IN THE STATUTORY TRIBUNAL, FIJI ISLANDS
SITTING AS THE TAX TRIBUNAL

Income Tax Application No 3 of 2012

BETWEEN: **COMPANY P**

Applicant

AND: **FIJI REVENUE & CUSTOMS AUTHORITY**

Respondent

Counsel: **Mr C Young, Young & Associates, for the Applicant**

Ms I Ratuvuku, FRCA Legal Unit, for the Respondent

Date of Hearing: **Tuesday 22 October 2013**

Date of Decision: Tuesday 12 November 2013

DECISION

NON-RESIDENT MISCELLANEOUS WITHHOLDING TAX– Section 8A INCOME TAX ACT (CAP 201) – know how payments; supply of professional services.

Background

1. The Applicant Taxpayer is a limited liability company having its registered office in Lautoka, Viti Levu. The Applicant engaged Company B, an international specialist in the design, supply and construction of milling machinery, to supply, install and commission plant and machinery at the Taxpayer's mill to increase its capacity. The nature and scope of the services were set out within a contract, with a total price of CHF 1,550,000.[1]

[1] Swiss Francs.

2. Between December 2010 and April 2011, Company B sent plant and machinery, engineers and consultants to carry out and complete the works in terms of the contract. The Respondent imposed a taxation in the amount of $55,241.05 as Non-Resident Miscellaneous Withholding Tax, against Company P, based on the total monies paid to the overseas engineers who had provided the professional services, in accordance with Section 8A of the Income Tax Act.

3. The Respondent also imposed a penalty of 20% ($11,048.19) under Section 46 of the *Tax Administration Decree* 2009 on the basis it was claimed that the taxpayer had made a false or misleading statement and charged a further $5354.91 as Insufficient Advance Payment Penalty. A Notice of Amended Assessment was issued on 30 June 2011. On 25 October 2012, the Applicant filed an Objection to the Notice of Amended Assessment and the Respondent partially allowed that objection by agreeing to reverse the Insufficient Advance Payment Penalty.

4. On 22 December 2012, the Applicant filed this Application for Review of the Objection Decision.

Grounds for Review

5. The Grounds of the Application for review are as follows:-

    a. The Objection Decision is wrong in law and in fact because the Respondent has misinterpreted the meaning and effect of the words "gross amount" as used in S.8A(1) of the Income Tax Act (inserted by Decree 8 of 2001) and has wrongly applied it to the facts of this case, in that:

    The Tax has been wrongly calculated on the total charges for services of CHF 194,580 instead of on the actual lump sum labour/service component of the general contract with (Company B) ie CHF 139,000

	CHF
Price for Equipment	1,411,000
Lump sum price for services	139,000
Total contract value	1,550,000

On that basis the Tax should have been calculated on CHF 139,000 as follows:

Lump sum price for services	CHF 139,000
Exchange rate as at 25/9/12 (as per FRCA's letter of 26/9/12)	0.528357
	FJ$263,079.7
Tax at 15%	**FJ $39,461.96**

b The Respondent has wrongly imposed penalty $11,048.21 for making a false statement when the facts of this case did not warrant or justify imposition of such penalty, in that:

The Applicant was not aware and could not reasonably ascertain the actual service component from the invoices received from (Company because the contract with them was a contract for services for a lump sum. The Applicant has been a good corporate citizen of Fiji and has always satisfied all the statutory requirements in a timely manner and has been up to date with payment of its taxes and lodgement of its returns. It did not knowingly or recklessly to (sic) make any statement which was false.

6. On 13 September 2013, the Applicant sought the leave of the Tribunal to amend its application by including the following ground:

That no tax is payable by the Applicant in view of the decision of the Court of Appeal in Vergnet SA v The Commissioner of Inland Revenue (Civil Action No 221 of 2008) [2013]FJCA 51.

