

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 201 of 2017

Orix Holding Limited

v

Luping Zou

Counsel: Mr Shelvin Singh for the plaintiff
Mr A. Pal with Ms Z. Dean for the defendant
Date of hearing: 19th September,2022
Date of Judgment: 22nd February,2023

Judgment

1. This claim is in respect of the Value Added Tax, (VAT) paid by the plaintiff to the Fiji Revenue & Customs Service,(FRCS). The plaintiff and “*Xin Zhe*”(XZ) had entered into a Sale Agreement,(SA) for the sale of CT no. 14291,(property) for the sum of \$660,000.00. XZ nominated the defendant to purchase the property in his place in terms of the SA. The property was transferred to the defendant. The statement of claim continues to state that the parties contracted on the basis that the sale was zero rated for VAT in terms of section 15(2) of the VAT Act. It was 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 subject to VAT at the rate of 15% and imposed penalties on the plaintiff totaling the sum of \$115,335.00.

2. The defendant, in her defence states that the contracting party remained XZ. The nomination did not transfer the obligations under the agreement to her. The plaintiff failed to deliver a tax invoice to her. Registered entities are entitled to reclaim VAT paid to FRCS within a period of 3 years. By failing to deliver a tax invoice, the plaintiff deprived the defendant the opportunity to pay VAT and reclaim the same from FRCS. The VAT assessment arose from an audit of the plaintiff's tax affairs, which revealed irregularities. As a result, it was penalized for making false statements, failing to maintain proper records, late payment and lodgment.

3. The plaintiff in its reply states that by taking a transfer of the property as nominee under the SA, the defendant is liable for the claim. VAT only became an issue when the FRCS conducted an audit and raised an assessment for VAT to be paid on the sale. The VAT invoice can only be raised once the defendant makes payment of the claim. There were no irregularities in the plaintiff's tax affairs.

The determination

4. *Agreed facts*
 - 1) *The Plaintiff is a limited liability company having its registered office at Suva, Fiji.*
 - 2) *The Defendant is a businesswoman.*
 - 3) *On 23 January 2014, the Plaintiff and one Xin Zhe entered into a sale agreement for the transfer of property comprised in Certificate in Title No. 14291 for the sum of \$660,000.00.*
 - 4) *The said agreement had a provision to nominate a purchaser in place of Xin Zhe and by Transfer dated 6 May 2014, the said Xin Zhe nominated the Defendant to purchase the said property pursuant to the said Sale and Purchase Agreement.*
 - 5) *The parties had a VAT clause 25.2 in the said agreement that set out how the issue of VAT was to be dealt with if VAT became an issue.*
 - 6) *On or about 31 July 2015, Fiji Revenue and Customs Authority has deemed the said sale of the property to the Defendant to be subject to Value Added Tax at the rate of 15% and has imposed penalties on the Plaintiff totaling the sum of \$115,335.00....*
 - 7) *The Plaintiff has paid the VAT and Penalties imposed by the Fiji Revenue and Customs Services totaling \$115,335.00.*

Issues

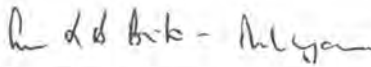
- *Is the Plaintiff able to enforce the terms of the sale agreement against the Defendant?*
 - *If so, what is the extent of that liability?*
 - *Is the Plaintiff entitled to its claim against the Defendant?*
 - *Who is entitled to the costs of this action and on what basis?*
5. On 23 January, 2014, the plaintiff entered into a SA with XZ had for the sale of the property. The sale was zero rated for VAT at the date of settlement. The plaintiff claims the VAT it paid subsequently together with penalties imposed and interest for late payment
 6. The first question that arises for determination is whether the plaintiff can enforce the agreement against the defendant. The second is whether the defendant is required to indemnify the plaintiff the VAT it paid to FRCS.
 7. The Interpretation clause of the SA states that reference to “*Purchaser*” include their ...*nominee(s)*”.
 8. Section 27 states that “*Purchaser* ..*includes any nominee or nominees of the Purchaser from time to time*”.
 9. It is an agreed fact that the SA had a provision to nominate a purchaser in place of XZ and by transfer of 6 May, 2014, XZ nominated the defendant to purchase the property.
 10. The transfer of 6 May, 2014, provides that the property was transferred to the defendant on payment of the consideration. The transfer was registered on 9th July, 2014. The memorial of 9th July, 2014, in CT no. 14291 provides that the property was transferred to the defendant.
 11. In my judgment, the defendant is bound by the terms of the SA.

12. On the second question, I would first refer to the evidence of PW1, (*Nalin Kant, Head of Finance, plaintiff company*). I do not find it necessary to refer to the evidence of PW2 and PW3.
13. PW1 in cross examination said that FRCS audited the plaintiff and issued a notice of amended assessment, which levied a late payment penalty of \$ \$23,513.60 and a penalty of \$16,228.27 for failure to maintain proper records. PW1 said that it was not necessary to obtain a ruling from FRCS, as residential property did not attract VAT. It also transpired that the plaintiff did not appeal the assessment.
14. Clause 25 of the SA titled “VAT” reads:
- 25.1 *In the event that the parties are contracting on the basis that the sale is zero rated pursuant to Section (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. (emphasis added)*

15. In terms of clause 25.2(a), the defendant was required to pay the plaintiff VAT on the date of settlement or a later date as advised by the plaintiff.
16. PW1 testified that VAT was zero rated at the date of settlement. On 31 July, 2015, FRCS deemed the sale to be subject to VAT.
17. Clause 25.2 (d) provides that the plaintiff “will deliver a tax invoice” to the defendant.
18. It transpired in the cross-examination of PW1 that the plaintiff did not issue a VAT invoice nor a demand to the defendant.
19. 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)*
20. In my judgment, the requirement to issue a tax invoice is mandatory under the Act and the SA. The plaintiff’s claim fails.

21. **Orders**

- a. The plaintiff’s claim is declined.
- b. The plaintiff shall pay the defendant costs summarily assessed in a sum of \$ 2000.00.


A.L.B. Brito-Mutunayagam
JUDGE
22nd February, 2023

