IN THE HIGH COURT
AT SUVA
APPELLATE JURISDICTION

Civil Action No: HBA 01/2009(B)
Value Added Tax Appeal No. 03 of 2009

BETWEEN : WAQAVUKA DEVELOPMENT COMPANY LIMITED

Appellant

AND : THE COMMISSIONER OF INLAND REVENUE

Respondent

BEFORE : The Hon. Mr Justice David Alfred

Date of Judgment : 26 February 2016

JUDGMENT

1. This Appeal was heard by Balapatabendi J on 16 November 2012 when judgment was reserved.

2. The matter was called before me on 6 August 2015, when Mr H Nagin of Counsel for the Appellant and Ms T Rayawa of Counsel for the Respondent consented to my delivering judgment based on the written record and did not require oral submissions to be made before me.

3. In the course of reaching my decision, I have perused:
   (1) The Copy Record, Volumes I and II.

(2) The Statement of Agreed Facts.

(3) The Judgment of the Value Added Tax Tribunal dated 6 February 2009.

(4) The Notice of Appeal to the High Court, of the Appellant dated 5 March 2009.

(5) The Written Submission of the Appellant's Counsel.

(6) The Written Submission of the Respondent's Counsel.

(7) The Written Submission in Reply of the Appellant's Counsel.

4. I now proceed to deliver my judgment. My starting point is the reasons afforded for the Appeal which may be summarized as follows:

(1) The Tribunal erred in not holding that the Appellant's Transit Café (Café) only supplied customers in the transit area, with goods to be exported out of Fiji and the sales should therefore be zero rated, and in holding that the goods were not exported out of Fiji.

(2) The Tribunal erred is not considering that the Respondent had given a ruling on 28 February 2002 that the sales in the Café were zero-rated.

(3) The Tribunal erred in not dealing with the Omitted Income Penalty and Amended Assessments, and in not reversing them.

(4) The Tribunal erred in not holding that the Café is a concessionaire approved under Code 213.

5. According to the Statement of Agreed Facts, the Appellant had been operating the Café in the Transit Departure Lounge (beyond Immigration and Customs) for the transit passengers at Nadi International Airport. The Appellant treated all sales therein as zero-rated, and therefore did not charge Value Added Tax (VAT) and did not pay VAT to the Commissioner of Inland Revenue on the sales.

6. The Appellant is relying on Clause 12 of the Catering Concession Agreement (Agreement) between Airports Fiji Limited and the Appellant, dated 29 December 2005.

7. I have perused clause 12 of the Agreement and it states "However no Value Added Tax is payable in respect of sales at the Transit Café as the revenue from Sales in the Transit Lounge is exempt from VAT."

8. I have to note that this Agreement is between Airports Fiji Limited (Airports) a Government Commercial Company and the Appellant. It is not between the Respondent and the Appellant. Therefore, although Airports is a Government Company, an agreement with it cannot bind the Respondent, nor can it give any entitlement to exemption from VAT to the Appellant. Therefore if the Appellant is asserting an exemption from VAT it has to seek this elsewhere.

9. Thus the Appellant seeks this in the Respondent's ruling on 28 February 2002 that the sales in the Cafe are zero rated. So I turn to peruse this ruling contained in Revenue and Customs' (Revenue) letter to Airports Fiji Limited, para 5 of which reads, "The sale of Goods by Duty Free Shops and Catering Concessionaires in the restricted areas at the Airport and Services provided to International Passengers are subject to vat at zero percent." It is to be noted here that Revenue is talking of Duty Free Shops and Catering Concessionaires as 2 different businesses. This distinction is significant and should have been apparent to the Appellant.

10. The Respondent however asserts it is entitled to say that the ruling has now been superseded by its decision made on 11 December 2006. This decision contained in Revenue's letter to Messrs Price Waterhouse Coopers of the same date, states that the grounds of objection have been disallowed and Revenue is of the view that all goods sold by the (Appellant) attract VAT "since it is not a duty free concession holder hence, duty payable and that the taxable activity is still within Fiji."