7. There being no opposition by the Respondent, leave to amend was granted.

8. The application is heard in accordance with the relevant provisions of the *Tax Administration Decree* 2009 and the *Magistrates Court (Amendment) Decree* 2011.

The Case of the Applicant

9. Counsel for the Applicant relied on three witnesses in the proceedings. The Group Financial Controller, an Engineer involved in the commissioning activity and a Company Engineer.

10. The primary purpose of the first witness Mr L, was to provide some backdrop to the activities that led to the expansion of the Mill works. Mr L spoke of the manner in which the resourcing of the expansion project came about and was able to identify some of the discrete payments made for professional services performed by various personnel as part of the project.[2] Mr P spoke of the various meetings that were held with the Respondent, that first came about after the Applicant had made application to gain 100% depreciation of the new plant.

11. According to the witness, the initial request for information relating to costs of professional services related to Part III of the 'Scope of Supply' (Contract) that had identified various roles required for the installation, supervision and commissioning of the plant.[3]

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[2] See for example, Folio 45 of the Section 83 Documents where various payments were made to the consultant Mr B.

[3] See Folio 37 where the roles of Chief Installation Engineer, Technologist(s), Supervisor Electricity Installation and PLC Specialist are itemised.

12. The second witness Mr K gave evidence in relation to his role assisting in the upgrading process. He explained the production increases that arose out of the plant upgrade and the fact that as he had worked on similar machinery, that at the time of expansion, he was conversant with the operations of an expanded plant. [4]

13. The third witness to give evidence was Company P's Engineering Manager, who was responsible for engineering staff required to service the various activities of the group. Mr P gave an account of the role that his own staff played in assisting with plant upgrade. Mr P spoke of the increase available in production capacity arising out of the upgrade and provided a brief insight as to the ancillary role undertaken by his employees at that time.

Case of the Respondent

14. The Respondent relied on the evidence of Ms Malugulevu, a Tax Auditor who was involved in the audit of Company P in 2012.

15. According to the witness, the assessment made by the Respondent was caused by the identification of certain professional services provided for within Part III of the Scope of Supply Contract document. The witness identified various documents that had been provided by Company P in response to requests for additional information.[5] She indicated that the Respondent sought further invoices from Company P, but did not receive any.

16. The witness was shown various invoices (Folios 73 to 76) relating to the works undertaken by a project co-ordinator and indicated that these were not subject to withholding tax.

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[4] Presumably this evidence was led to defeat any claim by the Respondent that relied on the know how payment provision found at Section 8A(2)(b) of the Act.

[5] Folio 10 within the Section 83 Documents, was one such document identified as part of the audit process.

17. On cross examination, the witness conceded that an amount of $5354.91 was allowed by the Respondent, for the Insufficient Advance Payment Penalty, previously imposed.

18. The witness was not sure whether there were any records that showed the requests made to Company P for further substantiation of the amount of professional services payments made, though did indicate that she maintained discussions with the company's accountants for some time beyond March 2012.

19. The witness was asked by Counsel to attempt to clarify which provision within Section 8A (2) of the Act, was the one that captured the various services provided. According to Ms Malugulevu, the activities of mechanical installation, cabling installation and co-ordinating the cabling installation were all capable of being regarded as know how payments[6], but similarly they could be viewed as 'professional services'.[7]

Should the Taxpayer Pay Non-Resident Withholding Tax?

20. The argument of the Taxpayer does not appear to be that it is not liable to pay non-resident miscellaneous withholding tax, at least having regard to the requirement that is Section 8A(2)(d) of the Act. It appears only to challenge the quantum and method for calculation.

21. The professional services that are the subject of this taxation, are clearly identified within the Scope of Supply Contract at Part III. Whether there has been any overlap for the purposes of Section 8A(2)(b) is not that material to the analysis. The cost estimation for the delegation of staff required to install, supervise and commission accessories and machines, covers the following services:-

    - Supervision and co-ordinating the mechanical installation and commissioning by a Chief Installation Engineer;

[6] See Section 8A(2)(b) of the Act.

