

In the High Court Fiji at Suva

HBC No. 283 of 2011

Between: Roby Overseas Pty Limited

Plaintiff

And: Fiji Islands Revenue And Customs Authority

Defendant

Appearances : Ms R.Patel for the plaintiff

Mr Vukica for the defendant

Date of argument: 6th May,2013

Judgment

1. This is a claim by the plaintiff for a refund of VAT recovered by FIRCA, the defendant. The plaintiff claims that it paid VAT together with the purchase price to Denarau Investment Limited,(DIL) for its purchase of a villa at the Fiji Beach and Spa and the defendant has to recover that payment from DIL. The defendant, in reply, states that there is no evidence of the payment of VAT by the plaintiff to DIL.
2. *The statement of claim*
 - a. The statement of claim states that on 17th March,2006, the plaintiff entered into agreements with DIL, to purchase villa number 15D, a two bedroom premium apartment at the Fiji Beach and Spa for a price of NZ\$840,000. The plaintiff paid VAT to DIL, in addition to the purchase price, as required by the agreements.
 - b. The defendant was under a statutory obligation to collect VAT from DIL and refund it to the plaintiff, on its application. In September 2007, the plaintiff lodged a VAT return.
 - c. On 29th September,2008,the defendant issued a notice of amended assessment stating that the plaintiff was entitled to a refund of \$97,519.69. On 2ndMay,2010, the defendant deposited \$98,746.67 to the plaintiff's ANZ Bank Account Number 8751404.
 - d. On 21stJuly,2010,the defendant reversed the assessment and debited the plaintiff's account with a sum of \$98,409.34.The defendant placed a garnishee order on the plaintiff's account on 1st October, 2010, and withdrew the same on 20th December, 2010. The defendant placed a further garnishee order on 22nd December, 2010.

- e. The statement of claim concludes that the plaintiff has been deprived of the refund, it is legally entitled to and has suffered and continues to suffer loss.

3. *The statement of defence*

- a. The defendant states that its records depict that the purchase price of NZ\$840,000 excludes VAT and comprises of the following:-

<i>Title lease:</i>	\$ 8696.00
<i>Construction:</i>	\$ 796735.00
<i>Furniture, fittings and equipment</i>	\$ 34597.00
<i>Total amount payable:</i>	<u>\$ 840,000.00</u>

- b. The plaintiff has not provided a valid tax invoice, to make an “input claim” under the VAT Decree.
- c. The defendant was under no statutory obligation to collect VAT from DIL, and refund the same to the plaintiff .
- d. The VAT return lodged did not contain the claim of VAT on the purchase of the villa. It only contained the claim of VAT on the purchase of the business in a sum of \$242.43.
- e. The plaintiff has to provide a tax invoice, as evidence that VAT was paid to DIL.
- f. The defendant has a statutory obligation to recover the tax owed to the State.

4. *The reply*

- a. A supply of goods and service can be deemed to have taken place at the time payment was received by DIL. The lodgement of the VAT return for the relevant period July to September,2007,showed the purchase price was “net of VAT”. DIL, as a registered person was then, required by law to account to the defendant, for the VAT it received.
- b. The plaintiff provided evidence of the payments made on the supply of goods and services it received from DIL to the Commissioner, when it lodged its “VAT ROP” for the period June to September,2007.
- c. The defendant’s action, in reversing the assessment and debiting \$98,409.34 from the plaintiff’s account, has caused it severe hardship.

5. *The determination*

- a) The sole issue to be determined in this case, as submitted by both counsel, is whether the plaintiff was required to provide the defendant with a valid tax invoice, in order to make a claim under the VAT decree.

- b) The case for the plaintiff is that DIL failed to provide or issue an invoice to the plaintiff under the VAT Decree, 1991. Ms Patel, counsel for the plaintiff contended that the payment received by DIL under the Sale and Purchase Agreement constitutes an invoice, in terms of the following provisions of the Value Added Tax Decree.

- c) Section 18(1) provides:

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 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. (emphasis added)*
- d) Section 18 deems three situations when a contract for supply of goods and services takes place. In my view, the section does not address the matter in issue.
- e) Reference is also made to section 41 of the VAT Decree, 1991. This provides:

Except as otherwise provided 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. (emphasis added)

- f) Section 41 obligates a supplier to issue an invoice.
- g) Next, the plaintiff reproduces the following regulation 8 of the VAT Regulation 1991:

Where a recipient, being a registered person, creates a document containing the particulars specified in regulation 3 and purporting to be tax invoice in respect of a taxable supply of goods and services made to the recipient by a supplier, being a registered person, that document shall be deemed to be a tax invoice issued by the supplier under Sub Section (1) of Section 41 of the Decree where –

- a) *The Commissioner has granted prior approval for the issue of such documents by a recipient in relation to the taxable supplies to which the documents relate; and*
- b) *The supplier and the recipient agree that the supplier shall not issue a tax invoice in respect of any taxable supply to which this regulation applied; and*
- c) *The document is provided to the supplier and a copy is retained by the recipient; and*
- d) *The words “buyer” created tax invoice – Inland Revenue Department approved are contained on that document.*

