VAT and reclaim the same from FRCS. Whether the respondent was a registered entity and how she would become eligible to reclaim VAT is not clear. It is noteworthy that the respondent did not give evidence nor called any other evidence to substantiate the positions taken up in the statement of defense.

[41] Thus, for all purposes the respondent continues in her refusal to pay the VAT paid by the appellant to FRCS. Judged objectively by the language used in clause 25.2 (a) and (b) of the Sale and Purchase Agreement, it is clear the intention of both parties was that in case of such a default the respondent should pay to the appellant the VAT and interest for late payment of VAT. I shall delve into this aspect further in the following paragraphs. While issuing a tax invoice is a legal requirement, absence of it is not fatal to the appellant's claim particularly when VAT became payable after the date of transfer and date of settlement. The purchaser's contractual obligation to pay VAT is enforceable, provided there is evidence of the taxable supply and payment of VAT to FRCS by the vendor.

Should the respondent reimburse the appellant for the VAT?

[42] Interpretation of clauses 25.1 and 25.2 requires close scrutiny to determine whether they explicitly or implicitly obligate the purchaser to reimburse the vendor for VAT. One needs to look carefully at the language, context, and purpose of the clauses within the framework of the Sale and Purchase Agreement and VAT law.

[3] **Export Freight Services v Chief Executive Officer, Fiji Revenue & Customs Service** [2019] FJCA 34; ABU077.2017 (8 March 2019)

[43] Clause 25.1 confirms that the transaction was initially structured as zero-rated, with no VAT payable. The clause does not explicitly address what happens if the supply is later determined to be taxable, but it introduces the idea by the use of the phrase *'In the event'* that VAT payability can be a variable depending on subsequent determinations.

[44] The clause 25.2 begins with "If the purchaser is to pay VAT (in addition to the purchase price)". This clearly anticipates a scenario where VAT may be payable, even after settlement. This condition ties the obligation to pay VAT to a subsequent determination or demand. Sub-clause 25.2 (a) obligates the purchaser to pay VAT in full when demanded by the vendor, either at settlement or after. Sub-clause 25.2 (b) imposes liability for default VAT (additional VAT, penalties, or sums levied due to non-payment) and interest if the purchaser fails to pay VAT when advised. The writ of summons and the statement of claim was the advice or demand for the respondent to pay default VAT with interest. According to the appellant, it had difficulty in locating the respondent and the original writ had to be advertised to serve on the respondent legally with the proceedings. In other words, even if the invoice was made or a demand was issued, the respondent could not be located for service and the writ issued in the present matter ought to be considered the advice or demand for payment. Thus, the purchaser has an explicit obligation to pay VAT to the vendor if it becomes payable, even after settlement. This obligation extends to covering penalties and interest if the VAT is not paid on time. Thus, the purchaser is contractually responsible for reimbursing VAT and any associated penalties or interest.

[45] The Sale and Purchase Agreement clearly contemplates that VAT status may change after the transaction, as evidenced by the inclusion of a detailed clause (25.2) addressing VAT payment obligations. The purchaser's duty to pay VAT is triggered if the supply is later determined to be taxable. The purpose of clauses 25.1 and 25.2 is to allocate the risk and responsibility for VAT liability: clause 25.1 reflects the parties' assumption of zero-rating and clause 25.2 ensures that the vendor is indemnified for any VAT liability arising if that assumption proves incorrect.

[46] Moreover, it would be commercially unreasonable to interpret the Sale and Purchase Agreement as leaving the vendor to bear VAT liability for a taxable supply when the purchaser has received the full benefit of the supply. The contract's indemnity provisions

[e.g., clause 25.2(f)] further confirm the intention to shield the purchaser from VAT liability but this presumes that the purchaser fulfills its obligation to reimburse the VAT to the vendor. Clause 25.2 (c) denies the purchaser of any possible defence arising from late payment of VAT by the vendor in a claim by the vendor against the purchaser for payment of default VAT and interest.

[47] Courts generally interpret commercial contracts in a way that reflects the parties' intentions and avoids unjust enrichment. In **Customs and Excise Commissioners v Redrow Group plc** [1999] UKHL 4, the court emphasized that VAT obligations often rest on the recipient of the benefit unless explicitly excluded.

[48] While Clauses 25.1 and 25.2 may not explicitly state "the purchaser shall reimburse the vendor for VAT", they create a framework where VAT liability, once determined, must be borne by the purchaser. This is supported by the conditional language anticipating future VAT liability, the detailed mechanisms for payment, penalties, and interest and the commercial purpose of the agreement to avoid unfairly burdening the vendor with VAT. Thus, clause 25.2, read in its entirety and in context, supports the vendor's right to reimbursement. These clauses unequivocally bind the purchaser to reimburse the VAT and any associated penalties, provided the supply is deemed taxable under VAT law.

[49] The respondent argues that the failure to issue a tax invoice nullifies the appellant's claim. However, the agreement anticipates the possibility of a retrospective VAT assessment and obligates the purchaser to bear the liability. The lack of a tax invoice does not affect the underlying taxability of the supply or the purchaser's obligation to reimburse the vendor for amounts already paid to the Fiji Revenue and Customs Authority (FRCS).

[50] The respondent is liable to reimburse the appellant for the VAT paid, as this obligation arises from the Sale and Purchase Agreement and the retrospective determination by FRCS. The contractual terms are clear and enforceable, regardless of the procedural lapse in issuing a tax invoice. The High Court should have focused on the substantive obligation under the contract rather than the procedural irregularity of issuing a tax invoice.

Qetaki, JA

[51] I have read and considered the judgment of Prematilaka, RJA in draft, and I agree entirely with it, the reasons and orders.

Clark, JA

[52] I agree with Honourable Prematilaka, RJA's judgment which I have read in draft and I concur in the orders to be made.

Orders of Court:

1. Appeal is allowed.
2. Judgment of the High Court is set aside.
3. Respondent is directed to pay to the appellant a sum of $115,335.00 within 21 days of this judgment.
4. Respondent is directed to pay interest on $115,335.00 pursuant to the Law Reform Miscellaneous (Death and Interest) Act within 21 days of this judgment.
5. Respondent is directed to pay $5000.00 to the appellant as cost of the High Court and this Court within 21 days of this judgment.

.....
Hon. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Justice A. Qetaki
JUSTICE OF APPEAL

.....
Hon. Justice C. Clark
JUSTICE OF APPEAL

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Respondent in person