

IN THE TAX COURT OF THE HIGH COURT OF FIJI
AT SUVA

HBT Actions No. 05 and 07 of 2017
(Consolidated)

IN THE MATTER of the Value
Added Tax Act 1991

AND

IN THE MATTER of section 82 of
the Tax Administration Act 2009

BETWEEN : GRAHAM EDEN AUCTIONS LIMITED

APPLICANT

AND : CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND
CUSTOMS AUTHORITY

RESPONDENT

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr M. Lennard, Mr B. Solanki with him, for the Applicant

: Ms. R. Malani, Mr E. Eterika with her, for the Respondent

Dates of Hearing : 13 and 14 August 2018

Date of Judgment : 2 November 2018

JUDGMENT

1. These 2 tax actions were transferred to this Tax Court by the Tax Tribunal on 28 August 2017. They have been consolidated on the application of Mr Solanki who said the issues and the evidence are the same in both cases and requested for one Ruling, Ms Malani had no objection.
2. The Application for Review in the former action seeks the following orders:
 - (1) To revise or set aside the decision of the Respondent (Revenue) dated 13 April 2017 (Decision) partly disallowing the 29 July 2016 objection by the Applicant to the Value Added Tax (VAT) assessments for January to December 2012, 2013 and 2014 and demanding payment by the applicant of \$947,971.66 (Disputed Sum) as VAT and Late Payment Penalties (Penalties).
 - (2) The Revenue withdraws or amends the amended assessments issued on 13 April 2017 for the above periods to give effect to the order of the Court.
 - (3) The Revenue refund to the Applicant all moneys resulting from the withdrawal or amendment of the assessments together with interest.
3. The Application for Review in the latter action seeks the following orders:
 - (1) To revise or set aside the decision of the Revenue dated 19 June 2017 disallowing the 1 June 2017 objection by the Applicant to the VAT assessments for January to December 2015 and 2016 and demanding payment by the Applicant of \$414,823.67 (Disputed Sum) and penalties.
 - (2) The Revenue withdraws or amends the assessments issued on 4 May 2017 for the above periods to give effect to the order of the Court.
 - (3) The Revenue refund to the Applicant all moneys resulting from the withdrawal or amendment together with interest.
4. The Grounds of the Application are the same in both actions and are appended below:
 - (1) The Decision is wrong in law and in fact in not taking account of the following matters:
 - (a) The Decision decides that the Applicant as an auctioneer is liable as the supplier for VAT on goods which it sold as agent on behalf of principals being insurance companies (Principals).

- (b) The primary rule as to who, as between agent and principal, makes a supply of goods and services is section 30(1) of the Value Added Tax Decree 1991 (now Act). (All references to sections are to sections in this Act)
- (c) That section 30(1) provides that the supply shall be deemed to be made by the principal and not the agent.
- (d) That section 30(1) is only displaced by s.30(4) such that the agent is deemed to be the supplier, if the agent and principal so agree.
- (e) That the Applicant as agent and the Principals do not have an agreement with each other within s.30(4).
- (f) That the Applicant has at all times acted as the agent for the Principals within s.30(1).
- (g) That the Applicant only provided an auctioneering service to the Principals and has never supplied goods (the motor vehicles) in its own name.
- (h) That the Principals were at all time the supplier of the goods.
- (i) That the Applicant always stated that it was auctioneering goods on behalf of the Principals and was paid a commission by the Principals which was duly declared by the Applicant for VAT purposes.
- (j) That the supply of the motor vehicles is not a supply made by the Applicant within s.3.
- (k) That the Applicant is not required to declare output VAT pursuant to s.39(3) considering that it did not supply the motor vehicles.
- (l) That the Penalties imposed by the Revenue are excessive and unnecessary as no additional VAT is payable by the Applicant.

5. The Statement of Agreed Facts and Issues (SAFI) include, inter-alia, the following:

FACTS

- (1) The Applicant auctioned damaged motor vehicles (vehicles) which had been acquired by insurance companies through subrogation under their policies with the insured.