[7] See Section 8A(2)(d) of the Act.

- Commission services and instruction of personnel by a Technologist;
- Supervision and co-ordination of cable installation by a Supervisor Electricity Installation; and
- Commissioning of the Control System by a PLC Specialist.

22. While it is clear that the title of the heading at Part III G of the Contract, reads, '*Cost Estimation of Delegation of Staff*'[8] and that an actual lump sum price for services has been provided by Company B, in its letter dated 27 March 2012,[9] that is the extent of the documentary evidence that is being relied on by the Taxpayer. According to Ms Malugulevu the Respondent had sought more from the Taxpayer, but such information was not forthcoming.

23. The Respondent quite correctly places the burden of proof in establishing that the tax is excessive, on the Taxpayer.[10] The Taxpayer is a well resourced company that would clearly have the capacity to isolate the relevant costs associated with the professional services as identified. In my view, more is required than the simple reliance on one letter from Company B. Non-resident miscellaneous withholding tax has been a feature of the *Income Tax Act* (Cap 201) since 2001.[11]

24. I note that within the Scope of Supply Contract at page 24, it reads:

> *Any variation of the above mentioned durations will correspondingly be refunded or additionally invoiced, based on time sheets provided by (Company B) and signed by the Purchaser.*

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8 See Folio 37 of the Section 83 Documents.

9 See Folio 10 of the Section 83 Documents.

10 See Section 21 of the *Tax Administration Decree* 2009.

11 See Decree 8 of 2001

25. If the Taxpayer was arguing that the actual figures to be relied upon for the determination of tax were a lesser amount, based on that provision, the accessing of such documentation to have established that fact, would have appeared to have been quite a simple task. The Applicant for whatever reason has not discharged the requisite burden of proof. The application must fail on that basis.

Should a Section 46 Penalty Apply?

26. Section 46 of the *Tax Administration Decree* 2009 relevantly provides:

> *46. — (1) This section applies to a person —*
>
> *(a) who makes a statement to a tax officer that is false or misleading in a material particular or omits from a statement made to a tax officer any matter or thing without which the statement is false or misleading in a material particular; and*
>
> *(b) the tax liability of the person or of another person computed on the basis of the statement is less than it would have been if the statement had not been false or misleading (the difference being referred to as the "tax shortfall").*
>
> *(2) Subject to subsection (3), a person to whom this section applies is liable—*
>
> *(a) if the statement or omission was made knowingly or recklessly, for a penalty equal to 75% of the tax shortfall; or*
>
> *(b) in any other case, for a penalty equal to 20% of the tax shortfall.*

27. In *Taxpayer S v Fiji Revenue & Customs Authority*[12], this Tribunal stated:

> *There are several issues to consider. Firstly the Taxpayer must have made a statement that is false or misleading. Secondly, the statement must be false or misleading "in a material particular". In Khoury (M&S) and Anor v Government Insurance Office of NSW[8], in the case of a contract for property insurance, such an expression was found to capture, "facts material to the risk". In the present case, the Tribunal concludes that for statements to be false or misleading in a material particular, would require those statements to be "material to the*

[12] [2013]FJTT 15

assessment". For example, the non-disclosure of approximately $160,000.00 of income in one financial year period, would if declared a true and complete return, be material to the assessment. Insofar as the terms false and misleading are concerned, the Decree does not define either of these expressions. Given its plain meaning, the term 'false' has been defined to mean "not true or correct; erroneous: a false statement; a false accusation". The term 'misleading' as "to lead or guide wrongly; lead astray, to lead into error of conduct, thought, or judgement".[9] (See also Given v C.V.Holland (Holdings) Pty Ltd (1977) 29FLR 212.

There is no doubt and there has been a concession already made, that the Income Tax Returns for 2008 to 2011, were incorrectly completed insofar as they did not account for all income received in each of those years. It was certainly a false statement made by the Taxpayer, that on each year so filed, that the tax return was "true and complete".[10] The measure of whether or not, there was a deliberate or misleading quality to those declarations is clearly an issue requiring a higher threshold test.