Provided that where a tax invoice is issued pursuant to this regulation any tax invoice issued by the supplier in respect of that taxable supply shall be deemed to be tax invoice for the purposes of the Decree.(underlining mine)

- h) Regulation 8 provides that a recipient may create a document containing the particulars required to constitute an invoice. But importantly, the Commissioner of Inland Revenue has to grant approval for the issue of such a document, as expressly stated in sub-section a). That is not the case here.
- i) In support of the contention that a tax invoice is required, Mr Vukica, counsel for the defendant, in his submissions relied on section 39(5) of the Decree and Legal Notice 65, Part II of the Value Added Tax Regulations 1991.
- j) Section 39(5) provides:
- Notwithstanding anything in this Decree, no deduction of input tax shall be made in respect of a supply, unless;*
(a) *a tax invoice or credit note or debit note, in relation to that supply, has been issued in accordance with Sections 41 and 42 of the Decree and is held and retained in accordance with Section 79 of this Decree by the registered person making the deduction at the time that any return in respect of that supply is furnished; or*
(emphasis added)
- k) Section 39(5) clearly provides that no deduction of the relevant tax “shall” be made unless a tax invoice, credit or debit note has been issued.
- l) Legal Notice 65, Part II of the Value Added Tax Regulations 1991 sets out the particulars to be contained in a tax invoice.
- m) Mr Vukica submitted that the Sales and Purchase Agreement did not contain any of the particulars laid down in Legal Notice 65. Ms Patel did not present any contentions to the contrary.
- n) Accordingly, the plaintiff’s contention that the Sales and Purchase Agreement constitutes an invoice is unacceptable.
- o) Finally, the plaintiff contends that the defendant’s action, in reversing the assessment and debiting \$98,409.34 from the plaintiff’s account, has caused it losses.
- p) Mr Vukica, in reply, submitted that the Commissioner in refunding VAT to the plaintiff in the first instance, had opted out of his statutory obligations under the governing Decree.

- q) In support, he cited the case of *Punjas Ltd vs. Commissioner of Inland Revenue*, [2006] FJCA 66 where the Court of Appeal stated as follows:

The Commissioner does not have a general dispensing power. He is unable to opt out of the obligation to make a statutory judgment of liability of every tax payer under the Decree Brierley Investments Ltd –vs- CIR (Supra) at page 10215 per Richardson J. The special dispensing powers of the Commissioner to grant relief from tax contained in the Section 70 of the VAT Decree (to which we have already referred) are not applicable to the present case as it does not involve any questions of additional tax or penal tax or penalty. S. 70 can therefore be ignored.

The Commissioner is free to resile from a position hitherto taken up by him.

“It is his judgment that counts under the statutory scheme in all these situations and it is a judgment which must be exercised from time to time unfettered by any views that he may have previously expressed either generally or in relation to a particular tax payer or matter and unconstrained by an assessment he may have previously made”.
Lemington at page 522 per Richardson J.

The doctrine of estoppel does not operate to prejudice the Commissioner from pursuing his statutory duty to assess tax in accordance with law AGC Investments Limited v. FTC (1991) ATR 1379 at page 1396 per Hill J.

Likewise Lemington at page 523 per Richardson J:

“As we have said, the Commissioner cannot be estopped by past conduct from performing his statutory obligations to make assessment as and when he thinks proper. It is his present judgment as to the statutory imposed liability for tax that counts. The correctness of that judgments and of the Commissioner’s view of the law and facts which lead him to make his assessment cannot be challenged outside the objection procedures.”

r) Reference was also made to section 80(1) of the VAT Decree. This reads:

Notwithstanding anything in anyway, every contract, agreement, transaction or arrangement made or entered into, orally or in writing, shall, so far as it has or purports to have the purpose or effect of in any way, directly or indirectly.

- a) altering the incidence of the tax; or*
- b) relieving any person from liability to pay or make any return; or*
- c) defeating, evading, or avoiding any liability imposed on any person by this Decree or*
- d) preventing the operation of this Decree in any respect.*

be absolutely void, as against the Commissioner, or in regard to any proceeding under this Decree.

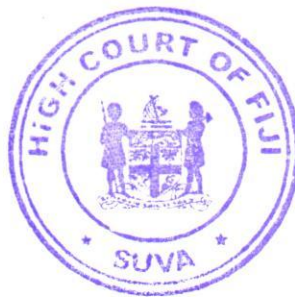
s) I agree with Mr Vukica that the Commisisoner does not have the right to opt out of his statutory obligations in terms of section 80(1) and as held in *Punjas Ltd vs. Commissioner of Inland Revenue*, (*supra*)

6. In my judgment, the plaintiffs' action fails. The defendant was entitled to garnish the plaintiffs' account to recover the VAT payable by the plaintiff.

7. **Orders**

- a) The plaintiff's action is dismissed.
- b) The plaintiff shall pay the defendant cost in a sum of 1500 summarily assessed.

23rd June, 2015



A.L.B. Brito-Mutunayagam
Judge