- (2) The insurance companies instructed the Applicant to auction, on their behalf as principals, the vehicles and the Applicant accordingly conducted auctions on the insurance companies' behalf.
- (3) The Applicant advertised in the local papers of the auctions and stated that the Applicant is auctioning the goods on "behalf" of the insurance companies whose names are also stated in the advertisement.
- (4) The Applicant charged the insurance companies a 5% commission on the proceeds from the auction plus related costs which were deducted from the auction proceeds and the balance remitted to the insurance company which acquired the vehicle.
- (5) At no time did the Applicant agree with any of the insurance companies to have any of the auctions treated as if that supply had been made by the Applicant and not by the insurance companies.
- (6) The Applicant remitted to Revenue output VAT on the 5% commission earned by it.
- (7) The Applicant has been assessed by Revenue at \$947,971.66 and \$414,823.67 for VAT on the full auction proceeds including penalties, had objected but the objections were disallowed.

Agreed Issues

- (1) Whether the Applicant as auctioneer is liable as supplier for VAT on goods it sold as agent on behalf of principals.
- (2) Whether s.30(1) provides that supply shall be deemed to be made by the principal and not the agent.
- (3) Whether s.30(1) is only displaced by s.30(4) such that the agent is deemed to be the supplier, if the agent and principal so agree.
- (4) Whether the proviso in s.30(4) applies on the facts of this case.
- (5) Whether s.30(1) applies to auctioneers.
- (6) Whether the Applicant acted as the agent for the insurance companies within s.30(1).
- (7) Whether the penalties are excessive and unnecessary as the additional VAT is payable by the Applicant.

6. The hearing commenced with the Applicant's first witness giving evidence. She was Ms Louisa Mitchell (PW1) the claims manager of Tower Insurance Ltd. She overlooks the auction process carried out by the Applicant of the written-off vehicles which become the (insurance company's property. They give the particulars and the reserve price of the salvage. They retain the documents to be picked up by the ultimate purchaser. The Applicant collects the advertisement charges and the 5% commission. Under cross-examination, PW1 said they instruct the Applicant to auction. The reserve price is the minimum sum they want.
7. The next witness was Arjun Singh Karwal (PW2), a manager of the New India Insurance Co. It retains the Applicant to auction written-off vehicles the ownership of which is with New India. New India pays their insured and sends the vehicle to be auctioned and they pay 5% commission. The buyer becomes the owner. The Applicant never becomes owner of the vehicle. New India is not liable for VAT. Under cross-examination PW2 said they have no written agreement with the Applicant. In re-examination he said there was nothing in writing but an understanding that the Applicant never owned the vehicle.
8. The next witness was Tarlochan Singh (PW3) the general manager of Sun Insurance Limited. He said they used the Applicant's services to auction vehicles. There was no written agreement. When a vehicle was written-off, Sun has the right under subrogation and gives the vehicle to the Applicant to auction on Sun's behalf. It is Sun's property until it is auctioned off. It is never the Applicant's property. The Applicant take a commission of 5% in Suva and 6% in Nadi. Sun never agreed that sale by auction gave the Applicant any right. Under cross-examination PW3 said Sun tells the auctioneer the reserve price and provides the Applicant with the vehicle to sell on Sun's behalf. When Sun pays their insured, the sum is V.I.P. If the reserve price is \$20,000 and it is sold for \$22,000, VAT on \$2,000 is paid by Sun.
9. The next witness was Jainendra Prakash Govind (PW4). He was the claims officer of QBE Insurance Company who looks after all motor vehicles. He said QBE takes ownership of written-off cars. There is no agreement between QBE

and the Applicant. QBE tells them the reserve price and the Applicant never becomes the owner. QBE hands ownership to the new owner. The Applicant is paid commission and advertisement expenses. Under cross-examination PW4 said there was no written agreement but there was an understanding. The reserve price is not V.I.P. The provision of written-off vehicles to the Applicant is not a supply.