In Deery v Peek[11], Lord Herschell characterised the consideration along these lines:

In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds.

28. I agree with the view of the Applicant that there has been no statement that can be identified as warranting the attraction of this provision. There is certainly no evidence of any false or misleading statement made knowingly or recklessly. While this may be a case of non-disclosure, the non-disclosure does not arise out of the making of a false statement. There is an omission, but as it does not occur through the supply of any statement, it is hard to understand how it could be captured by Section 46 of the Decree.

29. No penalty in such case should apply. If the forms of the Respondent made provision for the declaration as to whether or not the non-resident miscellaneous withholding tax should apply to any transfer amount and the Taxpayer, indicated “no”, then the issue would be quite different. The Respondent will be required to refund the penalty amount of $11,048.21.

Conclusions

30. To conclude, the Tribunal is of the opinion that the Taxpayer has not discharged the burden of proof otherwise required to disturb the Amended Assessment as issued, at least insofar as it requires the payment of taxation under Section 8A(2) of the Act. I am nonetheless satisfied that there was not sufficient justification to impose a penalty for the purposes of Section 46 of the *Tax Administration Decree* 2009, in these circumstances.

31. The Taxpayer in its submissions has raised other issues in relation to the refunds owing as a result of the overpayment of taxes. Specifically, it is contended that the amount of $69,952.17 was transferred from Company P's VAT Refunds, prior to the Taxpayer paying to the Respondent that full amount. That is, that payment for the taxation charge and penalties took place twice. While that is not a matter that strictly falls within the review application, I would nonetheless recommend to the Respondent to refund any monies owing to the Taxpayer, that have been obtained through inadvertence. In the absence of understanding the administrative rationale that has given rise to any transfers out of the VAT Refund Account, I am reluctant to do or say more.

32. Finally, the Applicant has made various submissions in relation to the right to recover interest, as compensation for the deprival of monies held by the Respondent. I note specifically, the case of *Woolwich Building Society v Inland Revenue Commissioners (No 2)*[13], in which the House of Lords held that taxes and levies paid to a public authority pursuant to an ultra vires demand were recoverable by the subject as a right at common law, together with interest. Such a position appears consistent with the approach taken by the Court of Appeal in *SA v Commissioner of Inland Revenue*[14] in recognising that interest should be paid on refundable amounts.

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13 [1992}3AllER 737

14 [2013]FJCA51.

33. In the event that the parties cannot agree on the formula to apply in relation to interest, having regard to the recent Court of Appeal decision, either party is free to make further application to the Tribunal so as to determine the specific entitlement that is due and payable.

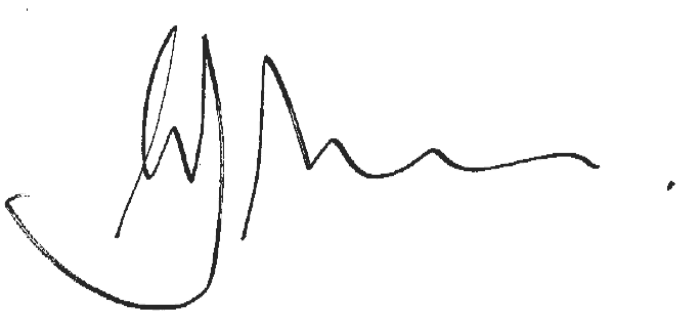
Decision

It is the decision of this Tribunal that:

(i) The application as it relates to the imposition of non-resident miscellaneous withholding tax, is dismissed.

(ii) The Respondent is required to refund to the Taxpayer the amount of $11,048.21(plus interest), being the penalty payment incorrectly imposed under Section 46(2) of the *Tax Administration Decree* 2009.

I order accordingly.



Mr Andrew J See
Resident Magistrate