11. So I have to consider whether the Respondent is still bound by its ruling or if it is entitled to consider that that has been superseded by its later decision. The

Respondent relies on the decision in *Commissioner of Inland Revenue v Lemmington Holdings Ltd* [1982] 1NZLR 517, which was adopted by the Fiji Court of Appeal in the case of *Punjas Ltd v Commissioner of Inland Revenue* [2006] FJCA para [88] where it held the Commissioner "cannot be encumbered by any previous position which he had taken up. He must be free to exercise his judgment and discharge his statutory functions as and when he thinks proper. In short, he is entitled to change his mind and take up a new position and disavow one that he has taken up previously."

12. Applying the principle of stare decisis, the precedent of the Court of Appeal decision is binding on me and has to be followed.
Thus I hold the Respondent is entitled to change his position and take a contrary view to that which he previously had taken.

13. The Appellant seeks to rebut the Respondent's denial that it is a duty free concession holder by relying on the Agreement with Airports. However although titled a Concession Agreement, it is a different type of concession from that which the Respondent has in mind. This is because under the Agreement the Appellant is granted the right to operate a concession which is defined in clause 2.1(d) as "the non-exclusive right to establish and operate premises for the provision and sale of authorized goods and services."

14. When the Respondent states concession, it is correctly thinking of a right given by Government to some person to do something. An example of this would be to operate a duty free shop. I do not think it can justifiably be part of the Appellant's case that the Café is a duty free shop like those selling expensive chocolates and designer clothes.

15. The business and premises we are concerned with here is that of a café. Referring to the Oxford Advanced Dictionary of Current English, I take a cafe to be a place where members of the public may purchase food and drinks, collect them on trays from the counters and carry them to tables where they are eaten

and drunk. It is of course also possible that waiters take the orders from customers at their tables and serve the food ordered there. Whatever mode it may be, it probable to my mind that the food and drinks will be consumed within the Café within the confines of the airport. In the post 9-11 (September 11, 2001) situation, it is unlikely that passengers can any longer freely take drinks in large bottles for instance aboard their aircraft.

16. That there will be consumption on premises can be gleaned from the Appellant's submission that the Café is also there to cater to passengers who are in transit for considerable periods of time while awaiting their connecting flights. It would therefore be unlikely that food and drinks purchased would be conserved for consumption much later on the aircraft.

17. I have also perused the Second Schedule to the Value Added Tax Decree 1991. The relevant clauses thereof, which are 1 to 4, in my view, do not apply to the supply of food and drinks by and at the Café.

18. Further, I note that the Appellant is contending it is a concessionaire approved under code 213 of the Customs Tariff Act. In the first place, it has not provided any documentary evidence that it is indeed a concessionaire approved by the Minister to sell by retail in the Customs Area of the airport. In the second place food and drinks are not goods sold to passengers immediately about to leave Fiji or immediately after their final disembarkation in Fiji.

19. I am therefore constrained to accept the Respondent's submission that the Café of the Appellant does not fall within the ambit of Code 213 of the Customs Tariff Act 1986 and that the Respondent has correctly levied VAT on the sale of food and drinks in the Café.

20. I turn now to the penalties imposed by the Respondent under Section 76A of the Value Added Tax (Amendment) Act No. 16 of 1995. This provides where there is an understatement of tax the person liable shall be liable to a penalty not exceeding the full amount of the deficient tax. Here the penalty imposed was at

the reduced rate of 30%. There is no ground shown by the Appellant to dispute the amount of the Omitted Income Penalty or its liability to pay the same, because it claimed zero rated sales when it was not entitled to make such a claim.

21. In fine, I am not satisfied that the Appellant has shown any ground for me to upset the decision of the VAT Tribunal. I therefore uphold the Judgment of the Tribunal and dismiss this Appeal with no order to costs.

Dated at Suva, this 26th day of February, 2016.

.....
David Alfred
Judge of the High Court of Fiji