10. The final witness was Graham Ross Eden (PW5), the auctioneer of his own company, the Applicant. He said they only sell insurance companies' smashed cars and embassy furniture etc. The vehicles belong to the insurance companies. The Applicant has no interest in the vehicle at all. The money less 5% is money belonging to the insurance company. The insurance company asks them to sell a car on their behalf, as agent of the insurance company. Under cross-examination, PW5 said his company was registered for VAT and its taxable activity is auctioning vehicles. He paid VAT on the 5% commission and advertising charges. He is not paying VAT on the motor vehicle. No tax is charged on the invoice. In re-examination PW5 said VAT is the concern of the insurance company.
11. With that the Applicant closed its case and Revenue opened their's.
12. The first witness was Nuvitalai Biukoto (DW1), the Revenue's principal auditor for fraud and evasion. His team conducted an audit on a taxpayer named Thomas Sinclair t/a Tanz Auto who was claiming input VAT on invoices issued by the Applicant. The team decided to check the corresponding output VAT which should have been declared by the Applicant. The team noted the Applicant had not declared VAT on the sale of those vehicles under the provisions of s.30(4). The Applicant had been charging VAT as shown in the bottom of the invoice – Exhibit D1. DW1 confirmed Vat has been charged on all these invoices which gives a right to VAT registered buyers to claim the VAT on these amounts. The name and TIN of the insurance company is written on the invoice, that the Applicant is making the sale on behalf of an insurance company.

13. Under s.30(4) the Applicant is auctioning and making a supply for VAT purposes. The proceeds from the sale of vehicles are VAT inclusive which the Applicant was supposed to declare and remit the VAT charged on the gross proceeds to Revenue. The Applicant deducts 5% commission and remits the rest to the insurance company. The Applicant should also deduct VAT, pay the VAT to Revenue, and give the balance to the insurance company. The Applicant only accounted for its 5% commission.
14. Under cross-examination, DW1 said referring to s.3(8)A, the insurance company only pays VAT on the difference between what it paid to their insured and what is collected from the auction. All the letters from the insurance companies stating there were no agreements are dated after the team audited the assessments on the Applicant. DW1 thought there was a mutual agreement between PW5 and the insurance company. He said it can be implied there was an agreement. S.30(4) specifically applies to auctions. DW1 said he was aware one buyer Sinclair claimed but one else claimed input VAT. These invoices were provided by PW5 to Revenue and these do not have most of the features of VAT invoices. DW1 said VAT included an auctioneer selling vehicles and PW5 should know the amount of VAT. Revenue received the breakdown from the insurance company.
15. In re-examination DW1 said he could confirm that all these invoices are inclusive of VAT. The Applicant is obliged to declare VAT from these sales.
16. With that the Revenue closed its case and Counsel began their submissions.
17. Mr Lennard said the issue is whether s.30(4) applies to every auction. He said s.30(4) gives an option that it applies. He said from para 8 of the SAF1, the letters from the insurance companies and the sworn evidence of their witnesses and PW5 it is clear there was no agreement by the Applicant to treat the sale as a supply by the Applicant. S.30(1) applies as it is an agency. The purchaser has to look to the insurance company for a refund.

18. Ms Malani then submitted. She said the Applicant is a registered VAT taxpayer and its taxable activity is to conduct auctions of written off vehicles. The Applicant is to be held accountable for output VAT declaration on auctions of written off vehicles for insurance companies. Revenue treated the Applicant as an auctioneer and not as an agent, but Revenue treats the insurance company as principal in line with s.30(4). There is a clear understanding of a commercial agreement. The witnesses said there was no written agreement but there was an understanding. What the insurance companies wrote is inconsistent with their testimony i.e what is on paper is not the same as what is spoken. The Applicant raises V.I.P. invoices. As the Applicant is a supplier of auctioned goods then it has to account for VAT. Sinclair claimed input VAT as he was entitled to as he is a registered VAT taxpayer. Revenue has to refund what it did not collect from the Applicant in the first place – s.18(1)(a). The Applicant should have been declaring VAT and not treated as an agent under s.30(1).
19. Mr Lennard in his reply said that s.30(1) – no VAT – applies to all situations including auctions unless there is agreement otherwise, which is not the case here.
20. At the conclusion of the arguments I said I would take time for consideration. Having done so I shall now deliver my decision which will be for both actions. The sole issue for me to decide is whether the Applicant is liable as the supplier to pay VAT on goods it sold as agent on behalf of principals - Agreed Issue(1).
21. It is an Agreed Fact (8) that at no time did the Applicant agree with the insurance companies (principals) to have the auctions treated as if that supply had been made by the Applicant and not by the insurance companies.
22. It is an agreed Fact (4) that the insurance companies instructed the Applicant to auction, on their behalf as principals the vehicles and the Applicant accordingly conducted auctions on the insurance companies' behalf.

23. It is an Agreed Fact (7) that the balance (after deducting advertisement and related costs) was remitted to the insurance company which acquired the vehicle.
24. Now that I have dealt with the facts, I shall turn to the law which is the Value Added Tax Act 1991 (Act). The first section I shall consider is s.30(1) which reads as follows:
“Subject to this section, where an agent makes a supply of goods and services for and on behalf of any other person who is the principal of that agent, that supply shall be deemed to be made by that principal and not by that agent”.
25. The next section for consideration is s.30(3) which states “For the purposes of subsection (4), the expression “auctioneer” means a registered person carrying on a taxable activity which comprises or includes the supply by auction of goods as an auctioneer or agent for or on behalf of another person (hereafter in this section referred to as a principal)”.
26. Finally I shall consider s.30(4) which states “Notwithstanding anything in the foregoing provisions of this section, where the principal and the auctioneer agree to have a supply by auction of any goods, not being a taxable supply, treated as if that supply had been made by that auctioneer and not by that principal, that supply shall be charged with tax as if it were made by that auctioneer in the course or furtherance of that auctioneer’s taxable activity and that auctioneer may –(a) recover the amount of tax charged on that supply from that principal as a debt together with the costs of recovery in any court of competent jurisdiction; or (b) retain or deduct the same out of any money in that auctioneer’s hands belonging or payable to that principal”.
27. It is clear that the definition of “auctioneer” in s.30(3) only applies to s.30(4). If the intention of the draftsman was that it should apply throughout the Act, then he would have included it in s.2(1) – Interpretation. But he did not, so the Court is obliged to look outside the Act for the definition.

28. I shall therefore turn now to the Concise Oxford English Dictionary, twelfth edition, which defines "auctioneer" as "a person who conducts auctions by accepting bids and declaring goods sold".
29. I next turn to the Oxford Dictionary of Law, ninth edition, which defines "auction" as "a method of sale in which parties are invited to make competing offers (bids) to purchase an item. The auctioneer, who acts as the agent of the seller until fall of the hammer, announces completion of the sale in favour of the highest bidder by striking his desk with a hammer...".
30. In my opinion there can be no dispute that the operative subsection in this matter is s.30(1) for the following reasons:
- (a) The sample advertisement by the Applicant states that the Applicant "On behalf of Insurance Companies mentioned below we will Auction a number of vehicles....."
 - (b) Terms and Conditions of Auction(T and C):
 - 4."The Vendor reserves the right to withdraw any lots from the sale at any time before the lot is offered for sale",
 - 12." "The Purchaser agrees that the Company is acting as the authorized agent of the Vendor and any rights of the action he may have in respect of the lots purchased by him lie against the Vendor, not the Company. In the event that he wishes to take proceedings in respect of the said lots and the Vendor has not been named by the Company in its dealings with him to date, he agrees to request the name of the Vendor from the Company, and , provided the Company provides the relevant details to proceed again the Vendor, not the Company".
 - (c) Agreed Fact 8 above.
31. It is clear that in the T and C, the expressions "Auctioneer" and "Company" are used interchangeably to refer to the Applicant.

32. At the end of the day, I find and I so hold that it is the provisions of s.30(1) that apply to the Applicant here, and not the provisions of s.30(4).
33. Since there is no evidence, written or oral provided by Revenue that the principal (insurance company) and the auctioneer (the Applicant) have agreed to the situation envisaged in s.30(4) there is no basis for the Court to depart from its conclusion that s.30(1) applies and consequently any VAT chargeable on the proceeds of any auction sale carried out by the Applicant shall rest squarely on the shoulders of the insurance company as it will be deemed that the supply of the vehicle to the purchaser was made by the principal (insurance company) and not by its agent (the Applicant).
34. In the result, the Application for Review in each action is allowed and I shall make the following Orders:
- (1) The Respondent is to refund to the Applicant all Value Added Tax and late payment penalties (if any) paid by the Applicant under both Objection Decisions.
 - (2) There shall be no interest payable by the Respondent, on the sums refunded under (1).
 - (3) Each party shall bear their own costs.

Delivered at Suva this 2nd day of November 2018.



David Alfred

JUDGE

High Court of Fiji